



Form 59
Rule 29.02(1)

Affidavit

No. NSD616/2021

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

WESTPAC BANKING CORPORATION ABN 33 007 457 141 and another named in the Schedule

Applicants

FORUM FINANCE PTY LIMITED ACN 153 301 172 and others named in the Schedule

Respondents

Affidavit of: NIGEL DAVID EVANS
Address: Level 1, 84 William Street, Melbourne, Victoria
Occupation: Solicitor
Date: 28 September 2022

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I, **NIGEL DAVID EVANS**, Solicitor, of Level 1, 84 William Street, Melbourne, Victoria, **DO SOLEMNLY AND SINCERELY DECLARE AND AFFIRM** as follows:

A INTRODUCTION

1 I am an Australian Practitioner and Director of Aptum Legal (**Aptum**).

Filed on behalf of (name & role of party)	Third Respondent
Prepared by (name of person/lawyer)	Nigel Evans
Law firm (if applicable)	APTUM LEGAL
Tel	(03) 7020 9230
Email	nigel@aptumlegal.com.au
Address for service (include state and postcode)	C/- Aptum Legal, Level 1, 84 William Street Melbourne, Victoria 3000

[Form approved 01/08/2011]

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2 Aptum is the solicitor for the Third Respondent (**Mr Tesoriero**) and his associated entities (collectively, the **Respondents**):

2.1 in this proceeding and proceeding number NSD681/2021 (collectively, the **Main Proceedings**); and

2.2 in proceeding VID778/2021 and NSD224-232/2022 (**Winding Up Proceedings**).

3 Aptum is also engaged (by separate engagement) as the solicitor for the Forty-Fifth Respondent (**Mr Tesoriero Snr**) in this proceeding.

4 I am authorised by the Respondents to make this affidavit on their behalf.

5 I make this affidavit in support of the interlocutory application by the Tesoriero Parties (as set out in Schedule 2 to that interlocutory application) dated 23 September 2022 seeking (among other things) a variation to the freezing orders made against him on 2 July 2021 (as varied on 9 July 2021; 27 August 2021; 12 November 2021; and 20 July 2022) (**Freezing Orders**).

6 By making this affidavit, I do not intend and have no authority to waive any legal professional privilege of the Respondents. Nothing in or exhibited to this affidavit ought to be construed as waiving privilege. Except where otherwise stated, I make this affidavit of my own knowledge. Where I state in this affidavit that I depose to any matter based on any information known to me or based on a belief, I believe those matters to be true and correct.

7 Now produced and shown to me and marked "**NDE-4**" is a paginated bundle of true copies of the documents referred to in this affidavit (**the Exhibit Bundle**).

B MY PREVIOUS AFFIDAVITS

8 I make this affidavit as a supplement to the affidavits which I have previously affirmed in this proceeding, being

8.1 my affidavit of 19 August 2022 (**my First Affidavit**), in which I deposed to the status as at that date of the handover of the engagement from the Respondents' former solicitors, Madgwicks, to Aptum; and

8.2 my affidavit of 15 September 2022 (**my Second Affidavit**), in which I deposed to the work I considered likely to be necessary for the Respondents to properly prepare for trial in the Main Proceedings;

8.3 my affidavit of 22 September 2022 (**my Third Affidavit**), in which I deposed to the legal costs to date and the estimate of future costs required by the Respondents; and

8.4 my affidavit of 22 September 2022 (**my Fourth Affidavit**), in which I deposed to the previous affidavits filed on behalf of the Respondents, as well as transcripts and reasons for the orders previously made on 20 July 2022.

9 I refer to and rely on my First, Second, Third and Fourth Affidavit in this further Fifth Affidavit.

C WESTPAC'S PLEADINGS

10 As at the date of this affidavit, the following correspondence, which has not been referred to in my earlier Affidavits, has been exchanged between Aptum and the First and Second Applicant (together **Westpac**) in relation to their pleadings:

10.1 Letter from MinterEllison to Aptum dated 15 September 2022 which was received after filing and serving my Second Affidavit, which sets out a response to a request from Aptum dated 15 September 2022 (which appears at page 57 of the Exhibit Bundle to my Second Affidavit) which asked Westpac to agree to either provide an amended pleading or to provide a separate document stating the particulars. A true copy of the letter from MinterEllison appears from pages 9 to 10 of the Exhibit Bundle.

10.2 A separate letter from MinterEllison to Aptum dated 15 September 2022 (**Westpac's Second 15 September 2022 Letter**) which was received after filing and serving my Second Affidavit, which sets out a detailed response to previous correspondence sent to MinterEllison about the First and Second Applicant's pleadings. A true copy of MinterEllison's second letter appears from pages 11 to 18 of the Exhibit Bundle.

10.3 Emails from MinterEllison to Aptum dated 16 and 23 September 2022 confirming that the particulars of Westpac claim will be sent in one document (however as at the date of this affidavit, this document has not been received). True copies of the emails from MinterEllison appears from pages 19 to 21 of the Exhibit Bundle.

11 **Annexure A** to Westpac's Second 15 September 2022 Letter appears to indicate that the quantum of the funds now alleged by Westpac to have been received by the respondents in the proceeding, including the Respondents, has changed from their Second Amended Statement of Claim and has reduced by \$5,139,375.81 in the Respondents' and Mr Tesoriero Snr's favour as follows:

No.	Party name	Quantum from Second Amended Statement of claim filed 11 Nov 2021	Quantum from Annexure A to MinterEllison letter dated 15 Sep 2022
3rd Resp.	Vincenzo Frank Tesoriero	\$ 2,356,784.17	\$ 1,581,500.98
8th Resp.	64-66 Berkeley St Hawthorn Pty Ltd	\$ 1,865,000.00	\$ 752,414.64
13th Resp.	23 Margaret Street Pty Ltd	\$ 689,742.00	\$ 638,433.49
14th Resp.	1160 Glen Huntly Road Pty Ltd	\$ 1,054,000.00	\$ 942,638.73
15th Resp.	14 Kirwin Road Morwell Pty Ltd	\$ 300,794.00	\$ 251,392.34
16th Resp.	Canner Investments Pty Ltd	\$ 1,180,000.00	\$ 143,745.05
17th Resp.	123 High Street Taradale Pty Ltd	\$ 78,353.00	\$ 63,428.46
18th Resp.	160 Murray Valley Hwy Lake Boga Pty Ltd	\$ 260,202.74	\$ 200,336.95
19th Resp.	31 Ellerman Street Dimboola Pty Ltd	\$ 155,262.00	\$ 125,393.34
20th Resp.	4 Cowslip Street Violet Town Pty Ltd	\$ 346,623.00	\$ 271,388.65
21st Resp.	55 Nolan Street Maryborough Pty Ltd	\$ 173,907.00	\$ 132,125.95
22nd Resp.	89 Betka Road Mallacoota Pty Ltd	\$ 174,574.00	\$ 143,992.79
23rd Resp.	9 Gregory Street Ouyen Pty Ltd	\$ 18,969.00	\$ 5,173.25
24th Resp.	9 Main Street Derrinallum Pty Ltd	\$ 146,136.00	\$ 129,605.76
25th Resp.	286 Carlisle Street Pty Ltd	\$ 2,405,000.00	\$ 872,839.06
26th Resp.	275 High Street Golden Square Pty Ltd	\$ 339,214.00	\$ 273,390.59
38th Resp.	Tesoriero Investment Group Pty Ltd	\$ 1,159,000.00	\$ 639,632.25
39th Resp.	Mangusta (Vic) Pty Ltd	\$ 150,009.85	\$ 82,578.70
40th Resp.	193 Carlisle Street Enterprises Pty Ltd	\$ 30,304.64	\$ 30,304.64
41st Resp.	8-12 Natalia Ave Oakleigh Pty Ltd	\$ 1,436,000.00	\$ 2,272,473.03
45th Resp.	Giovanni (John) Tesoriero	\$ 809,727.00	\$ 437,437.94
Total		\$ 15,129,602.40	\$ 9,990,226.59

D FROZEN MONEY TO BE UTILISED FOR LEGAL EXPENSES

12 From a perusal of the summary of evidence served on the Respondents (purportedly under section 50 of the *Evidence Act 1995* (Cth)) titled "Property Purchases and Ownership", "Payment to assets" and "Payment to, or on behalf of, Mangusta (Vic) Pty Ltd" (true copies of which appear from pages 22 to 61 of the Exhibit Bundle), and an email received from Allens, solicitors for the Liquidator, Aptum have identified that

there are the following frozen funds totalling **\$2,854,613.98** in the name of the respective Respondents:

Property sold/source	Legal Owner	Funds available	Held by
23 Margaret Street, Rozelle, NSW 2039	23 Margaret Street Pty Ltd (23 Margaret St) Legal Owner ATF 23 Margaret Street Trust	\$ 271,331.20	MinterEllison and Madgwicks lawyers in a joint controlled monies account BSB - 033 003 ACC - 667 565
1160 Glen Huntly Road, Glen Huntly VIC 3163	1160 Huntly Road Pty Ltd Legal Owner ATF 1160 Glen Huntly Road Unit Trust	\$ 795,000.00	The Supreme Court of Victoria
8-12 Natalia Avenue, Oakleigh VIC 3167	Vince Tesoriero as signatory to the contract of sale	\$ 773,362.88 \$ 398,637.12	Federal Court of Australia Arnold Bloch and Leibler lawyers
XOXO Yacht owned by Mangusta (Vic) Pty Ltd	Mangusta (Vic) Pty Ltd	\$ 616,282.78	Allens Lawyers, solicitors for the Liquidator

- 13 The documents purporting to be in compliance with section 50 of the *Evidence Act 1995* (Cth) are still under consideration and no admission, or acceptance of the document being in an admissible form, is being made in this affidavit.

E CHARACTERISATION OF MONIES RECEIVED BY THE RESPONDENTS

- 14 Aptum have identified the following documents relevant to the character of the funds allegedly received from Forum Group Financial Services Pty Ltd (**FGFS**) by the relevant Respondents (as mentioned at paragraph 12 above):

23 Margaret Street Pty Ltd

14.1 Documents served by Westpac purporting to be a summary of evidence served on the Respondents (purportedly under section 50 of the *Evidence Act 1995* (Cth)) titled "Payments to, or on behalf of, 23 Margaret Street Pty Ltd" which indicate that the transactions were either loans or rent payments to 23 Margaret Street Pty Ltd from FGFS. A true copy of the document appears from pages 62 to 67 of the Exhibit Bundle.

14.2 Statutory demand dated 7 December 2021 issued by the liquidator of FGFS against 23 Margaret Street Pty Ltd which appears to characterise some of the same payments the Applicants seek against that respondent, as a loan. A true copy of the statutory demand appears from pages 68 to 73 of the Exhibit Bundle.

- 14.3 Financial Statements and tax returns for the year ending 30 June 2019 and 30 June 2020 for 23 Margaret Street Pty Ltd which shows that rent received was included as income and that there was a loan owed to FGFS. True copies of the financial statements and tax returns appear from pages 74 to 100 of the Exhibit Bundle.
- 14.4 A lease agreement dated 1 May 2018 in place for 23 Margaret Street Pty Ltd between Forum Group Pty Ltd as Tenant and 23 Margaret Street Pty Ltd as Landlord. A true copy of the lease agreement appears from pages 101 to 123 of the Exhibit Bundle.

1160 Glen Huntly Road Pty Ltd

- 14.5 Documents served by Westpac purporting to be a summary of evidence served on the Respondents (purportedly under section 50 of the *Evidence Act 1995* (Cth)) titled "Payments to, or on behalf of, 1160 Glen Huntly Road Pty Ltd" which indicate that some of the payments were loan amounts paid to 1160 Glen Huntly Road Pty Ltd from FGFS. A true copy of the document appears from pages 124 to 127 of the Exhibit Bundle.
- 14.6 Financial Statements and tax returns for the year ending 30 June 2020 for 1160 Glen Huntly Road Pty Ltd which shows that there was a loan owed to FGFS. True copies of the financial statements and tax returns appear from pages 128 to 138 of the Exhibit Bundle.
- 14.7 Demand dated 26 September 2022 issued by the liquidator of FGFS against 1160 Glen Huntly Road Pty Ltd, which appears to characterise some of the same payments Westpac seek against that respondent, as a loan. A true copy of the demand appears from pages 139 to 143 of the Exhibit Bundle.

8-12 Natalia Avenue Oakleigh Pty Ltd

- 14.8 Documents served by Westpac purporting to be a summary of evidence served on the Respondents (purportedly under section 50 of the *Evidence Act 1995* (Cth)) titled "Payments to, or on behalf of, 8-12 Natalia Ave Oakleigh Pty Ltd" which indicate that some of the payments were loan amounts paid to 8-12 Natalia Ave Oakleigh Pty Ltd from FGFS. A true copy of the document appears from pages 144 to 148 of the Exhibit Bundle.
- 14.9 Statutory demand dated 7 December 2021 issued by the liquidator of FGFS against 8-12 Natalia Ave Oakleigh Pty Ltd, which appears to characterise some of the same payments Westpac seek against that respondent, as a

loan. A true copy of the statutory demand appears from pages 149 to 155 of the Exhibit Bundle.

15 The documents purporting to be in compliance with section 50 of the *Evidence Act 1995* (Cth) are still under consideration and no admission, or acceptance of the document being in an admissible form, is being made in this affidavit.

Affirmed at MELBOURNE)
in the State of Victoria)
by Nigel David Evans)
on 28 September 2022)



Signature of **NIGEL DAVID EVANS**

Before me:



Signature of **NIKOLAS KALCIC**

of Level 1, 84 William Street, Melbourne, Victoria,
an Australian Legal Practitioner within the meaning of the Legal Profession Uniform Law (Victoria),
a person authorised under section 19(1) of the Oaths and Affirmations Act 2018 to take an affidavit

As a witness, I certify the following matters concerning the person who made this affidavit (deponent):

1. This affidavit is witnessed over audio visual link in accordance with Part 2B of the *Electronic Transactions Act 2000* (NSW).
2. I saw the face of the deponent.
3. I observed the deponent signing a copy of this affidavit in real time.
4. I attest or otherwise confirm witnessing the deponent's signature by signing this affidavit.
5. I am reasonably satisfied this affidavit signed by me is a copy of the affidavit signed by the deponent.
6. I have known the person for at least 12 months.

Form 59
Rule 29.02(1)

Annexure certificate

No. NSD616/2021

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

WESTPAC BANKING CORPORATION ABN 33 007 457 141

Applicant

FORUM FINANCE PTY LIMITED ACN 153 301 172 and others named in the Schedule

Respondent

ANNEXURE "NDE-4"

Before me:



Signature of **NIKOLAS KALCIC**
of Level 1, 84 William Street, Melbourne,
Victoria, an Australian Lawyer, a person
authorised under s 19(1) of the Oaths and
Affirmations Act 2018 to take an affidavit in
the State of Victoria.

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 28/09/2022 4:04:15 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: Affidavit - Form 59 - Rule 29.02(1)
File Number: NSD616/2021
File Title: WESTPAC BANKING CORPORATION ABN 33 007 457 141 & ANOR v
FORUM FINANCE PTY LIMITED (IN LIQUIDATION) ACN 153 301 172
& ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 28/09/2022 4:16:08 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.

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.