

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 6/10/2021 8:20:34 AM 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: 6/10/2021 8:20:37 AM 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

Interlocutory Application dated 2 October 2021

Introduction

1. By interlocutory application dated 2 October 2021, Westpac Banking Corporation and Westpac New Zealand Limited, the applicants, apply for an order that Mr Rocco Vincenzo Panetta, the former solicitor for Mr Basile Papadimitriou (also known as Bill Papas) (the second respondent) (**Mr Papas**), disclose the contact details of which he is aware for, and the means to communicate with, Mr Papas. In support of this application, the applicants rely on the affidavit of Caitlin Maria Murray sworn 2 October 2021 (**Murray 17**); Exhibit **CMM-15** to that affidavit, and a small tender bundle of subsequent communications (**Bundle**).

Factual background

2. On about 1 July 2021, Mr Panetta filed and served a notice of appearance in the proceeding on behalf of Mr Papas and, separately a Notice of Address for Service for Mr Papas.
3. During cross-examination, on 7 July 2021, Mr Panetta stated that Mr Papas was not in Australia but was in Greece: 7.07.21 T16.31-45.
4. On 22 September 2021, a case management hearing was held in the proceeding. At that case management hearing Mr Panetta stated that he had served a notice of intention to cease to act on Mr Papas: Murray 17 at [6].
5. On 29 September 2021, Mr Panetta served on MinterEllison a copy of the Notice of Ceasing to Act (**Notice**): Murray 17 at [7] CMM-15 p1, 4. The Notice nominated 23 Margaret Street Rozelle in NSW as the last known residential address for Mr Papas: CMM-15 p4. This address was nominated notwithstanding that Mr Panetta was aware Mr Papas was in Greece: 7.07.21 T16.31-45; CMM-15 p15. Whether it is Mr Papas' address last known to Mr Panetta, it is clearly not Mr Papas' current address.
6. An email request was made for further contact details for Mr Papas noting that Mr Papas was not residing at the Rozelle address: CMM-15 p1. On 30 September 2021, in response,

Mr Panetta indicated that the notice of ceasing to act “*only provides for the last known residential or business address, not an email address*”: CMM-15 p5.

7. Email correspondence sent to the known email address for Mr Papas, billpapas07@gmail.com, on 30 September 2021, was initially transmitted and no error message received: Murray 17 at [12]; CMM-15 pp 7 and 9. However, the email sent at 7:40pm on 30 September 2021 resulted in an error message to the effect that the email could not be delivered to this email address: Murray 17 at [11]; CMM-15 p12. In the circumstances, the applicants have neither a current address for Mr Papas nor a means by which to communicate with him.
8. Pausing there, that does not prevent service of documents in the proceedings (other than those relating to the motion for contempt) because, an address for service having been filed and served, no notice has been filed under Rule 11.09. That is, Mr Panetta’s office remains the address for service. However, that is not wholly satisfactory. It is clearly preferable that the applicants’ solicitors and the Court be able to communicate with Mr Papas at least in relation to the date, time and Microsoft Teams link for hearings. Further, service of the contempt motion is impeded, although that may be overcome by the issue of a warrant under Rule 42.01.
9. On 1 October 2021, MinterEllison sent an email to Mr Panetta notifying him that the applicants intended to seek a direction from the Court that Mr Panetta be required to file an amended Form 8 that provided the current physical address, telephone number and email address for Mr Papas: Murray 17 at [13], CMM-15 p13. In a regrettable response (and one that overlooks the requirements of s 37M and s 37N(2) of the *Federal Court of Australia Act 1976 (Cth) (Act)*, and Mr Panetta’s obligations as a solicitor) Mr Panetta stated that: CMM-15 p15:
 - a. he believed he had satisfied his obligations under rule 4.05 of the *Federal Court Rules 2011 (Cth) (FCR)*;
 - b. he did not have an address for Mr Papas in Greece;
 - c. he had concerns about the disclosure of other matters like telephone numbers due to ongoing obligations of confidentiality, client legal privilege and legal professional privilege;
 - d. he required an appropriate interlocutory application and affidavit to be sought if relief was sought against him.

10. Despite repeated attempts to contact Mr Panetta during the afternoon on 1 October 2021, including email (CMM-15 p17), text message (CMM-15 p20) and telephone (Murray 17 at 14(a)) Mr Panetta could not be contacted and did not appear at the case management hearing on 1 October 2021. At the case management hearing on 1 October 2021, the Court gave the applicants leave to serve the interlocutory application for additional contact details of Mr Papas, on Mr Panetta.
11. On 1 October 2021, the orders, which included the order for leave to issue an interlocutory application to Mr Panetta, were delivered to Mr Panetta: CMM-15 p21-22. On 2 October 2021, the sealed orders were served on Mr Panetta: CMM-15 p22. At about 3.07pm on 2 October 2021, the interlocutory application and affidavit of Ms Murray dated 2 October 2021, was served by email on Mr Panetta: Bundle p2.
12. Further correspondence (which appears to have crossed with the email serving the interlocutory application) was received from Mr Panetta on 2 October 2021 which said:
Bundle p1:

We are currently preparing additional correspondence to send to you with a view to resolving this matter and to avoid both parties incurring further unnecessary costs.
13. On 3 October 2021, Mr Panetta sent an email to Ms Galasso that confirmed receipt of the application and indicated that he was considering his position: Bundle p3. On 4 October 2021, MinterEllison received an email from Paul Hunt, solicitor of Hunts.Law who stated that he was acting for Mr Panetta in relation to the interlocutory application dated 2 October 2021: Bundle p4.
14. At the time of these submissions, contrary to Mr Panetta's position expressed on 2 October 2021, no proposal for the provision of information has been provided by Mr Panetta and it is necessary for the applicants to proceed with the application.

Direction to provide contact details

15. The Court has power to make the form of order sought by the applicants: s 23 of the Act; the requirement of Rule 4.05 and Form 8 is either an exercise of that power or of the rule making power which is supported by the power conferred by s 23 of that Act. Similar orders have been made in Australia pursuant to a power to order discovery (*R v Bell; ex parte Lees* (1980) 146 CLR 141) and the analogous power applicable in England and Wales conferred by the *Senior Courts Act 1981: JSC BTA Bank v Solodchenko (No 3)* [2013] Ch 1. The Court can also direct Mr Panetta to provide contact information for Mr Papas if it

considers that it is appropriate in the interests of justice to do so: FCR rule 1.32; or if it considers the direction is appropriate for the management of the proceeding: FCR rule 5.04.

16. The order here is appropriate. It is plainly desirable that Mr Papas have the documents filed in the proceedings. The applicants' concern is not simply one of procedural fairness: Mr Papas will be served with documents at the current address for service, Mr Panetta's office, and Mr Papas is able to specify another address if he wishes. The applicants' concern includes that Mr Papas is attempting to game the system. Further, it is appropriate that Mr Papas be communicated with, if possible, to be informed of hearing dates, and presently the link to attend Court remotely using Microsoft Teams. Indeed, there is no apparent legitimate reason why Mr Papas would not wish to participate in the proceedings.
17. To the extent that Mr Panetta asserts that it is not possible for him to disclose this information due to a claim for legal professional privilege, that claim should be rejected.
18. Whether privilege attaches to the name and address of a client was considered in *Commissioner of Taxation v Coombes* [1999] FCA 842; 92 FCR 240 in which the Full Court said after a detailed examination of the relevant cases (including importantly *R v Bell; ex parte Lees* at 161 per Wilson J, Aickin J agreeing) at [31] (emphasis added):

The following propositions, amongst others, can be distilled from the cases we have examined:

- *Privilege attaches to communications, and not to facts which a lawyer observes while acting in the course of a retainer.*
- *Privilege does not attach to everything a client says to the lawyer, but only to communications made by the client for the purpose of obtaining the lawyer's professional assistance. It will not attach to "mere collateral facts". The address and identity of a client will usually be "collateral facts".*
- *Privilege attaches to communications only if they are confidential. In almost all cases the client's name and address will not have been communicated confidentially.*

...

19. In *Z v New South Wales Crime Commission* [2007] HCA 7; 231 CLR 75, the High Court noted that a client's address, without more, is not privileged: per Hayne and Crennan JJ at [32]; also *Hamdan v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1267; 211 ALR 642 (Finn J). And in, to an extent, similar circumstances the

English court ordered disclosure by a solicitor of the solicitor's client's telephone number although expressly provided to the solicitor on a confidential basis: *JSC BTA Bank v Solodchenko* [2011] EWHC 2163 (Ch) at [38]-[39] (although reflecting perhaps a greater degree of protection of confidentiality than the Australian authorities which focus on client legal privilege as the primary determining criterion).

20. In the present circumstances, there is no suggestion that Mr Papas' address, email, phone numbers and other means of communication have been communicated to Mr Panetta for the purposes of being advised by Mr Panetta. Indeed, Mr Panetta's email of 2 October 2021 at least inferentially suggested further disclosure may be made. In the circumstances, and absent more (as contemplated by the High Court of Australia in *Z v New South Wales Crime Commission*), the information cannot be the subject of any claim for legal professional privilege. This is not an appropriate basis for Mr Panetta to refuse to provide this information.
21. Absent this information, the applicants will not be able to contact Mr Papas and it is in the interests of justice, and appropriate for the management of these proceedings, for Mr Panetta to be directed to provide the additional contact information for Mr Papas that are known to Mr Panetta.

Costs

22. Costs are at the discretion of the Court: s 43 of the Act. The Court may order that costs of an interlocutory application be taxed immediately if it is in the interests of justice to do so: *Axent Holdings Pty Ltd v Compusign Australia Pty Ltd (No 3)* [2018] FCA 6 at [13].
23. A factor which may incline the Court to order that costs on an interlocutory application be taxed immediately is some unreasonable conduct on the part of the party against whom costs have been ordered: *Fiduciary Ltd v Morningstar Research Pty Ltd* (2002) 55 NSWLR 1 at [12]. In this way, an order for costs to be payable immediately may be used to discourage interlocutory disputation and conduct inconsistent with the overarching requirement for parties to act in accordance with ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). As explained by Colvin J in *Richmond v Ora Gold Ltd* [2020] FCA 70 at [37]:

[T]he references in the cases as to unreasonableness as a basis for exercising the discretion to order that costs thrown away be assessed and paid forthwith are intended to capture those cases where there has been a relatively serious failure to observe the approach to the bringing or contesting of interlocutory applications that

may be expected to be adopted in accordance with the modern approach to case management.

24. This is such a case. Mr Panetta has refused to provide the information in relation to Mr Papas' contact details. He resisted providing that information, including somewhat anachronistically insisting that the applicants file an interlocutory process (increasing costs quite unnecessarily). Further, when attempts were made to contact him to avoid the necessity of filing an interlocutory application and to have the application dealt with when the matter was already before the Court, Mr Panetta did not respond. Mr Panetta was on notice that the matter was before the Court on 1 October 2021: CMM 15 p6, 13 and 14-16. The matter was stood down on 1 October 2021, so that further attempts could be made to contact Mr Panetta in an attempt to determine the application expeditiously on 1 October 2021: CMM-15 p17-18, 20. However, Mr Panetta did not appear at this time and no explanation has been provided for that failure at the time of these submissions.
25. Instead, Mr Panetta has required the applicants to file an application and appear at a further hearing in order to deal with the matter. In the circumstances, it is appropriate that Mr Panetta be ordered to pay the applicants' costs of the motion and pay them forthwith.

Conclusion

26. In all of the above circumstances, the Court should grant the relief sought and should direct Mr Panetta to disclose the additional information in relation to Mr Papas' contact details and means of communication.
27. The applicants also seek an order that Mr Panetta pay the costs of the application forthwith, and there is no basis why the Court should not exercise its jurisdiction to make this order. Costs should be fixed as a lump sum, and evidence to allow that to be done can be provided.

Jeremy Giles

7 Selborne Wentworth Chambers

Email: jcg@7thfloor.com.au

Ph: 9231 4121

Catherine Hamilton-Jewell

Alinea Chambers

Email: chamiltonjewell@alineachambers.com.au

Ph: 9165 1413

5 October 2021
Counsel for the applicants