



**Westpac Banking Corporation & anor v Forum Finance Pty Ltd (in liquidation)  
(receivers appointed) & ors**

**Federal Court of Australia NSD 616/2021**

**THIRD RESPONDENT'S OUTLINE OF OPENING SUBMISSIONS FOR FINAL HEARING**

***Unless otherwise indicated, these submissions use definitions used in the Second Further Amended Statement of Claim***

**Introduction**

*The Proceedings*

- 1 These submissions are for the third respondent (**Mr Tesoriero**) in the Westpac Proceeding, in which Westpac alleges that Mr Tesoriero participated in the fraudulent transactions. Despite the overlap with the SMBC Proceeding and the Société Générale Proceeding, the applicants in those proceedings have not joined Mr Tesoriero as a respondent and make no allegation that he participated in such fraudulent conduct.
- 2 In this proceeding, Westpac alleges that a "Scheme" was devised by Mr Papas "either together with Mr Tesoriero *or alone*" (2FASOC at [55]), involving in broad terms: (a) the fabrication of fraudulent documents by Mr Papas, (b) the submission by Mr Papas of those fabricated documents to BHD Leasing/Eqwe to be passed on to the applicants as part of the "Eqwe / Forum Programme", (c) the payment of funds by the applicants to Forum Finance/IUGIS NZ, and (d) the dispersal of the funds to Mr Papas, Mr Tesoriero or other entities or persons related to one or both of them (at [56]).
- 3 Westpac alleges that the Scheme was carried out by 136 fraudulent transactions, pleaded in Section "D", across hundreds of pages at [59]-[1830]. Those pleadings articulate how the Scheme was effected and constitute the crux of Westpac's claim. Westpac makes no allegation in any of [59]-[1830] of any involvement by Mr Tesoriero.
- 4 Westpac's claims against Forum Finance Pty Ltd, Mr Papas, and several other persons and entities (50 in total) are set out in Sections "F" to "BBB". Relevantly, the claim against Mr Tesoriero is in Section "H" (at [1895]-[1912]). It consists of five causes of action, being (a) funds held on trust, (b) unlawful means conspiracy, (c) knowing receipt, (d) knowing assistance, and (e) involvement in misleading, deceptive or false conduct engaged in by Forum Finance and Mr Papas. It is helpful to separate the tracing claim (funds held in trust) from the other causes of action and

address claims in (b) to (e) above as the **knowledge claims**, as distinct from the tracing claim. Each of the knowledge claims is founded on the Scheme allegation.

5 Mr Tesoriero denies that he had *any* knowledge of the Scheme prior to June 2021 and denies *any* involvement in the Scheme.

6 There is no direct evidence of Mr Tesoriero's involvement in the fraudulent transactions. Westpac's knowledge claims are circumstantial, resting entirely on inference. The question for the Court in relation to the knowledge claims, having regard to the gravity of the allegations (and therefore the *Briginshaw* standard now embodied in s 140 of the *Evidence Act 1995* (Cth)), is whether the Court can be satisfied that the more probable inference from the circumstantial, documentary evidence relied on by Westpac is that which Westpac alleges.<sup>1</sup> Mr Tesoriero contends that on the circumstantial, documentary evidence on which Westpac relies, the more probable inference is that Mr Tesoriero, like many others, was deceived by Mr Papas and had no knowledge of or involvement in the fraudulent transactions.

7 As to the tracing claim, Westpac does not advance an alternative case for when Mr Tesoriero became aware that the money he received was stolen money. In those circumstances, the question for the Court, if Westpac fails on its knowledge claims, will be a factual one – taking the date of the proceedings as the only possible date of for knowledge – what funds were in the hands of Mr Tesoriero at the time proceedings were issued that Westpac can establish it can trace from the stolen funds. Westpac's evidence does not establish that there remained any funds in Mr Tesoriero's hands when Mr Tesoriero became aware that the funds he received from FGFS were alleged to be stolen funds.

### **The Scheme**

8 Westpac's claims are all founded on the 136 fraudulent transactions, pleaded in Section "D". It is not essential to Westpac's claim against Mr Papas to plead the existence of a Scheme – those claims are made out on the allegations made against Mr Papas in relation to each of the fraudulent transactions in section D. It is also not necessary for Westpac to plead a Scheme in its tracing claim to recover the funds that remain in each of the defendants' hands since issuing this proceeding. The Scheme allegation is therefore pleaded in aid of its knowledge claims against Mr Tesoriero – in the absence of the alleged Scheme, Westpac has no foundation for pleading the knowledge claims against Mr Tesoriero.

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<sup>1</sup> *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666 at [1330], citing *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [88], [375].

- 9 For Westpac, the Scheme is a bootstraps argument: there were fraudulent transactions, because there were fraudulent transactions there must have been a scheme, and because there must have been a scheme, there is a larger field of commercial activity to implicate participants in the scheme, and because Mr Tesoriero was a ‘participant’ by reason of that broader definition of activities, he must have known about the fraudulent transactions, notwithstanding the lack of evidence linking him to any involvement or participation in any such fraudulent transactions. All of the inferences for which Westpac contend proceed on an assumption that Mr Tesoriero knew of the fraudulent transactions. Remove the assumption of knowledge, and the inferences said to support the Scheme allegation are insufficient to establish the case against Mr Tesoriero.
- 10 Central to Westpac’s Scheme allegation was the now abandoned allegation that FG, FE and FGFS were involved in an earlier fraudulent scheme against Maia Financial (**Maia**). It was appropriate for Westpac to abandon that allegation when pressed for particulars<sup>2</sup>; there was never a proper factual foundation for such an allegation. Absent an allegation of fraud, the circumstances surrounding Maia are of no probative value and are irrelevant. Westpac maintains allegations about Maia, but it is, in effect, attempting to maintain the prejudice of a fraud allegation without the burden of making such a serious allegation. The attempt is transparent and should be rejected – there is no probative value in the submissions made by Westpac in relation to Maia. In any case, as will be seen below, the circumstances concerning Maia on which it relies do not support the inferences it seeks to draw against Mr Tesoriero.
- 11 Mr Tesoriero’s role in devising the Scheme is alleged by Westpac to be apparent from eight matters listed at [47] to [55] of its Opening Submissions. Not one of the eight matters is inconsistent with Mr Tesoriero playing a role as an investor, shareholder and director in the Forum business while remaining completely ignorant of the fraud. Indeed, given Westpac appears to accept that Mr Papas’ fraud deceived so many who were closely involved in the impugned transactions, people who were charged with ensuring these transactions were legitimate, people who were responsible for auditing the entities who received the stolen money (such FG and FE), it cannot follow that mere involvement in the Forum business gives rise to knowledge of and participation in the apparent Scheme.
- 12 For example, Westpac makes no allegation that Forum’s Executive General Manager, Craig Rollinson, knew or was involved in the Scheme, and yet his

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<sup>2</sup> See Westpac’s Supplementary Submissions at [8].

involvement in the activity surrounding the fraudulent transactions was substantially greater than Mr Tesoriero's. Westpac leads no evidence from Mr Rollinson about his knowledge of the participants in the fraudulent transactions. Equally, Mr Bouchahine was the financial controller for the Forum business, controlled the FGFS financial accounts, authorised and was responsible for the impugned transactions involving 286 Carlisle Street, controlled the funds released to the Jointly Owned Entities and Tesoriero Entities, and yet Westpac makes no allegations against Mr Bouchahine of knowledge of or involvement in the alleged Scheme. Likewise, Westpac makes no allegations against BHO/Eqwe in circumstances where BHO/Eqwe acted as intermediary between Westpac and Forum (as the latter's undisclosed principal) with respect to relevant transactions including the fraudulent transactions and presumably conducted audits of the information held by Forum in respect to each customer contract.<sup>3</sup> Westpac does not address the fact that the accounting firm Rothsay's completed its audit of the Forum companies without detection of the fraudulent transactions.<sup>4</sup>

13 Westpac does not address the fact that its Director of Asset Finance, Mr Geoffrey Anderson was directly involved with Mr Papas<sup>5</sup> and Forum customers, taking steps to conduct due diligence over the financing and payment arrangements under the customer contracts<sup>6</sup> including being involved in audits by customers of the obligations to Westpac under the arrangements entered into by Forum,<sup>7</sup> and yet still remain oblivious to the fraud.

14 The Court can therefore infer that close proximity to and involvement in the impugned transactions are not circumstances that give rise to an inference of knowledge of their fraudulent nature. If no reasonable inferences of that nature arise from direct involvement in the impugned transactions, then in circumstances where there is no evidence directly linking Mr Tesoriero to any of those transactions, an inference that Mr Tesoriero was equally unaware of Mr Papas' fraudulent conduct is clearly compelling and probable. An important feature of the context in this regard, when assessing the probability of the alleged Scheme and Mr Tesoriero's alleged participation in it, is that Mr Papas' fraudulent conduct was forgery. Of its nature, that conduct was not so complex as to require the participation of others to give effect to it, as might explain the necessity of devising a scheme involving third parties to successfully implement it, and as is explored in these submissions, the

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<sup>3</sup> CB Part C: SEC.5000.0067.8034

<sup>4</sup> CB Part C: FOG.1000.0004.3238; FOG.1000.0001.0409; FOG.1000.0003.1325

<sup>5</sup> CB Part C: EQW.5000.0001.8660

<sup>6</sup> WES.5000.0003.7203

<sup>7</sup> CB Part C: WBC.3000.0004.0037

evidence on which Westpac relies to support the drawing of such an inference is insufficient to reach that conclusion.

- 15 Westpac's case is that the Court should infer Mr Tesoriero's knowledge and involvement in the Scheme (and therefore the fraudulent transactions) from the circumstances surrounding Mr Tesoriero's involvement in the broader Forum business. In order for the Court to draw reliable inferences about the circumstances, it is important that the Court be satisfied that it is informed of all relevant circumstances, not just those circumstances selected to give rise to Westpac's contended inferences. Westpac's pleaded case and the materials on which it relies indicates that Westpac may know of other relevant circumstances that have not been adequately disclosed in this proceeding.
- 16 For example, Westpac plead at [1844] that there was agreement reached between Mr Papas and Mr Tesoriero and *diverse others (both known and unknown)* to devise and implement the Scheme. Putting to one side that this allegation (repeated throughout the pleading) is inconsistent with Westpac's Scheme allegation at [55], it suggests that Westpac had a reasonable basis to believe that there were other parties, unknown, involved in devising and implementing the Scheme. Westpac has led no evidence concerning the basis for the assertion that there were 'unknown' parties involved in devising and implementing the Scheme. Further, Mr Anderson's evidence is that he conducted extensive investigations and yet the findings of those investigations are not detailed in his evidence.
- 17 In response to the eight matters that Westpac relies on to give rise to an inference that Mr Tesoriero devised and implemented the alleged Scheme, Mr Tesoriero notes the following.
- 18 The *first* of those eight matters concerns Mr Tesoriero's involvement in the Forum business.
- 19 Having regard to the submissions in paragraphs 11 to 14 above, no reasonable inference can be drawn from Mr Tesoriero's involvement in circumstances where there are many others who were more actively involved in the circumstances surrounding each of the fraudulent transactions and it is not said that any such persons were aware of the so-called Scheme or the fraudulent conduct. In those circumstances, that Mr Papas deceived those involved in the Forum business is the more probable inference.
- 20 Westpac contends that the existence of FGFS is telling, in the sense that Mr Tesoriero's shareholding and period as director give rise to an inference of knowledge of the alleged Scheme.

- 21 However, as the FGFS liquidators found and reported in their report to creditors dated 8 October 2021<sup>8</sup>:
- 21.1 FGFS was established in New South Wales in November 2017. Mr Papas was the sole director of FGFS (FGFS Director), and Mr Tesoriero was only a director of FGFS from 13 November 2018 to 30 April 2020;
- 21.2 FGFS primarily acted as the Forum Group's treasury entity, acting as the conduit for funds transfers between Forum Group entities, as well as providing loans to associated entities and associates of Mr Papas and Mr Tesoriero;
- 21.3 FGFS operated primarily through an employee and a contractor who acted under the supervision and direction of Mr Bouchahine who in turn acted under the direction of Mr Papas;
- 21.4 The funds advanced by FGFS to other entities within the appointment group were used for a wide variety of purposes, including;
- (a) funding repayments to financiers of other Forum entities in respect of funds that are alleged to have been fraudulently obtained where there was no underlying customer;
  - (b) funding the entities' working capital requirements; and
  - (c) funding acquisitions.<sup>9</sup>
- 22 In light of the liquidators' findings, there is no reasonable basis to infer that involvement in FGFS would necessarily give rise to an inference that Mr Tesoriero knew or had any basis to suspect that FGFS was receiving stolen funds.
- 23 Equally, the FGFS accounts<sup>10</sup> show that:
- 23.1 FGFS was funded by overseas loans;<sup>11</sup>
- 23.2 FGFS appeared to be playing the role of a treasury entity, with multiple loans owing to it by related entities including the Forum Group entities;<sup>12</sup> and
- 23.3 there is nothing in the financial statements to show the receipt of funds from Westpac or from customer contracts involving Westpac financing.
- 24 In addition, the Forum group entities' accounts were audited accounts,<sup>13</sup> and there is no evidence of any issues or concerns associated with the flow of funds between the

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<sup>8</sup> See CB Part C: page 5 of MIN.5000.0021.0001

<sup>9</sup> see CB Part C: page 12 of MIN.5000.0021.0001

<sup>10</sup> CB Part C: FOG.1000.0008.4875

<sup>11</sup> CB Part C: FOG.1000.0003.4652

<sup>12</sup> CB Part C: FOG.1000.0008.4875

<sup>13</sup> See CB Part C: SEC.5000.0027.1360, FOG.1000.001.7237, FOG.1000.0004.3238, FOG.1000.0001.0409 and FOG.1000.0003.1325

Forum group entities and FGFS being picked up or raised with Mr Tesoriero for that matter.

25 The *second* of those eight matters is that Mr Tesoriero directed expenditure of funds traced to the fraudulent transactions.

26 If, as addressed below, no reasonable inferences against Mr Tesoriero can be drawn from the circumstances surrounding Mr Tesoriero's involvement in the Forum business and his ownership and involvement in the Jointly Owned Entities and the Tesoriero Entities, then directing payments is clearly not probative. The fact that funds are directed to be expended in a certain way is not probative of knowledge as to how those funds were received. Directing funds for the purpose of the commercial investment in property is consistent with Mr Tesoriero being deceived into believing that those funds were legitimately obtained.

27 The *third* of the eight matters is that Mr Tesoriero was involved in and knew of the Maia settlement.

28 As outlined at paragraph 10 above, having abandoned any allegation of fraud involving Maia, the circumstances surrounding Maia are of no probative value and are irrelevant to Westpac's knowledge claims.

29 There is no basis in the documentary evidence to draw any inferences against Mr Tesoriero concerning the circumstances that led to the Standstill Agreement and Mr Tesoriero's execution of the guarantee. Westpac is not calling evidence from any persons involved at Maia, the counterparty to those arrangements. Westpac does not suggest that in entering into those arrangements, Maia was aware of circumstances which would have indicated dishonest conduct on the part of others; the Court may infer that Maia would not have entered into those arrangements were it otherwise. How a competing inference can be drawn against Mr Tesoriero by virtue of his participation in those same arrangements is not made by clear by Westpac. It is in any event not one which is available, and is in fact consistent with a lack of knowledge of any dishonest conduct on the part of Mr Tesoriero.

30 The *fourth* of the eight matters is Mr Tesoriero's involvement in the Forum Eqwe/Program.

31 If Mr Tesoriero did not know of the fraudulent transactions, if he was not aware that the Forum/Eqwe program was to be used by Mr Papas for fraudulent transactions, if he was deceived by Mr Papas into believing that the Forum/Eqwe program was for a legitimate business purpose, then his involvement in and signing of the agreement is obviously not probative of knowledge.

- 32 Mr Tesoriero's limited involvement in the Forum/Eqwe program is only of relevance if it can be established that Mr Tesoriero knew of the fraudulent transactions – one precedes the other, not the reverse, as Westpac effectively contends.
- 33 The *fifth* of the eight matters to which Westpac points is Mr Tesoriero's interest in the Jointly Owned Entities and the Tesoriero Entities and the use of funds derived from FGFS in relation to the acquisition of properties.
- 34 To draw the inference contended for by Westpac, one must leap from knowledge that funds are being advanced by FGFS to the Jointly Owned Entities to knowledge that those funds, which came from Forum entities, were stolen. But there is no evidence to bridge that gap. To the contrary, what evidence there is supports a reasonable inference that Mr Tesoriero, through these entities, was involved in commercial arrangements consistent with the apparent long-term financial success of the Forum business.
- 35 The evidence demonstrates that advances made by FGFS to the Jointly Owned Entities and the Tesoriero Entities were accounted for by FGFS as loans to those entities (and they have been the subject of demands and wind-up applications by the liquidators of FGFS). Inconsistent with a reasonable inference of knowledge or suspicion that these funds were stolen, there is no evidence of any attempt to conceal these advances.
- 36 The funds advanced by way of loans to the Jointly Owned Entities and the Tesoriero Entities that Westpac alleges are traceable from FGFS were used to partially fund either transactional costs, incidental costs or some amount (but never the full amount) of the purchase of the Joint Properties or the Tesoriero Properties. It is misleading to point to the value of the properties acquired as indicative of the scale of the funds being advanced by FGFS.
- 37 Further, Mr Tesoriero contributed financial resources to the Jointly Owned Entities and the Tesoriero Entities, in the form of personal guarantees, and guarantees from his father, to secure funding for those entities.<sup>14</sup> Westpac does not address the implausibility of Mr Tesoriero doing so if he were aware that the properties acquired by those entities were otherwise being financed using stolen funds. If Mr Tesoriero did in fact know of the alleged fraudulent Scheme, and the so-called "free money" that it yielded, the more reasonable inference is that it would have been completely unnecessary for him to borrow funds or have risked his personal solvency and his

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<sup>14</sup> CB Part C: MIN.5000.0018.0296



father's and family's assets. There is no evidence to suggest that Mr Papas took on such risk.

38 The *sixth* of the eight matters on which Westpac relies is Mr Tesoriero's receipt of spreadsheets in relation to payments.

39 The spreadsheets relate primarily to funding advanced to the Jointly Owned Entities and the Tesoriero Entities. If Westpac's fifth point is incapable of giving rise to the necessary inferences for which Westpac contends, then this adds no further weight to Westpac's case.

40 The *seventh* of the eight matters on which Westpac relies is the nature of the expenditure.

41 There is no force to Westpac's submissions in this regard. To the extent there is evidence consistent with Westpac's submissions as to Mr Tesoriero's 'lifestyle', those submissions do not account for Mr Tesoriero's 'lifestyle' prior to the alleged fraud, nor is any such conduct inconsistent with the lifestyle of a person who believed the funds to have been obtained by legitimate means, in particular where that person was an investor in the ostensibly successful Forum business, and where the founder of that business and perpetrator of the fraud in this case (Mr Papas) was very clearly enjoying the fruits of that 'success'. Again, Westpac's submission is predicated on knowledge that the funds were stolen, and not probative of any inference about that knowledge.

42 The *eighth* and final matter on which Westpac relies is the contention that through 286 Carlisle St Pty Ltd (the Twenty-Fifth Respondent), Mr Tesoriero caused moneys to be paid to Greek companies connected to Mr Papas.

43 However, the evidence does not support Westpac's contention that Mr Tesoriero *caused* moneys to be paid to Greek companies through 286 Carlisle St. On the contrary, the payments were made through a bank account in the name of 286 Carlisle St held with the National Australia Bank, and the evidence demonstrates that:

43.1 the NAB account was opened by Mr Bouchahine;<sup>15</sup>

43.2 the transfers were undertaken by Mr Bouchahine and Brandon Chin.<sup>16</sup>

44 Further, knowledge that funds were being transferred overseas from the NAB account, when Forum conducted business overseas, is not evidence of knowledge that the source of the funds was stolen money.

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<sup>15</sup> CB Part C: FOG.1001.0002.5086

<sup>16</sup> CB Part C: FOG.1002.0001.0030; FOG.1002.0001.0273; FOG.1003.0001.0008

45 For the reasons set out above, there is no reasonable basis to conclude, as Westpac contend, that Mr Tesoriero was knowingly concerned in any 'Scheme' in connection with the fraudulent conduct of Mr Papas.

### **The dishonest and fraudulent purpose of Mr Tesoriero**

46 Westpac's submissions on Mr Tesoriero's alleged dishonest and fraudulent purpose are entirely dependent on the Scheme allegations. Mr Tesoriero refers to his submissions in relation to the Scheme above.

### **The Fraudulent Documents and Fraudulent Transactions**

47 As noted above, it is critical to observe that Westpac makes no allegations against Mr Tesoriero of involvement in any of the fraudulent documents and fraudulent transactions.

### **The knowledge of the relevant parties**

#### *Mr Tesoriero*

48 Westpac concedes at [93] of its Opening Submissions that establishing Mr Tesoriero's knowledge of the Scheme is necessary to establish Westpac's knowledge claims.

49 For the reasons addressed above in relation to the Scheme, Westpac will fail to satisfy the Court that knowledge of the alleged Scheme on the part of Mr Tesoriero is the more probable inference to be drawn from all the circumstances.

### **The conduct and role of the relevant parties**

50 Again, Westpac's allegations in relation to Mr Tesoriero's conduct and role are based entirely on its Scheme allegations. As addressed above, Westpac will fail to satisfy the Court that knowledge of the alleged Scheme on the part of Mr Tesoriero is the more probable inference to be drawn from all the circumstances.

### **Claims in Trust**

#### *Principles*

51 Mr Tesoriero accepts that Westpac's Opening Submissions accurately recount the relevant legal principles underlying Westpac's claims in trust. The critical issue is highlighted in Westpac's Opening submissions at [119]:

*if the recipient receives the property and obtains notice, actual or constructive, that it was trust property and that the transfer to the recipient was a breach of trust or if **the recipient subsequently discovers that fact while the property is still in the recipient's hands**, the recipient is liable to account for the property (emphasis added).*

52 Westpac's case is that Mr Tesoriero knew the funds were stolen when he received funds. Westpac does not run an alternative case on knowledge if it fails on its knowledge claims. Although not expressly put, Mr Tesoriero assumes that, in those circumstances, Westpac will be left to trace the stolen property that *is still in Mr Tesoriero's hands* at the time Westpac issued proceedings – which, absent any pleaded alternative, could be the only time on which notice would arise if Westpac fails on its knowledge claims.

53 In this regard, the evidence on which Westpac relies fails to establish that there were stolen funds in Mr Tesoriero's hands as at the time Westpac issued the proceeding.

#### **Tort of unlawful means conspiracy**

54 Again, Westpac's allegations against Mr Tesoriero in relation to the tort of unlawful means conspiracy are based entirely on its Scheme allegations. As addressed above, Westpac will fail to satisfy the Court that knowledge of the alleged Scheme on the part of Mr Tesoriero is the more probable inference to be drawn from all the circumstances.

#### **Misleading or deceptive conduct or false or misleading conduct**

55 Again, Westpac's allegations against Mr Tesoriero in relation to involvement in misleading or deceptive conduct are based entirely on its Scheme allegations. As addressed above, Westpac will fail to satisfy the Court that knowledge of the alleged Scheme on the part of Mr Tesoriero is the more probable inference to be drawn from all the circumstances.

#### **Knowing receipt**

56 Again, Westpac's allegations against Mr Tesoriero in relation to knowing receipt are based entirely on its Scheme allegations. As addressed above, Westpac will fail to satisfy the Court that knowledge of the alleged Scheme on the part of Mr Tesoriero is the more probable inference to be drawn from all the circumstances.

#### **Knowing assistance**

57 Again, Westpac's allegations against Mr Tesoriero in relation to knowing assistance are based entirely on its Scheme allegations. As addressed above, Westpac will fail to satisfy the Court that knowledge of the alleged Scheme on the part of Mr Tesoriero is the more probable inference to be drawn from all the circumstances.

#### **Claims against Mr Tesoriero**

58 As outlined above, Westpac's knowledge claims are based entirely on its Scheme allegations. As addressed above, Westpac will fail to satisfy the Court that

knowledge of the alleged Scheme on the part of Mr Tesoriero is the more probable inference to be drawn from all the circumstances.

59 As also outlined above, in the event Westpac fails on its knowledge claims, the critical issue for Westpac's tracing claim will be establishing whether there is any stolen money traceable to Mr Tesoriero that was in Mr Tesoriero's hands at the time Westpac issued proceedings. The evidence on which Westpac relies fails to establish that there were stolen funds in Mr Tesoriero's hands as at the time Westpac issued the proceeding.

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*Sia Lagos*

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