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Sia Lagos

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**Westpac Banking Corporation & Anor v Forum Finance Pty Ltd (In Liquidation)
(Receivers Appointed) & Ors**

Federal Court of Australia NSD 616/2021

THIRD RESPONDENT'S CLOSING SUBMISSIONS

Introduction and summary

- 1 The essential question for the Court's determination is whether Mr Tesoriero had knowledge of circumstances which would have indicated to an honest and reasonable person in his position that Mr Papas was perpetrating the fraud that has come to light in this case.
- 2 If Mr Tesoriero had such knowledge, and being armed with such knowledge, continued to participate in the conduct impugned in this proceeding – or perhaps more accurately, failed to act to stop it – then equity will regard Mr Tesoriero's conscience as being bound by Mr Papas' wrongdoing in a manner that renders Mr Tesoriero liable to account to Westpac for its losses.
- 3 In assessing this question of conscience, it is important to appreciate how Mr Tesoriero and Westpac stood in relation to each other. Notably, Westpac and Mr Tesoriero stood in no legal relationship at any time. In the ordinary course of events, Westpac could have no legitimate expectation that Mr Tesoriero would make good losses suffered by Westpac in connection with its dealings with Forum Finance, being the entity with whom Westpac had legal relations, nor any other entity in the Forum group. Westpac had not contracted with Mr Tesoriero, and it is not alleged, for example, that he owed Westpac a duty to act reasonably to avoid causing pure economic loss to Westpac. Further, Westpac has no standing to complain of the manner in which Mr Tesoriero discharged his duties as a director of the Forum group entities or FGFS, in so far as any such conduct might otherwise have affected those entities or their shareholders.
- 4 This is not to suggest that Mr Tesoriero's conduct in the above respects is not relevant to Westpac's case against him; what Mr Tesoriero did and did not do is of course crucially relevant. But what must be appreciated is *why* it is relevant. On Westpac's case, Mr Tesoriero's conduct is only relevant to the extent it reveals a knowledge of circumstances which would have indicated to an honest and reasonable person in Mr Tesoriero's position that Mr Papas was engaging in fraud. In order to succeed in its case, Westpac must be able to point to some feature of Mr Tesoriero's knowledge which would have indicated the fact of Mr Papas' fraud to an honest and reasonable

person in his position. And not merely the possibility of some wrongdoing warranting further inquiry; a knowledge of circumstances which would have indicated, then and there, the fact of Mr Papas' fraud to an honest and reasonable person in Mr Tesoriero's position.

- 5 It is also necessary at the outset to say something of the nature of the Eqwe / Forum program, which is at times obscured in Westpac's submissions. Under the program, Westpac purchased, via Eqwe, Forum's receivables. It did not lend funds to Forum for a specific purpose,¹ as might impress upon those funds the character of a trust in the event they were not directed by a borrower of those funds towards that purpose. That had two consequences of relevance to this case. First, as a matter of law, Forum was free to do what it liked with funds received from Westpac under the Eqwe / Forum program. Practically, it was of course necessary for Forum to deploy funds it received in the course of its business to meet its obligations associated with the conduct of that business. But the point for present purposes is that the direction of funds received from financiers across the broader Forum group, including to FGFS, did not carry with it the necessary inference that such funds were being misapplied. The second point of relevance is that Westpac's claims to the recoupment of funds paid out to the various respondents in breach of trust derives solely from its status as a victim of Mr Papas' theft, and not from any other legal or equitable relationship. Thus, at the risk of repetition, Westpac's title to any such amounts, insofar as they concern the claim against Mr Tesoriero, depends on a finding that Mr Tesoriero ought properly, as a matter of conscience and based upon (at least) what he ought to have known, account to Westpac for Westpac's losses associated with the Eqwe / Forum program.
- 6 In the sections that follow, each of the relevant features of Mr Tesoriero's conduct identified by Westpac as evincing constructive knowledge on his part is analysed in its proper context, and the significance of those acts in the context of Westpac's case critically assessed. That analysis reveals that the full circumstances do not warrant the conclusion which Westpac urges the Court to draw; indeed, in many cases, Westpac has failed to prove the full set of circumstances necessary to make good the proposition for which they contend. For example, Westpac contends that an honest and reasonable person ought to have appreciated that a company of the scale and scope of Forum would not have been in a position to expend funds in the manner that it did, yet Westpac affords the Court no evidentiary foundation to explain why that submission, which is cast in relative terms, ought to be accepted. And, no less

¹ Although as discussed below, Westpac's and its agent Eqwe's dealings with third parties may at times have been apt to create that impression.

importantly, why an honest and reasonable person in Mr Tesoriero's position ought to have appreciated as much, and drawn from that fact a conclusion of suspected fraud.

7 It was put by Westpac in opening that an honest and reasonable person who had done nothing wrong would stay and give an explanation, if there was a fair and honest explanation to give.² Mr Tesoriero has done that. He has not absconded overseas like Mr Papas, notwithstanding that on Westpac's case, he was Mr Papas' co-conspirator. When the issues arose with Mr Papas in June 2021, Mr Tesoriero, Westpac's alleged co-conspirator in wholesale fraud, went with his accountant and Mr Bouchahine to see an administrator, in order to understand what the options were for the administration of the Forum business.³

8 Mr Tesoriero gave his evidence to this Court carefully, candidly and without fear of recrimination. He endured all manner of attacks on his credit, his character and his conduct. In doing so, his evidence revealed no material inconsistency, whether from the contemporaneous documents or prior accounts, which could logically support Westpac's case that he was knowingly concerned, even if only constructively, in the epic fraud that Mr Papas perpetrated. He trusted Mr Papas, not blindly or without question, but with good reason based on the circumstances known to him, just as so many others in this case did, including Westpac.

9 For the reasons outlined below, there is no feature of this case which would permit the Court to answer the essential question posed by Westpac in this case favourably to Westpac and adversely to Mr Tesoriero. Like so many others, Mr Tesoriero was simply unaware of the fraudulent conduct of Mr Papas and at no stage was he armed with the knowledge to suspect it. Regardless of the attack that Westpac may make upon his credit, character or conduct, there is no basis to conclude that Mr Tesoriero is relying upon moral delinquency to avoid accounting to Westpac for the wrongdoing of Mr Papas.

10 The case against him ought to be dismissed.

The free money hypothesis

11 The central theme of Westpac's case is the so-called 'implausibility of free money'. The proposition goes that insofar as funds were disbursed from FGFS to projects with which Mr Tesoriero was involved, he ought to have appreciated that something inappropriate was going on.⁴

² T86.08-.09.

³ T383.18-385.06.

⁴ T89.6-.12.

12 However, the essential predicate of Westpac's submission is that in the eyes of someone in Mr Tesoriero's position, the money was free, and that is not borne out by the facts of the case. There are at least the following features militating against that conclusion.

Contributions to the Forum business

13 First, Mr Tesoriero invested, via Tesoriero Investment Group, very substantial sums in the Forum business. That commenced with an investment of \$100,000 in November 2012 and \$900,000 in February 2013, borrowed against properties Mr Tesoriero's family had developed, followed by a further \$200,000 on 4 October 2013, a further \$1.5 million on 2 June 2014, a further \$100,000 on 5 September 2014 and another \$2 million on 2 May 2017, in each case funded by leveraged borrowings.⁵ Mr Tesoriero's investment is not in dispute.⁶

14 Mr Tesoriero first invested in Forum following some meetings with Mr Papas in late 2012, discussions with friends who had previously worked with Mr Papas and who were working with him at Forum and having received a prospectus promising "10 times money within 3 years".⁷

15 From the outset, all indications were that Mr Tesoriero had invested in a diverse and expanding business. On 20 February 2013, Mr Papas sent Mr Tesoriero a presentation ahead of a shareholders' meeting that day, which described the business as providing IT and communications, managed print and GPS fleet solutions to small and mid-sized businesses, boasted well known customers across each division, and indicated a current valuation of \$6.9 million for the business following a Melbourne acquisition.⁸

16 Indeed, the occasions for Mr Tesoriero to further invest in the Forum business included acquisitions of opposition businesses, of which Mr Tesoriero understood there to have been some 11 or 12 over the period he was involved with Forum.⁹ Examples of the apparent growth of the business by acquisitions and increasing revenues can be found in Mr Papas' Friday Forum newsletters to staff of 28 March 2014 and 28 July 2014 respectively.¹⁰

⁵ FOG.1000.0001.9630; MIN.5000.0016.0169 at .0170, .0175, 0.179, 0183 and .0185; T332.10-333.15.

⁶ See Westpac's Chronology of Major Events at items: 12, 19, 25, 30, 31, 47.

⁷ T331.01-332.02; MIN.5000.0018.0310 at .0312.

⁸ FOG.1000.0006.9174; FOG.1000.0006.9175.

⁹ T333.04-334.21.

¹⁰ FOG.1000.0003.6031; FOG.1000.0002.7974.

- 17 From Mr Tesoriero’s observation and discussions with Mr Papas and executive team members, the Forum business was growing at a rapid rate, with new staff joining, sales staff talking about new deals, increasing revenues, expansion into new offices and warehouses nationally, and expansion into overseas markets.¹¹ Mr Tesoriero understood from discussions with Mr Papas that the finance book of the business – which he understood to be the backbone of the business and the means by which Forum made its money, by “clipping” everything sold through finance – was forever growing and had reached some \$800 million by the end of the Forum business.¹²
- 18 These matters were sufficient to lure Mr Tesoriero to continue to make material financial contributions to the Forum business. In addition to the equity contributions noted above, Mr Tesoriero provided funds to the Forum business via leveraged borrowings over his or his family’s personal assets on numerous occasions. For example, on 24 April 2017, Mr Tesoriero obtained a loan of some \$2.12 million from NWC Finance in the name of Tesoriero Investment Group, with he and his parents as guarantors and secured by Tesoriero family properties.¹³ Mr Papas thereupon directed Mr Tesoriero, on 28 April 2017, to apply \$1.6 million of the proceeds to The Forum Group of Companies and the remainder to an entity known as ‘Environmental Solutions International Pty Ltd’.¹⁴

Establishment of FGFS

- 19 The fact of Mr Papas looking to Mr Tesoriero to provide material financial contributions to the Forum business, leveraged against Mr Tesoriero’s family properties, and Mr Tesoriero consistently answering Mr Papas’ calls, formed the context for the establishment of FGFS.
- 20 From around 2015, Mr Tesoriero had discussed with Mr Papas his “constant lament” that there had been much expansion of the Forum business by acquisitions and by the rollover of funds including funds contributed by Mr Tesoriero, with no money coming back out, contrary to the original plan under the prospectus of a sell out at a 10 times multiplier within a two-year timeframe.¹⁵
- 21 In about August or September 2017, Mr Tesoriero had a discussion with Mr Papas in Queensland, in which Mr Papas explained that:¹⁶
- 21.1 he was setting up FGFS;

¹¹ T335.30-338.21.

¹² T336.31-337.23; FOG.1000.0002.7957.

¹³ FOG.1001.0012.0272.

¹⁴ FOG.1000.0002.7635.

¹⁵ T341.24-342.07.

¹⁶ T338.25-342.27.

- 21.2 Mr Papas was going to put some seed capital into it;
- 21.3 FGFS would fund some in-house deals itself;
- 21.4 FGFS would otherwise act like a funder for the group, taking a “clip” on funds received from financiers on contracts and funding those contracts on behalf of the Forum group; and
- 21.5 profits received from the activities of FGFS would offer some return on the capital Mr Tesoriero had put into the Forum business.
- 22 FGFS was incorporated on 23 November 2017 with Mr Papas and Mr Tesoriero as equal shareholders. Mr Papas was a director from 23 November 2017 onwards, while Mr Tesoriero was a director from 13 November 2018 to 30 April 2020.¹⁷

Further contributions to the Forum business and contributions to properties

- 23 Following the establishment of FGFS in 2017, Mr Tesoriero made financial contributions to the various property acquisitions the subject of this case, by way of personal borrowings against family assets. For example, on 1 May 2018, the Tesoriero Investment Group borrowed the sum of \$1.033 million, secured against family properties, to apply in settlement of the property at 23 Margaret Street.¹⁸
- 24 On 7 April 2020, Mr Tesoriero forwarded an email to a broker, Harry Tsouskas, referring to an earlier email of 20 March 2020 concerning the property acquired by 1160 Glen Huntly Rd Pty Ltd, in which it was noted that in order to get that deal over the line, Mr Tesoriero’s father would be prepared to guarantee the loan.¹⁹
- 25 On 7 July 2020, Mr Tsouskas sent an email to Mr Tesoriero and Mr Papas concerning proposed borrowings in connection with the development of certain properties, and noting that in respect of properties owned by Mr Tesoriero’s parents, the goal was to refinance those properties in order to extract equity.²⁰
- 26 Such loan contributions of Mr Tesoriero and his family continued well into 2021. On 15 February 2021, Mr Tsouskas sent an email to Mr Tesoriero confirming the ownership of properties in his parents’ names prior to kick starting “the valuation process”.²¹ Then, on 24 February 2021, Mr Tsouskas sent an email to Mr Papas, Mr Tesoriero and others, attaching a NuLend application for the refinance of a

¹⁷ MIN.5000.0006.1747 at .1752.

¹⁸ MIN.5000.0018.0296.

¹⁹ FOG.1000.0014.1777.

²⁰ FOG.1000.0008.5225.

²¹ FOG.1001.0014.1636.

Hawthorn property, noting that the indicative equity release was heavily reliant on the Tesoriero family property valuations.²²

27 On 27 February 2021, Mr Tesoriero and his parents signed a NuLend letter of offer for a loan of \$3 million in the name of Tesoriero Investment Group, secured by Tesoriero family properties,²³ and the loan agreement and mortgages for this loan were signed on 2 March 2021.²⁴ The proceeds of this loan were applied in aid of the acquisition of the Autonomous Energy business by Iugis Investments, via a loan to the latter from FGFS on 5 March 2021, and subsequently repaid by FGFS to NuLend on 6 April 2021 and 5 May 2021 respectively.²⁵ The Autonomous Energy business was subsequently sold by the liquidators following their appointment.²⁶

28 In the above context, Mr Tesoriero gave evidence of his understanding of how each of the relevant properties came to be acquired, commencing with Forum's Brisbane office at 26 Edmonstone Road which settled on 11 April 2018.²⁷ Mr Tesoriero's evidence was to the effect that:²⁸

28.1 each of the properties was financed by third party finance on a specific loan to value ratio, and that either Mr Tesoriero would contribute any shortfall by drawing on loans against his family properties, or Mr Papas would contribute funds to any shortfall, or a mixture of both;

28.2 any rents on the properties would generally be collected in house by Forum's accounts staff under Mr Bouchahine; and

28.3 Forum's accounts staff under Mr Bouchahine would administer the payment of outgoings and expenses on those properties and attend to the accounting of those matters.

29 Apart from the leveraged borrowings on properties, as at FY2018, the financial statements of Tesoriero Investment Trust (of which Tesoriero Investment Group was trustee) recorded total loans in favour of Forum of \$3,559,755.²⁹

30 Further, on 19 November 2019, The Forum Group of Companies Pty Ltd approved a return of capital to shareholders in the sum of approximately \$5 million, of which entities associated with Mr Tesoriero were due to receive approximately \$1.3 million

²² FOG.1001.0001.8989.

²³ FOG.1001.0001.9007.

²⁴ FOG.1001.0002.0418; FOG.1000.0003.5149.

²⁵ T274.07-276.35; Exhibit JP-4 to the Preston 7 February 2022 Affidavit at items 5 March 2021, 6 April 2021 and 5 May 2021; T379.45-381.42.

²⁶ T277.23-.25.

²⁷ MIN.5000.0005.0439.

²⁸ T343.45-345.12; T347.05-350.09; T335.18-366.26.

²⁹ FOG.1000.0011.6775 at .6777.

(i.e. Tesoriero Investment Group's holding of 15.06% and half of Intrashield's holding of 22.94%). However, rather than receive his entitlement like the other shareholders, Mr Tesoriero was told by Mr Papas that his entitlement, along with Mr Papas', totalling some \$4 million or so of the \$5 million, had been rolled into the properties.³⁰

The Forum business was apparently successful

31 As noted above, Mr Tesoriero's contributions to the Forum business and the property ventures were occurring against the backdrop of the continued expansion of the Forum business. The Forum business had 'enviro', 'fleet', 'print', 'IT', 'security' and 'finance' divisions, and had been lauded as a BRW 'Faststarter'.³¹ Forum had offices in every capital city of Australia, in New Zealand and in other locations overseas.³² Forum's operations in Australia and New Zealand encompassed telematics, print, IT and waste digesters.³³

The Orca program

32 This apparent success and expansion was exemplified by the Orca program. Forum's expansion into waste digesters arose following the acquisition of a business called 'Power Perfector', which sold currently balancing machines across Australia for Coles. The individual responsible for introducing that opportunity to Forum, Rod Hazelton, then advised Mr Papas and Mr Tesoriero in late 2014 or early 2015 of an entity in Japan which was endeavouring to develop a product called WasteMaster, which Forum subsequently invested in and installed at test sites in the Intercontinental Hotels in Sydney. In the course of those activities, Forum came across the Orca product out of Canada in 2016, and teamed up with Orca to import and sell those products in Australia and overseas. Between 2016 and 2018, Mr Tesoriero saw the machines at the Intercontinental Hotels, the Melbourne Spring Racing Carnival, the Alfred Hospital, the MCG, Etihad Stadium and Southland in Melbourne. In the same period, Mr Tesoriero had discussions with a representative from South East Water in Melbourne about the products and about testing them for water quality.³⁴

33 Mr Tesoriero would discuss the Orca machines with Forum's customers at the Spring Racing Carnival, where the machines were installed, and the feedback he received was that it was a great product. As part of those interactions at the Spring Racing Carnival, Mr Tesoriero had discussions with representatives of Veolia, including a

³⁰ FOG.1000.0004.5637; T343.16-.40.

³¹ See, e.g., the Forum boilerplate email signature of Mr Tesoriero reproduced at item 3 of Westpac's *Dramatis Personae*.

³² T337.25-.41.

³³ T337.34-.36.

³⁴ T373.01-377.13.

'Daniel', who was head of sales,³⁵ and a 'Lawrence' or 'Laurie'³⁶ in 2018 or 2019, from whom he understood that Veolia had signed a contract with Forum to buy about \$100 million worth of machines annually.³⁷ Mr Tesoriero also had discussions with Mr Papas or Mr Tas Papas about the Veolia contract, and it was openly discussed around the office that Veolia were going to be distributing the Orca to their customer base.³⁸

34 The Distribution Agreement between Orca Enviro Systems Pty Ltd (a Forum entity) and Veolia Environmental Services (Australia) Pty Ltd was entered into on 19 December 2018.³⁹ Under it, Veolia committed to sales of 1000 Orca units in the first six quarters.⁴⁰ The prices of the Orca units ranged from \$29,000 to \$69,000, plus usage fees and ongoing monthly fees.⁴¹

35 A sense of the excitement generated internally at Forum by the Veolia Distribution Agreement, of which Mr Tesoriero gave evidence, is apparent from Mr Papas' email to a Shawn Dym and Lous Anagnostakos, copying Tas Papas and Craig Rollinson, in which he stated, "*Some great news!!!! Attached is the final executed Agreement with Veolia for 1,000 units. BOOM!!!!*"⁴²

36 The Veolia arrangements, as well as other Forum ventures, were also generating excitement externally at Eqwe and Westpac. On 3 September 2018, Mr Anderson and Mr Daniel of Westpac met with Mr Price and Mr Sheeran of Eqwe, where they discussed the Orca units that they understood were being distributed in Australia by Forum, and reviewed a presentation which revealed that the machines were being taken up by major global customers.⁴³ Reviewing this material, Mr Anderson understood the Orca program had significant commercial potential.⁴⁴ The following day, Mr Price of Eqwe sent an email to representatives Westpac referring to the session the previous day, noting that where acceptable to Westpac, Eqwe would purchase receivables from Forum in respect of their customer base, and attaching the executed MSRGA between Eqwe and Forum among other documents.⁴⁵

³⁵ Presumably Mr Daniel Conlon: WES.5000.0003.5417.

³⁶ Mr Kozlovic.

³⁷ T377.07-.43.

³⁸ T378.01-.14.

³⁹ SEC.5000.0043.3319.

⁴⁰ Clause 6.9 and Schedule 1, item 7.

⁴¹ Schedule 1, item 8.

⁴² SEC.5000.0043.3318.

⁴³ Anderson 14 October 2021 Affidavit (MIN.5000.0006.1446) at [20]-[21] and WES.5000.0001.5499 and WES.5000.0001.5500.

⁴⁴ T234.06-.07.

⁴⁵ Anderson 14 October 2021 Affidavit (MIN.5000.0006.1446) at [22] and WES.5000.0001.5523.

- 37 On 13 September 2018, Mr Price of Eqwe sent an email to Mr Anderson in relation to a drawdown under the Eqwe / Forum program, thanking Mr Anderson for working through the bank's approvals to get it done as quickly as possible, to which Mr Anderson responded, "*Great to have the opportunity – thanks We are keen to do more for these guys for their investment grade clients*".⁴⁶ Notably, this desire to fast track such significant settlements for Forum under the Eqwe / Forum program came in circumstances where Westpac appreciated that the purchase of receivables under the program carried credit risks to Westpac both on the customer side of the relationship and on the Forum side.⁴⁷
- 38 Throughout the Eqwe / Forum program, representatives of Westpac and Eqwe attended meetings with both Forum and Veolia at which the Orca units were discussed and the arrangements with Veolia affirmed.
- 39 On 16 October 2018, Mr Anderson and Mr Van Klaveren of Westpac attended a meeting at the Park Royal Hotel with Mr Papas and Ms Agostino of Forum, Mr Sheeran of Eqwe, and representatives of Veolia, to discuss financing of the Orca product, at which Mr Papas gave a demonstration of how the unit functioned and noted that the unit had been leased by Veolia.⁴⁸
- 40 On 4 April 2019, Mr Anderson and other representatives of Westpac attended a meeting the Park Royal Hotel in Sydney, with Mr Papas and Tas Papas of Forum and Mr Kozlovic of Veolia. At that meeting, Mr Veolia stated that Veolia expects to need financing for 1000 units throughout the year and \$8-9 million per month in expected drawdowns, which was not out of line with what Westpac was then funding and expected to fund over the coming months.⁴⁹ Prior to that meeting, Mr Price of Eqwe had flagged to Mr Anderson on 15 January 2019 expected drawdowns on \$5 million from February to June 2018,⁵⁰ and on 1 March 2019, Mr Price flagged with Mr Anderson and others at Westpac drawdowns of between \$4 and \$9 million per month for the remainder of 2019.⁵¹
- 41 On 25 July 2019, Mr Anderson and Mr Daniel of Westpac, Mr Price and Mr Sheeran of Eqwe, and Mr Papas of Forum had a telephone meeting. At that meeting, there was discussion of (among other things): forecasts of 3, 6 and 9 months and 500 machines

⁴⁶ WES.5000.0001.7717.

⁴⁷ T232.33-42.

⁴⁸ Anderson 14 October 2021 Affidavit (MIN.5000.0006.1446) at [24]; WBC.5000.0013.0114; T244.01-44.

⁴⁹ Anderson 14 October 2021 Affidavit (MIN.5000.0006.1446) at [45]-[50]; WBC.3000.0003.0001; T245.16-246.11.

⁵⁰ WES.5000.0002.8995.

⁵¹ WES.5000.0003.1607 (at .1609).

to date in relation to the Department of Defence; Woolworths' \$100 to \$150 million ballpark subject to supply; the refinancing by Westpac of existing Veolia contracts with NMF (broker), Flexi and Eclipse (funders); the capacity of Westpac to fund new business (\$115 million limit, exposure of \$91 million and capacity of \$14 million); \$8-10 million per month and 100 units per month in relation to Veolia; and a proposal by Mr Papas to capture and commercialise methane emissions from Orca units.⁵²

42 Finally, on 31 March 2020, Mr Anderson and other representatives of Westpac had a Webex meeting with Mr Kozlovic of Veolia, Mr Price of Eqwe and Mr Papas of Forum to discuss the impact of COVID-19 on Veolia's Orca program, at which Mr Kozlovic stated that Veolia expected to acquire another 1000 units in 2020, and that while the usage of Orcas in pubs and restaurant venues was slowing down, the supermarket market was still going strong.⁵³

43 Mr Tesoriero gave evidence of his understanding from discussions with Mr Papas and representatives of Forum's sales team that the Canadian Orca manufacturer could not keep up with Forum's sales of the products, so Mr Papas explored other options and eventually came across Mr Giamoroudis in Greece, who produced a prototype for the lugis machine and ultimately commenced production of those machines for Forum. Mr Tesoriero visited the factory in Greece in 2020 and saw the lugis machines in production. Also around 2020, Mr Tesoriero was shown photos by Mr Papas or Mr Tas Papas of the lugis machines sitting at the docks in warehouses and containers.⁵⁴

44 That the Forum business was a business of material scale and scope is confirmed by the evidence of the liquidators. Mr Ireland's evidence is that after his appointment, he became aware that there were some 588 waste digester and disinfectant (Surfacide) machines held on behalf of Forum at third party warehouses in Sydney, Melbourne and Brisbane, and some 285 pieces of equipment located on customer premises.⁵⁵ As at July 2021, Forum Group had 127 employees, a subsidiary of Forum, Autonomous Energy, had 25 employees as at July 2021, and another subsidiary of Forum, lugis, had employees.⁵⁶ Upon their appointment, the administrators sold the main Forum business, and the liquidators subsequently sold certain businesses that

⁵² Anderson 14 October 2021 Affidavit (MIN.5000.0006.1446) at [51]-[53]; WES.5000.0004.1407; WBC.3000.0004.0003; T249.01-251.09.

⁵³ Anderson 14 October 2021 Affidavit (MIN.5000.0006.1446) at [54]; WES.5000.0005.4120.

⁵⁴ T376.45-377.02; T378.16-379.12.

⁵⁵ Ireland 9 June 2022 Affidavit (SMB.500.001.0001) at [37]-[39] and exhibit JI-4.

⁵⁶ T278.23-.37.

were in place when they were appointed, including the Autonomous Energy business.⁵⁷

Summing up on the free money issue

- 45 In the above context, the proposition advanced by Westpac that Forum was some mere office supply company that could not have been earning the sort of money to justify the expenditure with which Mr Tesoriero was involved, and that Mr Tesoriero, who had advanced substantial personal funds to the Forum business to achieve its apparent success, ought to have appreciated this,⁵⁸ is without reasonable foundation. The issue of so-called payment directions by Mr Tesoriero of FGFS funds is addressed in more detail below. However, it is submitted that the material personal financial contributions that Mr Tesoriero made to both the Forum business and the properties he and Mr Papas acquired during Mr Tesoriero's involvement with Forum are fundamentally inconsistent with the proposition that Mr Tesoriero was receiving 'free money' associated with Mr Papas' fraudulent scheme and that he ought to have appreciated as much. It is submitted that it is simply implausible to suggest that Mr Tesoriero would have placed his personal family assets at risk and contributed such substantial funds to these ventures if he were given to the understanding that Mr Papas had access to a ready supply of 'free money'.
- 46 Insofar as FGFS directed expenditure to projects or assets concerning Mr Tesoriero, that was consistent with his understanding and expectation that, having invested such substantial sums of money into the apparently very successful Forum business and with a sale of that business having been delayed (seemingly indefinitely), he would receive some returns from his investment by way of profits made by FGFS.
- 47 It also cannot be overlooked in this regard, in terms of the objective circumstances facing Mr Tesoriero, that amounts disbursed from FGFS in respect of projects or assets with which he was associated were invariably recorded by Forum staff in the Xero records as loans, on which the liquidators relied in making demands that relevant entities repay those amounts.⁵⁹ A credit point is sought to be made by Westpac of Mr Tesoriero's understanding of those loans,⁶⁰ but in fact his accounts are not inconsistent as Westpac would have it, and his evidence supports the proposition that Mr Tesoriero was not across Forum's accounting records at the time. Importantly, however, the books and records of FGFS support the proposition that an honest and

⁵⁷ T277.16-.25.

⁵⁸ T22.23-.35.

⁵⁹ T272.31-273.34

⁶⁰ Westpac Closing Submissions at [94]-[97].

reasonable person in Mr Tesoriero's position would not have regarded payments from FGFS as 'free money'.

48 When account is taken of the full picture, it is apparent that there is nothing in the circumstances identified by Westpac which would permit the Court to be comfortably satisfied that an honest and reasonable person in Mr Tesoriero's position would have concluded that the source of the funds expended by FGFS on projects or assets associated with Mr Tesoriero was stolen money.⁶¹

So-called payment directions and the payment spreadsheets

49 Another issue raised by Westpac in connection with its case for constructive knowledge on the part of Mr Tesoriero of Mr Papas' fraud is the alleged direction of payments and receipt of payment spreadsheets.

The approval of payments and Mr Tesoriero's involvement with payment spreadsheets

50 However, in terms of the alleged direction of payments, the evidence is clear that Mr Tesoriero was not involved in directing payments at all, but rather that the process of making payments, insofar as Mr Tesoriero was concerned, was that Mr Tesoriero would discuss expenditure on projects with Mr Papas, formally raise those matters with Mr Papas and Mr Bouchahine via email, and then Mr Bouchahine would seek Mr Papas' approval to make any such payments as were proposed by Mr Tesoriero.

51 The email exchange of 3 December 2018 between Mr Tesoriero and Mr Papas, copying Mr Bouchahine, makes this clear.⁶² In the first email in the chain, with the subject "wish list", Mr Tesoriero outlines a list of outstanding payments on projects he is involved with, and concludes by saying, "*Please let me know what we can do guys*". Mr Bouchahine then requests Mr Papas to advise, which prompts Mr Papas to respond as follows:

...

*I can't just approve s*** when I don't remember what I did last week.*

Vince

I asked for projects and spreadsheets to manage each and the timing of payments. We approve once and then manage the cashflow

Forum is not a cash cow that has funds set aside as these being a priority

⁶¹ See *Moriah War Memorial College Association v Augustine Robert Nosti* [2020] NSWSC 942; 147 ACSR 480 at [4], [7], [14], [40], [41], [42], [45], [47], [50], [57], [59], [69], [75], [77], [91], [93], [95], [97], [112] and [115] (Hammerschlag J).

⁶² FOG.1000.0002.7062.

Once I have this in some sort of order and we agree then Bouch, you need to provide input to me as to timing of cashflow availability when you know everything that's happening around us.

...

- 52 Mr Tesoriero then responds that Mr Bouchahine and Mr Chin did up a spreadsheet and asks whether Mr Papas saw it, and goes on to note that he is not expecting Forum to be a cash cow, explaining that he is either meeting payments from his own pocket or otherwise attempting to avoid paying invoices.
- 53 Clearly enough, the payment of outstanding invoices submitted by Mr Tesoriero in respect of projects with which he was involved was ultimately a matter to be approved by Mr Papas, on advice from Mr Bouchahine about cash flow availability in the broader context of the Forum business. It was in that context that Mr Tesoriero received spreadsheets from Mr Bouchahine and Mr Chin containing the outstanding invoices worksheets.⁶³ The evidence of Mr Bouchahine, who was responsible for maintaining the spreadsheets, was consistent with this, in that he understood that Mr Tesoriero was only sent the outstanding payments spreadsheets (as distinct from broader cash flow spreadsheets), and he also gave evidence that while Mr Tesoriero could request that payments be made, all payments had to be approved by Mr Papas.⁶⁴

The 'cashflow' spreadsheets in context

- 54 It is in the above context that the receipt by Mr Tesoriero of certain spreadsheets from Mr Chin containing the 'Cashflow' or 'FGFS' cashflow worksheets is to be assessed. Mr Tesoriero was taken in cross-examination to just five such instances of this occurring between 30 July 2020 and 24 February 2021, the circumstances of which were as follows:
- 54.1 on 30 July 2020, Mr Chin sent an email to Mr Tesoriero attaching a spreadsheet entitled 'Outstanding and Recurring Payments for BP & VT', and stating, *"As requested, see updated outstanding spreadsheet attached"*.⁶⁵ The attachment opens to the 'Outstanding' worksheet to which Mr Tesoriero had been directed, with certain items highlighted yellow. The 'cashflow' worksheet is the third worksheet in the document;
- 54.2 on 19 August 2020, Mr Chin, sent an email to Mr Tesoriero attaching a spreadsheet entitled 'Outstanding and Recurring Payments for BP & VT' and stating, *"Please see attached updated spreadsheet of expenses outstanding*

⁶³ See e.g. T479.41-.44; T483.08-.11; T497.46-498.02; T498.12-.15; T501.04-.09; T518.30-519.26; T529.15-.31; T540.27-.38.

⁶⁴ T581.12-584.27; T589.24-590.12.

⁶⁵ FOG.1000.0001.3302; FOG.1000.0001.3303.

in our system. I know there is another Leigh Design and the plumber to add. Will try to get the plumber sorted tomorrow".⁶⁶ Again, the attachment opens to the 'Outstanding' worksheet to which Mr Tesoriero had been directed, with certain items highlighted yellow. The 'cashflow' worksheet is the third worksheet in the document;

54.3 on 24 August 2020, Mr Chin sent an email to Mr Tesoriero attaching a spreadsheet entitled 'Outstanding and Recurring Payments for BP & VT', and stating, "*See updated spreadsheet as discussed. I've highlighted the ones I've set up payment for. Let me know what else is urgent*".⁶⁷ Again, the attachment opens to the 'Outstanding' worksheet where one can see certain items highlighted yellow to which Mr Chin had referred. The 'cashflow' worksheet is the third worksheet in the document;

54.4 on 18 February 2021, some 6 months later, Mr Chin sent an email to Mr Tesoriero attaching a spreadsheet entitled 'Outstanding and Recurring Payments for BP & VT' and stating, "*As discussed, see attached*".⁶⁸ The attachment opens to the 'Outstanding' worksheet, being the first of six worksheets. The 'FGFS' cashflow worksheet is the sixth of those worksheets; and

54.5 finally, on 24 February 2021, Mr Chin sent an email to Mr Tesoriero, relevantly attaching a spreadsheet entitled 'Outstanding and Recurring Payments for BP & VT', and stating, "*As discussed, please see attached updated spreadsheets of outstanding and payments*".⁶⁹ Again, the attachment opens to the 'Outstanding' worksheet, being the first of six worksheets. The 'FGFS' cashflow worksheet is the sixth of those worksheets.

55 When Mr Tesoriero was taken in cross-examination to 'cashflow' spreadsheets,⁷⁰ including those outlined above, his evidence was that he was unfamiliar with the spreadsheet, did not recall seeing it, had no input into the cash flow report and that the matters it covered were not his area of the business.⁷¹ When it was put to him that Forum would have no occasion to be paying amounts recorded to 'BHO - New Funder' in the cashflow spreadsheet, Mr Tesoriero's evidence was that he had no idea about

⁶⁶ FOG.1000.0001.3402; FOG.1000.0001.3403.

⁶⁷ FOG.1000.0001.4208; FOG.1000.0001.4209.

⁶⁸ FOG.1000.0001.5040; FOG.1000.0001.5041.

⁶⁹ FOG.1000.0001.5054; FOG.1000.0001.5056.

⁷⁰ The first of which was at SEC.5000.0056.5945, which was a spreadsheet sent by email from Mr Bouchahine to Mr Papas: SEC.5000.0056.5944.

⁷¹ T486.33-488.40.

that.⁷² Equally, when Mr Tesoriero was shown each of the cashflow of FGFS worksheets in the spreadsheets sent from Mr Chin to Mr Tesoriero as described above, Mr Tesoriero maintained that he did not recall seeing the cashflow or FGFS worksheet (as applicable) and did not know anything about the numbers recorded in them.⁷³

The significance of those spreadsheets in the context of the Eqwe / Forum program

- 56 Having traversed the relevant material and the evidence, the following observations may be made. First, it seems highly unlikely in the circumstances that Mr Tesoriero actually saw the ‘cashflow’ or ‘FGFS’ cashflow worksheets, or that if he did, that he paid them any particular attention. On each occasion that he received spreadsheets containing those ‘cashflow’ or ‘FGFS’ cashflow worksheets as their final tab, he was being directed to items in the outstanding payments worksheet (the first tab) for which he had responsibility. In contrast, he was not involved in the areas of the Forum business covered by the ‘cashflow’ and ‘FGFS’ cashflows worksheets and was therefore not in a position to comment on them.
- 57 Secondly, even if Mr Tesoriero saw those ‘cashflow’ or ‘FGFS’ cashflow worksheets, and happened to notice the item ‘BHO – New Funder’ buried within them – which entry was not highlighted or given any particular prominence as compared to the many other line items in those worksheets (recalling that the relevant line items were highlighted and expanded by the Court Book operator when shown to Mr Tesoriero in cross-examination) – then there is nothing to suggest that that would have put an honest and reasonable person in Mr Tesoriero’s position on notice of any fraudulent activity. In the first place, the fact that Forum was paying money to the broker, BHO, with whom it dealt was not of itself redolent of fraud. At most, the fact of the relevant entry in the worksheets could do no more than put an honest and reasonable person on inquiry, though even that seems a stretch, when the proper context of these matters is analysed without the benefit of hindsight.
- 58 In the second place, and more fundamentally, Westpac’s *own* evidence reveals that payments under the Eqwe / Forum program were made through Forum, as distinct from the customer, and that Westpac and its agent Eqwe had acquiesced in that course. This is apparent from Mr Price’s account of the Eqwe / Forum arrangements addressed in Mr Anderson’s affidavit of 28 June 2021⁷⁴ at [37], where Mr Price explained that under the program, customers paid into *Forum’s* NAB account, *Forum*

⁷² T488.42-489.23.

⁷³ See T493.13-494.07; T497.33-498.02; T498.26-.34; T500.16-501.02; T501.04-.34.

⁷⁴ MIN.5000.0006.1313.

transferred those amounts to a *NAB Forum account controlled by Eqwe*, and then *Eqwe transferred* those funds to the Eqwe Westpac account.⁷⁵ Similarly, in an email from Mr Price to Mr Rodney Owen of Westpac,⁷⁶ Mr Price stated:

...

Before closing, I just want to respond to your point – “It has recently come to Westpac’s attention that the scheduled payments by Customers may not have been into the Westpac bank account as required under the MSRGA”

With the numbing situation we all find ourselves in, we can understand that everyone is trying to protect their position, but that statement is not correct. Westpac have been aware and accepted that that [sic] the scheduled payments by some Customers has not have [sic] been paid into the Westpac bank account as required under the MSRGA. That has been the case for three years. We can discuss further when we have got to the bottom of the current Forum contracts.

...

59 The same understanding of payment flows is apparent from an email Mr Anderson of Westpac sent to a representative of Capital Finance on 9 July 2019, wherein Mr Anderson sought to track the “flow of funds from *Veolia to Forum and into the BHO bank account*”, and to ensure that BHO were not debiting funds from the BHO bank account without Westpac’s approval.⁷⁷

60 In a similar vein, Mr Anderson, when explaining an email that Mr Price of Eqwe had re-drafted for Mr Anderson to send to Coles, in which a reference to Westpac purchasing receivables from Forum had been re-drafted to refer to Westpac using “the contracts to providing funding to Forum”, gave evidence that this was reflective of Forum being the front for the contracts and there not being an understanding with Forum’s clients of the funding arrangements behind them, and also that it was reflective of the fact that Westpac were looking to work with Eqwe and Forum in having a successful financing structure for these facilities.⁷⁸ Mr Anderson also accepted in this connection that it was possible that there may not be the level of understanding outside of Westpac of what Westpac understood the arrangement to involve.⁷⁹

61 Clearly enough, Eqwe were aware of the understanding that Forum would make payments to Eqwe on behalf of the customer, which understanding they had conveyed to Westpac, and that understanding endured for the three year duration of the Eqwe

⁷⁵ MIN.5000.0006.1313 at .1320.

⁷⁶ WBC.5002.0001.0169 (formerly page 291 of Exhibit GKA-1).

⁷⁷ WES.5000.0003.7203.

⁷⁸ T247.29-248.40; WES.5000.0004.1383; WBC.3000.0004.0001.

⁷⁹ T248.42-43.

/ Forum program, as the evidence outlined above demonstrates.⁸⁰ Accordingly, being on notice of the payment of funds by Forum to Eqwe / BHO was not something which could properly have placed an honest and reasonable person in Mr Tesoriero's position on notice of fraudulent activity, as that is precisely how the Eqwe / Forum program was operating in practice, to the understanding of all participants to that program (and to the extent a person may have been put on inquiry by what was revealed by the spreadsheets, which is contestable in any event as explained above, the appropriate inference is they would quickly have been disabused of any inclination of wrongdoing). Consequently, there is no basis to infer that Mr Tesoriero's receipt of cashflow spreadsheets which were not expressly directed to him was something which ought to have aroused suspicion in his mind of the fraudulent activity which has since come to light.

The alleged concealment of FGFS

62 Another circumstance on which Westpac apparently places reliance in its case against Mr Tesoriero for constructive notice of fraudulent wrongdoing by Mr Papas is the fact of FGFS' position outside the Forum group.

63 However, there are at least the following flaws in Westpac's argument. First, Westpac adduces no evidence to demonstrate why it is said that the arrangements with FGFS were apt to conceal Mr Papas' fraudulent conduct from Westpac and Eqwe, for example, or anyone else for that matter. Rather, what the evidence reveals is that Mr Papas' forgery concealed the fact of the fraud, no more and no less. And when Westpac came close to detecting that fraud, it was Mr Papas at Forum who intervened to throw Westpac off the scent, as the events involving the Coles standard audit certificate reveal.⁸¹

64 Westpac has not led evidence to suggest that the arrangements as between the Forum group entities on the one hand, and FGFS on the other, was something which in fact concealed the fraud from it. And nor could it: Westpac was aware of the fact of FGFS, its directors and shareholders, its security arrangements with a third-party funder, and its proposal to take over the arrangements, both existing and prospective,

⁸⁰ Westpac apparently places reliance on an email from Mr Price to Mr Bouchahine and Mr Papas in February 2020 concerning the establishment of a Forum NAB locked box account: see Westpac Closing Submissions at [157]; although as the submission recounts, that never occurred, which Mr Price must be taken to have known (and the Court should infer) given the evidence above concerning his understanding of the Eqwe / Forum program between 2018 and 2021.

⁸¹ T247.15-249.39; WBC.3000.0004.0001; WES.5000.0004.1383; WBC.3000.0004.0003; Anderson 14 October 2021 Affidavit (MIN.5000.0006.1446) at [52].

under the Eqwe / Forum program from at least by 15 April 2019.⁸² Westpac's agent Eqwe was aware of those matters even earlier, from at least 13 February 2019.⁸³

65 Secondly, insofar as FGFS' accounting arrangements were concerned, Forum's accounts staff under Mr Bouchahine were responsible for maintaining FGFS' internal accounting records using the Xero system,⁸⁴ being the same system used for internal accounting in respect of the other Forum entities.

66 Thirdly, in the above context, it is not at all clear how it might be said that Mr Tesoriero was sufficiently apprised of the accounting arrangements between FGFS on the one hand, and the Forum entities on the other, as to give rise to any suspicion of fraudulent conduct on the part of Mr Papas. Insofar as something is sought to be made of Mr Tesoriero's family accountant, Mr Stefanetti, performing some limited external accounting work for FGFS, there is no evidence to suggest that Mr Stefanetti was in receipt of information which might have aroused suspicion in his mind as to possible fraudulent conduct of Mr Papas under the Eqwe / Forum program, when he was not privy to the detail of those arrangements. Moreover, Mr Stefanetti was in direct communication with the Forum group's auditors, Rothsay, between 21 and 31 January 2019, about entities involving Mr Papas, and he provided Rothsay with FGFS' 2018 Financial Accounts in that context, along with financial information concerning other entities associated with Mr Papas.⁸⁵ Thus, there is nothing to suggest that Mr Stefanetti was anxious to conceal the nature of FGFS' accounting treatment from the auditors of the Forum group entities, or that those auditors saw anything untoward in the separate accounting treatment afforded to FGFS, which was by definition not part of the Forum consolidated group given its different shareholders.

67 Fourthly, Mr Tesoriero gave evidence that as far as he was aware, FGFS had a NAB account and that Rothsay as auditors would have to look at all the NAB accounts connected to the Forum entities, including FGFS, and would see the flow of funds between those entities.⁸⁶ Moreover, insofar as it was put to Mr Tesoriero during cross-examination that he was in receipt of FGFS bank statements showing funds flowing in to FGFS from Forum Finance, and funds flowing out to Forum group entities that were purportedly earmarked to Forum customers,⁸⁷ then again that would not give rise to any relevant suspicion on the part of a recipient of such bank statements in

⁸² WES.5000.0003.3053. The matter was also discussed at Westpac's meeting with Mr Papas and others on 25 July 2019: T249.41-250.03; WBC.3000.0004.0003.

⁸³ FOG.1000.0002.7145.

⁸⁴ T593.24-.29.

⁸⁵ SEC.5000.0044.2478.

⁸⁶ T445.01-.06.

⁸⁷ See T514.45-517.29.

Mr Tesoriero's position, given how the Eqwe / Forum program was operating in practice, as discussed above. Mr Preston, who was responsible for tracing the flow of funds based on Forum's internal Xero accounting records, acknowledged that of the financier funds transferred to FGFS from relevant Forum entities, a significant proportion of those funds were then transferred back to the Forum group entities,⁸⁸ a fact which is confirmed (in a graphical sense) by Westpac's flow of funds diagram (tab 4).

68 In all of the circumstances, there is simply no basis to conclude that the establishment of FGFS (which preceded the fraudulent conduct of Mr Papas) outside of the Forum group, and its separate external accounting treatment, were matters which ought to have given rise to a suspicion on the part of Mr Tesoriero of Mr Papas' fraudulent wrongdoing.

The events involving Maia Financial

69 Mr Tesoriero's evidence in respect of Maia Financial was that:⁸⁹

- 69.1 he was aware in late 2017 that a broker with whom Forum had dealings, NMF, were organising some bigger funding lines for Forum;
- 69.2 then, in mid-2018, Mr Papas called up Mr Tesoriero and advised him that when he was next in Sydney, he would need to come and meet with the Maia Financial representatives;
- 69.3 at a subsequent meeting at the offices of Maia Financial, Daniel Blizzard and a "Joey" discussed how there was a standstill agreement being put in place, as some of the contracts did not meet the criteria for the way they understood things had been sold to them by NMF and they were going to need those contracts paid out;
- 69.4 it was discussed that they did not like the way that money was coming back through Forum and then to them, and that they wanted to have access direct to the customers;
- 69.5 in a subsequent discussion with Mr Papas, Mr Papas explained to Mr Tesoriero that the representatives of Maia did not like Forum's forward invoicing model whereby there was a delay between the sale of contracts by Forum and funding being provided in respect of those contracts, to when the goods are placed with the customer and the customer commences making repayments on the goods;

⁸⁸ T278.41-279.05.

⁸⁹ T367.19-372.31.

- 69.6 Mr Papas also said to Mr Tesoriero that he was in the process of selling those contracts out to other funders in Forum's book for whom the arrangements would meet their funding criteria;
- 69.7 Mr Tesoriero had a further phone call with representatives of Maia Financial in which he was asked to sign a guarantee in respect of the standstill arrangements, which he subsequently did;
- 69.8 Mr Tesoriero signed the guarantee because he trusted what Mr Papas had told him about the forward invoicing model not meeting Maia Financial's funding criteria, and because he understood that Mr Papas was arranging to have the contracts placed with another funder in Forum's book for whom the funding criteria would be met; and
- 69.9 some time later in the year, in about October or November 2018, Mr Tesoriero asked Mr Papas whether the dealings with Maia Financial got sorted and Mr Papas said yes.
- 70 Mr Tesoriero's account of these events broadly corresponds with the relevant documents insofar they as concern him. Mr Tesoriero's signature is recorded on the Standstill Agreement dated 18 April 2018,⁹⁰ although his evidence was that he does not recall signing it.⁹¹ Likewise, Mr Tesoriero's signature is recorded on the variation to the Standstill Agreement of 11 July 2018,⁹² although again his evidence is that he does not recall signing it.⁹³ At any rate, it is noteworthy that paragraph 2 of that document refers to various telephone conversations, emails and meetings between Mr Papas and Daniel Blizzard and others from Maia Financial, with no mention of Mr Tesoriero.
- 71 The first piece of correspondence involving Mr Tesoriero is the email of 1 August 2018.⁹⁴ The first email in the chain, from Mr Blizzard to Mr Papas and Mr Tesoriero, copied a Mr Fridman and a Ms Eliatamby of Maia Financial, referred to a discussion that day, and noted at paragraph 3 that post payment of outstanding amounts under the standstill agreement, the Veolia contracts will be transferred to Forum subject to the required due diligence requirements, most notably that the assets are in place and rental contracts are recognised by the client. Mr Blizzard concluded by stating that they must focus on delivering on these commitments for the sake of retaining ongoing confidence in Maia Financial and the Forum Group. Two things are apparent from this

⁹⁰ MCN.0001.0003.0107.

⁹¹ T452.01-454.24.

⁹² MCN.0001.0003.0802.

⁹³ T461.15-462.16.

⁹⁴ FOG.1000.0002.3740.

exchange: first, there will be no transfer of the Veolia contracts if the assets are not confirmed and the rental contract not recognised by the client, and second, Mr Blizzard is speaking of the need to deliver on the commitments for sake of retaining ongoing confidence in Maia Financial and the Forum Group.

- 72 The next email involving Mr Tesoriero is an email from Mr Blizzard to Mr Papas and Mr Tesoriero, copying a Ms Marland of Maia Financial, of 16 August 2018.⁹⁵ Mr Blizzard referred to the due diligence requirements regarding the Veolia contracts ahead of any transfer of those contract, and noted that it would not occur by the expected date. Mr Blizzard then proposed a further variation to the payments under the Standstill Agreement, and noted they could then confirm how to finalise the transfer of Veolia contracts and standstill agreement after that.
- 73 On 4 September 2018, Ms Eliatamby, General Counsel of Maia Financial, sent Mr Papas and Mr Tesoriero an email, referencing recent discussions with Mr Blizzard and Mr Fridman, and attaching a Standstill Variation Letter and Deed of Guarantee & Indemnity to be signed by Mr Tesoriero (noting that Mr Papas had already agreed to guarantee the Forum entities' obligations under the terms of the original Standstill Agreement to which he was personally made a party),⁹⁶ which guarantee Mr Tesoriero subsequently signed.⁹⁷
- 74 In the course of cross-examination, Mr Tesoriero was taken to an email he sent to a broker on 5 September 2018,⁹⁸ in which he sought a short-term loan of \$1.5-2 million for bridging purposes while Forum was *"in the midst of opening a third funder to the finance book portfolio for large enterprise deals that our historical funding lines have tapped out on large transactions"*. Mr Tesoriero's evidence was that he did not know the identity of the funder referred to in his email, as Mr Papas mainly dealt with Forum's funders,⁹⁹ but that (consistently with his earlier evidence noted above) he understood from Mr Papas that Forum would be re-assigning the customer contracts to a different financier that was part of Forum's book.¹⁰⁰ It may be noted here that the fact that Mr Papas discussed with Mr Tesoriero the re-assignment of customer contracts to a new funder is consistent with Mr Papas' similar discussion with Mr Anderson and others in the call on 25 July 2019, where the refinancing by Westpac of existing Veolia contracts with NMF, the broker under the Maia Financial arrangements, and the funders Flexi and Eclipse was discussed, as outlined above.

⁹⁵ SEC.5000.0033.5218.

⁹⁶ FOG.1000.0008.2622.

⁹⁷ MCN.0001.0003.0607.

⁹⁸ FOG.1001.0016.1260.

⁹⁹ T468.36-.40.

¹⁰⁰ T472.35-473.30.

In this connection, Mr Tesoriero accepted the proposition put to him that there could be no possible commercial basis for the Forum group paying Maia Financial \$58 million to acquire receivables from Maia Financial, that it would be a crazy thing to do given they did not have \$58 million of their personal money in the bank, and that no honest or reasonable person would enter into such a deal,¹⁰¹ which rather illustrates the fact that, in light of the matters known to him, he had no reason to suspect any wrongdoing.

75 On 22 October 2018, Maia Financial and an entity associated with it, entities in the Forum group, and Mr Papas and Mr Tesoriero, entered into respective Deeds of Assignment with respect to customer contracts concerning print and Orca assets, including Veolia contracts.¹⁰²

76 In the above circumstances, it is submitted that it cannot be concluded that the events involving Maia Financial, to which Mr Tesoriero was privy, either did give or ought to have given rise to any suspicion on his part as to the propriety of the arrangements the subject Standstill Agreement, Guarantee and ultimately the Deeds of Assignment. Mr Tesoriero's evidence is inconsistent with such a conclusion, including as to his discussions with the Maia Financial representatives, as are the contemporaneous documents to which he is a party, which made clear that there would be no assignment of the relevant customer contracts until Maia Financial had conducted due diligence to ascertain that the contracts were in place and recognised by the customers. It must necessarily follow from the completion of those arrangements in the form of the Deeds of Assignment that Maia Financial had in fact been satisfied of those matters, and Westpac has not called anyone from Maia Financial to contradict either that fact or Mr Tesoriero's evidence of his dealings with them, or to otherwise suggest that their dealings with Mr Tesoriero ought to have engendered in him, or a reasonable person in his position, a suspicion that Mr Papas may have been engaging in fraudulent conduct at the time, which it must be emphasised, Westpac *does not* allege. In those circumstances, the Court can infer that evidence from relevant representatives of Maia Financial would not have assisted Westpac's case that the events involving Maia Financial, as they concerned and were known to Mr Tesoriero, could or would have given rise to a suspicion of fraudulent conduct on the part of Mr Papas in relation to the Eqwe / Forum program. Moreover, Westpac cannot articulate with precision what those circumstances are that ought to have led to the relevant suspicion. Accordingly, in the above circumstances, the Court cannot reliably

¹⁰¹ T473.32-.46.

¹⁰² See email at MCN.0001.0003.0635 and attachments: MCN.0001.0003.0639; MCN.0001.0003.0642; MCN.0001.0003.0664; MCN.0001.0003.0667.

draw the inferences Westpac seeks, and the submission that the events involving Maia Financial ought to have led Mr Tesoriero to suspect fraudulent conduct under the Eqwe / Forum program ought to be rejected.

77 Finally in this regard, it is necessary to address what Westpac seeks to make of Mr Tesoriero's knowledge of the so-called scheme based on the entries in Mr Papas' personal diary to which Westpac points.¹⁰³ The first and most obvious point is that Mr Papas' personal musings about his fraudulent conduct in his private notebook are not at all a reliable source of what Mr Tesoriero knew or was told for that matter. The highest it gets on Westpac's case is some superficial process of reasoning based, in essence, on guilt by association.¹⁰⁴

78 The second point is that what Mr Papas intended to convey by the note is far from clear, but insofar as any meaning can be gleaned from it, all indications are that it is *exculpatory* of Mr Tesoriero. That is, the note apparently records Mr Papas' overseas escape plan, which apparently has disclosure to "Vince" as step 7 and "overseas escape" as step 8, and then goes on to record, in a prospective manner, "Tell Vince everything you need to tell him". Mr Papas did not of course escape overseas in 2018, but rather notoriously did so in June 2021, so there is nothing to suggest from this note that he told "Vince" anything at the time of the note or in any relevant subsequent period. Moreover, there is an assumption in Westpac's submissions on this point that Mr Papas intended to tell "Vince" about the fraud, when the note says no such thing. Rather, it says, "tell Vince everything you need to tell him". Far from being a co-conspirator in any scheme, the note indicates, at best, that Mr Papas treated Mr Tesoriero as being on a need to know basis, in the sense that once Mr Papas finally saw fit to cut and run to Greece and leave his fellow director Mr Tesoriero behind to pick up the pieces, he might tell him "what he needed to know" then.

79 This search for meaning in Mr Papas' personal diary indicates the inherent unreliability in deploying it, as Westpac seeks to do, in the case against Mr Tesoriero. The Court cannot safely conclude anything adverse to Mr Tesoriero from it; if anything, the situation is the opposite. In any event, the Court should reject Westpac's submissions that knowledge of Mr Papas' 'scheme' on the part of Mr Tesoriero can be inferred from Mr Papas' personal diary.

¹⁰³ Westpac Closing Submissions at [116], and see also [79]-[80].

¹⁰⁴ Westpac Closing Submissions at [116].

Payments to, or on behalf of, Mr Tesoriero

- 80 Finally, with respect to Westpac's trust claim, if Westpac fails to establish Mr Tesoriero's knowledge, then Mr Tesoriero is only liable to account for property that is still in the Mr Tesoriero's hands at the time Westpac issued proceedings.¹⁰⁵
- 81 In those circumstances, other than Mr Tesoriero's own evidence that he retains possession of the Chevrolet Bel Air (line 9 in Annexure E of Westpac's closing submissions, which payment is characterised in FGFS' financial records as a loan to Mr Tesoriero), Westpac have not established, and made no attempt to establish, that the payments that Westpac contends were made to him remained in his hands at the time Mr Tesoriero became aware of the fraud.
- 82 Further, the payments which Westpac contend support its trust claim were not made to Mr Tesoriero. For example, as referred to at 27 above, the uncontested evidence in relation to the payments at lines 16 and 18 of Annexure E were that those payments were made to NuLend to repay funds that were borrowed by Tesoriero Investment Group and advanced to FGFS to allow for the acquisition of Autonomous Energy.
- 83 Other payments were re-allocated from other entities to Mr Tesoriero. For example, Mr Preston conceded that payments were re-allocated from 65 Nelson St Enterprises Pty Ltd to Mr Tesoriero.¹⁰⁶ Westpac acknowledges this as being an exception in their written closing submissions, and they may be put to one side accordingly.¹⁰⁷

Date: 22 February 2023

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¹⁰⁵ See footnote 51 of Mr Tesoriero's Opening Submissions and Westpac's Closing Submissions at [119].

¹⁰⁶ T277.35-.42.

¹⁰⁷ Westpac Closing Submissions at [40]-[41].