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Details of Filing

Document Lodged:	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: 12/11/2021 8:57:20 AM AEDT

Registrar

Important Information

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Federal Court of Australia
District Registry: New South Wales
Division: General

No. NSD of 616/2021



Westpac Banking Corporation
ABN 33 007 457 141

Applicant

AND

Forum Finance Pty Ltd
ACN 153 301 172 (In Liquidation)

And Others named in the Schedule

Respondents

Submissions of the Third Respondent

(Vincenzo Frank Tesoriero)

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I. Preliminary

1. At the interlocutory hearing listed for 12 November 2021, the Third Respondent, Mr Tesoriero, seeks the following primary relief:
 - (a) The freezing orders made against:
 - (i) the Third Respondent, Vincenzo Frank Tesoriero, by order 4 of the orders made by Justice Lee on 2 July 2021 (as varied on 9 July 2021 and 27 August 2021);
 - (ii) the Twenty-Fifth Respondent, 286 Carlisle Street Pty Limited ACN 610 042 343, by order 1 of the orders made by Justice Lee on 20 October 2021; and
 - (iii) the Thirty-Eighth Respondent, Tesoriero Investment Group Pty Ltd ACN 161 088 115, by order 2 of the orders made by Justice Lee on 20 October 2021, be discharged.
 - (b) The application made by the Applicant pursuant to s 461(1)(k) or s 459A of the Corporations Act 2001 (Cth) (**Corporations Act**) that the following respondents be wound up:
 - (i) the Fourth Respondent, Forum Group Financial Services Pty Ltd (provisional liquidators appointed) ACN 623 033 705;
 - (ii) the Sixth Respondent, Forum Enviro Pty Ltd (provisional liquidators appointed) ACN 168 709 840; and
 - (iii) the Seventh Respondent, Forum Enviro (Aust) Pty Ltd (provisional liquidators appointed) ACN 607 484 364, (collectively the **Three Companies**), be refused.
 - (c) Order 9 of the orders made by Justice Lee on 15 July 2021, appointing Jason Preston and Jason Ireland of Level 12, 20 Martin Place, Sydney NSW 2000 jointly and severally as provisional liquidators of the Three Companies pursuant to s 472(2) of the Corporations Act, be set aside.
 - (d) By 4:00pm on 19 November 2021, the Third Respondent file and serve any request for Further and Better Particulars of the Second Further Amended Statement of Claim filed 5 November 2021 (**Second Further Amended Statement of Claim**).

- (e) By 4:00pm on 26 November 2021, the Applicants file and serve their response to any request for Further and Better Particulars filed on behalf of the Third Respondent.
 - (f) The Third Respondent file and serve any application to strike out the claim made against him by the Applicants in the Second Further Amended Statement of Claim, on or before 3 December 2021.
2. In the alternative to (a) above, Mr Tesoriero seeks an order that paragraph 10(b) of the Penal Notice at Annexure A of the orders made by Justice Lee on 2 July 2021 (as varied on 9 July 2021 and 27 August 2021) be varied to provide that the order does not prohibit the third respondent paying \$150,000 per month (up to the sum of \$1.2 million unless varied by subsequent order) on account of his legal expenses.
3. For the purposes of the hearing, Mr Tesoriero relies upon:
- (a) the affidavits of Mr Tesoriero sworn on 21 July 2021, 3 September 2021, 19 October 2021 and 8 November 2021; and
 - (b) the affidavit of Sazz Nasimi sworn on 9 November 2021 (**Nasimi Affidavit**).

II. Discharge of the Injunction (Third Respondent)

The Orders of 2 July 2021

4. On 2 July 2021, Lee J made ex parte orders freezing Mr Tesoriero's Australian assets until 9 July 2021 and requiring him to provide an affidavit disclosing those assets to the Applicant.
5. No written submissions were filed in advance of the ex parte hearing. In support of its application, the Applicant relied primarily on two affidavits:
- (a) an affidavit sworn by Caitlin Murray on 2 July 2021 (**Fourth Murray Affidavit**); and
 - (b) an affidavit sworn by Anna Ross, the independent solicitor, on 2 July 2021 (**Ross Affidavit**).
6. At the ex parte hearing, counsel for the Applicant submitted that the orders should be made on the basis that:
- (a) Mr Tesoriero was, at relevant times, a director of the First Respondent (**Forum Finance**);¹

¹ Transcript 2 July, 19.24-19.27, 22.17-22.19.

- (b) Mr Tesoriero was a joint shareholder with Mr Papas in six companies;²
- (c) in this capacity, Mr Tesoriero's signature appeared on documents connected with the alleged fraudulent scheme (what were later pleaded to be the First Forum Agreement and the Second Forum Agreement³);⁴ and
- (d) based on the coincidence of timing between the "prima facie dishonest" conduct of Mr Papas, and purchases of property in which Mr Tesoriero had some interest, there was a "prima facie inference to be drawn that the two are connected".⁵

The hearing of the application for injunctive relief against Tesoriero on 9 July 2021

- 7. On 9 July 2021, Lee J made orders extending the freezing order until further order. The orders were made by consent, but on the express basis that, if Mr Tesoriero subsequently applied to vary or set aside the order, the applicant would bear the onus.⁶
- 8. In its written submissions filed in advance of the 9 July hearing, the Applicant relied on the circumstances outlined in paragraph 5 above, together with the additional facts, or assertions, that:
 - (a) Mr Tesoriero was at Mr Papas' address on 25 June and 1 July 2021.⁷ The date of 1 July appears to be an error; the Ross Affidavit relied on in support of that date refers instead to an attendance on 28 June 2021; and
 - (b) the circumstances of the property purchases were unexplained.⁸
- 9. The allegation regarding the coincidence of timing between Mr Papas' conduct and the property purchases was further supported by a Schedule to the submissions, which interleaved the various property purchases with the allegedly fraudulent transactions.
- 10. On this basis, the Applicant submitted that:
 - (a) "there is a prima facie case of an agreement between Mr Papas and Mr Tesoriero, as the directors of Forum Finance, to design and then give effect to the fraudulent and dishonest scheme... It is plain that this agreement was carried into effect and has caused loss";⁹ and

² Transcript 2 July, 19.27-19.30.

³ Further Amended Statement of Claim dated 23 September 2021 (**FASOC**), [43], [46].

⁴ Transcript 2 July, 20.08-20.25, 22.17-22.19.

⁵ Transcript 2 July, 20.11-22.15.

⁶ Transcript 2 July, 37.25-37.32.

⁷ Applicant's Outline of Submissions for hearing on 9 July 2021 (**9 July Submissions**), [51]-[56],[65].

⁸ 9 July Submissions, [65], [75].

⁹ 9 July Submissions, [73].

- (b) "Westpac also has a prima facie case, either in accordance with the principles in *Barnes v Addy* or the tort of unlawful means conspiracy, that would entitle it to judgment against Mr Tesoriero for all of the losses arising from the fraud."¹⁰
11. At this point in time, on 9 July 2021, no pleaded case had been articulated against Mr Tesoriero by the Applicants.
 12. On 27 August 2021, Lee J made orders varying the freezing order to (inter alia) apply to Mr Tesoriero's worldwide assets, and to require Mr Tesoriero to provide an affidavit disclosing his assets outside Australia to the Applicants. The orders were made "[w]ithout admissions, and on the same basis as to onus identified by senior counsel for the applicants on 9 July 2021"—that is, that the Applicants would bear the onus if Mr Tesoriero subsequently applied to vary or set aside the orders.
 13. In their outline of submissions filed for the hearing on 20 October 2021, the Applicants referred to their previous submissions in support of the alleged prima facie case against Mr Tesoriero.¹¹ Freezing orders were sought and obtained against the Twenty-Fifth and Thirty-Eighth Respondents (286 Carlisle St Pty Ltd and Tesoriero Investment Group Pty Ltd, respectively) on the basis of the knowledge and control of them by Mr Tesoriero, and their role as recipients of the allegedly fraudulently obtained money.¹²

The Further Amended Statement of Claim dated 23 September 2021

14. The claim against Mr Tesoriero was first pleaded in the Statement of Claim dated 21 July 2021, and has not materially changed since that date.
15. Central to the Applicants' case is an alleged "Scheme", which is pleaded as follows:¹³

"On a date not known to Westpac and WNZL but by no later than 31 August 2018 or, alternatively, 13 September 2018, Mr Papas either together with Mr Tesoriero or alone devised a scheme involving Forum Finance and IUGIS NZ and persons or entities related to one or both of them (including entities that they would later bring into existence) to obtain money dishonestly and fraudulently from Westpac and WNZL that they were not entitled to receive through the Eqwe / Forum Programme or at all (the Scheme)."
16. The unlawful means conspiracy is pleaded along similar lines:¹⁴

¹⁰ 9 July Submissions, [76].

¹¹ Applicant's Outline of Submissions for hearing on 20 October 2021, [8], [18].

¹² Applicant's Outline of Submissions for hearing on 20 October 2021, [21]-[23].

¹³ FASOC, [55].

¹⁴ FASOC, [1844].

"On a date not known to Westpac and WNZL but by no later than 31 August 2018 or, alternatively, 13 September 2018, there was an agreement reached between Mr Papas and Mr Tesoriero and diverse others (known and unknown) to devise and implement the Scheme (the Scheme Agreement)."

17. The other "known" conspirators are particularised to include various corporations controlled by Mr Papas and/or Mr Tesoriero, apparently on the basis that they are infected with Mr Papas' and Mr Tesoriero's alleged knowledge of the Scheme.
18. The Scheme is alleged to have operated via the creation of fraudulent documents by Mr Papas, and the submission of those documents by Mr Papas to Eqwe in order to obtain funds from Westpac. Mr Tesoriero's only pleaded involvement in operation of the Scheme is that he ultimately received those funds either directly or through entities he controlled.¹⁵
19. The purpose of the Scheme is pleaded as:¹⁶

"The dishonest and fraudulent purpose of Mr Papas and Mr Tesoriero, or Mr Papas, in devising and implementing the Scheme was:

- (a) to benefit themselves and people and entities related to them, to the detriment of Westpac and WNZL;
- (b) to spend the funds on properties including the properties acquired by the Jointly Owned Entities and the Tesoriero Entities (being the Jointly Owned Real Property and the Tesoriero Real Property);
- (c) to spend the funds on businesses in Australia and overseas (including in the Hellenic Republic, the United Kingdom, the Federal Republic of Germany and the United Arab Emirates) for the benefit of themselves and people and entities related to them, to the detriment of Westpac and WNZL;
- (d) to use as purported loans to the businesses or subsidiaries of TFGC, including FG, FE and FEA, including to support the cash flow of businesses which, unless the fraud was engaged in and the funds obtained, were unprofitable;
- (e) to acquire other goods or choses in action, including racing cars, luxury cars, a race horse, boats, a yacht, jewellery and 94.38% of a Greek football team known as Xanthi FC through Mazcon."

¹⁵ FASOC, [56].

¹⁶ FASOC, [57].

20. Mr Tesoriero is alleged to have participated in the alleged conspiracy as follows:¹⁷

"In furtherance of the Scheme Agreement, Mr Tesoriero:

- (a) signed the First Forum Agreement;
- (b) signed the Second Forum Agreement;
- (c) was and acted as a director of Forum Finance the predominant corporate purpose of which was to carry into effect the Scheme;
- (d) was a shareholder in FGFS the predominant corporate purpose of which was to carry into effect the Scheme, including receiving and dispersing funds improperly obtained by Forum Finance and IUGIS NZ from Westpac and WNZL;
- (e) procured or permitted Forum Finance to pay the amounts received by it from Westpac away to third parties (including FG, FE or FEA and FGFS and the subsequent recipients);
- (f) received himself or in the Jointly Owned Entities, the Tesoriero Entities, 275 High St and 286 Carlisle Street money derived from Transactions 1 to 100 and NZ1 to NZ36;
- (g) managed with Mr Papas the Jointly Owned Entities, which were entities created to hold property that was financed in part through amounts improperly obtained from Transactions 1 to 100 and NZ1 to NZ36;
- (h) managed the Tesoriero Entities, which were entities created to hold property that was financed in part through amounts improperly obtained from Transactions 1 to 100 and NZ1 to NZ36;
- (i) managed 286 Carlisle St which received \$2,405,000 from FGFS, which was money (or the traceable proceeds of money) stolen from Westpac and WNZL, in the period 26 February 2021 to 24 June 2021."

21. The knowing receipt claim is pleaded on the basis that Mr Tesoriero knew that the funds were dishonestly obtained because he knew that they had been obtained pursuant to the Scheme.¹⁸ The knowing assistance claim relies on the same knowledge and alleged acts as the conspiracy claim.¹⁹

¹⁷ FASOC, [1900].

¹⁸ FASOC, [1905].

¹⁹ FASOC, [1907]-[1908].

Tesoriero's evidence

22. In his affidavit sworn on 8 November 2021, Mr Tesoriero deposes that, between 2012 and 2019, he made financial contributions of \$7-\$10 million in the Forum Group. The funds for these contributions were sourced by way of borrowings secured against properties which Mr Tesoriero owned through his property business, which he had operated since 2002.²⁰
23. Mr Tesoriero first met Mr Papas when Mr Papas was in Melbourne trying to raise money for a business which was, at the time, called "leaseIT".²¹ He was provided with a prospectus that included an "Investor Proposition" of "'10 times money' within 3 years."²² He expected that he would invest in the business, oversee its growth for a few years, and then exit the business through a public listing.²³
24. Mr Tesoriero's contributions began with \$1 million in 2012. By 2017, his contribution was at approximately \$5 million, and he had received no funds at all—either in the form of a dividend or other return on his capital, or in the form of a salary or director's remuneration. When Mr Papas asked him for further funds, he agreed only because Mr Papas assured him that he would soon receive a return in the form of the business covering loan payments on Mr Tesoriero's properties, and providing funds for the purposes of property acquisitions.²⁴ Mr Tesoriero contributed a further \$2-5 million after 2017.
25. Although Mr Tesoriero was appointed as a non-executive director of The Forum Group of Companies Pty Ltd in January 2013, he did so in order to oversee the money he contributed to the business.²⁵ He did not play any active role in the day to day running of the business in general,²⁶ or of Forum Finance in particular.²⁷ He had no dedicated office or phone extension, and only rarely visited the business's offices.²⁸
26. His only involvement in the business's dealings was when the Forum Group started to conduct some property developments in around 2017. From that time, he was responsible for that aspect, and only that aspect, of the business.²⁹
27. Mr Tesoriero had no involvement at all in any dealings with equipment leasing, Westpac, or Eqwe.³⁰ He never knew or suspected that any equipment leases might have been

²⁰ Affidavit sworn by Mr Tesoriero on 8 November 2021 (**8 November Affidavit**), [11], [18].

²¹ 8 November Affidavit, [12].

²² 8 November Affidavit, [15], VFT-1 pp 23-24.

²³ 8 November Affidavit, [16], [19].

²⁴ 8 November Affidavit, [21].

²⁵ 8 November Affidavit, [24].

²⁶ 8 November Affidavit, [34].

²⁷ 8 November Affidavit, [36].

²⁸ 8 November Affidavit, [29], [31].

²⁹ 8 November Affidavit, [30].

³⁰ 8 November Affidavit, [32]-[33].

fraudulent—he thought the business was doing well and had started to give him a return on his financial contributions.³¹ In 2020, he ceased to be a director because he thought his money was safe.³²

No prima facie case against Tesoriero

28. The applicant's case alleges the involvement of Mr Tesoriero in the 'fraudulent design' of the Scheme (which was designed to defraud the Applicants and Eqwe).
29. There have been no detailed particulars provided by the Applicants as to Mr Tesoriero's involvement in, and knowledge of, any or all the Scheme's components (most saliently, the component which involved serious dishonesty diverting the Westpac money from its proper use), other than the dry fact that he signed the First and Second Forum Agreements.
30. The purpose of the First and Second Forum Agreements was to source capital from the Applicants for the Forum Group of Companies to on-lend to leasing customers. Such documentation, and its purpose, and the sourcing of funds pursuant to that documentation, is unremarkable in the ordinary or usual conduct of the Forum Group's undertaking. Central to the Forum Group's undertaking was the task of sourcing funds to on-lend to its customers in the form of the provision of leasing facilities. This is what the Forum Group had been doing, without incident, since 2012.
31. Here, the component of the Scheme which was fraudulent, was not the acquisition of funds from the Applicants, but their alleged fraudulent dispersal by Mr Papas (which it is alleged he did by furnishing the Applicants with the forged equipment leases, and rather than advancing the monies to customers, he used it for his own means).
32. If it is being put against Mr Tesoriero that he participated in, and/or had knowledge of the fraudulent design of the entire Scheme—in that funds were to be sourced from Westpac, so that Mr Papas could fraudulently appropriate them—then the Applicants are required to lead evidence to establish Mr Tesoriero's knowledge of the entire Scheme (which materially includes the fraudulent component) in order to draw the inferences they seek to rely upon from his limited participation in it, by his execution of the First and Second Forum Agreements. No such evidence is before the Court.
33. Alternatively, the Applicants are required to lead evidence to prove that Mr Tesoriero knew that Mr Papas was fraudulently appropriating monies from Westpac, and received such monies knowing that they were stolen. Again, there is no such evidence as to Mr Tesoriero's knowledge of these facts before the Court.

³¹ 8 November Affidavit, [39].

³² 8 November Affidavit, [38].

34. In addition to the evidentiary shortcomings as regards Mr Tesoriero's state of knowledge referred to in the preceding two paragraphs, the Applicants' case against him, as pleaded to date, has not descended to a properly particularised allegation as to what his knowledge was of:
- (a) the Scheme (in particular, the fraudulent component); and
 - (b) Mr Papas' allegedly fraudulent appropriation of monies pursuant to the 137 transactions.
35. The Applicants' case against Mr Tesoriero, at its highest, on a circumstantial basis, rests upon the following facts, from which the Applicants have invited the Court to draw an inference as to the extent of Mr Tesoriero's knowledge and participation in the Scheme:
- (a) his signature on the First and Second Forum Agreements (unremarkable transactions in the usual undertaking of Forum Group business);
 - (b) his directorship and/or shareholding in certain companies that were used to carry out the Scheme (he held a non-executive role in the non-property related aspects of the business—in reality, Mr Tesoriero was an investor in the business);
 - (c) his receipt, either directly or indirectly, of funds obtained by Mr Papas pursuant to the Scheme (other than a raw assertion, there is no particularised allegation in the pleading, or evidence before this Court, that Mr Tesoriero knew that the funds he received from Mr Papas had been fraudulently obtained by Mr Papas); and
 - (d) the temporal relationship between the acquisition of various properties and Mr Papas' conduct arising from his involvement in the 137 allegedly fraudulent transactions (without a proper allegation of, and evidence of, knowledge on the part of Mr Tesoriero, as referred to in the preceding sub-paragraph, such a contention is of little significance).
36. For the Applicants to suggest that an inference, or inferences, can be drawn from these facts to establish knowledge of the Scheme on the part of Mr Tesoriero, is to invite impermissible speculation, rather than a sound permissible inference. Critically, it is Mr Papas' role in the 137 allegedly fraudulent transactions which makes the Scheme fraudulent. This is a critical element of the Applicants' case against Mr Tesoriero, which even on a circumstantial basis, as presently pleaded and on the evidence before the Court to date, falls well short of the 'good arguable case' threshold for the grant of Mareva relief.
37. In fact, the evidence now before the Court points to a different conclusion, that being not only did Mr Tesoriero (together with Forum Group's auditors, the Applicants and possibly

Eqwe) not know of Mr Papas' allegedly fraudulent conduct, he too was persuaded by Mr Papas to make significant financial contributions to the Forum Group, at his own personal expense.

38. The evidence also now establishes that Mr Tesoriero was not a volunteer, but an investor in the Forum Group business, having invested many millions of dollars in the business over a number of years.³³
39. Trite as it may be, it is incumbent upon the Applicants to prove their case. On the face of the Applicants' claim against Mr Tesoriero as currently pleaded, and in the absence of it being properly pleaded and particularised, the causes of action relied upon by the Applicants cannot be properly made out against Mr Tesoriero. The claim as pleaded, at its highest, rests on a limited number of arguably benign facts, impermissible speculation and unparticularised and unsubstantiated assertion. On a careful analysis of the Applicants' claim made to date against Mr Tesoriero, both on the pleading and in submission when the matter has been previously before the Court, it falls short of the necessary 'good arguable case'³⁴ or 'prima facie case'³⁵ threshold.

Discretionary factors

40. In seeking a freezing order against Mr Tesoriero, the Applicants placed some weight on an alleged failure to cooperate, or delay in cooperating, with the execution of the search order at Mr Papas' residence as being indicative of risk (which the Applicants sought to rely on as justification for making the application on 2 July ex parte).³⁶
41. Mr Tesoriero has fully cooperated at all stages of the investigation into the allegations of fraud. This includes cooperation at the earliest opportunity when Ms Ross, the independent solicitor, attended at Mr Papas premises to execute a search. During the ex parte hearing on 2 July 2021, when his Honour noted that Ms Ross deposed to Mr Tesoriero's "high degree of cooperation",³⁷ it was submitted on behalf of the Applicants that "there was cooperation, but only after Mr Tesoriero spoke with the solicitor, who we know now is Mr Papas' solicitor."³⁸
42. This is not an entirely accurate or fair reading of the Ross Affidavit. Ms Ross deposes that:³⁹

³³ 8 November Affidavit, [18].

³⁴ *Jackson v Sterling Industries Ltd (1987)* 162 CLR 612; *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49.

³⁵ *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

³⁶ Transcript 2 July, 22.44-24.06.

³⁷ Transcript 2 July, 23.06-23.09.

³⁸ Transcript 2 July, 23.29-23.31.

³⁹ Ross Affidavit, [22]-[24].

- (a) Mr Tesoriero confirmed that he was a temporary resident of the property, due to COVID restrictions;
 - (b) Mr Tesoriero said that he was "ok with" giving Ms Ross access to the house, but he wanted to check with Ms Agostino, the "lady of the house";
 - (c) Mr Tesoriero called Ms Agostino, who told him she was comfortable with access being granted to the property;
 - (d) Mr Tesoriero then invited Ms Ross into the property, noting that it was raining and cold;
 - (e) Ms Ross then "emphasised that Mr Tesoriero had the opportunity to seek legal advice and said that I strongly recommend that he do so".
43. It was only at this point that Mr Tesoriero contacted a solicitor. As at the date of the search, Mr Tesoriero was not a party to the proceeding and there was no suggestion that the search of Mr Papas' property was in any way directed at him.
44. It is wrong to suggest, based on the Ross Affidavit, that there was "cooperation in due course".⁴⁰ Mr Tesoriero cooperated at the earliest opportunity, and followed Ms Ross's strong recommendation to contact a solicitor.
45. Mr Tesoriero has also voluntarily cooperated with the liquidators. On 19 July 2021, he attended a video conference during which he provided information and answered enquiries. He has undertaken to provide further information to the liquidators in order to assist them with their enquiries and investigations into the affairs of entities involved in the proceedings.⁴¹
46. The Applicant's solicitors have written to Mr Tesoriero's solicitors, raising alleged "discrepancies" in Mr Tesoriero's disclosure of his assets.⁴² There is no proper basis for these allegations. The relevant assets were either owned by companies in which Mr Tesoriero was a shareholder (which shareholding had been disclosed), or were owned by someone with a similar name to Mr Tesoriero.⁴³
47. Although there was some delay in the finalisation of Mr Tesoriero's asset disclosure, the delay was explained and Mr Tesoriero volunteered an undertaking not to leave Australia until that disclosure was finalised.⁴⁴

⁴⁰ Transcript 2 July, 24.05.

⁴¹ Affidavit of Mr Tesoriero sworn 21 July 2021, [19]-[20].

⁴² Letter from MinterEllison to Fortis Law dated 9 August 2021, Exhibit VFT-1 page 9.

⁴³ 8 November Affidavit, [10].

⁴⁴ Transcript 20 July, 5.16-5.25.

48. Mr Tesoriero has given evidence that:⁴⁵
- (a) he has lived in Melbourne all his life, and has family, property and business interests in Melbourne;
 - (b) he holds no passport other than his Australian passport; and
 - (c) he intends to remain in Melbourne to defend the proceedings until the very end.

The injunction against Tesoriero should be discharged

49. For the reasons advanced above, the Applicants' claim against Mr Tesoriero, as it currently stands, falls short of the necessary 'good arguable case' or 'prima facie case' threshold.
50. Additionally, on an unhurried and measured view of the overall facts insofar as they concern Mr Tesoriero (and also having regard to the evidence set out in his latest affidavit now that he has had an opportunity to address the core of the allegations made against him), there is no actual or inferential risk attributable to Mr Tesoriero.
51. In terms of actual risk, for the reasons advanced above, he remains in the jurisdiction, has responded to the claim and what has been required of him by the Court as best as he has been able, and has properly engaged with the Court's processes. The suggestion that risk can be inferred by reason of his alleged involvement in the Scheme⁴⁶ also falls short by reason of the weakness of the Applicants' case against Mr Tesoriero, as already addressed.
52. It is well settled, and for good reason, that a freezing order should not be used as security for a judgment.⁴⁷
53. For these reasons, the freezing orders that restrain Mr Tesoriero from using his assets should be discharged.
54. On the same basis, given the case against the Twenty-Fifth and Thirty-Eighth Respondents is predicated upon the knowledge of Mr Tesoriero,⁴⁸ the freezing orders against those respondents should also be discharged.

⁴⁵ 8 November Affidavit, [40]-[44].

⁴⁶ *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325-326.

⁴⁷ *Brereton & Ors v Milstein & Ors* [1988] VR 508 and *A.J. Bekhor & Co Ltd v Bilton* [1981] 2 WLR 601.

⁴⁸ See paragraph 13 above.

III. The Claim against Tesoriero ought be properly pleaded and particularised, or otherwise struck out

Defects in the Claim

55. As set out in paragraphs 28 to 39 above, there is no evidence, nor any adequate pleading, that Mr Tesoriero was directly involved in, or had knowledge of, any of the allegedly fraudulent transactions. The Scheme is alleged to have been operated entirely by Mr Papas.
56. Further, the pleading itself reveals that the Applicant does not know whether Mr Tesoriero had any involvement in the Scheme at all. The Scheme is alleged to have been devised by Mr Papas "either together with Mr Tesoriero *or alone*", with a "dishonest and fraudulent purpose of Mr Papas and Mr Tesoriero, *or Mr Papas*".
57. This equivocal pleading is then used to support each of the "three broad limbs" of the case against Mr Tesoriero:⁴⁹
- (a) the trust claim relies on Mr Tesoriero being a "thief";
 - (b) the *Barnes v Addy* claim is pleaded on the basis of actual awareness of the Scheme; and
 - (c) the conspiracy claim requires Mr Tesoriero to have been a party to the conspiracy—all of the acts carried out by Mr Tesoriero in purported furtherance of the Scheme Agreement otherwise have no relevant meaning.
58. Rule 15.3 of the *Uniform Civil Procedure Rules 2005* (NSW) provides that a pleading must give particulars of any fraud, misrepresentation, breach of trust, wilful default or undue influence on which the party relies.⁵⁰
59. The Applicant's solicitors have been advised by their client that it "has had no dealings with Mr Tesoriero".⁵¹ Given the nature of the alleged fraud, and its concealment from those closest to the transactions (being the Applicant and Eqwe) and the company's auditors, an equally available inference on the evidence is that it was concealed from Mr Tesoriero as well.
60. Any Westpac funds that Mr Tesoriero received were not given to him as a volunteer. He had contributed millions of dollars to the business. The fact that payments were made

⁴⁹ Applicant's Outline of Submissions for hearing on 9 July 2021, [57]-[74].

⁵⁰ Cf *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW), r 65. A party must plead proper particulars sufficient to prove actual fraud, so that the respondent knows the case it must meet: *Derry v Peek* (1889) 14 App Cas 337.

⁵¹ Fourth Murray Affidavit, [19].

to him in the form of interest payments and deposits on property is not "unexplained". He runs a property business.

61. The claim is defective, lacks particulars, and should be struck out.

Necessary next steps

62. Mr Tesoriero seeks orders providing for:

- (a) the Third Respondent to file a request for further and better particulars by 19 November 2021;
- (b) the Applicants to respond to that request by 26 November 2021;
- (c) the Third Respondent to file and serve any application to strike out the Applicant's claim against him by 3 December 2021.

IV. The solvency of the Three Companies

The Three Companies

63. The Three Companies in provisional liquidation are:

- (a) the Fourth Respondent, Forum Group Financial Services Pty Ltd;
- (b) the Sixth Respondent, Forum Enviro Pty Ltd; and
- (c) the Seventh Respondent, Forum Enviro (Aust) Pty Ltd.

The Three Companies are more likely than not, solvent

64. Mr Tesoriero has limited access to the books and records of the Three Companies. On 27 October 2021, his solicitors wrote to the liquidators' solicitors seeking various categories of documents in relation to the Three Companies in order to further assess the solvency of the three companies.

65. In response to this request, the liquidators' solicitors provided a series of folders, many of which were empty.

66. The provisional liquidators in their Report to Creditors dated 8 October 2021 repeatedly cast doubt on the reliability of accounts of the Three Companies.⁵²

⁵² For example, see section 3.2, Exhibit SN-1 p 54: "We also note that based on our investigations to date, we do not consider that the Forum Finance accounting records accurately reflect the true nature of the underlying transactions (noting the apparent fraudulent activity), and are therefore likely misleading."

67. Mr Tesoriero contests the application for winding up of the Three Companies, on the basis that:
- (a) any liability to Westpac (in respect of the debts claimed by Westpac) is contingent upon Westpac establishing such monies were received by these entities from Westpac. As the provisional liquidators' investigations currently stand, and given that the provisional liquidators have not been able to reliably or accurately trace the source of funds received by the Three Companies, it would be premature and speculative to conclude that they are insolvent. For instance, as observed by the provisional liquidators, "FGFS did not have a direct relationship with the financiers and these amounts would be more appropriately classified as intercompany loans";⁵³ and
 - (b) the companies had significant assets at the time of appointment of the provisional liquidator, including intercompany loans which may ultimately be traced to companies outside the Forum Group.⁵⁴
68. A further example of how the provenance of funds in the hands of the Three Companies is in doubt is apparent from the NAB bank statement of Forum Enviro Pty Ltd, where it can be readily observed that the Sixth Respondent has received funds from the Seventh Respondent, and such monies have almost immediately been disbursed to Eqwe.⁵⁵
69. No asset registers were provided for the Three Companies. The Three Companies are not trading entities, and it is unclear how it is said that there is a risk of trading whilst insolvent.
70. In light of the matters raised in the preceding paragraphs, it would be premature to wind up the Three Companies.

V. Release of additional monies to Tesoriero for personal and legal costs

71. The freezing order against Mr Tesoriero currently permits him to pay:
- (a) \$5,000 per week on ordinary living expenses;
 - (b) \$30,000 per month on legal expenses, up to a total of \$350,000; and
 - (c) paying business expenses and other obligations bona fide and properly incurred before the order was made.

⁵³ For example, see section 3.2, Exhibit SN-1 p 54

⁵⁴ See sections 3.2.1 and 3.2.2, Exhibit SN-1 p 54-55, which disclose that Forum Group Financial Services has assets of \$19.1m, and liabilities

⁵⁵ Exhibit SN-1 p 127. See for example 1 October 2019, 15 October 2019, 1 November 2019, 15 November 2019, 13 and 16 December 2019.

72. Mr Tesoriero has given evidence that the carve out for ordinary living expenses is sufficient for now, provided that existing interest obligations relating to his properties are paid out of his frozen assets.
73. However, as raised by senior counsel for Mr Tesoriero during the hearing on 28 July 2021, the provision for legal expenses is inadequate.⁵⁶ Mr Nasimi estimates that Mr Tesoriero will incur costs of approximately \$460,000 to the end of 12 November 2021, with an additional approximately \$350,000 to be incurred to the end of 2021.⁵⁷ The potential works anticipated between now and Christmas include:
- (a) the preparation of a defence;
 - (b) interlocutory applications regarding pleadings, particulars, the freezing orders and the provision of documents;
 - (c) requests for further documents from the Applicants and the liquidators; and
 - (d) preliminary engagement with a forensic accountant to review the books of the various companies to assist Mr Tesoriero's legal team.
74. As will be evident from the above list, the precise extent of legal fees to be incurred will depend on unknown factors, such as the outcome of the 12 November hearing and the Applicants' attitude to any requests made by Mr Tesoriero. But the estimate of costs is proportionate to the size of the proceeding, and is not out of proportion (in fact, it is significantly less than) the funding secured by the liquidators.⁵⁸ It is apparent that the existing carve out is inadequate, and provision should be made for Mr Tesoriero to be in a position to take whatever steps are necessary to protect his interests, and to respond to any steps taken by the other parties to the proceeding.
75. Accordingly, if the freezing orders are not set aside, Mr Tesoriero therefore seeks a variation to permit him to pay \$150,000 per month in relation to his legal expenses, from the date of the original order, up to a total of \$1.2 million (unless varied by subsequent order).
76. Further, Mr Tesoriero seeks a release of the monies held in Court totalling \$773,362.88, should the Court not discharge the freezing order. These monies are Mr Tesoriero's personal monies which represent a deposit Mr Tesoriero paid in the amount of approximately \$1.2m on or about 20 December 2019 to purchase a property at 8-12 Natalia Avenue, Oakleigh South, Victoria. The purchaser was identified as 'Vince

⁵⁶ Transcript 28 July, 20.26-20.31.

⁵⁷ Nasimi Affidavit, [21]. There is an error in the table—the sub-totals for counsel do not include works to 12 November. The total figure for estimated costs to the end of 2021 should be \$810,935.52.

⁵⁸ Nasimi Affidavit, [19].

Tesoriero and/or nominee'. It was Mr Tesoriero's intention at the time to nominate another party to complete the contract; however, during July 2021 Mr Tesoriero did not have the monies to settle given the completion date was on 3 August 2021. Following receipt of a notice of default from the vendor's solicitors on 4 August 2021, Mr Tesoriero identified an unrelated entity to take over the contract as nominee, less expenses payable. After the deduction of those expenses incurred by the nominee, the balance of Mr Tesoriero's original deposit was \$773,362.88, which are the monies held in Court.⁵⁹

VI. Conclusion

77. For the reasons set out above, the Court should make the following orders:

- (a) the freezing orders made against the Third, Twenty-Fifth and Thirty-Eighth Respondent be set aside;
- (b) in the alternative to (a):
 - (i) the freezing order be amended to permit Mr Tesoriero to pay \$150,000 per month in relation to his legal expenses, from the date of the original order, up to a total of \$1.2 million (unless varied by subsequent order); and
 - (ii) the monies held in Court totalling \$773,362.88 be released to Mr Tesoriero;
- (c) the application to wind up the Three Companies be refused;
- (d) the order appointing provisional liquidators to the Three Companies be set aside;
- (e) the Third Respondent to file a request for further and better particulars by 19 November 2021;
- (f) the Applicants to respond to that request by 26 November 2021;
- (g) the Third Respondent to file and serve any application to strike out the Applicant's claim against him by 3 December 2021.

Dated: 11 November 2021

P J HAYES

M O'HAIRE

Counsel for the Third Respondent

⁵⁹ Affidavit of Mr Tesoriero sworn on 19 October 2021, [17]-[27].