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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: 21/09/2021 7:58:40 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 & Anor v Forum Finance Pty Ltd and others

Federal Court of Australia NSD 616/2021

APPLICANTS' OUTLINE OF SUBMISSIONS
FOR HEARING ON 22 SEPTEMBER 2021

Introduction

1. On 16 September 2021, the applicants filed an interlocutory application (the **IA**) seeking orders including orders:
 - a. under r 16.53 of the Federal Court Rules (**FCR**) for leave to amend the pleadings to file the Third Further Amended Originating Application (the **3FAA**) and the Further Amended Statement of Claim (**FASOC**) in the form attached to the IA (subject to a change to paragraph 34M(d) noted in the minutes of order provided with these submissions) so as to join additional respondents, all of whom are further entities controlled by either Mr Papas or Mr Tesoriero;
 - b. under FCR r 10.43(2) for leave to serve the 3FAA on four respondents in the Hellenic Republic (**Greece**) and on four respondents in the United Kingdom of Great Britain and Northern Ireland (the **UK**);
 - c. for leave under s 471B of the *Corporations Act 2001* (Cth) (the **Corporations Act**) against companies of which partners in the firm McGrath Nicol are liquidators or provisional liquidators.
2. The evidence relied upon is the affidavit of Caitlin Murray sworn 16 September 2021 (**Murray 13**), and exhibit CMM-11 (**CMM-11**) thereto and a bundle of additional pages from the records of Xero referred to Murray 13 [13], the bank statements referred to at Murray 13 [12] and further Greek company searches (the **Additional Bundle 1**).
3. In relation to the *prima facie* case requirement for service out of the jurisdiction, the applicants also rely upon the evidence that was read at the hearings on 28 June 2021 and 2 July 2021: namely the affidavits of Mr Anderson (28 June 2021), Mr O'Brien (27 June and 1 July 2021) and Ms Murray (a first affidavit of 28 June 2021, a second affidavit of 28 June 2021, a third affidavit of 2 July 2021 and a fourth affidavit of 2 July 2021). These will be provided to the Court in a separate bundle for more ready reference (referred to as **Additional Bundle 2**).

Leave to amend

4. The power of the Court to grant or refuse leave is to be exercised in the way that best promotes the Court's overarching purpose, expressed in s 37M(3) of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**), to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible: **Caason**

Investments Pty Ltd v Cao (2015) 236 FCR 322 at [19] per Gilmour and Foster JJ. The Court's power to grant leave to amend is broad and includes the objective of ensuring that the real questions in the controversy are properly agitated and to avoid a multiplicity of proceedings: *Caason* at [20]. Generally, leave should be granted unless the proposed amendment is futile, likely to be struck or would cause substantial prejudice to the opposing party in a way that cannot be compensated for by costs: *Caason* at [21].

5. The amendments contained in the proposed 3FAA and FASOC are to plead similar claims to those made against the current respondents against additional corporate respondents who *prima facie* have received funds from FGFS, which were obtained from Westpac and WNZL, pursuant to the forged equipment contracts which were the subject of the evidence relied upon on 28 June 2021 and 2 July 2021 (and which is contained in Additional Bundle 2) and addressed in *Westpac Banking Corporation v Forum Finance Pty Limited* [2021] FCA 807 (*Westpac v Forum*) at [2]-[5].
6. The additional respondents who are sought to be joined are the thirtieth to forty-third respondents set out in Murray 13 [4(a)]. Using the defined terms for those respondents that are used in Murray 13 and the FASOC, the additional respondents fall into four categories:
 - a. additional Australian companies of which Mr Papas was and remains a director (TFGC,¹ Iugis,² Spartan³ and Intrashield⁴);
 - b. additional Australian companies of which Mr Tesoriero was and remains a director (TIG,⁵ Mangusta,⁶ 193 Carlisle St⁷ and 8-12 Natalia Ave⁸);
 - c. UK companies of which Mr Papas was and remains a director (Iugis UK,⁹ Iugis Holdings UK,¹⁰ Iugis GFS UK¹¹ and Iugis Finance UK¹²);
 - d. two further Greek companies of which Mr Papas either was and remains a director (Iugis Greece)¹³ or which he controls as controller of the 99% shareholder (Iugis Energy Greece¹⁴).
7. The claims against the additional corporate respondents all arise from their identification as additional entities, controlled by either Mr Papas or Mr Tesoriero, to which FGFS, at the direction of either Mr Papas or Mr Tesoriero, transferred funds

¹ Mr Papas has been a director of TFGC since it was incorporated on 28 September 2011: CMM-11, p 3.

² Mr Papas has been a director of Iugis since it was incorporated on 12 April 2019: CMM-11, p 37.

³ Mr Papas has been a director of Spartan since it was incorporated on 8 April 2014: CMM-11, p 53.

⁴ Mr Papas has been a director of Intrashield since 6 May 2012: CMM-11, p 69.

⁵ Mr Tesoriero has been a director of TIG since it was incorporated on 5 November 2012: CMM-11, p 87.

⁶ Mr Tesoriero has been a director of Mangusta since it was incorporated on 8 February 2019: CMM-11, p 99.

⁷ Mr Tesoriero has been a director of 193 Carlisle St since it was incorporated on 25 May 2016: CMM-11, p 109.

⁸ Mr Tesoriero has been a director of 8-12 Natalia Ave since it was incorporated on 26 August 2020: CMM-11, p 120.

⁹ Mr Papas has been a director of Iugis UK since it was incorporated on 28 April 2017: CMM-11, p 129.

¹⁰ Mr Papas has been a director of Iugis Holdings UK since it was incorporated on 22 December 2017: CMM-11, p 132.

¹¹ Mr Papas has been a director of Iugis GFS UK since it was incorporated on 24 January 2019: CMM-11, p 134.

¹² Mr Papas has been a director of Iugis Finance UK since it was incorporated on 22 December 2017: CMM-11, p 137.

¹³ Additional Bundle 1, pp 4-6.

¹⁴ Additional Bundle 1, pp 7-10.

received by it from Forum Finance, which were in turn obtained by it from Westpac or WNZL using forged equipment contracts.

8. The amounts that were received have been identified from FGFS' accounting records, which record substantial transfers to each of the entities.¹⁵ Often, the transfers are styled as 'loans', which is a characterisation the applicants do not accept (*inter alia* for the reason that it was not possible for FGFS to lend money that was not its but rather stolen from Westpac; and because one or other of Mr Papas and Mr Tesoriero is a director of the recipients and their knowledge prima facie attributed to the corporate respondents). The transactions can also be linked to FGFS' bank statements. These documents provide sufficient verification, at least for the purposes of a pleading amendment.
9. By way of example, 8-12 Natalia Ave, a company controlled by Mr Tesoriero, is recorded in FGFS' accounting records as receiving from FGFS \$586,000 on 19 December 2019 and \$200,000 on 4 August 2020, among other amounts.¹⁶ The FGFS bank statements record a transfer of \$586,000 on 19 December 2019 described as "Deposit 12 Natalia"¹⁷ (just before the proceeds of Transaction 44 are transferred to FGFS: FASOC [631]) and a transfer of \$200,000 on 4 August 2020 described as "Natalia Payment".¹⁸
10. The only additional respondent that the applicants are presently unable to quantify a receipt claim based on these documents is Iugis Finance UK. The receipt claim against it is currently an inferential based on (1) its common control with the other UK companies by Mr Papas (2) the practice evidenced by the other entities controlled by Mr Papas by which Mr Papas funded his entities by transfers between entities and (3) the substantial sums of at least \$15.04 million transferred to Iugis Holdings UK (incorporated on the same day as Iugis Finance UK) and at least \$6.226 million transferred to Iugis UK, which combine to suggest it is likely that Iugis Finance UK was also funded through money transferred from FGFS, albeit indirectly through either Iugis Holdings UK or Iugis Finance UK.
11. The causes of actions proposed to be pleaded against the additional respondents are the same as against the existing corporate respondents; namely, a trust claim, an unlawful means conspiracy claim, knowing receipt and assistance claims and involvement in Mr Papas' misleading or deceptive conduct.
12. Accordingly, leave should be granted to make these amendments as they arise out of the same factual substratum as the existing claims, it promotes the Court's overarching purpose for these additional claims to be heard in the same proceeding as those already pleaded and there is (at least) a *prima facie* basis to advance the claims for relief south against the additional respondents in the proposed 3FAA on the grounds set out in the proposed FASOC.

¹⁵ CMM-11, pp 203-224.

¹⁶ CMM-11, p 222.

¹⁷ CMM-11, p 202.

¹⁸ CMM-11, p 200.

Service out of the jurisdiction

13. The applicants seek leave under FCR r 10.43(2) to serve their originating application (if leave is granted to amend, the 3FAA) on the companies incorporated in Greece and the UK in those jurisdictions as well as serving Mr Giamouridis, who has received \$10.7 million from FGFS, with no evidence of any benefit being provided to FGFS with respect to that money.
14. Rule 10.43(4) provides that a party seeking leave under r 10.43(2), the applicants must satisfy the Court that:
 - (a) *the Court has jurisdiction in the proceeding; and*
 - (b) *the proceeding is of a kind mentioned in rule 10.42; and*
 - (c) *the party has a prima facie case for all or any of the relief claimed in the proceeding.*

Jurisdiction

15. Jurisdiction may be dealt with readily. The Court has jurisdiction for the statutory relief by reason of s 138(1) of the *Competition and Consumer Act 2010* (Cth) with respect to the Australian Consumer Law claims, and under s 12GH of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) and s 1337B(1) of the *Corporations Act* with respect to the claims under those statutes. Under s 5 of the *FCA Act*, the Court is a superior court of record and is a court of law and equity. It has jurisdiction to hear and determine the equitable and common law claims advanced by the applicants which are part of the one “matter” and consequently wholly in federal jurisdiction: *Rizeq v Western Australia* (2017) 262 CLR 1 at [54]-[56].

Prima facie case

16. It is convenient to address the *prima facie* case requirement next, before returning to the criterion in r 10.43(4)(b). Before doing so, it should be noted that, though there are two applicants in the proceeding, the individual claims made by each applicant are not regarded as separate proceedings for the purposes of r 10.43: *Binqld Finances Pty Ltd v Israel Discount Bank Limited* (2020) 384 ALR 148; [2020] FCA 1208 at [143]. Rather, the proceeding referred to in r 10.43(4) is the “entire proceeding” commenced by the originating application: *Binqld* at [143]; *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548; [2019] FCAFC 8 at [42]. As such, it is not necessary for every applicant to establish that it has a claim of a type described in r 10.42 or that it has a claim that meets the *prima facie* case threshold: cf *Binqld* at [142]-[145].
17. In the present case, it is thus sufficient to focus upon the position of the first applicant (**Westpac**), although the position of the second applicant is in point of analysis no different. The questions are whether Westpac has a claim that meets the *prima facie* case threshold, and whether that claim is one listed in the table in r 10.42: *Tiger Yacht* at [45].

18. The test that applies in determining whether Westpac has a prima facie case is as follows (*Ho v Akai Pty Ltd (in liq)* (2006) 247 FCR 205; [2006] FCAFC 159 at [10]; *Binqld v IDB* at [49]; *ACN 078 272 867 Pty Ltd (in liq) (formerly Advance Finances Pty Ltd) v Binetter* [2018] FCA 952 at [8]):

As has been observed on many occasions, the prima facie case requirement has to be met at the outset, usually on an ex parte basis, and without the advantage of discovery and other procedural aids to the making out of a case: see eg Merpro Montassa Ltd v Conoco Specialty Products Inc (1991) 28 FCR 387 at 390. It “should not call for a substantial inquiry”: WSGAL Pty Ltd v Trade Practices Commission (1992) 39 FCR 472 at 476; see also Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd (1996) 68 FCR 539 at 549. For present purposes it is sufficient to say that a prima facie case for relief is made out if, on the material before the court, inferences are open which, if translated into findings of fact, would support the relief claimed: Western Australia v Vetter Trittler Pty Ltd (in liq) (1991) 30 FCR 102 at 110. Or, to put the matter more prosaically as Lee J did in Century Insurance Ltd (in prov liq) v New Zealand Guardian Trust Ltd [1996] FCA 376:

What the Court must determine is whether the case made out on the material presented shows that a controversy exists between the parties that warrants the use of the Court’s processes to resolve it and whether causing a proposed respondent to be involved in litigation in the Court in Australia is justified.

19. The “requirement to establish a prima facie case must be understood in the context in which it arises. Inferences may be drawn more readily than they may be at trial”: *Tiger Yacht* at [46], citing *Merpro Montassa Ltd v Conoco Specialty Products Inc* (1991) 28 FCR 387 at 390. It “involves a mini not a mega trial”: *Tiger Yacht* at [46], citing *WSGAL Pty Ltd v Trade Practices Commission* (1992) 39 FCR 472 at 476.
20. In light of these principles, and in accordance with the approach taken in *Binqld* (see at [94]-[97]) and *Advance* (see at [27]), the material relied upon by the applicants to establish Westpac’s prima facie case is Murray 13 and the Additional Bundles 1 and 2.
21. This evidence demonstrates, at least prima facie, that Forum Finance has been used to carry out a fraudulent scheme and that significant funds have been paid to Forum Finance by Westpac (as was held in *Westpac v Forum* at [3]-[4], [10]-[11] and [19]). From there, significant funds have been paid to FGFS and then on to:
- a. Mazcon - \$16.456 million;¹⁹
 - b. Mr Giamouridis - \$10.7 million;²⁰
 - c. Iugis Greece - \$851,323,54;²¹
 - d. Iugis Energy Greece - \$558,421.82;²²

¹⁹ FASOC [2332]; Additional Bundle 1, pp 32-69.

²⁰ FASOC [2368]; Additional Bundle 1, pp 11-31.

²¹ FASOC [2600]; CMM-11, p 223 (excluding loan interest amounts).

²² FASOC [2619]; CMM-11, p 224 (excluding loan interest amounts).

- e. Iugis UK - \$6.226 million;²³
 - f. Iugis Holdings UK - \$15.04 million;²⁴
 - g. Iugis GFS UK - \$48,609.²⁵
22. As noted already, Westpac cannot currently show funds going to Iugis Finance UK, but relies on the inferential case outlined in paragraph 10 above.
 23. Each of these respondents, other than Mr Giamouridis, is controlled by either Mr Papas or Mr Tesoriero, who were also the directors of Forum Finance and FGFS (there is a dispute as to whether and, if so, when Mr Tesoriero resigned as a director, but on any view he was a director of FGFS for part of the period of the fraud). There is a *prima facie* basis to conclude that each of the respondents controlled by Mr Papas and Mr Tesoriero had the knowledge of the dishonest and fraudulent scheme which they had, and received the funds with that knowledge.
 24. As to Mr Giamouridis, the only claim pursued against him is a receipt-based claim, on the basis that the funds he received from FGFS are impressed with a trust under the principles in *Black v S Freedman & Company* (1910) 12 CLR 105.²⁶ Mr Giamouridis is the holder of 1% of the shares in Mazcon.
 25. In these circumstances, Westpac readily passes the *prima facie* case threshold on its claim against the overseas respondents.

Proceeding of a kind mentioned in r 10.42

26. The next question is whether Westpac's claim is one listed in the table in FCR r 10.42. The answer is yes. The proceeding consists of one or more of the following kinds of proceeding mentioned in FCR r 10.42:
 - a. Item 1 – Proceeding based on a cause of action arising in Australia;
 - b. Item 5 – Proceeding based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring);
 - c. Item 7 – Proceeding seeking the execution of a trust governed by Australian law;
 - d. Item 13 – Proceeding based on a contravention of an Act (wherever occurring) seeking relief in relation to damage suffered wholly or partly in Australia;
 - e. Item 15 – Proceeding seeking any relief or remedy under an Act, including the Judiciary Act;
 - f. Item 20 – Proceeding properly brought against a person who is served, or is to be served, in Australia, if the person to be served has been properly joined as a party.

²³ FASOC [2410]; CMM-11, p 211 (excluding loan interest amounts).

²⁴ FASOC [2429]; CMM-11, p 212 (excluding loan interest amounts).

²⁵ FASOC [2448]; CMM-11, p 214 (excluding loan interest amounts).

²⁶ FASOC [2366]-[2369].

27. On one view, it is not necessary to rely on anything other than Item 20, however, each is addressed in sequence.
28. In relation to Item 1, some of the causes of action arose in Australia. It was in Australia where the dishonest and fraudulent scheme was conceived and where Westpac advanced the funds to Forum Finance, and where Westpac has suffered loss as a result of the scheme. It was from Australia where the funds were sent abroad, as the fruits of that scheme.
29. In relation to Item 5, this is enlivened by the tort claim of unlawful means conspiracy, which conspiracy was conceived of and executed in Australia and which caused damage to Westpac here.
30. In relation to Item 7, this is enlivened by the claim that the stolen money, whether held by FGFS or other recipients, is held on trust for Westpac and associated relief (the item is attracted whether execution means performance or enforcement).
31. In relation to Items 13 and 15, the proceeding seeks relief for contraventions of the Australian Consumer Law, the ASIC Act and the Corporations Act.
32. Item 20 allows an applicant to serve any person who is outside the jurisdiction if that person is a necessary or proper party to an action that is brought against another party who has already been served. The correct approach to determining whether the proceeding is of a kind referred to in Item 20 is to ask whether a local respondent has been properly joined, then determine whether the proposed foreign party would have been a proper party to the proceeding if it had been within the jurisdiction: *Costa Vraca Pty Ltd v Bell Regal Pty Ltd* [2003] FCAFC 305 at [17] per Ryan, Kiefel and Gyles JJ. A person may be considered to be a proper or necessary party where the claims against them arise of a common substratum of facts: *Costa Vraca* at [25].
33. Here, Forum Finance and FGFS (as Australian corporations) and Mr Papas and Mr Tesoriero (as Australian residents) were properly joined to the proceedings, as well as the multiple other Australian companies related to Mr Papas and Mr Tesoriero.
34. The foreign respondents are all proper parties to the proceeding because the claims against them arise from a common substratum of facts as do the claims against the other respondents, which are all corporations registered under Australian law with registered offices in Australia. To take an example, Mr Giamouridis, if in Australia, would be a proper party to the proceedings, the claim against him arising on a common substratum of facts.

Conclusion on r 10.43

35. The criteria in r 10.43(4) are satisfied for the reasons given above.
36. The final matter to address is the mode of service.
37. With respect to the UK companies, as identified in Murray 13 at [25], and subject to what is said regarding substituted service below, it is proposed to serve the four UK companies by international registered post. Such a method “is ‘permitted by’ and ‘in accordance with’ the [Hague] Convention”: *Deputy Commissioner of Taxation v Power*

Assets Holdings Limited (previously known as Hongkong Electric Holdings Ltd) (2013) 96 ATR 51; [2013] FCA 708 at [20]; *Kabbabe v Google LLC* [2020] FCA 126 at [8]; *Kukulka v Google LLC* [2020] FCA 1229 at [9]; *Barilaro v Shanks-Markovina (No 1)* [2021] FCA 789; *Ford v Advanced Energy Minerals Limited* [2021] FCA 995 (cf FCR r 10.43(2) and (3)(c)(ii)).

38. The UK has not opposed Art 10(a) of the Convention, which deals with service by post: Murray 13 [24]; cf *Power Assets* at [20]; *Ford* at [26]. The Court should grant leave under r 10.43(2) for the applicants to serve the four UK companies by international registered post to their registered offices: see Murray 13 [9] as to this address.
39. In relation to the respondents in Greece, an order for service in accordance with the *Convention on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters done at the Hague on 15 November 1965* by way of the process described at Murray 13 [27].

Leave to proceed

40. Leave is sought to proceed against the respondents of which partners of McGrath Nicol are joint and several liquidators is sought, on the basis that those respondents are excused from filing a defence. As set out at Murray 13 and pages 263 to 266, the liquidators consent to orders for leave to proceed on that basis. Leave is sought as Westpac asserts proprietary relief, both against the companies and as, in effect, a stepping stone to proprietary relief against recipients from those companies.

Date: 21 September 2021

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