

**NOTICE OF FILING****Details of Filing**

Document Lodged: Outline of Submissions  
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
Date of Lodgment: 5/12/2022 8:16:30 PM AEDT  
Date Accepted for Filing: 5/12/2022 8:16:47 PM AEDT  
File Number: NSD681/2021  
File Title: SMBC LEASING AND FINANCE, INC. ARBN 602 309 366 v FORUM  
ENVIRO (AUST) PTY LTD (VOLUNTARY ADMINISTRATORS  
APPOINTED) ACN 607 484 364 & ORS  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

**Important Information**

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 of the filing of the document is determined pursuant to the Court's Rules.



Federal Court of Australia  
New South Wales Registry  
General Division

No. NSD 681/2021

**SMBC Leasing and Finance, Inc. v Forum Enviro (Aust) Pty Ltd (in liq) & Others**

**Applicant's outline of opening submissions for final hearing**

A.	Introduction.....	3
	The Proceedings.....	3
	The Parties .....	3
	Evidence relied upon by SMBC .....	7
	The SMBC Master Agreements.....	9
	Results of investigations by SMBC and Veolia.....	14
	The Scheme.....	16
	The dishonest and fraudulent purpose of Mr Papas .....	20
	The Fraudulent Documents and Fraudulent Transactions.....	20
	The receipt of monies by the respondents.....	21
	The 2018 Representations and the 2020 Representations.....	23
	The knowledge of the relevant parties .....	25
	The conduct and role of the relevant parties.....	26
B.	SMBC's summary contentions in relation to each of the contested legal issues to the extent they relate to SMBC .....	27
	<i>Claims in Trust</i> .....	27
	Principles .....	27
	Receipt of Funds .....	28
	Payment away of funds.....	28
	<i>Money had and received</i> .....	28
	Principles .....	28
	<i>Tort of unlawful means conspiracy</i> .....	29
	Principles .....	29
	<i>Tort of deceit</i> .....	29
	Principles .....	29
	Reliance on Transaction Documents and Representations .....	30
	<i>Misleading or deceptive conduct or false or misleading conduct</i> .....	31
	Principles .....	31
	Accessory to the conduct .....	32
	The respondents' conduct.....	32
	<i>Knowing receipt</i> .....	33
	Principles .....	33
	<i>Knowing assistance</i> .....	34
	Principles .....	34
	<i>Claims against FEA</i> .....	34

Trust.....	34
Money had and received .....	35
Contract.....	35
Unlawful means conspiracy .....	35
Deceit.....	36
Misleading or deceptive conduct or false or misleading conduct .....	36
Conclusion .....	37
<i>Claims against FE .....</i>	<i>37</i>
Trust.....	37
Money had and received .....	37
Knowing receipt.....	37
Unlawful means conspiracy .....	38
Conclusion .....	38
<i>Claims against Mr Papas .....</i>	<i>38</i>
Trust.....	38
Money had and received .....	39
Knowing assistance.....	39
Knowing receipt.....	39
Unlawful means conspiracy .....	39
Deceit.....	40
Misleading or deceptive conduct or false or misleading conduct .....	40
Conclusion .....	41
<i>Claims against the Papas Related Entities .....</i>	<i>41</i>
Trust.....	41
Money had and received .....	41
Knowing receipt.....	41
Unlawful means conspiracy .....	42
Conclusion .....	42
<i>Claims against the Tesoriero Related Entities.....</i>	<i>42</i>
Trust.....	42
Money had and received .....	43
Conclusion .....	43
C. Relief.....	44

## A. Introduction

### *The Proceedings*

1. These proceedings are brought by SMBC Leasing and Finance, Inc (**SMBC**) against twenty-five respondents (**SMBC Proceeding**). They are to be heard simultaneously with proceedings no NSD616/2021 (**Westpac Proceeding**) and proceedings no NSD642/2021 (**Societe Generale Proceeding**).
2. SMBC's claims relate to over \$113 million in payments that were made by SMBC to the first respondent, Forum Enviro (Aust) Pty Ltd (**FEA**), and the third respondent, Forum Enviro Pty Ltd (**FE**), in reliance on fraudulent documents, in the period from August 2018 to May 2021. The second respondent, Basile Papadimitriou (**Mr Papas**), was the sole director and secretary of FEA and FE. It is alleged that Mr Papas devised and carried out the fraud.
3. The fourth to twenty-fifth respondents in the SMBC proceedings are companies that, it is alleged, received the traceable proceeds of the funds paid by SMBC to FE and FEA. The fourth to twenty-second respondents are alleged by SMBC to have had knowledge of the fraud. The twenty-third to twenty-fifth respondents are sued by SMBC in their capacity as recipients only.

### *The Parties*

4. SMBC is a company incorporated in Delaware and registered as a foreign company in Australia.<sup>1</sup> It is in the business of, amongst other services, providing financing for its clients' leasing arrangements in Australia.<sup>2</sup>
5. The first and third respondents, FEA and FE, received the payments from SMBC. They are companies in the Forum group of companies.<sup>3</sup> They are both subsidiaries of The Forum Group of Companies Pty Ltd (**TFGC**), which is the seventh respondent.

---

<sup>1</sup> SMBC Corporate Summary, p 7 (CB F.II.67 pF.II.21).

<sup>2</sup> Second Timpany Affidavit at [6] (CB D.II.29 pD.II.41).

<sup>3</sup> Save where otherwise noted, the corporate information referred to in these submissions for each of the respondents is in evidence in Westpac's s 50 Summary of Corporate Directorships, Shareholdings and Trusts (**Westpac Corporate Summary**) (CB F.I.2 pF.I 1.77). A useful structure diagram of the Forum

6. The second respondent, Mr Papas is a director or controller<sup>4</sup> of all but three of the respondents. Mr Papas absconded to Greece at the time that the fraud was detected by Westpac and Westpac New Zealand.<sup>5</sup> Although he initially appeared in this proceeding by counsel, Mr Papas is no longer taking an active role in defending the proceeding. He has not put on a defence or filed any evidence.
7. The fourth to twenty-second respondents (**Papas Related Entities**) all have Mr Papas as a director or controller.<sup>6</sup> The Papas Related Entities incorporated in Australia are:
- (a) Forum Group Pty Ltd, of which Mr Papas is the sole director;
  - (b) Forum Finance Pty Ltd (**Forum Finance**), of which Mr Papas and Vincenzo Tesoriero (**Mr Tesoriero**) are the directors;
  - (c) TFGC, of which Mr Papas is the sole director;
  - (d) Forum Fleet Pty Ltd (**Forum Fleet**), of which Mr Papas is the sole director;<sup>7</sup>
  - (e) Iugis Pty Ltd, of which Mr Papas is the sole director;
  - (f) Iugis Waste Solutions Pty Ltd (**Iugis Waste**), of which Mr Papas is the sole director;<sup>8</sup>
  - (g) Forum Group Financial Services Pty Ltd (**FGFS**), of which Mr Papas is the sole director and Mr Tesoriero ceased being a director on 30 April 2020;
  - (h) 26 Edmonstone Road Pty Ltd, of which Mr Papas is a director and Mr Tesoriero ceased being a director on 1 May 2020;

---

group of companies and the overseas entities appears at p 27 of the Westpac Corporate Summary (CB F.I.2 pF.I 1.77 – F.I.1.106).

<sup>4</sup> In the case of Iugis Hellas IKE (registered in Greece), he is the appointor of the nominee director.

<sup>5</sup> *Westpac Banking Corporation v Forum Finance Pty Limited (Greek Telephone Number)* [2021] FCA 1341 at [6]-[8].

<sup>6</sup> In the case of Iugis Hellas IKE (registered in Greece), he is the appointor of the nominee director.

<sup>7</sup> SMBC Corporate Summary (CB F.II.67 pF.II.21).

<sup>8</sup> SMBC Corporate Summary (CB F.II.67 pF.II.21).

- (i) 5 Bulkara Street Pty Ltd, of which Mr Papas is a director and Mr Tesoriero ceased being a director on 30 April 2020;
  - (j) 6 Bulkara Street Pty Ltd of which Mr Papas is a director and Mr Tesoriero ceased being a director on 27 October 2020; and
  - (k) Imagetec Financial Services Pty Ltd (**Imagetec FS**), of which Mr Papas is the sole director;<sup>9</sup>
  - (l) Imagetec Solutions Australia Pty Ltd (**Imagetec Solutions**), of which Mr Papas is the sole director;<sup>10</sup>
  - (m) Intrashield Pty Ltd, of which Mr Papas is the sole director; and
  - (n) Spartan Consulting Pty Ltd (**Spartan**), of which Mr Papas is the sole director;
8. The Papas Related Entities incorporated overseas are:
- (a) Iugis Holdings Limited (registered in the UK) (**Iugis Holdings UK**), of which Mr Papas is the sole director;
  - (b) Iugis (UK) Limited (registered in the UK), of which Mr Papas is the sole director;
  - (c) Iugis Hellas IKE (registered in Greece), of which Mr Papas is the sole director;
  - (d) Iugis Energy SA (registered in Greece), of which Craig Rollinson is the sole director as nominee of Mr Papas through Mr Papas' 99% shareholding of the parent company Iugis Holdings UK; and
  - (e) Mazcon Investments Hellas IKE (registered in Greece), of which Mr Papas is the sole director.
9. The service of the foreign entities will be addressed separately at the start of the trial.

---

<sup>9</sup> SMBC Corporate Summary (CB F.II.67 pF.II.21).

<sup>10</sup> SMBC Corporate Summary (CB F.II.67 pF.II.21).

10. The remaining respondents, being the twenty-third to twenty-fifth respondents (**Tesoriero Related Entities**), all have Mr Tesoriero as a director:
  - (a) 23 Margaret Street Pty Ltd, of which Mr Tesoriero is the sole director;
  - (b) 286 Carlisle Street Pty Limited, of which Mr Tesoriero and his father Giovanni Tesoriero are the directors;
  - (c) 64-66 Berkeley St Hawthorn Pty Ltd, of which Mr Papas was a director until on 2 November 2020, and Mr Tesoriero is now the sole director.
11. Each of the Papas Related Entities incorporated in Australia is in liquidation under the control of Mr Jason Preston and Mr Jason Ireland of McGrathNicol (**Liquidators**). Leave has been granted to proceed against each of these companies, and each has been excused from filing a defence in the proceedings.
12. The Tesoriero Related Entities had filed defences in the SMBC Proceeding. However, they were recently placed into court-ordered liquidation under the control of the Liquidators. SMBC will shortly file an application seeking leave to proceed against the Tesoriero Related Entities in liquidation, and for each to be excused from filing a further defence in the proceedings.
13. The result is that none of the respondents in the SMBC Proceeding are actively defending the claims against them: Mr Papas and the overseas Papas Related Entities are not actively defending the proceeding, and each of the Australian Papas Related Entities and the Tesoriero Related Entities is in liquidation.
14. There is a substantial overlap between the respondents to the SMBC Proceeding and the respondents to the Westpac Proceeding. There are four corporate respondents sued by SMBC that are not sued by Westpac: Forum Fleet, Imagetec FS, Imagetec Solutions and Iugis Waste.<sup>11</sup> SMBC sues only one individual: Mr Papas. SMBC does not sue

---

<sup>11</sup> The corporate information of these companies is in evidence in SMBC's s 50 Corporate Summary: Directorships and Shareholdings (**SMBC Corporate Summary**) (CB F.II.67 pF.II.21).

Mr Tesoriero. Mr Tesoriero's only relevance in the SMBC proceeding is that he is a director and shareholder of some of the corporate respondents.

*Evidence relied upon by SMBC*

15. SMBC has filed the following evidence in the SMBC Proceeding:
  - (a) Affidavit of Roger Dobson sworn 13 July 2021 (**Dobson Affidavit**);
  - (b) Second Affidavit of Roger Dobson sworn 14 July 2021 (**Second Dobson Affidavit**);
  - (c) Affidavit of Michael Timpany sworn 13 July 2021 (**First Timpany Affidavit**);
  - (d) Affidavit of Lorenzo Kozlovic sworn 1 February 2022 (**Kozlovic Affidavit**);
  - (e) Affidavit of Gurpreet Brar sworn 3 February 2022 (**Brar Affidavit**);
  - (f) Affidavit of Julian Gaillard sworn 4 February 2022 (**Gaillard Affidavit**);
  - (g) Second Affidavit of Michael Timpany sworn 4 February 2022 (**Second Timpany Affidavit**);
  - (h) Affidavit of Daniel Conlon sworn 14 June 2022 (**Conlon Affidavit**); and
  - (i) Third Affidavit of Michael Timpany sworn 4 July 2022 (**Third Timpany Affidavit**)
16. The documents within the exhibits to those affidavits are to be subsumed in the tender bundle that will form part of the Court Book, or in SMBC's Section 50 Summaries (described below).
17. In accordance with the orders made by Lee J on 10 March 2022 (**10 March Orders**), SMBC relies on six summaries filed by SMBC on 15 July 2022 under s 50 of the *Evidence Act 1995* (Cth) being:
  - (a) Summary of Payments to Flexirent and FE;



- (b) Summary of Payments to FEA;
  - (c) Summary of Discovery of the Fraud;
  - (d) Summary of Fraudulent Documents;
  - (e) SMBC Corporate Summary; and
  - (f) Summary of Payments received from FEA.
18. The 10 March Orders included an order that evidence in each of the Westpac Proceeding, the SMBC Proceeding and the Societe Generale Proceeding be evidence in the others. Accordingly, SMBC relies on evidence filed by the Liquidators and Westpac. In particular, SMBC relies on:
- (a) the Liquidators tracing evidence as set out in the Affidavit of Jason Preston sworn 7 February 2022 (**Preston Affidavit**) and the Second Affidavit of Jason Preston sworn 10 June 2022 (**Second Preston Affidavit**) and supported by the spreadsheet in JP-17 (**Tracing Model**);
  - (b) the Liquidator's Affidavit of Jason Ireland affirmed 9 June 2022 (**Ireland Affidavit**) regarding the equipment said to be the subject of the leases to Veolia; and
  - (c) the following Westpac s 50 summaries:
    - (i) Westpac's Corporate Summary;
    - (ii) funds paid to, or on behalf of, the respondents (**Respondent Payment Summaries**);
    - (iii) a summary of payments made by FGFS towards the purchase and maintenance of luxury items and assets (**Assets Summary**); and
    - (iv) a summary of payments made by FGFS towards various property related expenses (**Property Payments Summary**).

*The SMBC Master Agreements*

19. SMBC entered two sets of invoice financing arrangements involving FEA, the first in 2018 and the second in 2020.
20. The 2018 arrangements were entered into by four primary agreements:
- (a) a Master Receivables and Acquisition Servicing Agreement between Flexirent Capital Pty Ltd (**Flexirent**) and SMBC dated 2 August 2018 (**2018 MRASA**) under which:<sup>12</sup>
    - (i) Flexirent could offer to sell to SMBC customer receivables and related assets which arose from various leasing contracts between FEA, as Flexirent's agent, and FEA's customers, in exchange for advancing finance; and
    - (ii) if the offer was accepted, there would be an equitable assignment of the receivables to SMBC and rights granted to SMBC in respect of the assets, in exchange for the finance provided;
  - (b) a Supplemental Deed between SMBC and Flexirent dated 2 August 2018 under which the parties agreed certain additional terms that would apply to any receivables owing by Veolia Environmental Services (Australia) Pty Ltd;<sup>13</sup>
  - (b) a principal and agency agreement (**Agency Agreement**) between Flexirent and FEA dated 13 June 2018 by which FEA was authorised to act as Flexirent's agent in relation to certain rental, lease and licence agreements that Flexirent was in the business of providing;<sup>14</sup> and
  - (c) an Agent Side Letter between SMBC, Flexirent and FEA dated 2 August 2018 by which FEA was authorised to act as SMBC's collection agent in relation to the monthly receivables which arose from the various underlying leasing arrangements (the effect of this arrangement was that FEA would remit all payments it received

<sup>12</sup> CB Part C SMB.001.001.0469 2018 MRASA..

<sup>13</sup> CB Part C SMB.001.001.0615 Supplemental Deed between SMBC and Flexirent dated 2 August 2018.

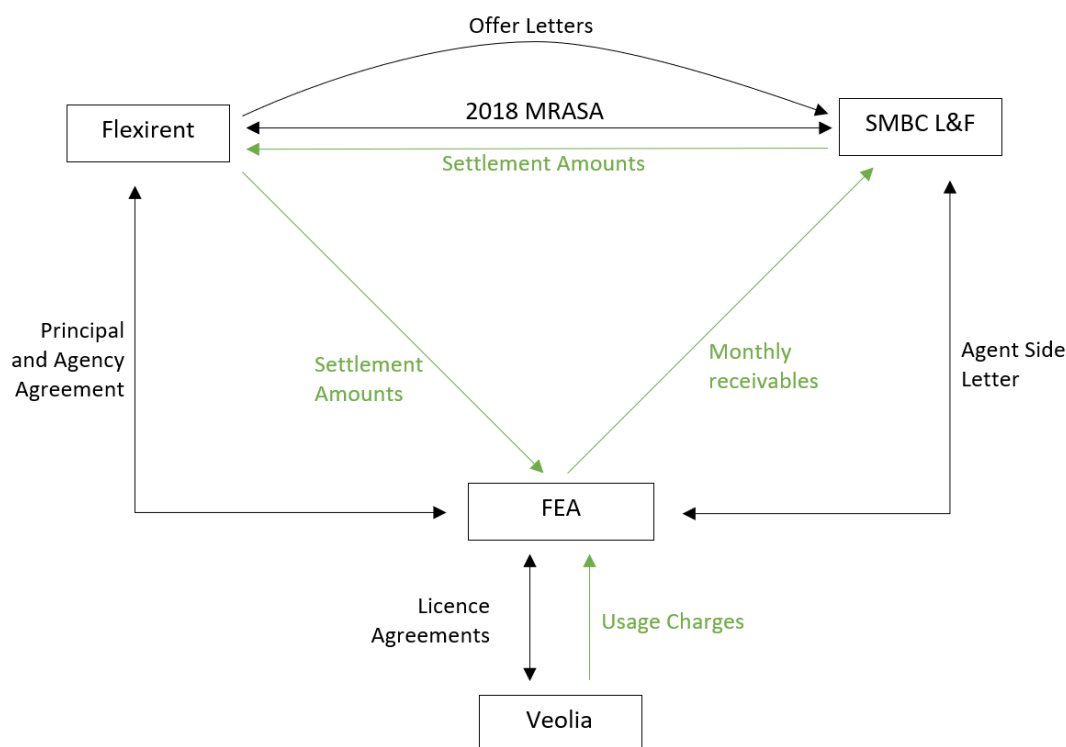
<sup>14</sup> CB Part C SMB.001.001.0718 Agency Agreement.

from Veolia under the purported TLAs to SMBC directly, rather than via Flexirent, as contemplated by the 2018 MRASA).<sup>15</sup>

21. The funding structure pursuant to the 2018 MRASA agreement was intended by SMBC to operate as follows:
  - (a) FEA, as an undisclosed agent of Flexirent, would enter into Technology Licence Agreements with a customer (being Veolia Environmental Services (Australia) Pty Ltd (**Veolia**)) under which FEA would lease waste management and disinfectant systems to Veolia. The terms of those agreements would require monthly payments, described as “usage charges”, to be paid by Veolia to FEA;
  - (b) Flexirent would provide SMBC with Offer Letters which proposed the sale of receivables and related assets under executed Technology Licence Agreement in exchange for financing;
  - (c) SMBC, if agreeable, would advance the settlement sum to Flexirent in exchange for an equitable interest over the receivables and related assets; and
  - (d) FEA would receive the monthly usage charges from the customer in respect of the lease arrangements, as a collection agent of SMBC, and remit those funds to SMBC in accordance with the Agent Side Letter.
22. The intended operation of the 2018 MRASA is summarised in the diagram below.

---

<sup>15</sup> CB Part C SMB.001.001.0739 Agent Side Letter between SMBC, Flexirent and FEA dated 2 August 2018..



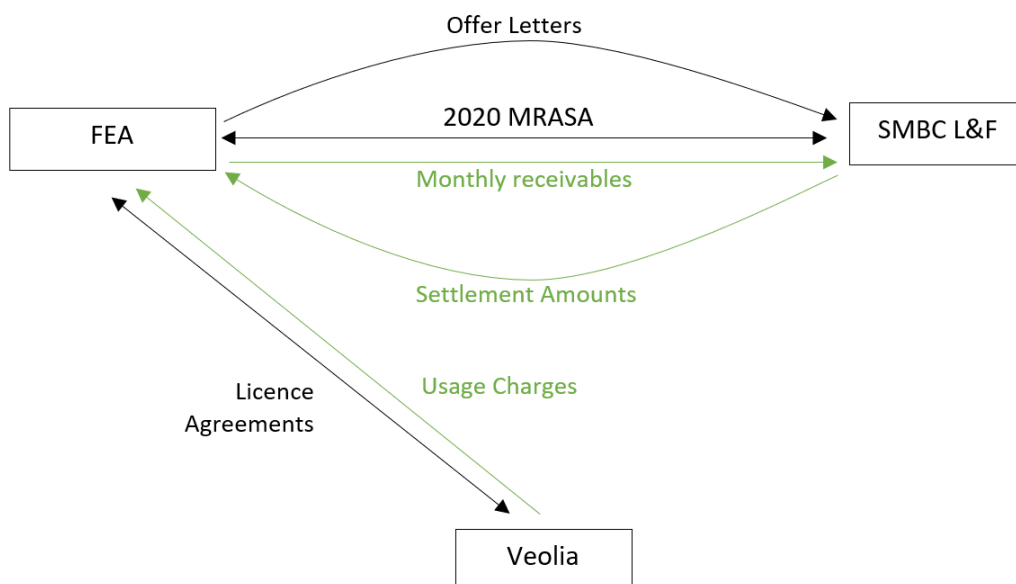
23. In fact, once the payments were advanced by SMBC to Flexirent under the 2018 MRASA, they were not paid by Flexirent to FEA but were instead paid by Flexirent to FE, because the nominated bank account to receive the payments was a bank account in the name of FE.<sup>16</sup>
24. The 2020 agreements were entered into by way of a Master Receivables and Acquisition Servicing Agreement between FEA and SMBC dated 17 July 2020 (**2020 MRASA**),<sup>17</sup> and a Supplemental Deed between FEA and SMBC dated 17 July 2020,<sup>18</sup> under which:
- (a) FEA could offer to sell to SMBC customer receivables which arose from various leasing contracts between FEA personally and its customers, in exchange for advancing finance; and

<sup>16</sup> First Preston Affidavit at [13(a)] (CB E.I.1 pE.I.1).

<sup>17</sup> CB Part C SMB.001.001.2280 2020 MRASA.

<sup>18</sup> CB Part C SMB.001.001.1597 Supplemental Deed between FEA and SMBC dated 17 July 2020.

- (b) if the offer was accepted, FEA would assign to SMBC the right and title to the receivables in exchange for the finance provided.
25. The funding structure pursuant to the 2020 MRASA agreement was intended by SMBC to operate as follows:
- FEA would enter into Technology Licence Agreements with a customer (being Veolia) under which FEA would lease waste management and disinfectant systems to Veolia. The terms of those agreements would require monthly usage charges to be paid by Veolia to FEA;
  - FEA would provide SMBC with an Offer Letter proposing the sale of receivables under an executed Technology Licence Agreement in exchange for financing; and
  - SMBC, if agreeable, would advance the settlement sum to FEA in exchange for a legal interest in the receivables.
26. The intended operation of the 2020 MRASA is summarised in the diagram below.



The 2018 Offer Letters, TLAs and payments by SMBC

27. Under the 2018 MRASA, four Offer Letters were sent by Flexirent and accepted by SMBC between 6 August 2018 and 19 December 2018.<sup>19</sup> In each Offer Letter, the receivables purportedly sold to SMBC were rental payments that were owed by Veolia pursuant to Technology Licence Agreements (**TLAs**) it had apparently entered into with FEA. The total amount paid by SMBC to Flexirent pursuant to those Offer Letters was \$29,709,714.14.<sup>20</sup> Flexirent paid all of this to FE. In fact, the total amount that Flexirent paid FE was \$29,737,241.60.<sup>21</sup> The amount claimed by SMBC is the amount of SMBC's money that was paid to Flexirent, being \$29,709,714.14.
28. For a number of the advances made by Flexirent under the 2018 MRASA, Flexirent would make payments to FE in anticipation of receiving payments from SMBC. Once Flexirent received payment from SMBC, it would reimburse itself for those amounts which it had paid to FE in advance.<sup>22</sup> SMBC made four payments to Flexirent pursuant to the four Offer Letters which SMBC had accepted,<sup>23</sup> and Flexirent made six advances to FE.<sup>24</sup>

The 2020 Offer Letters, TLAs and payments by SMBC

29. On 27 July 2020, FEA provided to SMBC a Master TLA – Waste Management (**Waste Management MTLA**) and a Master TLA – Health Management (**Health Management MTLA**) purportedly between FEA and Veolia which operated, in contrast to the TLAs issued under the 2018 MRASA, such that multiple equipment leases could be arranged under a single MTLA by submitting TLA Schedules.
30. Pursuant to the TLA Schedules submitted in accordance with the Waste Management MTLA and the Health Management MTLA, fifteen Offer Letters were sent by FEA and

---

<sup>19</sup> Summary of Fraudulent Documents (CB F.II.66 pF.II.12). By way of example, see the First 2018 Offer Letter dated 6 August 2018 (CB Part C SMB.001.001.0612).

<sup>20</sup> Dobson Affidavit at [33] (CB D.II.23 pD.II.1).

<sup>21</sup> Summary of Payments to Flexirent and FE (CB F.II.63 pF.II.1).

<sup>22</sup> Summary of Payments to Flexirent and FE (CB F.II.63 pF.II.1).

<sup>23</sup> Summary of Payments to Flexirent and FE at the second column (CB F.II.63 pF.II.1).

<sup>24</sup> Summary of Payments to Flexirent and FE at the third last column (CB F.II.63 pF.II.1).

accepted by SMBC between 27 July 2020 and 21 May 2021,<sup>25</sup> all of which were in relation to receivables that were apparently owed by Veolia pursuant to the TLA Schedules which it had purportedly submitted to FEA which were annexed to each Offer Letter.<sup>26</sup> Under the 2020 MRASA, the nominated bank account into which SMBC made payments was owned by FEA (rather than the bank account owned by FE which was the nominated bank account into which Flexirent made its payments under the 2018 arrangement). The total amount paid by SMBC to FEA pursuant to the fifteen Offer Letters was \$83,993,909.47.<sup>27</sup> SMBC often made a single payment comprising settlement amounts under multiple Offer Letters. For this reason, SMBC made nine payments to FEA in relation to the fifteen Offer Letters which it accepted under the 2020 MRASA.<sup>28</sup>

31. Between 30 August 2018 and 28 May 2021, FEA made 57 monthly payments to SMBC, totalling \$30,556,390.<sup>29</sup>

*Results of investigations by SMBC and Veolia*

32. FEA failed to make a payment of \$2,139,000 due on 30 June 2021.<sup>30</sup> On learning of the missed payment, Michael Timpany of SMBC emailed FEA personnel, including Bill Papas.<sup>31</sup> Various emails were exchanged between Mr Timpany and FEA staff on 1 and 2 July 2021.<sup>32</sup> On 2 July, Mr Papas emailed Mr Timpany stating that “significant issues” had arisen in their business and asking SMBC to await an update on 5 July

<sup>25</sup> Summary of Fraudulent Documents (CB F.II.66 pF.II.12). By way of example, see the First 2020 Offer Letter (Health) dated 27 July 2020 and First 2020 Offer Letter (Waste) dated 27 July 2020 (CB Part C SMB.001.001.1202; SMB.001.001.1201).

<sup>26</sup> Dobson Affidavit at [37] (CB D.II.23 pD.II.1); Summary of Fraudulent Documents (CB F.II.66 pF.II.12). By way of example, see the First 2020 TLA Schedule (Health) dated 1 August 2020 and the First 2020 TLA Schedule (Waste) dated 1 August 2020 (CB Part C SMB.001.286.2101; SMB.001.001.1341).

<sup>27</sup> Dobson Affidavit at [68] (CB D.II.23 pD.II.1); Summary of Payments to FEA (CB F.II.64 pF.II.3).

<sup>28</sup> Summary of Payments to FEA (CB F.II.64 pF.II.3).

<sup>29</sup> Second Timpany Affidavit at [67] (CB D.II.29 pD.II.41); Summary of Payments received from FEA (CB F.II.68 pF.II.28).

<sup>30</sup> First Timpany Affidavit at [12] (CB D.II.24 pD.II.15).

<sup>31</sup> First Timpany Affidavit at [13] (CB D.II.24 pD.II.15); Summary of the Discovery of the Fraud at item 1 (CB F.II.65 pF.II.7).

<sup>32</sup> Summary of the Discovery of the Fraud (CB F.II.65 pF.II.7).

before taking action.<sup>33</sup> Mr Timpany replied on the same day seeking further information and received no response.<sup>34</sup>

33. Around lunchtime on 2 July, Mr Timpany became aware of media reports regarding the Westpac proceedings against Forum Finance.<sup>35</sup>
34. After obtaining the necessary consent from Flexirent to speak with Veolia directly,<sup>36</sup> Mr Timpany had a call with Preet Brar, CEO of Veolia India and former CFO of Veolia on 5 July.<sup>37</sup> On that call, Ms Brar indicated that Veolia had not entered into a July 2020 Master Technology Licence Agreement with FEA, and emails purporting to have been sent by her confirming receipt or acknowledging the assignment of receivables to SMBC were likely forged.<sup>38</sup>
35. On 7 July, Mr Timpany emailed 27 relevant documents to Veolia including 18 contractual documents and nine purported confirmation emails.<sup>39</sup> On 8 July, Ms Brar responded by email stating:<sup>40</sup>

I can confirm that I have not signed these documents and neither did I approve the use of my electronic signature to execute these documents. Kindly also note that not only is the signature not mine but also this is the first time I have seen these documents.

...

These e-mails have been fabricated.

36. Mr Timpany then emailed five further contractual documents (being the purported Technology Licence Agreements) to Veolia on 8 July.<sup>41</sup> Ms Brar responded the same

<sup>33</sup> First Timpany Affidavit at [15] (CB D.II.24 pD.II.15), MT1 pp 33-34; Summary of the Discovery of the Fraud at item 14 (CB F.II.65 pF.II.7).

<sup>34</sup> First Timpany Affidavit at [16] (CB D.II.24 pD.II.15); Summary of the Discovery of the Fraud at item 15 (CB F.II.65 pF.II.7).

<sup>35</sup> First Timpany Affidavit at [21] (CB D.II.24 pD.II.15).

<sup>36</sup> First Timpany Affidavit at [23]-[24] (CB D.II.24 pD.II.15).

<sup>37</sup> First Timpany Affidavit at [25] (CB D.II.24 pD.II.15).

<sup>38</sup> First Timpany Affidavit at [27] (CB D.II.24 pD.II.15).

<sup>39</sup> First Timpany Affidavit at [29] (CB D.II.24 pD.II.15), Summary of Discovery of the Fraud at item 16 (CB F.II.65 pF.II.7).

<sup>40</sup> First Timpany Affidavit at [32] (CB D.II.24 pD.II.15), see also First Timpany Affidavit at [34] (CB D.II.24 pD.II.15), Summary of Discovery of the Fraud at item 18 (CB F.II.65 pF.II.7).

<sup>41</sup> First Timpany Affidavit at [33] (CB D.II.24 pD.II.15); Summary of the Discovery of the Fraud at item 19 (CB F.II.65 pF.II.7).



day confirming that she did not sign these documents or approve the use of her electronic signature on them.<sup>42</sup>

37. The affidavit evidence of Veolia officers as to the forgeries is addressed in paragraphs 43 to 48 below.

*The Scheme*

38. Mr Papas' devising of and implementation of the Scheme is pleaded at Amended Statement of Claim filed 19 November 2021 (**ASOC**) [12] to [13].<sup>43</sup> SMBC alleges that, by no later than 6 August 2018, Mr Papas<sup>44</sup> devised a scheme involving FEA, FE and other entities to obtain money dishonestly and fraudulently from SMBC that they were not entitled to receive (**Scheme**).<sup>45</sup>
39. That the Scheme was devised by Mr Papas is apparent from its operation, the steps that Mr Papas took to implement it, and the benefits he obtained from it.
40. The Scheme operated by Mr Papas creating, or causing to be created, false and fraudulent transaction documents, which Mr Papas then provided to Flexirent or directly to SMBC. In respect of the 2018 MRASA, Mr Papas provided the documents to Flexirent, intending that Flexirent would then provide them to SMBC and that SMBC would rely on them to advance money to Flexirent for the benefit of FE.
41. In respect of the 2020 MRASA, Mr Papas provided the documents directly to SMBC, intending that SMBC would rely on them to advance money to FEA.
42. The Fraudulent Documents purported to record transactions which were a fiction and of which the purported counterparty, Veolia, was unaware and into which Veolia had not entered. The evidence is that the officers of Veolia whose signatures apparently

---

<sup>42</sup> First Timpany Affidavit at [34] (CB D.II.24 pD.II.15); Summary of the Discovery of the Fraud at item 20 (CB F.II.65 pF.II.7).

<sup>43</sup> CB A.III.18.

<sup>44</sup> SMBC does not maintain the allegation that Mr Papas devised the scheme together with Mr Tesoriero.

<sup>45</sup> Amended Statement of Claim filed 19 November 2021 (**ASOC**) at [12] (CB A.III.18).

appeared on the documents had not signed them and that, accordingly, the documents were a fraud.

43. Ms Gurpreet Brar who, at the relevant times, was the Chief Financial Officer of Veolia gives evidence that the signatures which purport to be hers appearing on the 2018 TLAs, the 2020 Master TLAs, the TLA Schedules and the Certificates of Acceptance of Delivery are not her real signature and have been forged.<sup>46</sup> Ms Brar also gives evidence that she had not previously seen these documents before they were provided to her by SMBC's solicitors in July 2021.<sup>47</sup> Ms Brar also gives evidence that seven emails purportedly sent by her were not in fact sent by her.<sup>48</sup> Each of the seven purported emails were forwarded by Mr Papas to SMBC.<sup>49</sup>
44. Mr Lorenzo Kozlovic who, at the relevant times, was the Chief Strategic Development & Innovation Officer for Veolia, gives evidence that the signatures which purport to be his appearing on five of the TLA Schedules and associated Certificates of Acceptance of Delivery are not his and he had not previously seen the documents.<sup>50</sup> Mr Kozlovic also gives evidence that two emails purportedly sent by him were not in fact sent by him.<sup>51</sup> Each of the two purported emails were forwarded by Mr Papas to SMBC.<sup>52</sup>
45. Mr Julian Gaillard, the Company Secretary, Risk and Insurance at Veolia Australia and New Zealand, gives evidence that the five TLAs which purport to bear his signature were not signed by him, the purported signatures bear no resemblance to his own signature and were forged.<sup>53</sup>
46. Mr Daniel Conlon who, at the relevant times, was the Managing Director and Chief Executive Officer of Veolia, gives evidence that the signatures which purport to be his

---

<sup>46</sup> Brar Affidavit at [10]-[11] (CB D.II.27 pD.II.33).

<sup>47</sup> Brar Affidavit at [11] (CB D.II.27 pD.II.33).

<sup>48</sup> Brar Affidavit at [13] (CB D.II.27 pD.II.33).

<sup>49</sup> Summary of Fraudulent Documents at items 29, 37, 44, 48, 55, 62, 66 (CB F.II.66 pF.II.12).

<sup>50</sup> Kozlovic Affidavit at [5]-[8] (CB D.II.26 pD.II.29).

<sup>51</sup> Kozlovic Affidavit at [9] (CB D.II.26 pD.II.29).

<sup>52</sup> Summary of Fraudulent Documents at items 18 and 25 (CB F.II.66 pF.II.12).

<sup>53</sup> Gaillard Affidavit at [4] (CB D.II.28 pD.II.38).

appearing on the two Master TLAs are not his, they bear no resemblance to his own signature and he had not previously seen the documents.<sup>54</sup>

47. In respect of the 2018 MRASA, the emails between Mr Papas and Flexirent representatives demonstrate Mr Papas' involvement in the distribution of the Fraudulent Documents.
48. In respect of the 2020 MRASA, emails between Mr Papas and representatives of SMBC demonstrate Mr Papas' involvement in the provision of the Fraudulent Documents. For example, Mr Papas forwarded an email to Mr Michael Timpany of SMBC in which Mr Kozlovic purportedly acknowledges receipt of Notices of Assignment.<sup>55</sup> Mr Kozlovic attests that the emails which appear to be sent from him to Mr Papas in which he consents to the Notices of Assignment were not sent by him, nor were they authorised to be sent on his behalf.<sup>56</sup> On another occasion, Mr Papas forwarded an email to Mr Timpany of SMBC in which Ms Brar purportedly acknowledges a Notice of Assignment.<sup>57</sup> Ms Brar has given evidence that she did not send that email, and believes that the emails which bear her email address and email signature were forged.<sup>58</sup>
49. Mr Papas' name and apparent signature also appear as signatory, and sometimes both witness and signatory, on each of the 23 contractual documents that purport to have been signed by Ms Brar.<sup>59</sup> In fact, Mr Papas falsely witnessed many of the Fraudulent Documents.<sup>60</sup>
50. The inference from all of this is, having regard to his involvement and the fact that he ultimately presented the documents to Flexirent and SMBC, that the fraudulent signatures on the documents were procured by Mr Papas and with his knowledge.

<sup>54</sup> Conlon Affidavit at [6] (CB D.II.30 pD.II.56).

<sup>55</sup> Summary of Fraudulent Documents at item 18 (CB F.II.66 pF.II.12).

<sup>56</sup> Kozlovic Affidavit at [9] (CB D.II.26 pD.II.29).

<sup>57</sup> Summary of Fraudulent Documents at item 29 (CB F.II.66 pF.II.12).

<sup>58</sup> Brar Affidavit at [13] (CB D.II.27 pD.II.33).

<sup>59</sup> Summary of Fraudulent Documents (CB F.II.66 pF.II.12).

<sup>60</sup> .See the TLA Schedules at CB Part C SMB.001.286.2101; SMB.001.001.1341; SMB.001.071.6469; SMB.001.083.6709; SMB.001.069.3869; SMB.001.0320.1973; SMB.001.267.7632; SMB.001.076.3898; SMB.001.099.2072; SMB.001.072.2112; SMB.001.105.8895; SMB.001.078.6487; SMB.001.099.5873; SMB.001.106.2883; SMB.001.106.4796.

51. There is also evidence from the Liquidators that the equipment leases purportedly between FEA and Veolia (as represented in the TLAs and TLA schedules) are fraudulent because the Liquidators investigations have established that:<sup>61</sup>
- (a) the equipment referred to in them did not exist;
  - (b) no invoices were issued to Veolia in respect of the equipment leases;
  - (c) no payment was received by a Forum company from Veolia in respect of the equipment leases; and
  - (d) FGFS recorded the liability for the monthly payments associated with the equipment leases on its own balance sheet.
52. SMBC, in reliance upon the Fraudulent Documents and the representations made within them, paid funds to Flexirent (under the 2018 MRASA) and to FEA (under the 2020 MRASA). That SMBC relied upon the Fraudulent Documents and the representations is evident from the structure of 2018 and 2020 arrangements, and that SMBC would have had no reason to pay away in excess of \$113 million if it had not received and relied on the Fraudulent Documents.<sup>62</sup>
53. FE and FEA would then disperse the funds received from Flexirent and SMBC to other companies within the Forum group of companies, or related to Mr Papas or Mr Tesoriero, including each of the respondent companies, or otherwise used the funds for their own purpose. The detail of FE and FEA's dispersion of the funds received from Flexirent and SMBC, including the use of the funds for the purchase of various properties, is documented by the Liquidators in the Tracing Model.<sup>63</sup>
54. In order to conceal the Scheme and allow it to continue in operation, Mr Papas caused FEA to make monthly payments to the collections account of SMBC. The funds to

---

<sup>61</sup> Ireland Affidavit at [15] (CB E.II.5 pE.II.1).

<sup>62</sup> Summary of Payments to Flexirent and FE (CB F.II.63 pF.II.1); Summary of Payments to FEA (CB F.II.64 pF.II.3).

<sup>63</sup> JP-17 (CB E.I.3).

make those payments were not received from Veolia. FEA made 57 monthly payments to SMBC in the period of 2 August 2018 to 28 May 2021.<sup>64</sup>

*The dishonest and fraudulent purpose of Mr Papas*

55. SMBC alleges at ASOC [14] that the dishonest and fraudulent purpose of Mr Papas in devising and implementing the Scheme was:
- (a) to benefit himself and Mr Tesoriero, to the detriment of SMBC;
  - (b) to benefit people and entities related to them, to the detriment of SMBC;
  - (c) to spend the funds on properties including the properties acquired by the Papas-Related Entities; and
  - (d) to spend the funds on businesses in Australia and overseas (including in Greece, the United Kingdom, Germany and the United Arab Emirates) for the benefit of themselves and people and entities related to them, to the detriment of SMBC.
56. This purpose is evidenced by Mr Papas' central involvement in the Scheme in circumstances where he was the sole director of FEA and FE, as well as his receipt of funds from FGFS and other Forum Entities and subsequent expenditure of those funds on assets owned by him or his entities or individuals or entities associated with him.<sup>65</sup>

*The Fraudulent Documents and Fraudulent Transactions*

57. The Fraudulent Documents, and the purported signatures appearing on each of the forged documents, are identified in the Summary of Fraudulent Documents filed by SMBC.<sup>66</sup> Payments made in reliance on those Fraudulent Documents are set out in Summary of Payments to Flexirent and FE, and Summary of Payments to FEA.<sup>67</sup> The Fraudulent Documents include:

---

<sup>64</sup> Summary of Payments received from FEA (CB F.II.66 pF.II.28); Second Timpany Affidavit at Schedule A (CB D.II.29 pD.II.41).

<sup>65</sup> JP-10 (CB E.I.3).

<sup>66</sup> CB F.II.66 pF.II.12.

<sup>67</sup> CB F.II.63 pF.II.1; CB F.II.64 pF.II.3.

- (a) four Offer Letters made pursuant to the 2018 MRASA and described at paragraph 27, which referred to the forged TLAs;
- (b) 15 Offer Letters made pursuant to the 2020 MRASA and described at paragraph 30, which referred to the forged TLAs;
- (c) the corresponding forged TLAs to which the 19 Offer Letters relate which are purportedly signed by officers of Veolia and in relation to which those officers attest their fraudulent nature;<sup>68</sup>
- (d) 15 Certificates of Acceptance of Delivery issued between 23 July 2020 and 18 May 2021 which are purportedly signed by two officers of Veolia,<sup>69</sup> both of which have given evidence that the signatures which appear on such certificates were forged;<sup>70</sup>
- (e) various records of email correspondence between 30 July 2020 to 26 May 2021 purportedly between Mr Papas and officers of Veolia. Those officers who are purportedly the authors and recipients of those emails have given evidence which confirms the emails' fabrication;<sup>71</sup> and
- (f) Notice of Company's Authorised Signatories purportedly provided by Veolia on 6 November 2020 which bears the signature of two officers of Veolia.<sup>72</sup> Both officers whose signatures appear on that document give evidence that they did not sign the document and that it is forged.<sup>73</sup>

*The receipt of monies by the respondents*

58. Each of the respondents has received, or has caused to be paid to third parties for the relevant respondent's benefit, amounts paid by SMBC pursuant to the Scheme. The receipt of the monies, or payments for the benefit of the relevant respondent is

<sup>68</sup> Brar Affidavit at [11], [13], [16], [18] (CB D.II.27 pD.II.33); Kozlovic Affidavit at [8] (CB D.II.26 pD.II.29); Gaillard Affidavit at [4] (CB D.II.28 pD.II.38).

<sup>69</sup> Summary of Fraudulent Documents (CB F.II.66 pF.II.12).

<sup>70</sup> Brar Affidavit at [11], [13], [16], [18] (CB D.II.27 pD.II.33); Kozlovic Affidavit at [8] (CB D.II.26 pD.II.29).

<sup>71</sup> Brar Affidavit at [13] (CB D.II.27 pD.II.33); Kozlovic Affidavit at [9] (CB D.II.26 pD.II.29).

<sup>72</sup> Summary of Fraudulent Documents at item 36 (CB F.II.66 pF.II.12).

<sup>73</sup> Brar Affidavit at [11], [13], [16], [18] (CB D.II.27 pD.II.33); Kozlovic Affidavit at [8] (CB D.II.26 pD.II.29).

evidenced in the Liquidator's tracing evidence<sup>74</sup> and Westpac's Respondent Payment Summaries.<sup>75</sup>

59. FEA received \$83,993,909.47 directly from SMBC.<sup>76</sup> FE received \$29,709,714.14 of SMBC's money via Flexirent.<sup>77</sup>
60. A significant proportion of the amounts received by FEA and FE was transferred by FEA and FE into an account in the name of the fourth respondent, FGFS, with account number 082-080 27-105-8642 (**FGFS Account**), before being transferred to, or for the benefit of, the respondents. The amount of funding attributable to SMBC which made its way through the FGFS Account over the course of the Scheme is \$79,900,308.<sup>78</sup>
61. The total amount received by, or on behalf of, each respondent (other than FEA and FE) from the funds received by FEA and FE from SMBC is set out in the table at Annexure A to these submissions. In other words, Annexure A shows the traceable proceeds of SMBC's funds, and not the initial payments to FEA or to FE via Flexirent.
62. A practical limitation to the tracing analysis should be noted: with limited exceptions, the tracing exercise has not been pursued beyond the immediate or sometimes secondary recipient after FGFS. The payments to some of the recipients, for example FG, FE and FEA, are into mixed accounts which in turn have numerous other credit and debit transactions. Not every transaction has been traced to exhaustion. The likely consequence is that the tracing exercise underestimates receipts by other respondents, but as a matter of practicality those payments have not been further pursued.
63. The tracing exercise involves tracing through a fund (monies in the FGFS Account) which comprised money stolen from all three banks (Westpac, SMBC and Societe Generale). The usual presumptions as to tracing have been applied, with one matter to be explained. The tracing involves a day-by-day analysis, and as the FGFS account from time to time included money paid in by Forum companies which is not identified

---

<sup>74</sup> Tracing Model (JP-17) (CB E.I.3).

<sup>75</sup> CB F.I.9-60 pF.I.1.717. The preparation and source material for Westpac's Respondent Payment Summaries is explained in Westpac's opening submissions at [75] to [77] (CB B.1).

<sup>76</sup> Summary of Payments to FEA (CB F.II.64 pF.II.3).

<sup>77</sup> Summary of Payments to Flexirent and FE (CB F.II.63 pF.II.1).

<sup>78</sup> Second Preston Affidavit at [52] (CB E.I.2 pE.I.49); JP-17 (CB E.I.3).

as stolen money, the lowest intermediate balance rule has been applied.<sup>79</sup> As is conventional, where money has been wasted or is untraceable it is presumed to be the wrong-doer's money first (the Forum companies), but where the money can be traced to a recipient (particularly to an asset) the applicant banks' money is presumed to be paid to that recipient. Where money can be traced to a recipient, the banks have together traced that money on the basis that it was applied *pro rata* from the innocent banks' money in the FGFS account on the day of payment. That is, it is submitted, in accordance with the lowest intermediate balance rule as explained in *Caron v Jahani*, i.e. that each contributor to a fund is entitled to their rateable share calculated each time those shares change.<sup>80</sup> However, to make the analysis less cumbersome, the *pro rata* calculation has been done once per day, rather than after each and every transaction.

*The 2018 Representations and the 2020 Representations*

64. SMBC alleges at ASOC [30] that Mr Papas and FEA represented to SMBC that:
- (a) the transactions set out in the 2018 TLAs and their corresponding Offer Letters (together, the **2018 Transaction Documents**) were genuine;
  - (b) the 2018 TLAs had been executed by, and were binding on, Veolia;
  - (c) the 2018 Transaction Documents, and the security contemplated by them, were valid, binding and enforceable;
  - (d) the 2018 Transaction Documents were complete, accurate and not misleading;
  - (e) there was no fraud, dishonesty, misrepresentation or negligence on the part of FEA in connection with the selection and offer of the 2018 MRASA Transaction Documents; and
  - (f) the assets to be provided to Veolia to which the 2018 Transaction Documents related had been delivered to and duly accepted by Veolia on or before the payment of any money to Flexirent.

<sup>79</sup> See *Caron v Jahani (No 2)* [2020] NSWCA 117 (2020) 102 NSWLR 537.

<sup>80</sup> *Caron v Jahani* at [108], [179] (Bell P, Bathurst CJ and Macfarlan JA agreeing).



(collectively, the **2018 Representations**)

65. 2018 Representations (a) and (b) and (d) were necessarily made in providing the documents to Flexirent as though they were genuine and with the intention that they be provided to SMBC and that SMBC advance money in response to having received them. 2018 Representation (c) and (e) correspond with the representations that Flexirent was required to make under clause 6.2(b), (d) and (f) of the 2018 MRASA each time that Flexirent sent an Offer Letter to SMBC. 2018 Representation (f) arose by necessary implication from the inclusion in each of the 2018 TLAs of an Annexure bearing the apparent signature of an officer of Veolia listing product descriptions, serial numbers and location addresses of equipment, and corresponds with a representation that Flexirent was required to make under clause 6.3(c) of the 2018 MRASA.
66. That each of the 2018 Representations was false is amply demonstrated on the evidence already referred to above.
67. SMBC alleges at ASOC [79] that Mr Papas and FEA represented to SMBC that:
- (a) the transactions set out in the 2020 Master TLA Waste and the 2020 Master TLA Health, the Authorised Officer Certificate, the Offer Letters relying on the 2020 Master TLAs, and the TLA Schedules annexed to each Offer Letter (together, the **2020 Transaction Documents**) were genuine;
  - (b) the 2020 Master TLAs, the Authorised Officer Certificate and the TLA Schedules had been executed, and were binding on, Veolia;
  - (c) the 2020 Transaction Documents, and the security contemplated by them, were valid, binding and enforceable;
  - (d) the 2020 Transaction Documents were complete and accurate and not misleading;
  - (e) there was no fraud, dishonesty, misrepresentation or negligence on the part of FEA in connection with the selection and offer of the 2020 Transaction Documents; and

- (f) the assets to be provided to Veolia to which the 2020 Transaction Documents related had been delivered to and duly accepted by Veolia on or before the payment of any money to FEA.

(collectively, the **2020 Representations**).

68. 2020 Representations (a) and (b) and (d) were necessarily made in providing the documents to SMBC as though they were genuine and with the intention that SMBC advance money in response to having received them. 2020 Representation (c) and (e) correspond with the representations that FEA was required to make under clause 6.2(b), (d) and (f) of the 2020 MRASA each time that it sent an Offer Letter to SMBC. 2020 Representation (f) arose by necessary implication from the 2020 TLA Schedules which were apparently signed by an officer of Veolia and which gave product descriptions, serial numbers and location addresses of equipment, and it corresponds with a representation that Flexirent was required to make under clause 6.3(c) of the 2018 MRASA.
69. That each of the 2020 Representations was false is amply demonstrated on the evidence already referred to above.
70. The purpose of each of the 2018 Representations and 2020 Representations was to induce SMBC to pay the sums identified in each transaction to Flexirent or FEA. That the money was then used to the benefit of Mr Papas, the Forum group companies, and other individuals and entities associated with Mr Papas demonstrates the fraudulent purpose.
71. It follows that Mr Papas and FEA made the 2018 Representations and 2020 Representations with the knowledge that they were false, and with the intention that they should be acted upon by SMBC in a manner which would result in damage to SMBC.

*The knowledge of the relevant parties*

72. Knowledge of the Scheme is a necessary element to establish the liability of Mr Papas, FE and FEA in respect of some, but not all, of the claims against them.

73. A degree of knowledge of the Scheme is also a necessary element to establish the liability of the Papas Related Entities for the tort of unlawful means conspiracy, knowing receipt and knowing assistance.
74. As the requisite degree of knowledge differs in each cause of action, knowledge is addressed separately in the context of each cause of action below.
75. As to the attribution of knowledge from the individuals to the corporate defendants, under both Lord Hoffman’s approach to the corporate attribution of liability in *Meridian Global Funds Management Asia Ltd v Securities Commission*,<sup>81</sup> and under the ‘directing mind and will’ approach in *Baltic Shipping Company v Dillon*,<sup>82</sup> the mental state of Mr Papas, as director of each of the Papas Related Entities is to be attributed to each company by reason of his role in personally carrying out their business or undertakings.<sup>83</sup>
76. There is no need on SMBC’s case for attribution of knowledge to the Tesoriero Related Entities, as SMBC’s claims against them do not rely on knowledge, and the Tesoriero Related Entities do not rely on a defence that they were bona fide purchasers for value without notice.

*The conduct and role of the relevant parties*

77. Mr Papas performed numerous acts in furtherance of the Scheme, including:
- (a) signing the 2018 MRASA and 2020 MRASA;<sup>84</sup>
  - (b) acting as director of FEA and FE,<sup>85</sup> each of which had as its predominant corporate purpose to carry into effect the Scheme;

---

<sup>81</sup> [1995] 2 AC 500.

<sup>82</sup> (1993) 176 CLR 344.

<sup>83</sup> *Bernard Elsey Pty Ltd v Federal Commissioner of Taxation* (1969) 121 CLR 119 at 121 (Windeyer J).

<sup>84</sup> CB Part C SMB.001.001.0469.

<sup>85</sup> Westpac Corporate Summary (CB F.I.2 pF.I.1.77)

- (c) creating or causing to be created the false 2018 Transaction Documents and 2020 Transaction Documents and causing them to be submitted to SMBC and Flexirent;<sup>86</sup>
- (d) making the 2018 Representations and the 2020 Representations;
- (e) procuring FEA and FE to pay the amounts received from SMBC (and Flexirent) away to other corporate respondents and third parties;<sup>87</sup>
- (f) receiving himself, or through the Papas Related Entities, money the source of which was the Fraudulent Transactions.<sup>88</sup> The large sums of money were received by him and the corporate respondents with no honest explanation for their receipt; and
- (g) managing the respondent companies which purchased properties, the purpose of which was to acquire and own property financed in part through sums of money improperly obtained through the Fraudulent Transactions.

78. That Mr Papas performed these acts is seen from the matters set out at 38 to 54 above.

**B. SMBC's summary contentions in relation to each of the contested legal issues to the extent they relate to SMBC**

***Claims in Trust***

*Principles*

79. SMBC agrees with the statement of the relevant principles set out in Westpac's opening submissions at [115]-[125].

---

<sup>86</sup> See, eg, Summary of Fraudulent Documents at item 18 (CB F.II.66 pF.II.12); Part C SMB.001.001.2280.

<sup>87</sup> JP-17 (CB E.I.3).

<sup>88</sup> JP-17 (CB E.I.3).

*Receipt of Funds*

80. FEA and FE received the funds paid by SMBC as set out in SMBC's Summary of Payments to Flexirent and FE, and Summary of Payments to FEA.<sup>89</sup>

*Payment away of funds*

81. FEA and FE paid away the funds as set out in the Liquidator's Tracing Model, as discussed at paragraph 58 to 63 above.

***Money had and received****Principles*

82. In the alternative to the trust claims, SMBC relies on claims for money had and received. A victim of theft may recover stolen money from the thief in an action for money had and received.<sup>90</sup> Such claim may be relied on as alternatives to trust claims based on *Black v S Freedman*, and to knowing receipt and knowing assistance claims.<sup>91</sup>
83. In order to succeed in an action for money had and received, the plaintiff must establish that:
- (a) the respondent received money;
  - (b) the money was obtained by reason of a qualifying or vitiating factor by reason of which the enrichment of the defendant is treated by the law as unjust;<sup>92</sup> and
  - (c) the money which the respondent obtained was 'subtracted' from the applicant.<sup>93</sup>
84. By reason of the payments made by SMBC to Flexirent and FEA, and the subsequent payment of the traceable proceeds of that money to each of the respondents, the

<sup>89</sup> CB F.II.63 pF.II.1 and CB F.II.64 pF.II.3.

<sup>90</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 AC 548 at 559E-G (Lord Templeman); *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at [144] and [153] (Allsop P, Campbell JA and Handley AJA agreeing).

<sup>91</sup> *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732.

<sup>92</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [30] (French CJ, Crennan and Kiefel JJ).

<sup>93</sup> *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 75 (Mason J); *Shaw Building Group Pty Ltd v Narayan (No 2)* [2015] FCA 585 at [36] (Foster J).

respondents received money which was subtracted from SMBC. Equitable tracing may be used to establish receipt of money by a respondent.<sup>94</sup>

85. The qualifying of vitiating factor in this case, as it was in *Fistar v Riverwood Legion and Community Club Ltd*, is fraud.<sup>95</sup>

### ***Tort of unlawful means conspiracy***

#### *Principles*

86. SMBC agrees with the statement of the relevant principles set out in Westpac's opening submissions [128]-[138], and also notes that, with respect to the first element – that there is an agreement 'between two or more persons' – it is undisputed that the conspiracy can be between a natural person and a juristic person, and more specifically, between a company and its own directors.<sup>96</sup>

### ***Tort of deceit***

#### *Principles*

87. The essential elements of a claim in deceit are as follows:
- (a) a representation of fact (which can be as to the representor's opinion,<sup>97</sup> intention,<sup>98</sup> or the law<sup>99</sup>) that is conveyed to the claimant by the representor's words or conduct;<sup>100</sup>
  - (b) knowledge on the part of the representor that the representation is false, or failing that:
  - (c) the absence of a genuine belief that it is true; or

<sup>94</sup> *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 at [43] (Leeming JA, Bathurst CJ and Sackville AJA agreeing).

<sup>95</sup> (2016) 91 NSWLR 732.

<sup>96</sup> *Balkin & Davis Law of Torts* at [21.47]; *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] 1 All ER 188 (CA).

<sup>97</sup> *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337 at 346 (Gibbs J).

<sup>98</sup> *Jones v Dumbrell* [1981] VR 199, 200 (Smith J).

<sup>99</sup> *Public Trustee v Taylor* [1978] VR 289, 295 (Kaye J).

<sup>100</sup> *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706 at [38] (Sundberg J).

- (d) recklessness as to whether it is true or false;<sup>101</sup>
- (e) an intention on the part of the representor that the claimant (or a class including the claimant) should act upon the representation;<sup>102</sup>
- (f) actions by the claimant in reliance upon the representation;<sup>103</sup> and
- (g) damage as a result of that reliance.<sup>104</sup>

88. In the present circumstances, the 2018 Representations and the 2020 Representations satisfy the first element of the cause of action. Mr Papas, as the representor, had actual knowledge of the falsity of the representations in circumstances where he created, or caused to be created, the Fraudulent Documents to which the 2018 Representations and 2020 Representations related. Mr Papas' knowledge is also attributable to FEA.

*Reliance on Transaction Documents and Representations*

89. It is necessary for SMBC's claim in deceit as against FEA and Mr Papas that SMBC relied on the 2018 Representations and the 2020 Representations, and that the reliance produced in the mind of SMBC an erroneous belief that the documents and underlying transactions they documented were genuine, when they, in fact, were not.
90. SMBC's reliance on the 2018 Representations and 2020 Representations is seen from the structure of the 2018 MRASA and the 2020 MRASA, under both of which SMBC would rely on the Offer Letters and other documents provided to it to advance money to Flexirent and FEA. It is plain that SMBC relied on the documents and the representations conveyed by FEA and Mr Papas. It paid away very large sums of money, and it would not have done so if it were not for the representations contained in the Fraudulent Documents.

*Deceit claims*

<sup>101</sup> *Derry v Peek* (1889) 14 App Cas 337.

<sup>102</sup> *Jones v Dumbell* [1981] VR 199 at 204 (Smith J); *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337, 341-2 (Menzies J).

<sup>103</sup> *Gould v Vaggelas* (1985) 157 CLR 215.

<sup>104</sup> *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at [64]-[65] (Gummow J).

91. The deceit claims are advanced against Mr Papas and FEA, as it was Mr Papas and FEA that made the 2018 Representations and the 2020 Representations. There is no difficulty in attributing the dishonest representations to both Mr Papas and the company. In *Standard Chartered Bank v Pakistan National Shipping Corporation (No 4)*, Lord Hoffmann stated:<sup>105</sup>

Mr Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representations and his knowledge. He was the only human being involved in making the representation to SCB (apart from administrative assistance like someone to type the letter and carry the papers round to the bank).

92. The evidence already referred to establishes each element of the deceit claims. Judgment for the whole of SMBC's losses should be entered against FEA and Mr Papas.

### ***Misleading or deceptive conduct or false or misleading conduct***

#### *Principles*

93. Section 18(1) of the *Australian Consumer Law (ACL)* applies to conduct that is misleading or deceptive or likely to mislead or deceive. The conduct must lead, or be capable of leading, a person into error and the error or misconception must result from the conduct of the person.<sup>106</sup> Similar provisions are also contained within s 12DA(1) of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)* and s 1041H(1) of the *Corporations Act 2001 (Cth) (Corporations Act)* insofar as the conduct relates to financial products or financial services. By reason of s 131A of the *Competition and Consumer Act 2010*, s 18 of the ACL does not apply to the supply of financial products or financial services.
94. Further ss 29(1)(a), (b) and (d) of the ACL prohibit false or misleading representations in trade or commerce about (a) the standard, quality or value of goods, (b) the standard

<sup>105</sup> [2003] 1 All ER 173 at [20] (Lord Hoffmann).

<sup>106</sup> *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [102]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [39].



quality, value or grade of services, and (d) that a particular person has agreed to acquire goods or services.

95. Similarly, s 12DB(1)(a) and (b) of the ASIC Act prohibit false or misleading representations in trade or commerce about (a) the standard, quality, value or grade of services, and (b) that a particular person has agreed to acquire services.
96. Whether an applicant has relied on certain conduct can be inferred, and such an inference may be drawn more readily where the representor's business benefits from creating such an impression.<sup>107</sup>

*Accessory to the conduct*

97. By s 2 of the ACL and s 79 of the Corporations Act, a person is involved in a contravention if the person, among other things, has aided, abetted, counselled or procured the contravention, or has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention. The same definition of involvement set out in s 79 of the Corporations Act applies to the ASIC Act by reason of s 5(2)(b) of the ASIC Act.<sup>108</sup>
98. A person will be knowingly concerned in a statutory contravention if the person has knowledge of the essential elements of the contravention (although it is not necessary to show that the person knew the conduct amounts to a contravention).<sup>109</sup>

*The respondents' conduct*

99. The conduct of FEA and Mr Papas giving rise to the misleading or deceptive conduct, or false or misleading conduct, concerns the preparation and provision of the Fraudulent

<sup>107</sup> *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [55] (French CJ, Crennan, Bell and Keane JJ).

<sup>108</sup> *ASIC v M101 Nominees Pty Ltd (No 3)* [2021] FCA 354 at [391] (Anderson J); *Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC* (2020) 143 ACSR 241; [2020] NSWSC 61 at [69] (Hammerschlag J).

<sup>109</sup> *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661; *Lifepan Australia Friendly Society Ltd (ACN 087 649 492) v Ancient Order of Foresters in Victoria Friendly Society Ltd (ACN 087 648 842)* [2017] FCAFC 74; (2017) 120 ACSR 421 at [104].

Documents, and the making of each of the 2018 Representations and 2020 Representations to SMBC, which arose from the presentation of those documents.

100. The reasoning in relation to the deceit claims set out above applies equally to the misleading or deceptive conduct or false or misleading conduct causes of action.

### ***Knowing receipt***

#### *Principles*

101. Under the first limb of *Barnes v Addy*, a third party who receives trust property which has been misapplied by the trustee, with knowledge at the time of receipt that the property was trust property and that it was misapplied, is chargeable with that property and holds it on trust for the true owner.<sup>110</sup>
102. SMBC agrees with the statement of the relevant remedies set out in Westpac's opening submissions at [154]-[155].
103. The monies paid by SMBC and fraudulently obtained by FEA and FE, and their traceable proceeds, is trust property at every stage until received by a bona fide purchaser for value without notice of its fraudulent nature. All corporate respondents in the present proceedings received the funds, or its traceable proceeds.<sup>111</sup> Mr Papas, as the directing mind and will of each of the corporate respondents but for the Tesoriero Related Entities,<sup>112</sup> had actual knowledge that the funds and its traceable proceeds were trust property which had been misapplied, and therefore, his knowledge is to be attributed to those entities so as to establish knowledge for the purposes of the first limb of *Barnes v Addy*.

---

<sup>110</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [112] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Simmons v NSW Trustee and Guardian* [2014] NSWCA 405 at [86]-[88] (Beazley P, Barret and Gleeson JJA).

<sup>111</sup> JP-18 (CB E.I.3).

<sup>112</sup> Westpac Corporate Summary (CB F.I.2 pF.I.1.77).

## ***Knowing assistance***

### *Principles*

104. Under the second limb of *Barnes v Addy*, a person who assists a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary is liable as though they were the trustee or fiduciary.<sup>113</sup>
105. Liability under the second limb will be established if it can be established that the third party had knowledge within the first four categories of the *Baden* scale.<sup>114</sup> Only the first category of actual knowledge is relevant to SMBC's case.
106. The Scheme was fraudulent and dishonest. On receipt of the monies paid by SMBC, FEA and FE held those funds on trust. The payment away, as part of the Scheme, was fraudulent and dishonest. As the knowledge of Mr Papas is attributable to the Papas Related Entities, which then used and benefited from the stolen money, these respondents had actual knowledge that the Scheme was fraudulent and dishonest.

## ***Claims against FEA***

### *Trust*

107. As set out at paragraph 30 above, FEA received \$83,993,909.47 directly from SMBC. It follows from the principles set out above, and that the fraud was perpetrated as alleged, that FEA held those funds on trust for SMBC (a *Black v S Freedman* trust) and is obliged to account to SMBC for those funds, including funds paid away. A question may have arisen as to whether SMBC is required to give an allowance for the notional repayments it received (totalling \$30,556,390.00), but that question does not arise because SMBC seeks relief only in respect of the net amount (being \$53,437,519.47), plus interest. To the extent that FEA retains any of those funds, it holds them on trust for SMBC.

<sup>113</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [160] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>114</sup> *Farah Constructions* at [177]-[178]; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 398 (Gibbs J), 412 (Stephen J), referring to *Baden v Societe Generale pour Favoriser le Development du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161 at 235.

*Money had and received*

108. In the alternative to the trust claim, SMBC alleges that FEA is liable to pay \$53,437,519.47 to SMBC as money had and received.<sup>115</sup>

*Contract*

109. SMBC alleges that FEA breached the 2020 MRASA because the representations and warranties given by it under the 2020 MRASA were untrue. Those representations and warranties are set out in the ASOC at [142]. In summary, the representations were to the effect that there was no fraud, each receivable was valid and binding, there was no reason to believe the receivables would not be paid, and the underlying assets existed and were owned by FEA. The representations and warranties were false. Accordingly, FEA breached the contractual terms under which the representations and warranties were made. As a consequence, SMBC suffered loss of \$53,437,519.47 (being all of the amounts that it had paid to FEA, less the amounts paid to it by FEA). It has not been possible to fully determine exactly which of the amounts paid by FEA were referable to the 2018 arrangements and which were referable to the 2020 arrangements. SMBC has therefore given an allowance on this claim for the full amount paid by FEA, regardless of whether it was paid in respect of the 2018 or 2020 arrangements.

*Unlawful means conspiracy*

110. The conspiracy is described in paragraphs 38 to 54. FEA had two roles in the conspiracy. First, it was a party to both the 2018 contractual arrangements with Flexirent and SMBC and the 2020 contractual arrangements with SMBC, and it was FEA that was said to have entered into the TLAs with Veolia that were the subject of the Fraudulent Documents. Secondly, FEA received, used and disbursed the money stolen from SMBC under the 2020 arrangements. In both of these ways, it participated in and was a party to the conspiracy. FEA had an intent to injure SMBC by submitting the Fraudulent Documents, and as a result of which, SMBC has suffered loss and damage.

---

<sup>115</sup> ASOC at [123] (CB A.III.18).

111. The loss and damage claimed by SMBC is \$83,147,233.61 (being \$29,709,714.14 that SMBC paid to FE via Flexirent, plus \$83,993,909.47 that SMBC paid directly to FEA, less \$30,556,390.00 that FEA paid to SMBC).

*Deceit*

112. That FEA committed the tort of deceit is established by:
- (a) FEA making the 2018 Representations and the 2020 Representations;
  - (b) the representations being false;
  - (c) the representations having been made with the intention that they should be acted upon by SMBC in a manner which would result in damage to SMBC;
  - (d) SMBC relying on the representations, and forming an erroneous belief that the Fraudulent Documents and the underlying transactions were genuine; and
  - (e) SMBC paying to FEA the amounts pleaded.
113. By reason of the commission of the tort of deceit, SMBC suffered the loss of \$83,147,233.61 already identified.

*Misleading or deceptive conduct or false or misleading conduct*

114. It likewise follows from FEA making the 2018 Representations and the 2020 Representations and providing those representations to SMBC via Flexirent and directly, that FEA engaged in conduct, in trade or commerce, that was misleading or deceptive in contravention of:
- (a) s 18 of the ACL (so far as the conduct was not in relation to financial services); and
  - (b) 1041H(1) of the Corporations Act and s 12DA of the ASIC Act (so far as the conduct was in relation to financial services).
115. Further, to the extent that representations concerned the existence of the receivables or the equipment leases purportedly provided to Veolia as binding and valid obligations, FEA engaged in conduct in breach of ACL, s 29(1)(b) by making false representations

in connection with the supply of services that the services are of a particular standard, quality or value. To the extent the representations concerned the supply of equipment to Veolia, FEA engaged in conduct in breach of ACL, ss 29(1)(a) and (d) by making false representations as to the standard, quality or value of goods, and that a particular person (Veolia) has agreed to acquire the goods.

116. If and to the extent that the either the equipment leases or the receivables are financial services then s 12DB(1)(a) and (b) are engaged for the same reasons as those just given.

#### *Conclusion*

117. Judgment should be entered against FEA in the amount of \$83,147,233.61 plus interest, subject to an allowance for the various recoveries arising from the other claims over assets or funds. It should also be declared that, consistently with FEA's obligation to account, it holds such assets as it has on constructive trust for SMBC.

#### ***Claims against FE***

##### *Trust*

118. As set out at paragraph 27 above, FE received \$29,709,714.14 indirectly from SMBC. It follows from the principles set out above, and that the fraud was perpetrated as alleged, that FE held those funds on trust for SMBC (a *Black v S Freedman* trust) and is obliged to account to SMBC for those funds, including funds paid away. To the extent that FE retains any of those funds, it holds them on trust for SMBC.

##### *Money had and received*

119. In the alternative to the trust claim, SMBC alleges that FE is liable to pay \$29,709,714.14 to SMBC as money had and received.<sup>116</sup>

##### *Knowing receipt*

120. FE received \$29,709,714.14 stolen from SMBC. It had the requisite knowledge of the dishonest and fraudulent design of Mr Papas, as Mr Papas was the sole director of FE.

---

<sup>116</sup> ASOC at [123] (CB A.III.18).

By reason of these matters, SMBC has suffered loss and damage. FE is liable to pay equitable compensation to SMBC in the sum of \$29,709,714.14.

*Unlawful means conspiracy*

121. The conspiracy is described in paragraphs 38 to 54. FE's liability to SMBC in the tort of unlawful means conspiracy derives from FE's role as party to the Scheme Agreement. The knowledge and control of it by its director, Mr Papas, is attributed to it and the fact of its receipt, use and disbursement of money stolen from SMBC means it participated in and was a party to the conspiracy. The Scheme Agreement was entered into with the intent to injure SMBC. As a result, SMBC has suffered loss and damage in the amount of \$83,147,233.61, being the entire sum that SMBC has lost as a result of the conspiracy. For this purpose, the conspiracy is not limited to the amount that FE received. Alternatively, if the loss is properly limited only to the amount that FE received, the loss is \$29,709,714.14.

*Conclusion*

122. Judgment should be entered against FE in the amount of \$83,147,233.61 plus interest, subject to an allowance for the various recoveries arising from the other claims over assets or funds that SMBC has identified. It should also be declared that, consistently with FE's obligation to account, it holds such assets as it has on constructive trust for SMBC.

***Claims against Mr Papas***

*Trust*

123. As set out above in the Tracing Model, and in Westpac's Respondent Payment Summaries, \$284,742.91 of SMBC's funds have been traced to Mr Papas (directly, in contrast to companies that he owned or controlled). It follows from the principles set out above in relation to trusts, and from the fraud that was perpetrated by Mr Papas, that Mr Papas held the funds that he received on trust for SMBC and is obliged to account to SMBC for those funds, including funds paid away. To the extent that Mr Papas retains any of those funds, he holds them on trust for SMBC.

*Money had and received*

124. In the alternative to the trust claim, SMBC alleges that Mr Papas is liable to pay \$284,742.91 to SMBC as money had and received.<sup>117</sup>

*Knowing assistance*

125. Mr Papas caused FEA and FE to pay to FGFS and to other Forum group companies the money FEA and FE had received from SMBC. Mr Papas then caused FGFS to pay amounts to himself, to companies owned or controlled by him, and to his associates.
126. By reason of his knowledge of and participation in the fraudulent appropriation of those amounts, as well as the fact that the entities involved had no legitimate business entitling them to use the amounts they had received, Mr Papas had actual knowledge that the amounts were dishonestly obtained and paid by FEA or FE to FGFS in breach of their obligations to SMBC as trustees of the respective funds.
127. The evidence set out at paragraphs 39 to 54 above is sufficient for the Court to be satisfied that Mr Papas had the requisite knowledge. In those circumstances, Mr Papas knowingly assisted the breaches of obligations which FEA owed to SMBC as trustee of stolen funds. By reason of these matters, SMBC has suffered loss and damage and Mr Papas is liable to pay equitable compensation to it. SMBC is entitled to judgment against Mr Papas in the sum of \$83,147,233.61.

*Knowing receipt*

128. Having received \$284,742.91 of the traceable proceeds personally, Mr Papas is also liable to account to SMBC for that amount, or to pay equitable compensation.

*Unlawful means conspiracy*

129. The conspiracy is described in paragraphs 38 to 54. Mr Papas is liable to SMBC in the tort of unlawful means conspiracy by reason of his involvement as a creator of, and party to, the Scheme Agreement, and his conduct in furtherance of the Scheme Agreement as detailed at paragraph 77. His intent to injure SMBC is evident from his

---

<sup>117</sup> ASOC at [123] (CB A.III.18).



actions: the intent to injure is the converse of his intention to benefit himself. As a result, SMBC has suffered loss and damage in the amount of \$83,147,233.61.

*Deceit*

130. That Mr Papas committed the tort of deceit is established by:
- (a) him making the 2018 Representations and the 2020 Representations;
  - (b) that they were false;
  - (c) that they were made with knowledge of their falsity;
  - (d) that they were made with the intention that they should be acted upon by SMBC in a manner which would result in damage to SMBC;
  - (e) SMBC relied on the representations, forming an erroneous belief that the Fraudulent Documents and the underlying transactions were genuine; and
  - (f) SMBC paid away the amounts pleaded.
131. By reason of the commission of the tort of deceit, SMBC suffered the loss already identified.

*Misleading or deceptive conduct or false or misleading conduct*

132. It likewise follows from Mr Papas making the 2018 Representations and the 2020 Representations and providing those representations to SMBC via Flexirent and directly, that Mr Papas engaged in conduct, in trade or commerce, that was misleading or deceptive in contravention of s the ACL, the Corporations Act and the ASIC Act.
133. The application of each statutory provision to the relevant aspects of the representations is addressed above at paragraphs 114 to 116 in relation to FEA. The same applies equally to Mr Papas.
134. Alternatively, Mr Papas aided, abetted, procured and was knowingly concerned in FEA's misleading and deceptive conduct due to Mr Papas role in devising and carrying out the Scheme.

*Conclusion*

135. Judgment should be entered against Mr Papas in the sum of \$83,147,233.61, plus interest and costs. A declaration should be made that he holds the sum of, or assets to the value of, \$284,742.91 on trust for SMBC (being the traceable proceeds that he personally received). Of course, SMBC cannot make double recovery. The amounts held on trust should be deducted from the money judgments to which SMBC is entitled. Further, as the liability is in equity, it should be declared that he holds all his assets, to the net balance, on constructive trust for SMBC.

*Claims against the Papas Related Entities**Trust*

136. As set out in the Tracing Model, and in Westpac's Respondent Payment Summaries, SMBC's funds have been traced to each of the Papas Related Entities (except for Imagetec FS, to which no funds were traced in the final version of the Tracing Model). The relevant amounts are set out in Annexure A. It follows from the principles set out above in relation to trusts, and from the fraud that was perpetrated on SMBC, that the Papas Related Entities hold the funds that they each received on trust for SMBC and they are obliged to account to SMBC for those funds, including funds paid away.

*Money had and received*

137. In the alternative to the trust claim, SMBC alleges that each of the Papas Related Entities is liable to pay the relevant amount to SMBC as money had and received.<sup>118</sup>

*Knowing receipt*

138. By reason of Mr Papas knowledge of and participation in the fraudulent appropriations from SMBC, as well as the fact that Papas Related Entities had no legitimate business entitling them to use the amounts they had received, Mr Papas had actual knowledge that the amounts were dishonestly obtained and paid away in breach of FEA and FE's obligations to SMBC as trustees of the respective funds. That knowledge of Mr Papas

---

<sup>118</sup> ASOC at [123] (CB A.III.18).

is attributable to each of the Papas Related Entities through his directorships and control of them.

139. In those circumstances, each of the Papas Related Entities was a knowing recipient of the traceable proceeds of the funds, as set out in Annexure A. Each Papas Related Entity held the funds it so received on trust, and it is liable to account to SMBC for them, or to pay equitable compensation.

*Unlawful means conspiracy*

140. The conspiracy is described in paragraphs 38 to 54. Each of the Papas Related Entities was a party to the Scheme Agreement. The knowledge of Mr Papas is attributed to each of the Papas Related Entities, and the fact of each Papas Related Entity's receipt, use and disbursement of money stolen from SMBC means that it participated in and was a party to the conspiracy. The Scheme Agreement, to which each of the Papas Related Entities was party, was entered into with the intent to injure SMBC. As a result, SMBC has suffered loss and damage in the amount of \$83,147,233.61, being the entire sum that SMBC has lost as a result of the conspiracy. For this purpose, the conspiracy is not limited to the amount that FE received. Alternatively, if the loss is properly limited only to the amount that FE received, the loss for each Papas Related Entity is the amount that it received, as set out in Annexure A.

*Conclusion*

141. Judgment should be entered against each of the Papas Related Entities in the amount of \$83,147,233.61 plus interest, subject to an allowance for the various recoveries arising from the other claims over assets or funds that SMBC has identified. It should also be declared that, consistently with the Papas Related Entities' obligations to account, they hold such assets as they have on constructive trust for SMBC.

***Claims against the Tesoriero Related Entities***

*Trust*

142. As set out in the Tracing Model, and in Westpac's Respondent Payment Summaries, SMBC's funds have been traced to each of the Tesoriero Related Entities. The relevant

amounts are set out in Annexure A. It follows from the principles set out above in relation to *Black v S Freedman* trusts, and from the fraud that was perpetrated on SMBC, that the Tesoriero Related Entities held the funds that they each received on trust for SMBC. The Tesoriero Related Entities have been liable to account for the property since receiving notice, actual or constructive, of the fraud. Such knowledge was acquired by the Tesoriero Related Entities, through Mr Tesoriero, at the latest by early July 2021 after Westpac had commenced the Westpac Proceedings on 28 June 2021. The evidence relied on by Westpac in this proceeding may establish that Mr Tesoriero, and through him the Tesoriero Related Entities have had knowledge of the fraud throughout.

143. The traceable proceeds received by each of the Tesoriero Related Entities are set out in Annexure A. The Tesoriero Related Entities are obliged to account to SMBC for so much of the traceable proceeds as remained in their hands when they acquired knowledge, actual or constructive, of the fraud.

*Money had and received*

144. In the alternative to the trust claim, SMBC alleges that each of the Tesoriero Related Entities is liable to pay the relevant amount to SMBC as money had and received.<sup>119</sup>

*Conclusion*

145. Judgment should be entered against each of the Tesoriero Related Entities in the amount of traceable proceeds received by them as set out in Annexure A that remained in their hands when they acquired knowledge of the fraud. It should also be declared that such traceable proceeds as they still hold are held on trust for SMBC.

---

<sup>119</sup> ASOC at [123] (CB A.III.18).

**C. Relief**

146. SMBC will separately more precisely identify the relief sought against each respondent.

**M Izzo SC**  
Eleven Wentworth  
[mizzo@elevenwentworth.com](mailto:mizzo@elevenwentworth.com)  
Ph: 9221 1977

**E L Beechey**  
[beechey@newchambers.com.au](mailto:beechey@newchambers.com.au)  
Ph: 9151 2021

5 December 2022

**Annexure A - Payments to, or on behalf of each Respondent (Receipts Table)**

<b>Respondent</b>	<b>Total Amount</b>	<b>Amount of SMBC Funds</b>
5 Bulkara St	\$3,487,428.13	\$444,268.83
6 Bulkara St	\$4,809,830.00	\$1,438,895.72
23 Margaret St	\$878,355.32	\$187,348.86
26 Edmonstone Rd	\$2,023,347.36	\$141,973.32
64-66 Berkeley St	\$1,774,931.12	\$1,011,742.93
286 Carlisle St	\$1,470,499.84	\$539,705.74
Forum Finance	\$3,758,234.76	\$747,219.96
Forum Fleet	\$290,000	\$190,000
FGFS	\$2,286,387.22	\$261,700.03
FG	\$150,656,759.23	\$27,440,745.59
Imagetec FS	\$0	\$0
Imagetec Solutions	\$2,897,330	\$1,385,211
Intrashield	\$1,227,216.34	\$50,822.69
Iugis UK	\$2,343,417.04	\$666,690.08
Iugis Energy Greece	\$558,421.82	\$437,226.15
Iugis Greece	\$770,305.38	\$291,617.73
Iugis Holdings UK	\$4,285,855.56	\$1,227,033.75
Iugis Waste	\$1,153,000	\$1,010,820
Iugis	\$19,626,861.58	\$5,112,760.03
Mazcon	\$14,264,185.26	\$5,630,923.04
Palante	\$3,168,587.66	\$357,251.50
Mr Papas	\$3,503,875.10	\$284,742.91
Spartan	\$1,794,583.23	\$284,868.53
TFGC	\$11,102,895.52	\$3,416,089.07
<b>TOTAL</b>	<b>\$238,132,307.47</b>	<b>\$52,559,657.46</b>