

**Westpac & Anor v Forum Finance & Ors;
Societe Generale v Forum Finance & Ors; SMBC v Forum Enviro (Aust) & Ors
Federal Court of Australia Proceedings NSD 616, 642 and 681 of 2021**

**OUTLINE OF SUBMISSIONS OF
COMPANIES IN LIQUIDATION**

Introduction

1. These submissions on behalf of the companies in liquidation (**Companies**) address the following matters:
 - (a) The Companies' position as to quantum; and
 - (b) The defences filed by eight of the Companies in the Westpac proceedings¹ and three of the Companies in the SMBC proceedings² (which are collectively referred to in these submissions as the "Defence Companies").

Companies' position as to quantum

2. In opening submissions, senior counsel for the Companies indicated that the Companies may wish to be heard on the question of quantum at the end of the case: T13:9.
3. The Companies understand that each of the Applicants intends to identify the precise quantum of relief that they seek after the Court has delivered reasons in the proceedings, if successful. Accordingly, the Companies will make any submissions on quantum after the precise quantum of relief sought has been articulated.

Defences filed by some of the Companies

4. The Defence Companies – being Tesoriero-Related Entities and, in the case of 64-66 Berkeley Street Pty Ltd (in liquidation), a Jointly Owned Entity – were formerly

¹ 64-66 Berkeley St Hawthorn Pty Ltd (in liquidation) (8R) (MIN.5000.0006.0926), 23 Margaret Street Pty Ltd (in liquidation) (13R) (MIN.5000.0006.0936), Canner Investments Pty Ltd (in liquidation) (16R) (MIN.5000.0006.0961), 9 Gregory Street Ouyen Pty Ltd (in liquidation) (23R) (MIN.5000.0006.1017), 286 Carlisle Street Pty Ltd (in liquidation) (25R) (MIN.5000.0040.0001), Tesoriero Investment Group Pty Ltd (in liquidation) (38R) (MIN.5000.0006.1041), 193 Carlisle Street Enterprises Pty Ltd (in liquidation) (40R) (MIN.5000.0006.1058) and 8-12 Natalia Ave Oakleigh Pty Ltd (in liquidation) (41R) (MIN.5000.0006.1066) (being the **Defence Companies**).

² 23 Margaret Street Pty Ltd (in liquidation) (23R) (MIN.5000.0024.0016A), 286 Carlisle Street Pty Ltd (in liquidation) (24R) (MIN.5000.0024.0022), 64-66 Berkeley Street Hawthorn (in liquidation) (25R) (MIN.5000.0024.0027).

represented by the legal representatives for Mr Tesoriero, prior to the appointment of the liquidators.

5. Prior to those appointments, each of the Defence Companies filed defences which join issue with Westpac and SMBC's claims, and plead positive factual allegations concerning returns on investment alleged to have been made to Mr Tesoriero.
6. All of the defences are in substantively similar form (save that 286 Carlisle Street Pty Ltd (in liquidation) does not plead a positive factual allegation relating to a return on investment).
7. Taking 8-12 Natalia Ave Oakleigh Pty Ltd (in liquidation) as an example (MIN.5000.0006.1066), in relation to Westpac's claim, that entity:
 - (a) does not admit the principal factual allegations underpinning the alleged fraudulent "Scheme" (as defined in the 2FASOC) (paragraphs 55-58 and 1831-1833), and the "Fraudulent Transactions" (as defined in the 2FASOC) (paragraphs 59 to 1830);
 - (b) does not admit or denies the substantive allegations made pursuant to the principle in *Black v S Freedman & Company* (1910) 12 CLR 105 (paragraphs 2579-2582), unlawful means conspiracy (paragraphs 2583-2587), knowing receipt (paragraphs 2588-2590), knowing assistance (paragraphs 2591-2595) and misleading or deceptive conduct (paragraph 2596); and
 - (c) pleads that if (which is denied) 8-12 Natalia Ave did receive monies derived from the "Fraudulent Transactions", then half of those monies were returns on contributions made by Mr Tesoriero (paragraph 2581(d); MIN.5000.0016.0391). This pleading is particularised by a list of asserted capital investments in the Forum group of companies, totalling \$6.869 million, said to have been made by Mr Tesoriero or others on his behalf:
 - i. \$1,000,000 paid on or around 4 February 2013;
 - ii. \$200,000 paid on or around 4 October 2013;
 - iii. \$60,000 paid on or around 4 October 2013;
 - iv. \$1,500,000 paid on or around 2 June 2014;
 - v. \$2,109,755 paid on or around 1 May 2017; and

vi. \$2,000,000 paid on or around 2 May 2017.

8. Mr Tesoriero's defence is substantially similar to the Defence Companies' defences. In addition to denying knowledge and involvement in the alleged fraudulent scheme, Mr Tesoriero himself asserts a positive defence relating to returns on investment at paragraph 1900(p) of his defence (MIN.5000.0016.0380). Mr Tesoriero, however, asserts a lesser total of investment in the sum of \$4.86 million.³
9. Accordingly, with the exception of 64-66 Berkeley Street (of which Mr Papas is also a director), the Defence Companies' defences will succeed or fail to the same extent (if any) as Mr Tesoriero's defence in the Westpac proceedings succeeds or fails. In the circumstances, the Defence Companies (through their liquidators) do not propose to make any further submissions concerning the question of liability on behalf those companies, noting in particular that Mr Tesoriero is already in substance a contradictor in respect of the relevant claims made by Westpac and SMBC.
10. As regards 64-66 Berkeley Street (of which Mr Papas is also a director), the liquidators accept the submission at paragraph 140 of Westpac's closing submissions that the knowledge of Mr Papas would be attributable to that company, and therefore do not wish to be heard any further in relation to the defence filed by that entity.

Others creditors

11. The liquidators note for completeness that in relation to Forum Group Pty Ltd (receivers and managers appointed) (in liquidation) other creditors have asserted a security interest in the proceeds held in that entity's bank account. To the best of the liquidators' knowledge, each of those creditors has been made aware of these proceedings. The liquidators may seek directions from the Court in due course in the event that any orders are made in these proceedings giving effect to the claimed proprietary interests of one or more of the Applicants in the funds held in that entity's bank account, prior to distribution of those funds.
12. The liquidators have also been asked by the Department of Employment and Workplace Relations (operating the Fair Entitlements Guarantee) to notify the Court in these proceedings that it asserts an entitlement to the funds held by Forum Group Pty Ltd

³ See also Mr Tesoriero's oral opening submissions where Mr Tesoriero opened by reference to identifying \$4.5 million of investments made: T300:5-11 (\$900,000 and \$100,000); T301:1-8 (\$1 million and \$1.5 million), T301:25-26 (\$2 million).

(receivers and managers appointed) (in liquidation) pursuant to s 561 of the *Corporations Act 2001* (Cth).

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