

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/07/2021 1:48:04 PM AEST 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:	Submissions
File Number:	NSD616/2021
File Title:	WESTPAC BANKING CORPORATION ABN 33 007 457 141 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: 20/07/2021 3:44:19 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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WESTPAC BANKING CORPORATION v FORUM FINANCE PTY LIMITED

FEDERAL COURT OF AUSTRALIA

NSD 616/2021

APPLICANT'S SUBMISSIONS IN SUPPORT OF EX PARTE APPLICATION

Introduction

1. By interlocutory process dated 20 July 2021 the applicant (**Westpac**) applies *ex parte* for, in effect, two groups of orders. The first group of orders are for short service of the interlocutory process, in effect a process charging the third respondent (**Mr Tesoriero**) with contempt. Westpac suggests that the interlocutory process be made returnable at 2.15pm on 22 July 2021 when the matter is already before the Court. The second group of orders are in aid of the orders alleged to be breached by Mr Tesoriero. Westpac seeks an order restraining Mr Tesoriero from leaving Australia (with an ancillary order for delivery of his passport or passports to the Court), in the first instance until 5pm 22 July 2021 but ultimately until compliance with the orders of which he is in breach.
2. Westpac reads (a) the affidavit of Caitlin Maria Murray sworn 20 July 2021; and (b) the affidavit of Joseph Khoury sworn 7 July 2021.

Short Service

3. The circumstances are set out in the statement of charge, and the facts in the affidavits of Ms Murray and Mr Khoury.
4. On 2 July 2021 Lee J made an *ex parte* freezing order against Mr Tesoriero. That order included the common form ancillary information orders (annexure A, orders 8 and 9). Order 8 required, in the common form, a statement of assets and affidavit verifying that statement be served on Westpac (and the affidavit filed) by 5pm 8 July 2021. Order 8 was subject to the common form order 9 which allowed for a claim not to produce to Westpac information by reason of the privilege against self-incrimination. The information and affidavits required to comply with order 9 were also ordered to be filed and served (as the case may be) by 5pm 8 July 2021.
5. The orders of 2 July 2021 were served as required: Murray [4]-[8]; Khoury [3]-[6].

6. On 6 July 2021 Mr Nehme of Fortis Law informed Westpac’s solicitors that Mr Nehme acts for Mr Tesoriero: Murray [7].
7. On 9 July 2021 the matter was before the Court. At the time of that hearing Mr Tesoriero had not complied with orders 8 and 9 of the freezing order. He was represented by senior counsel. By consent and in the presence of senior counsel appearing for Mr Tesoriero, time for compliance with orders 8 and 9 of the freezing order was extended to 5pm on 14 July 2021: Murray [10]-[12]. Shortly after 4pm on 9 July 2021 the Court sent a copy of the orders made that day to Mr Nehme by email: Murray [12].
8. The orders as varied were not complied with: Murray [14], [22].
9. Subsequently Westpac’s solicitors corresponded with Mr Nehme about Mr Tesoriero’s failure to comply with orders 8 and 9 of the freezing order. Mr Nehme foreshadowed serving the information and affidavits by 11am on 16 July 2021: Murray [16], a *de facto* extension about which Westpac protested: Murray [18]-[19]. Mr Tesoriero did not file and serve the information and affidavits as foreshadowed, and still has not done so: Murray [22].
10. Mr Tesoriero did not appear at the hearing on 15 July 2021: Murray [20]-[21].
11. The purpose of orders 8 and 9 is ancillary to the order preventing disposition of Mr Tesoriero’s assets; that is to allow identification of assets and enforcement of the order: Biscoe “*Freezing and Search Orders: Mareva and Anton Piller Orders*” (2nd edn) (Biscoe) at [3.11] ff. The efficacy of the freezing orders made against Mr Tesoriero is diminished by his non-compliance, and the Court’s processes may be defeated. It is important to Westpac (and the other banks), and more broadly the administration of justice, that Mr Tesoriero’s failure to comply with orders 8 and 9 be brought before the Court and addressed. Orders 1, 4 (which facilitates service as Mr Tesoriero is represented) and 5 of the interlocutory process should be made, together with an order listing the interlocutory process at 2.15pm on 22 July 2021.

Travel restraint

12. Orders 2 and 3 of the interlocutory process provide for a temporary restraint on Mr Tesoriero leaving Australia.

13. This court has power to make the orders sought: in this Court the source of that power is s 23 of the *Federal Court Act* 1976 (Cth); as to the power generally see *Bayer AG v Winter* [1986] 1 WLR 497 at 502-3 per Fox LJ, 503 per Ralph Gibson LJ; *Talacko v Talacko (No 2)* [2009] VSC 444 (2009) 25 VR 613 at [41]-[43] per Habersberger J; Biscoe [3.50]-[3.53].
14. The order is sought in the circumstance in which it was initially conceived, which is to militate against the risk that the Court's processes are defeated by non-compliance with orders 8 and 9. The present circumstance are *a fortiori* those in *Bayer v Winter*. There the non-departure order (for want of a better term) was sought on the initial *ex parte* application for a *Mareva* and an *Anton Piller* order. The Court was there concerned that the defendant may leave the country and frustrate compliance with an information order ancillary to the *Anton Piller* order. In the present circumstances the order is sought (a) where there has been a serious fraud inflicting very large losses (*Westpac Banking Corporation v Forum Finance Pty Limited* [2021] FCA 807 at [10]) which has *prima facie* benefited Mr Tesoriero; and (b) Mr Tesoriero has now repeatedly failed to comply with this Court's orders to provide the required information. The inference is that he is seeking to defeat the Court's processes, or at least make recovery more difficult. Mr Tesoriero has engaged in that conduct in the circumstance that Mr Papas has left the country (and not returned) and has also failed to comply with the information orders made in relation to his assets.
15. While the relief sought should properly be regarded as exceptional, in the present circumstance of ongoing non-compliance with the Court's orders a restraint on Mr Tesoriero leaving the country, until the orders are complied with, is appropriate. The alternative is the risk that Westpac's (and the other banks') rights and this Court's processes are defeated. Orders 2 and 3 of the interlocutory process should be made.

Jeremy Giles

James Arnott

Catherine Hamilton-Jewell

20 July 2021