

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 11/11/2021 8:54:28 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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



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

Dated: 11/11/2021 8:54:33 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.

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.



APPLICANTS' OUTLINE OF SUBMISSIONS

FOR HEARING ON 12 NOVEMBER 2021

Introduction

1. The matters to be determined by the Court in this proceeding on 12 November 2021, at least to the understanding of the applicants (together, **Westpac**), relate to:
 - a. the winding up of three corporate respondents presently in provisional liquidation, Forum Group Financial Services Pty Ltd (**FGFS**), Forum Enviro Pty Ltd (**FE**) and Forum Enviro (Aust) Pty Ltd (**FEA**) pursuant to the provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**). Mr Jason Preston and Mr Jason Ireland were appointed joint and several provisional liquidators of FGFS, FE and FEA by this Court on 15 July 2021. This application was opposed by Mr Tesoriero on 1 and 20 October 2021 and appears to continue to be opposed;
 - b. leave to serve the originating application and statement of claim, in current form, on the three additional respondents located in Greece.
 - c. timetabling orders for the progression of the proceeding to trial; and
 - d. the freezing orders made against Mr Vincenzo Frank Tesoriero (**Mr Tesoriero**) on 2 July 2021 (extended and varied on 9 July 2021 and 27 August 2021) (**Freezing Orders**). In particular, it is understood that Mr Tesoriero seeks an amendment to exceptions to the Freezing Orders to allow a greater amount for legal fees and possibly Mr Tesoriero seeks access to the \$773,362.88 which has been paid into Court (**Fund**) in order to meet that expense, that application is opposed by the applicants.
2. The orders which are sought by Westpac are set out in the short minutes of order which have been provided to the Court.¹
3. The proceeding is listed together with proceeding NSD681/2021 commenced by SMBC Leasing and Finance, Inc. Sydney Branch (**SMBC Proceeding**) and proceeding

¹ Court Book for Hearing 12 November 2021 (**Nov CB**) at tab 22

NSD642/2021 commenced by Societe General (**SocGen Proceeding**). The short minutes of order also reflect the orders which are being sought in the SMBC Proceeding and have consistent timetabling across this proceeding, the SMBC Proceeding and the SocGen Proceeding.

Materials before the Court

4. The applicants rely on:
 - a. the materials before the Court on 20 October 2021 and contained in the Court Book for that hearing (**Oct CB**), including the affidavits of Ms Caitlin Murray of 30 September 2021 and 19 October 2021, the exhibits to those affidavits CMM-14 and CMM-16 (respectively tabs 5, 6, 8, and 9 of the Oct CB) and the affidavit of Jason Ireland of 29 September 2021 and exhibit JR-2: Oct CB tab 18 and 19.
 - b. a bundle of documents relating to the Oakleigh Property (defined below) (**Natalia Bundle**); and
 - c. a bundle of additional documents (**Additional Documents**).

Winding up applications

5. An issue which has been before the Court on 1 and 20 October 2021 is the application to wind up each of FGFS, FE and FEA (the **PL Entities**) and appoint the current provisional liquidators, Jason Preston and Jason Ireland, as the joint and several liquidators of FGFS, FE and FEA. The issue was addressed in the applicants' submissions dated 1 October (see at [31]-[42]² and 20 October 2021 (see [67]-[68]³) and those submissions are repeated. The winding up of these entities is sought: a) on the basis that each is insolvent; and b) on just and equitable grounds. An application for winding up in insolvency is to be determined expeditiously, with s 459R of the Corporations Act providing that an application for a company to be wound up in insolvency is to be determined within six months after it is made. The provisional liquidators consent to the winding up orders being made.

Insolvency

6. On 8 July 2021, administrators were appointed pursuant to s436A of the Corporations Act to each of the PL Entities, an appointment which is dependent on the companies being insolvent or likely to become insolvent. An appointment under s 436A of the Corporations Act can be made by a company only if the board considers that the company is, or is likely

² Oct CB tab 1

³ Oct CB tab 17

to become, insolvent. Mr Papas signed a resolution to this effect on 8 July 2021 in relation to each of FGFS, FE and FEA.⁴

7. Provisional liquidators were appointed to each of these entities by the Court on 15 July 2021. Mr Tesoriero was represented, including by senior counsel, at the hearing on 15 July 2021 when the application for the appointment of the provisional liquidators was made, including on the basis that each entity was insolvent. Mr Tesoriero did not seek to be heard in relation to that application, nor did Mr Tesoriero contradict the evidence before the Court on 15 July 2021 as to each entities. Similarly, Mr Tesoriero was a party to and represented at the earlier hearing at which Forum Finance Pty Limited was wound up due to its participation in the fraud perpetrated on Westpac: *Westpac Banking Corporation v Forum Finance Pty Limited* [2021] FCA 807.
8. At the hearing on 15 July 2021 the administrators of the PL Entities contended Westpac and SMBC were not creditors of the PL Companies (recalling that SMBC moves for the winding up of FE and FEA). At that hearing Westpac and SMBC established that they were respectively contingent creditors of one or more of the PL Entities with the consequence that Westpac or SMBC had standing under s 459P and s 462 of the Corporations Act (the issue further falls away as the provisional liquidators have standing under s 459P to pursue the application in insolvency).
9. Mr Tesoriero's position in relation to the winding up of the PL Entities is unclear. By letter from his solicitors dated 27 October 2021,⁵ Mr Tesoriero indicated to the liquidators that "the PL Entities are likely to be solvent ... and ought not be wound up". This position is unmaintainable on the evidence then before the Court, that he now proposes to adduce, and is not consistent with Mr Tesoriero not seeking to be heard in relation to the application to appoint provisional liquidators to each of these entities on 15 July 2021.
10. Mr Tesoriero's position is inconsistent with the financial records. The balance sheet for FGFS, as at 30 June 2021, records greater liabilities than assets with net assets recorded as "(13,885,913.17)"⁶, the majority of the assets being described as "loans" (but considered by Westpac as further misappropriation of money fraudulently obtained from it and the other banks and which remains Westpac's property) to various entities which are respondents to this proceeding, and which appear to have received, from FGFS, funds stolen from Westpac. It is unclear what Mr Tesoriero's position in relation to those "loans" or

⁴ Additional Documents 85-87, Nov CB tab 28

⁵ Exhibit SN-1, p.3 Nov CB tab 26

⁶ Exhibit SN-1 p.26 Nov CB tab 26

payments is because some of the payments described as “loans” are to him and companies he controls. On the one hand he may rely on those “loans” to assert solvency of FGFS yet on the other appears to deny any obligation to repay the amounts. The inconsistency is plain. Further, the profit and loss statement records a net loss just over \$300,000⁷ (though the applicants do not accept that FGFS had any legitimate business). These financial records do not support the assertion that FGFS is solvent. The same can be said of each of the other PL Entities. Finally, as already noted, each of the PL Entities was in external administration prior to the appointment of the provisional liquidators and resolutions were signed by Mr Papas that each of the PL Entities was or was likely to become insolvent.

Winding up on just and equitable grounds

11. Even if there is a prospect that the PL Entities are solvent (and there is not), liquidation on the just and equitable ground is justified and there is no proposal which has been put before the Court that would or could justify the termination of the appointment of the provisional liquidators.
12. Mr Papas is presently the sole director recorded for each of FGFS, FE and FEA.⁸ As set out at [53] of the applicants’ submissions dated 19 October 2021: Mr Papas was in Greece on 29 July 2021, when he swore affidavits which have been filed in this proceeding;⁹ he left Australia on 16 June 2021¹⁰ in circumstances in which the fraud was being uncovered. As held in *Westpac Banking Corporation v Forum Finance Pty Limited (Contempt Application)* [2021] FCA 1341 at [6]-[8] and [22]-[27], the evidence is to the effect that he is not likely to return to Australia in the foreseeable future, he is not currently participating in the proceeding (in that he has not filed and defence and has not filed an updated notice of address for service); he has disconnected an email address previously used to communicate with him¹¹ and has not provided any readily available means of communicating with him. Absence of a board in point of fact, and it is submitted in effect, is a proper basis to wind up a company on the just and equitable ground: *CIC Insurance Limited (prov liq apptd) v Hannan & Co Pty Limited* (2001) 38 ACSR 245 at [12]-[13].
13. That Mr Papas is the sole director is relevant in a second respect. The conduct of Mr Papas, shown by the unanswered evidence of the fraudulent way in which Mr Papas has

⁷ Exhibit SN-1 p33 (Nov CB tab 26)

⁸ Exhibit JI-2 at p1, 8, 17 (Oct CB tab 19), being the ASIC Current and Historical Extracts for each of these entities. Mr Tesoriero is recorded on the ASIC register as resigning as a director of FGFS in April 2020 and has never been recorded on the ASIC register as a director of FE and FEA.

⁹ See CMM-16 p 62 (Oct CB tab 9)

¹⁰ See CMM-16 p56 (Oct CB tab 9)

¹¹ *Westpac Banking Corporation v Forum Finance Pty Limited (Greek Telephone Number)* [2021] FCA 1340 at [3].

conducted the affairs of Forum Finance is sufficient to demonstrate a justifiable lack of confidence in his ability conduct the management of the entities currently in provisional liquidation. FGFS has been used as a vehicle to carry on unlawful conduct and this is a sufficient basis to wind up a company on just and equitable grounds: in addition to *Westpac v Forum Finance*, see *Hipages Group Pty Ltd v Reach Aussie Pty Ltd* [2017] FCA 112 at [47].

14. There is no explanation offered by Mr Tesoriero as to why the entities should not be wound up on just and equitable grounds.
15. If the PL Entities are not wound up, no proposal or application as to what should occur has been put forward by Mr Tesoriero. There are several problems each of which provides further reason to wind up the companies on the just and equitable ground. *First*, if the winding up applications are dismissed, the PL Entities will nevertheless remain in provisional liquidation. A provisional liquidation is an interlocutory function. It is unusual for a company to remain in provisional liquidation for any length of time: *Re United Medical Protection* [2003] NSWSC 1031; 47 ACSR 705 at 711 [27]. Plainly the companies cannot be returned to the (perhaps notional) control of Mr Papas. *Second*, if it is proposed to terminate the provisional liquidation, the Court would need to consider whether the purpose for which the appointment of the provisional liquidators was made has been exhausted and whether there will be any matter arising in the future with which the provisional liquidator should deal; whether the termination would put at risk the interests of the creditors, contributories and the provisional liquidator; and whether it is in the public interest that the appointment be terminated: *Re United Medical Protection* [2003] NSWSC 1031; 47 ACSR 705 at 712 [33]. Central to this is the question of solvency. As set out above, Mr Papas signed resolutions to the effect the PL Entities were either insolvent, or likely to be so, and Mr Ireland has deposed that the PL Entities are insolvent with no ongoing business¹². *Third*, if the provisional liquidators' appointment was terminated the Court could not be satisfied that the PL Entities should be placed back into the hands of Mr Papas, the sole director of each PL Entity.
16. In the circumstances, there appears to be no merit nor utility to the assertion by Mr Tesoriero that the PL Entities should not be wound up. The Court should order the winding up of FGFS, FE and FEA.

Leave to serve out

¹² Oct CB tab 18

17. The leave to serve out application substantially reflects that granted in relation to Mazcon and Mr Giamouridis. A separate written submission is being prepared and will be filed and served.

Timetabling directions

18. The short minutes of order proposed by the applicants provide for the close of pleadings, the filing of the applicants' evidence and seek to list the matter for final hearing with an estimate of up to 15 days (the estimate assumes substantial opposition on multiple grounds, an assumption which at this stage may be pessimistic in the absence of identified defences).

Application to vary the Freezing Order

19. The Freezing Orders were made *ex parte* on 2 July 2021, and extended and varied by consent on 9 July 2021 and again extended and varied by consent 27 August 2021 (although consent was on each occasion provided on a without admissions basis).
20. On 9 July 2021, the Freezing Orders were varied to allow an additional amount for legal fees – being the \$30,000 per month up to an amount of \$350,000 which is currently provided for in the Freezing Orders.
21. Despite repeated requests,¹³ Mr Tesoriero had not articulated the amendment to, or variation of, the Freezing Orders that he sought prior to the afternoon of 11 November 2021. The affidavit of Mr Sawar (Sazz) Nasimi of 9 November 2021 (**Nasimi Affidavit**)¹⁴ at [21] contains Mr Nasimi's estimate of Mr Tesoriero's legal fees up to the end of 2021, in the amount of \$682,885.52, which amount includes \$223,660.52 said to have been incurred by Mr Tesoriero's former solicitors.
22. To the extent that Mr Tesoriero's application is to vary the Freezing Orders to increase the amount provided for in the exception to the Freezing Orders in relation to legal fees in order 10(b) of the orders made on 27 August 2021 to allow for payment of an amount of \$682,885.52 in legal fees, that application is opposed on the materials which are currently before the Court. These submissions were prepared before receipt of short orders from Mr Tesoriero's solicitors, and address the substance of the application as far as it was understood based on the notice, such as it was, which had been given.
23. Pausing there, to the extent a variation of the Freezing Orders is sought, this application could, and should, have been dealt with at least in the first instance by way of a written

¹³ Additional Documents 79 and 83, Nov CB tab 28

¹⁴ Nov CB tab 26

request to the applicants' solicitors for a variation to the Freezing Orders before approaching the Court. Order 11 of the Freezing Order expressly contemplates this course. Mr Tesoriero made no such written request.

24. On 9 July 2021, the variation to the Freezing Orders which provided for an increased in the amount exempt for legal fees was dealt with by consent. Had that path been adopted the following could have been explored. *First*, on the evidence Mr Tesoriero has not demonstrated either complete disclosure of assets nor an inability to fund the litigation from money or assets not subject to the freezing orders or disclosed assets. Relatedly, due to the incomplete picture of Mr Tesoriero's assets and his receipt of considerable funds, it is not shown on the balance of probabilities that the money he wishes to spend is other than Westpac's (or the other banks') property. *Second*, the quantum appears based on a false premise.
25. There is no dispute that the allegations against Mr Tesoriero are serious although the complexity may be overstated. In the present case, in addition to *in personam* claims against Mr Tesoriero, the applicants have proprietary claims and have been able to trace stolen funds into the hands of Mr Tesoriero (and entities controlled by him). The basis of the claims against Mr Tesoriero, and the strength of those claims including proprietary relief, have been set out in detail in the submissions dated 9 July 2021, an extract of which is included in the November court book at tab 21.
26. It is accepted that 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 living expenses and legal fees: *Deputy Commissioner of Taxation v Bolland*s [2012] FCA 1050 at [22]. The Freezing Orders are not "all assets" Freezing Orders, but rather are those relevant to a specified amount. In this respect, given Mr Tesoriero seeks a relaxation of the existing Freezing Orders, he bears the evidentiary onus of demonstrating that he does not have any other assets available out of which the 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. Finally, for the reasons identified under the next heading, legal fees at least generally should not be paid from the funds the subject of a strongly arguable proprietary claim.
27. Mr Tesoriero has not adequately demonstrated that an exemption in the amount of legal fees is justified at this present time. This is for three predominant reasons. *First*, the

adequacy of Mr Tesoriero's disclosure as to his assets. *Second*, the claims against Mr Tesoriero include proprietary claims. While the applicants have not been able to complete a full tracing exercise at this time, there is a probability that Mr Tesoriero could be paying away amounts over which the applicants have a proprietary interest. Mr Tesoriero has not provided any evidence to substantiate the assets he holds are other than the product of the stolen money. *Third*, the reasonableness of the legal fees which have been estimated.

28. As to Mr Tesoriero's assets position, Mr Tesoriero has provided two affidavits as to his assets: a) one of 21 July 2021 setting out his Australian assets (**July Affidavit**): CMM-16 at p 79;¹⁵ and b) one of 3 September 2021 setting out his interest in worldwide assets (**September Affidavit**): see CMM-16 at p99.¹⁶ However, those affidavits do not adequately and fully disclose Mr Tesoriero's assets or those assets under his control, for at least the following reasons.
29. *First*, the July Affidavit failed to disclose Mr Tesoriero's interest in to the Mangusta XOXO yacht (which has been subsequently disclosed in his September Affidavit). It is understood that this was not disclosed on the basis that, although owned by an Australian company controlled by Mr Tesoriero (Mangusta (Vic) Pty Ltd), it was not moored in Australia or registered in Australia and thereby not required to be disclosed. That is an argument without any substance. The motor yacht is owned by an Australian company shares in which are in turn owned by Mr Tesoriero (and see the standard extended definition of asset in the freezing order) and held on an Australian trust of which he is a beneficiary. The value of the shares attributed to Mangusta (Vic) Pty Ltd by Mr Tesoriero in the July Affidavit is "nominal" ignoring its ownership of the motor yacht.
30. *Second*, the July Affidavit did not disclose Mr Tesoriero's interest in 8-12 Natalia Ave Oakleigh and part of the common property on 716735J (**Oakleigh Property**) – either his chose in action or equitable interest pursuant to the then uncompleted contract for the sale of land executed in December 2019 for the purchase of the Oakleigh Property or the repayment of the deposit money paid for the purchase of the Oakleigh Property under a nomination deed.¹⁷ No explanation has been provided as to why this was not included in the July Affidavit. Mr Tesoriero was seeking to deal with his right to buy that property during July. He did not forget about an asset he was seeking to sell for in excess of \$1 million.

¹⁵ Oct CB Tab 9

¹⁶ Oct CB tab 9

¹⁷ Natalia Bundle, Nov CB Tab 29

31. *Third*, there are a number of bank accounts referred to in the affidavit of 19 October 2021 (**October Affidavit**), see at [4], which were not disclosed in the July Affidavit: see Annexure B of the July Affidavit. Further Mr Tesoriero in his October Affidavit states, “*I believe I may have up to 30 accounts with NAB*” (at [4]) but only 18 accounts are referred to in the October Affidavit. Contrary both to the operation and intention of the disclosure order, Westpac remains uninformed whether additional accounts exist which Mr Tesoriero has not disclosed.
32. *Fourth*, 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.
33. In seeking to obtain additional exemptions to the Freezing Orders, Mr Tesoriero has not provided a proper disclosure of his assets, which has meant that there is no proper way to assess whether additional exemptions to the Freezing Orders are required.
34. Those shortcomings have several consequences. *First*, Mr Tesoriero has not proved his assets and the need for a variation as to quantum for legal fees. *Second*, his opaque, to say the least, approach 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 before the fraud was commenced, and not funded using stolen money (the one asset he points to, a property owned by 26 Edmonstone Road Pty Limited, while acquired prior to the fraud was financed, through interest and other payments, by money from FGFS). Indeed, at [6] of the November Affidavit Mr Tesoriero asserts that he cannot presently identify assets which “*were acquired without using money from ‘Forum’*” nor identify the source of funds used to acquire any assets in that category. That proposition alone provides good reason not to allow the application in the present circumstances. *Third*, it is not possible to be satisfied that Westpac has found all of those assets which Mr Tesoriero has not disclosed. *Fourth*, there is no explanation given by Mr Tesoriero for payments he caused to be made to others and whether that money is available to him (for example the money paid by FGFS to 286 Carlisle Street Pty Limited, of which Mr Tesoriero and his father are the directors, and which was paid to overseas accounts of the two additional Greek corporate defendants). *Fifth*, in light of the opaque disclosure to date the application should be supported by evidence of his assets, income and liabilities.

35. Moving to the third matter (quantum), the estimate that has been provided in the amount of approximately \$683,000 in legal fees until the end of December 2021 is based on flawed premises.
36. *First*, the estimate that has been provided and the work estimated to be carried in the Nasimi Affidavit (see at [21]) appears unconnected to the defence articulated in Mr Tesoriero's November affidavit (**November Affidavit**). The defence articulated appears to be reliant on an agreement with Mr Papas that funds would be paid out of the "Forum group" as repayment for Mr Tesoriero's investment: November Affidavit at [21]. There is insufficient evidence of the likelihood of the incursion of the estimated fees in the amounts estimated and for the tasks estimated. It is, by way of example only, unclear why it will be reasonable to incur \$43,295 in relation to "Expert Reports" in connection with a defence of this nature. Indeed, it is not clear why any expert evidence is required.
37. *Second*, it is not reasonable to incur a further \$143,645 in interlocutory applications including 8 days of senior counsel's time and 10 days of junior counsel's time in the period from after 12 November 2021¹⁸ to the end of 2021. Correspondence seeking clarification of these matters: Additional Documents 83 has not been answered. If the applications are to be the quality of Mr Tesoriero's opposition to the winding up of the PL Entities, the expenditure will not be reasonable. Indeed, it is difficult to see why any further interlocutory applications will be necessary.
38. *Third*, no evidence has been provided as to the actual costs liability to Fortis Law (an alleged liability which exceeds the permitted expenditure during the time Fortis Law were engaged). Mr Tesoriero's October Affidavit states only that he has been told that an amount of \$233,600.52 has been incurred, but he has not been provided with an invoice: October Affidavit at [29].
39. *Fourth*, to the extent that the amount of work conducted to 12 November includes legal fees in relation to the opposition of the winding up of FGFS, FE and FEA, those fees have not been reasonably incurred in circumstances where Mr Tesoriero is not a director of those entities and does not otherwise appear to have standing to challenge the winding up, as well as by reason of the matters set out below. Relatedly, a significant part of the correspondence about which Mr Nassimi complains has been seeking to enforce the interlocutory agreement relating to the sale of the property at 26 Margaret Street, and seeking responses to correspondence Mr Tesoriero has ignored.

¹⁸ Noting that there is already an estimate for works up to 12 November 2021.

40. Having regard to the matters set out above, including the concerns as to Mr Tesoriero's disclosure of his assets, the concerns as to the reasonableness of the estimated legal fees and the strength of the claim against Mr Tesoriero, there is not a justifiable basis, at this stage, for the Freezing Orders to be varied to provide additional amounts to be paid from the restrained assets in legal fees. A variation of the Freezing Orders should not be permitted at this stage. That is not to say a variation ought not be permitted (or would not be consented to if appropriate) but proper disclosure and an estimate which is related to the defence sought to be advanced is a prerequisite to that amendment.

Access to the Fund

41. Mr Tesoriero's position in relation to the Fund (namely part of the proceeds paid by the nominee purchaser of 8-12 Natalia Avenue and which has been paid into Court) is not clear. No formal application has been made to seek access to the Fund for the payment of legal fees, although one was foreshadowed on 20 October 2021: T7.9-22.
42. The Fund was paid into Court following orders made on 1 October 2021. The money had been held in the Fortis Law trust account and were 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, neither Mr Tesoriero's right to purchase the Oakleigh Property nor the contract with the Nominee for the purchase of this right was referred to in Mr Tesoriero's affidavit as to his assets of 21 July 2021.
43. The applicants have traced funds from FGFS being used to pay the deposit in relation to the purchase of the Oakleigh Property: Natalia Bundle at pp 3, 6, 15, 16 and have a proprietary claim in relation to the funds used for payment of the deposit for the Oakleigh Property. 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": *Crosby Textor Research Strategies Results Pty Limited v Syed* [2020] NSWSC 1792 at [34] per Rees J referring to *Re Courtenay House Capital Trading Group Pty Limited (in liquidation)* (2018) 133 ACSR 451; [2018] NSWSC 1918 at [51].
44. Put at the most favorable to Mr Tesoriero, the Court must weigh any potential injustice to Mr Tesoriero against any 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.

45. Mr Tesoriero has not demonstrated to the Court that it is necessary to have access to the Fund in order to pay his legal fees. 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 fees 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 Fund.
46. The Court should not permit Mr Tesoriero to access the Funds 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.

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11 November 2021
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