

**Societe Generale v Forum Finance Pty Limited (In Liquidation) & Ors**

**Federal Court of Australia Proceeding No. NSD642/2021**

**Applicant's Written Outline of Closing Submissions**

**PART A: INTRODUCTION**

1. The applicant (**SG**) is a multinational investment bank and financial services company. It advanced money to the first respondent (**Forum Finance**) on three occasions after Forum Finance/the second respondent (**Mr Papas**) submitted various transaction documents representing a state of affairs that was false, misleading or deceptive. That state of affairs was that Veolia Environmental Services (Australia) Pty Ltd (**Veolia**) had purchased waste digesters from Forum Finance, which Veolia had received and had agreed to pay for. The representations were put forward to SG to obtain money from it on the pretence the money would be used to fund the purchases.
2. Assuming that state of affairs to be true, SG advanced a total of \$8,987,198 to Forum Finance in three transactions (collectively, the **SG Payments**): on 9 March 2021 for \$4,128,757 (*Affidavit of Gregory Thong sworn on 30 June 2021 (Thong 1) at [13] (CB tab D1); and Ex. GT-8 (CB tabs C18 and C19); Affidavit of Nicolas Dumont sworn on 8 February 2022 (Dumont) at [34] (CB tab D4); Forum Finance Bank Statement Extracts (FF Statements) (CB tab C75)*); on 7 May 2021 for \$2,299,539 (*Thong 1 [23] (CB tab D1) and Ex GT-12 (CB tab C43); Dumont [39] (CB tab D4); FF Statements (CB tab C75)*); and on 24 May 2021 for \$2,558,902 (*Thong 1 [35] (CB tab D1) and Ex GT-18 (CB tab C59); Dumont [41] (CB tab D4); FF Statements (CB tab C75)*). It did so pursuant to the terms of the Receivables Acquisition and Servicing Agreement between SG, Forum Finance and EQWE Pty Ltd (**EQWE**), the equipment financing broker (**Master Agreement**).
3. That state of affairs was untrue. Veolia never agreed to purchase such waste digesters and never received them. Indeed, it is unclear whether the waste digesters even existed.
4. The main protagonist for representing that state of affairs to SG was Mr Papas, then a director and a controlling mind of Forum Finance and the third respondent (**FGFS**): *Thong 1 at [3]-[6(a)] (CB tab D1); Ex. GT-1 (CB tab C63), GT-2 (CB tab C64) and GT-3 (CB tab C73); Affidavit of Ian Timothy Bolster sworn on 9 August 2022 (Bolster 1) Ex. ITB-22 (CB tab C137) and ITB-23 (CB tab C138)*.
5. On each day Forum Finance received money from SG, it transferred all that money to FGFS (as addressed further in [44] below). From there, the money was transferred to and used for the

benefit of various entities, including Forum Finance, FGFS, Mr Papas and/or other companies within the corporate group, or affiliated with those companies or Mr Papas: *Affidavit of Jason Preston sworn 10 June 2022 (Preston 2) at [33], [36], [39], [41], [44], [52], [55], [56], [57], [61] (MIN.5000.0006.1616) and Ex. JP-15 (JP-15 (Revised Tracing Model)(520489107.1)) and JP-17 (JP-17 (Alternative Tracing Model)(520489108.1))*.

6. SG seeks declarations, equitable compensation and damages.
7. The respondents are aware of the proceedings and have been served with all material: *Bolster 1 (summarised at [5]) (CB tab D7) and its exhibits; Affidavit of Ian Timothy Bolster sworn on 18 October 2022 (CB tab D8) and its exhibits*. The corporate respondents were relieved from filing defences. Mr Papas was not. He did not file a defence. None of the respondents have put forward any evidence.
8. The corporate respondents have appeared at the hearing. Whilst Mr Papas has not appeared:
  - (a) on 8 February 2023, the Court having been satisfied that Mr Papas had been served with all relevant material and was aware of the hearing made an order pursuant to rule 30.21(1)(b)(i) of the *Federal Court Rules 2011 (Cth)* that the hearing of the proceeding was to proceed generally in the absence of Mr Papas; and
  - (b) Mr Papas was served with a copy of the Rule 30 order together with additional documents that came to comprise SG's court book (*Affidavit of Julian Zoller sworn on 20 February 2023 and its exhibits*) and still chose not to appear.
9. The absence of defences means SG needs to address in this closing every issue - albeit briefly.
10. Having regard to the above matters, the primary claims and remedies SG seeks to pursue against each of the respondents are as follows:
  - (a) As against Forum Finance, SG advances a primary claim of breach of fiduciary duties and seeks the remedies of equitable compensation and a declaration of trust. To the extent that SG (contrary to its submissions) is unsuccessful in its claims then it relies on its claim for misleading or deceptive conduct.
  - (b) As against Mr Papas, SG advances a primary claim of knowing assistance, seeking the remedies of equitable compensation. To the extent that SG (contrary to its submissions) is unsuccessful in its claims then it relies on its claim for and misleading or deceptive conduct.

- (c) As against FGFS, SG advances a primary claim of breach of fiduciary duties, seeking the remedies of equitable compensation and a declaration of trust. To the extent that SG (contrary to its submissions) is unsuccessful in that claim, then it relies on its claim for knowing receipt.
11. SG does not press its claim for the tort of injurious falsehood. Further, in light of the primary claims and secondary claims set out above, the evidence and the position of the respondents, SG's claims for breach of contract, false or misleading representations, the tort of deceit, the tort of conspiracy by unlawful means and (in respect of FGFS) knowing assistance do not need to be considered.
12. SG's approach to its claims as set out above reflect practical and commercial considerations. It is not indicative of SG's consideration as to its prospects of success in respect of its other claims.
13. Having regard to the above matters, SG's submissions are structured as follows:
- (a) **Part B** sets out the background facts (p3).
  - (b) **Part C** sets out the impugned conduct (p13).
  - (c) **Part D** sets out the true state of affairs (p14).
  - (d) **Part E** sets out the head of loss and damage suffered by SG (p15).
  - (e) **Part F** sets out SG's primary claim against Forum Finance for breach of fiduciary duties and trust (p16) and its secondary claim for misleading or deceptive conduct (p19);
  - (f) **Part G** sets out SG's primary claim against FGFS for breach of fiduciary duties and trust (p21) and its secondary claim for knowing receipt (p23);
  - (g) **Part H** sets out SG's primary claim against Mr Papas for knowing assistance and trust (p24) and its secondary claim for misleading or deceptive conduct (p26).
  - (h) **Part I** addresses the questions of interest and costs: p27.

## **PART B: THE BACKGROUND FACTS**

### **Parties**

14. The respondents operated within a larger group of entities (the **Forum Corporate Group**) that ran a business that, relevantly, sold waste digesters: *Thong 1* [6], [10] (CB tab D1) and *Ex. GT-4* (CB tab C72); *Affidavit of Jason Ireland affirmed 9 June 2022 (Ireland)* at [7] (SMB.500.001.0001). Although FGFS did not share the same ultimate holding company with

Forum Finance and other companies in the group, Mr Papas was nevertheless a shareholder and director of that business.

15. To fund the acquisition of waste digesters by customers, members of the Forum Corporate Group obtained equipment financing by, relevantly, selling and assigning customer receivables to financiers: *Ireland at [7]-[8] (SMB.500.001.0001)*.
16. The equipment financing arrangements with SG were brokered by EQWE: *Thong 1 [7] (CB tab D1) and Ex. GT-5 (CB tab C2)*. The overall arrangement between EQWE, SG and Forum Finance was contained in:
  - (a) the Master Agreement dated 6 November 2020: *Thong 1 [9], [10] (CB tab D1) and Ex. GT-6 (CB tab C3)*; and
  - (b) the EQWE Specific Servicing Guidelines between SG and EQWE (**Servicing Guidelines**): *Thong 1 [7] (CB tab D1) and Ex. GT-5 (CB tab C2)*.
17. Those relevantly involved within SG were Gregory Thong (**Mr Thong**), SG's then Head of Corporate Coverage – Australia & New Zealand, and Nicolas Dumont (**Mr Dumont**), SG's then Front Office Originators – Structured Solutions & Leasing: *Affidavit of Gregory Thong sworn on 14 December 2021 (Thong 2) at [1], [4]-[10] (CB tab D3); Dumont [6]-[9] (CB tab D4)*.
18. The relevant persons within EQWE were Luke Price (**Mr Price**) and Katrina Constable (**Ms Constable**).

#### **Servicing Guidelines and Master Agreement**

19. To consider the representations and their misleading nature, and the reliance placed on those representations, it is necessary to have regard to the Master Agreement. It contained provisions regulating, among other things, Forum Finance's offers to sell to SG, and SG's acceptances from Forum Finance, of "Offered Receivables".
20. Pursuant to the Master Agreement (*CB tab C3*), Forum Finance was able to offer to sell "Offered Receivables" to SG by delivering an "Offer Notice" to SG (Clause 2.1).
21. An "Offer Notice" was to set out the details of the account receivables (defined as the "Offered Receivables" (Clause 1.1 of each Offer Notice)) being offered for sale to SG. The template "Offer Notice" required to be provided (Annexure A to the Master Agreement) contained certain acknowledgements, agreements and confirmations by Forum Finance. The Offer Notices the subject of the three transactions are addressed further in paragraphs 30 and 33 below.

22. After receiving an Offer Notice, SG was able to accept the offer by paying to Forum Finance the “Discounted Amount” in the manner described in clause 2.1(h) (Clause 2.1(e) of the Master Agreement). The “Discounted Amount” was a figure less than the full price owing by Veolia (i.e. the “receivables”) for goods being supplied to Veolia (i.e. the waste digesters).
23. Forum Finance’s ability to give an Offer Notice was subject to, among other things, it also providing:
- (a) An executed Payment Schedule (**Payment Schedule**) (clause 7.1(b)(i) of the Master Agreement). The Payment Schedules the subject of the three transactions are addressed further in paragraphs 30, 32 and 37(c) below.
  - (b) An executed Notice of Assignment (**Notices of Assignment**) (clause 7.1(b)(ii) of the Master Agreement). The Notices of Assignment the subject of the three transactions are addressed further in paragraphs 36(a) and 37 below.
  - (c) A registered financing statement on the Personal Property Securities Register (**Verification Statements**) (clause 7.1(b)(v)). The Verification Statements the subject of the three transactions are addressed further in paragraphs 36(b) and 38 below.
24. In addition, Forum Finance also provided executed Certificates of Acceptance of Delivery (**Certificates of Acceptance**), although the Certificate of Acceptance for the third transaction was not passed on by EQWE to SG. The Certificates of Acceptance the subject of the three transactions are addressed further in paragraphs 30, 34 and 35 below.
25. Pursuant to the Master Agreement and each Offer Notice:
- (a) SG was to receive the full amount of the “Offered Receivables” (being the receivables that had arisen under the relevant Payment Schedules and set out in the Offer Notice) (Clause 2.1(a) of the Master Agreement – *Thong 1 Ex. GT-6 (CB Tab C3)* and Clauses 1.1 and 2 of the Offer Notices – see e.g. *Thong 1 Ex. GT-7 (CB tab C10)*).
  - (b) SG was to pay the “Discounted Amount” less the “Receivable Retention Amount” (Clause 2.1(i): *Thong 1 Ex. GT-6 (CB tab C3)*). The “Receivable Retention Amount” was an amount worked out in accordance with the formula in Clause 2.1(i) of the Master Agreement. Broadly, it was the net present value of the aggregate of the last 3 payments that were to be made by Veolia. In effect the “Receivables Retention Amount” operated as a further discount to the face value of the Receivables that SG was purchasing, which operated until such time as those final three payments were in fact made.

26. In addition, pursuant to the Master Agreement:

- (a) Forum Finance made representations and warranties to SG as set out in clauses 8.1 and 8.2 as at each day an Offer Notice was delivered and as at each Acceptance Date, with such representations being made with reference to the facts and circumstances then existing (clause 8.4).
- (b) Forum Finance acknowledged SG entered into the Master Agreement and would accept each Offer Notice and pay monies to Forum Finance in reliance of those representations (clause 8.3). The contractual representations and warranties relied on by SG are summarised in SoC [9(e)] and [86] (CB tab A3) and are addressed in Part C of these submissions.
- (c) Forum Finance gave contractual undertakings to SG as set out in clause 9.1. The undertakings relied on by SG are summarised in SoC [9(h)] (CB tab A3).
- (d)

#### **The Evidence**

27. The evidence led by SG consisted of documents and affidavits from Mr Thong, Mr Dumont and Gurpreet Brar (**Ms Brar**). Ms Brar was at all relevant times the Chief Financial Officer of Veolia.
28. Each of the lay witnesses' affidavits were read without objection. Their evidence was not challenged. The Court should accept their evidence, there being nothing to cast doubt on the cogency of that evidence: *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 370-371; *Ashby v Slipper* [2014] FCAFC 15 at [77]-[78].

#### **The transactions**

29. As identified above, there were 3 transactions. Each was largely the same and so it is convenient to deal with them collectively.

#### *Provision of the Offer Notices, Payment Schedules and Certificates of Acceptance*

30. As a first step, each transaction involved SG being provided an Offer Notice, a Payment Schedule and a Certificate of Acceptance. Those documents were:
- (a) first sent by Forum Finance (from Mr Papas' secretary with Mr Papas copied, or from Mr Papas directly) to EQWE: *Thong 1 Ex. GT-10A (CB tabs C11 and C13\_O)* (for the first transaction); *Thong 1 Ex. GT-14A (CB tabs C30\_O and C33\_O)* (for the second transaction) and *Thong 1. Ex GT-18A (CB tabs C47 and C49\_O)* (for the third transaction).

- (b) after being received by EQWE, onforwarded to SG: *Thong 1 Ex. GT-7 (CB tab C14)* (for the first transaction); *Thong 1 Ex. GT-11 (CB tab C34)* (for the second transaction) and *Thong 1 Ex. GT-15 (CB tab C50)* (for the third transaction, although for that transaction, the Certificate of Acceptance was not provided to SG, and the Payment Schedule was only received by SG with the Notice of Assignment, see paragraph 35 below).
31. Between the time Forum Finance sent the documents to EQWE, and EQWE onforwarding them to SG, emails were sent by EQWE to Forum Finance confirming that the documents were going to be used to obtain funding from SG: *Thong 1 Ex. GT-10A (CB tab C12)* (for the first transaction); *Thong 1 Ex. GT-14A (CB tab C32)* (for the second transaction); and *Thong 1 Ex. GT-18A (CB tab C48)* (for the third transaction).
32. Each Payment Schedule (*Thong 1 Ex. GT-10A (CB tabs C8)* (for the first transaction) (**First Payment Schedule**); *Thong 1 Ex. GT-14A (CB tabs C28)* (for the second transaction) (**Second Payment Schedule**) and *Thong 1 Ex. GT-18A (CB tabs C44)* (for the third transaction) (**Third Payment Schedule**)):
- (a) was purportedly executed on behalf of Veolia by Ms Brar (on page 2, and on the final page) and by Mr Papas on behalf of Forum Finance (on page 2);
- (b) represented that Forum Finance and Veolia had entered into a contract for Forum Finance to supply Veolia Iugis branded waste digesters, and Veolia was to pay the purchase price payable in instalments. Iugis' website referred to it being in the business of supplying waste digesters: *Thong 1 Ex. GT-4 (CB tab C72)*. Mr Papas was the sole director and secretary of Iugis Pty Ltd: *Thong 1 Ex. GT-3 (CB tab C73)*; and
- (c) referred to Veolia and Forum Finance as the relevant parties and included: (i) payment terms; and (ii) a list of waste digesters being sold (with purported serial numbers and location addresses).
33. Each Offer Notice (*Thong 1 Ex. GT-7 (CB tab C10)* (**First Offer Notice**); *Thong 1 Ex. GT-11 (CB tab C31)* (**Second Offer Notice**); and *Thong 1 Ex. GT-15 (CB tab C46)* (**Third Offer Notice**)):
- (a) was executed by Mr Papas on behalf of Forum Finance;
- (b) was a completed version of the template contained in Annexure A to the Master Agreement;

- (c) cross-referred to the corresponding Payment Schedule and the purported receivable amounts created by it which were to be sold and assigned to SG; and
- (d) at paragraph 5 stated that “*the Seller [i.e. Forum Finance] acknowledges, agrees and confirms to the Purchaser [i.e. SG] that*”, among other things:
- (i) “*(RASA binding on it) the RASA is a valid and binding obligation of the Seller enforceable in accordance with its terms subject to any necessary stamping and registration, general principles of equity and laws relating to insolvency*” (paragraph 5(a));
  - (ii) “*(repeat representations) the Seller repeats the representations and warranties made by it in clause 8.1 and 8.2 of the RASA*” (paragraph 5(b));
  - (iii) “*(description of Receivables) the description of Receivables as of the date of this Offer Notice (as set out in each corresponding Payment Schedule) is true and correct in every respect*” (paragraph 5(c)); and
  - (iv) “*(no default) no Event of Default or Potential Event of Default is subsisting as at the date of this Offer Notice nor, if the offer is accepted, will there be any Event of Default or Potential Event of Default subsisting at the date the offer is accepted or the date the aggregate Discounted Amount for all Offered Receivables is paid nor will any Event of Default result from the offer evidenced by this Offer Notice or the transfer of the Offered Receivables*” (paragraph 5(d)).
34. Each Certificate of Acceptance (*Thong 1 Ex. GT-7 (CB tab C9)* (for the first transaction) (**First Certificate of Acceptance**), *Thong 1 Ex. GT-11 (CB tab C29)* (for the second transaction) (**Second Certificate of Acceptance**) and *Thong 1 Ex. GT-18A (CB tab C45)* (**Third Certificate of Acceptance**):
- (a) was purportedly signed by Ms Brar (on behalf of Veolia) and was countersigned by Mr Papas as a purported witness of Ms Brar’s signature;
  - (b) referred to Forum Finance (as the supplier) and Veolia (as the customer), with purported acknowledgments, agreements and declarations from Veolia that the waste digesters had been received and accepted, and in respect of the payments that were due under the corresponding Payment Schedule; and
  - (c) represented that Veolia acknowledged and accepted delivery of the waste digesters the subject of the corresponding Payment Schedules.



35. Whilst the Third Certificate of Acceptance was never onforwarded by EQWE to SG after EQWE received it from Forum Finance, nothing turns on that matter given the various claims and representations relied on by SG, and SG had the belief in any event that the third transaction products had been delivered to Veolia: *Dumont [24] (CB tab D4)*.

*Provision of the Notices of Assignment and Verification Statements*

36. Following the provision of the Offer Notices, Payment Schedules and the Certificates of Acceptance, the next step was the provision of a Notice of Assignment and Verification Statement:

- (a) The Notices of Assignment were:
- (i) first sent by Forum Finance (from Mr Papas' secretary with Mr Papas copied, or from Mr Papas directly) to EQWE: *Thong 1 Ex. GT-10A (CB tab C25\_O)* (for the first transaction); *Thong 1 Ex. GT-14A (CB tab C41\_O)* (for the second transaction) and *Thong 1. Ex GT-18A (CB tab C53\_O)* (for the third transaction, which also attached the Third Payment Schedule).
  - (ii) onforwarded by EQWE to SG: *Thong 1 Ex. GT-10 (CB tab C26)* (for the first transaction, with the First Payment Schedule attached); *Thong 1 Ex. GT-14 (CB tab C42\_O)* (for the second transaction, with the Second Payment Schedule attached) and *Thong 1. Ex GT-18A (CB tab C55\_O)* (for the third transaction, with the Third Payment Schedule attached).
- (b) The Verification Statements were emailed by EQWE to SG: *Thong 1 Ex. GT-9 (CB tab C20)* (for the first transaction); *Thong 1 Ex. GT-13 (CB tab C39\_O)* (for the second transaction) and *Thong 1. Ex GT-16 (CB tab C54)* (for the third transaction). In each of those emails, the Verification Statements were described as being "provided by Forum" or "from Forum".

37. Each Notice of Assignment (*Thong 1 Ex. GT-10 (CB tab C16)* (**First Notice of Assignment**); *Thong 1 Ex. GT-14 (CB tab C37)* (**Second Notice of Assignment**); and *Thong 1 Ex. GT-17 (CB tab C58)* (**Third Notice of Assignment**)):

- (a) was signed by Mr Papas on behalf of Forum Finance and was purportedly signed by Ms Brar on behalf of Veolia;

- (b) represented that Forum Finance had assigned the receivables the subject of the corresponding Payment Schedule to Forum Finance, and which Veolia had acknowledged;
  - (c) attached a copy of the corresponding Payment Schedule (which in the case of the third transaction, had been attached by Forum Finance when sending to EQWE); and
  - (d) referred to Forum Finance (as the Seller) and Veolia (as the Debtor), cross-referred to the corresponding Payment Schedule, and included a purported notification of: (i) the purported assignment of the receivables the subject of the corresponding Payment Schedule, and (ii) SG's purported entitlements to collect or recover the receivables.
38. Each Verification Statement (*Thong 1 Ex. GT-9 (CB Tab C17) (First Verification Statement); Thong 1 Ex. GT-13 (CB Tab C36) (Second Verification Statement); and Thong 1 Ex. GT-16 (CB Tab 52) (Third Verification Statement)*):
- (a) represented that Forum Finance had a security interest against Veolia over the goods the subject of the corresponding Payment Schedule; and
  - (b) referred to Forum Finance (as the Secured Party), Veolia (as the Grantor) and the collateral by reference to the corresponding Payment Schedule purportedly between Forum Finance and Veolia.
39. In respect of the first transaction only, SG made a payment to Forum Finance on 9 March 2021 (as addressed further below) prior to receiving the First Notice of Assignment and the First Verification Statement. That was because SG had already received the First Offer Notice, the First Payment Schedule and the First Certificate of Acceptance (*Thong 1 Ex. GT-7 (CB tab C14)*), the "Acceptance Date" for the First Offer Notice was 9 March 2021 (i.e. the date that SG was required to make the payment); and because it was the first transaction SG wanted the transaction to be as smooth as possible: *Dumont [37] (CB Tab D4)*. The First Verification Statement was nevertheless received that same day (i.e. 9 March 2021). SG chased the First Notice of Assignment the following day (*Thong 1 Ex. GT-8 (CB Tabs 18-19 and 23-24)*) and it was received on 12 March 2021 (i.e. three days after payment). In those circumstances, nothing turns on the timing of SG making its first payment.

*Review of the documents by SG*

40. When SG received the Offer Notices, the Payment Schedules, the Certificates of Acceptance, the Verification Statements and the Notices of Assignment they were separately reviewed by Mr Thong and Mr Dumont, and each of them formed certain beliefs and understandings: *Thong*

2 [11], [17], [18], [25]-[26] and Dumont [13]-[14(a)] (in respect of the Offer Notices); Thong 2 [11], [19], [20], [25]-[26] and Dumont [16]-[19(a)] (in respect of the Payment Schedules); Thong 2 [11], [21],[25]-[26] and Dumont [21]-[23(a)] (in respect of the Certificates of Acceptance); Thong 2 [11], [22], [25]-[26] and Dumont [26]-[28(a)] (in respect of the Verification Statements) and Thong 2 [11], [23], [25]-[26] and Dumont [30]-[31(a)] (in respect of the Notices of Assignment). When Mr Dumont did not receive the documents directly from EQWE, he received it shortly afterwards from Mr Thong (see Thong 2 Ex. GT-39 (CB tabs C15 and C15\_O), GT-40 (CB tabs C21 and C21\_O), GT-41 (CB tabs C27 and C27\_O), GT-42 (CB tabs C35 and C35\_O) and GT-43 (C51 and C51\_O)).

41. In summary, Mr Dumont and Mr Thong each believed and understood, as any recipient would, that:
- (a) the receivables the subject of the Offer Notices, the Payment Schedules and the Notices of Assignment were genuine and payable by Veolia to Forum Finance;
  - (b) the goods the subject of the Payment Schedules, Certificates of Acceptance and Verification Statements were genuine, and had been purchased by, delivered to, and accepted by, Veolia;
  - (c) a genuine security interest existed between Forum Finance and Veolia in respect of the goods the subject of the Payment Schedules and recorded in the Verification Statements; and
  - (d) Ms Brar had, on behalf of Veolia, signed the Payment Schedules, the Certificates of Acceptance and the Notices of Assignment.
42. That evidence was unchallenged.

Payments made by SG

43. Based on the above beliefs and understandings:
- (a) on 9 March 2021, SG paid \$4,128,757 (**First Payment**) to Forum Finance by way of bank transfer to a bank account held in its name with National Australia Bank with a BSB ending in 080 and an account number ending in 83695 (**FF Account**): *FF Statements p3 (CB Tab C75); Thong 1 Ex. GT-8 (CB Tabs C18 and C19) and Dumont [34] (CB Tab D4)*.
  - (b) on 7 May 2021, SG paid \$2,299,539 (**Second Payment**) to Forum Finance by way of bank transfer to the FF Account: *FF Statements p6 (CB Tab C75); Thong 1 Ex GT-12 (CB Tab C43) and Dumont [39] (CB Tab D4)*.

(c) on 24 May 2021, SG paid \$2,558,902 (**Third Payment**) to Forum Finance by way of bank transfer to the FF Account: *FF Statements p6 (CB Tab C75)*; *Thong 1 Ex GT-18 (CB Tab C59)* and *Dumont [41] (CB Tab D4)*.

44. On the same day that Forum Finance received each of the above payments from SG, unbeknown to SG, Forum Finance transferred the full amounts of those payments to a bank account held in FGFS' name with the National Australia Bank with a BSB ending in 080 and an account number ending in 8642 (**FGFS Account**): *FF Statements p3 (CB Tab C75)* and *FGFS Bank Statement Extracts (FGFS Statements) p6 (CB Tab C76)* (in respect of the First Payment); *FF Statements p6 (CB Tab C75)*; *FGFS Statements p15 (CB Tab C76)* (in respect of the Second Payment); and *FF Statements p6 (CB Tab C75)*; *FGFS Statements p18 (CB Tab C76)* (in respect of the Third Payment).

Amounts received by SG

45. On or about:

(a) 31 March 2021, 30 April 2021 and 28 May 2021, SG received \$84,000 (being a total of \$252,000) in connection with the first transaction: *Thong 1 [18] (CB Tab D1)*; and

(b) 28 May 2021, SG received the sum of \$46,800 in connection with the second transaction: *Thong 1 [27] (CB Tab D1)*.

46. The court can readily infer that the making of those payments was an element of the ruse being carried out and were intended to give legitimacy to the transactions being entered into. Documents were created which recorded that repayments to be made under SG's transactions were in fact being made (and provisioned to be made) by FGFS rather than Veolia: *FOG.1002.0001.0016* (covering email dated 28 May 2021) and *FOG.1002.0001.0017* (see FGFS sheet; row 49); T607.20-31 (albeit in respect of Westpac, but the Court can readily infer extended to payments to SG). The purpose of the payments made to SG, it can be inferred, was to induce SG to continue accepting Offer Notices and making further payments to Forum Finance. SG ceased receiving repayments in June 2021 when the ruse was being investigated and exposed: *Thong 1 [38], [42]-[60] (CB Tab D1) Ex. GT-10 (CB tab C60), Ex GT-20 (CB tabs C61 and C62) and Ex. GT-24 (CB tab C71)*.

## PART C: THE IMPUGNED CONDUCT

47. The conduct complained of is really that of Mr Papas. It was he who:
- (a) signed each of the Offer Notices (*Thong 1 at Ex. GT-7 (CB tab C10), GT-11 (CB tab C31) and GT-15 (CB tab C46)*), Payment Schedules (*Thong 1 at Ex. GT-7 (CB tab C8), GT-11 (CB tab C28) and GT-17 (CB tab C44)*) and Notices of Assignment (*Thong 1 at Ex. GT-10 (CB tab C16), GT-14 (CB tab C37) and GT-17 (CB tab C58)*);
  - (b) purportedly witnessed Ms Brar signing the Certificates of Acceptance (which he also then signed as a purported witness): *Thong 1 at Ex. GT-7 (CB tab C9) and Ex GT-11 (CB tab C29)*;
  - (c) either personally, or through his executive assistant with himself copied in, sent the Offer Notices, the Payment Schedules, the Certificates of Acceptance and the Notices of Assignment to EQWE to be passed on to SG: *Thong 1 Ex. GT-10A (CB tab C25\_O), GT-14A (CB tab C30\_O) and GT-18A (CB tab C47)*. The Payment Schedules, the Certificates of Acceptance and the Notices of Assignment documents contained a “signature” of Ms Brar on behalf of Veolia.
48. As set out in paragraph 26(a) above, as at the time of the Master Agreement, each day an Offer Notice was delivered and as at each Acceptance Date, Forum Finance made various representations to SG (which it acknowledged SG would rely upon in making a payment to Forum Finance), including in particular the express representations contained in 8.1(e), 8.1(g)(i), 8.1(j)(i), 8.1(k), 8.1(n), 8.1(r), 8.1(s), 8.1(u)(i), 8.1(v), 8.2(a), 8.2(b), 8.2 (c), 8.2(f), 8.2(g) and 8.2(i) of the Master Agreement (*Thong 1. Ex. GT-6 (CB Tab C3)*) (and summarised in SoC [9(e)] and [86] (*CB Tab A3*)).
49. Mr Papas made each of those representations to SG as the person:
- (a) who was the controlling mind and director of Forum Finance;
  - (b) who signed the Master Agreement, the Offer Notices, the Payment Schedules, Certificates of Acceptance and the Notices of Assignment; and
  - (c) through whom the transaction documents were sent from Forum Finance (including through his executive assistant) to be provided to SG pursuant to the Master Agreement.
50. In addition, by signing and providing each of the Offer Notices, the Payment Schedules, and the Notices of Assignment, further representations (as set out in the document itself and see SoC [85] CB tab A3) were also made.

51. Whilst SG pleads numerous representations were made to it (see SoC [85]-[86] (CB tab A3)), given the way the hearing has been run, it is only necessary to focus on the following seven core representations:
- (a) Forum Finance and Veolia had entered into the Payment Schedules: SoC [85(a)]
  - (b) the receivables the subject of the Offer Notices existed and were legitimate: SoC [85(j)];
  - (c) Ms Brar had signed, and Mr Papas had witnessed Ms Brar signing each of the Certificates of Acceptance: SoC [85(i)];
  - (d) Veolia had received and accepted the goods the subject of the Payment Schedules: SoC [85(e)];
  - (e) the Notices of Assignment had been signed by Ms Brar for and on behalf of Veolia: SoC [85(n)];
  - (f) each of the receivables the subject of the Offer Notices had been assigned to SG: SoC [85(l)]; and
  - (g) Forum Finance had a valid and enforceable security interest against Veolia in respect of the goods the subject of the Payment Schedules: SoC [85(o)].
52. Each of the other representations contained in SoC [85] (arising from the conduct of Forum Finance and Mr Papas) and SoC [86] (arising from the Master Agreement) are variations of those seven core representations. Accordingly, if the Court were to find that the above seven core representations were impugned, then all of the representations contained in SoC [85] and SoC [86] will be impugned.

#### **PART D: THE TRUE STATE OF AFFAIRS**

53. The evidence given of the true state of affairs, as contained in the affidavit of Ms Brar sworn on 1 July 2021 (**Brar**) at [6]-[7] and [11]-[14] (*CB tab D2*), was contrary to the matters referred to in paragraph 50. Ms Brar deposes that:
- (a) She had never seen or been provided with copies of the Payment Schedules, the Certificates of Acceptance or the Notices of Assignment for her signature.
  - (b) She never signed (and Mr Papas never witnessed her signing) the Payment Schedules, the Certificates of Acceptance or the Notices of Assignment.
  - (c) Given their purported value, she was the relevant person responsible for signing the Notices of Assignment and the Payment Schedules;

- (d) She did not handwrite her name on the First Notice of Assignment.
- (e) The purported goods referred to in the Payment Schedules and the subject of the Certificates of Acceptance were never delivered to, nor received nor accepted by, Veolia.
- (f) Veolia never agreed to, and did not, buy the purported goods referred to in the Payment Schedules and the subject of the Certificates of Acceptance and never had an obligation to pay any money to Forum Finance in respect of those goods.
- (g) She was not responsible for signing documents like the Certificates of Acceptance – this was the responsibility of the relevant operations/sales team (*Brar [8]*) and therefore the mere existence of her signatures on the purported documents is a contradiction.
- (h) The purported waste digesters the subject of the Payment Schedules were not waste digesters Veolia had in fact acquired and did not match any of the serial numbers of the Jugis waste digesters Veolia had been supplied with: *Brar [13]* and *Ex. GB-7* (CB tab C70).

54. That evidence was unchallenged.

55. The acceptance of Ms Brar's evidence permits the Court to make the following findings:

- (a) Ms Brar never signed the Payment Schedules, the Certificates of Acceptance or the Notices of Assignment;
- (b) Ms Brar's signatures were forged on the Payment Schedules, the Certificates of Acceptance and the Notices of Assignment, and further, the purported witnessing of Ms Brar's signatures by Mr Papas on each of the Certificates of Acceptance never occurred;

and by virtue of the above matters:

- (c) Veolia never entered into the transactions the subject of the Payment Schedules, the Certificates of Acceptance or the Notices of Assignment;
- (d) Veolia never executed those transaction documents; and
- (e) the purported receivables the subject of the transaction documents never existed, no relevant goods had ever been delivered or accepted, and no security interests ever arose.

#### **PART E: LOSS AND DAMAGE**

56. SG has suffered loss and damage comprising the amounts that SG advanced that have not been repaid.

57. As set out in paragraph 45 above, Forum Finance has re-paid a total of \$298,800 to SG in respect of the first two transactions. No payments have been received in respect of the third transaction: *Thong 1* [38] (CB Tab D1). Accordingly, SG remains \$8,688,398 out of pocket in respect of the three transactions (**Outstanding Payments**).

## **PART F: CLAIMS AGAINST FORUM FINANCE**

### **Primary Claim: Breach of Fiduciary Duties and Trust**

58. SG's primary claim against Forum Finance is its claim for breach of fiduciary duties in respect of the monies SG advanced to it: *SoC* [147]-[153] (CB tab A3).
59. Forum Finance's status as a fiduciary arises from the institutional (rather than remedial) constructive trust that was imposed the moment that Forum Finance received each of the SG Payments (*Sze Tu v Lowe* (2014) 89 NSWLR 317 at [147]). That constructive trust arose because the payments were obtained by Forum Finance through deception - the purported transactions were a fraud committed against SG.

#### *The creation of the trust*

60. In *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 Leeming JA (with whom Bathurst CJ and Sackville AJA agreed) said at [36] and [40] (and see also [39]):

[36] ... *In Australia it is settled law that "[w]here money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character": Black v S Freedman & Co (1910) 12 CLR 105 at 110 (O'Connor J). In England the same was said by Lord Browne-Wilkinson, in obiter, in Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 at 716:*

*"Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity."*

...

[40] *It follows therefore that the victim of theft may have a variety of claims when a third party receives trust property. In practice, there may be claims based on the victim's legal title to the property, and, because any dealing with trust property by the thief to a third party will be in breach of the trust, there may be equitable claims consequent upon that breach.*



61. The trust is created immediately upon acquisition of the property, not when recognised by a court: *Evans of Robb Evans and Associates v European Bank Ltd* (2004) 61 NSWLR 75 at [113].
62. The deceptive and fraudulent nature of Forum Finance's receipt of funds from SG is proven by the following matters.
63. *First*, in the course of seeking the payments from SG, a number of representations were made (as set out in paragraphs 48 to 52 above).
64. *Second*, as set out in Part D, Ms Brar's evidence reveals that each of the representations referred to in paragraphs 48 to 52 above are false.
65. *Third*, the evidence establishes that Forum Finance (through Mr Papas) knew, or were at least reckless or careless as to whether the representation were false or not. Mr Papas was personally involved in the provision of each of the documents to SG. The truth or falsity of the representations were entirely within his knowledge, and by virtue of his role in Forum Finance, in its knowledge. In that respect, the representations related to: (i) purported transactions that Forum Finance itself was said to have entered into, and (ii) the transaction documents that were personally signed by Mr Papas (except for the Verification Statements which did not require a signature). Whether the representations were true or false was readily ascertainable by Forum Finance (and Mr Papas).
66. *Fourth*, the evidence establishes that Forum Finance (through Mr Papas) made the representations with the intention that SG rely on them. There is no other credible purpose for the representations to have been made to SG. It is clear from the transaction documents and the circumstances in which they were made and then delivered to SG, that the whole purpose of making them was for SG to accept the offers in the Offer Notices, and more specifically, to make the SG Payments to Forum Finance. The very nature of the transaction and the commercial context in which they were being given meant that the representations had to be conveyed to SG before SG would make the SG Payments.
67. *Fifth*, the evidence of Mr Thong and Mr Dumont establishes that they, as representatives of SG, relied on the representations. Both have given evidence as to reviewing the transaction documents and forming certain understandings and beliefs based on their review of the documents (see paragraphs 40 to 42 above), which align with the representations that were made. Each of them has also given evidence that had they become aware that any of that knowledge and belief was incorrect then they would not have proceeded with the transactions and, to the extent that monies had been paid out, would have sought to reverse the transaction as soon as possible:

*Thong 2 [27], [30] (CB tab D3); Dumont [35], [40], [42] (CB tab D4)*. Given the fundamental and basic characteristics of the representations involved, the sums of money involved, that Mr Dumont and Mr Thong's evidence is unchallenged and the obvious commercial logic of it, that evidence can be readily accepted.

68. As the funds remain traceable into the hands of third parties (*Preston 2 at [33], [36], [39], [41], [44], [52], [55], [56], [57], [61] (MIN.5000.0006.1616) and Ex. JP-15 (JP-15 (Revised Tracing Model)(520489107.1)) and JP-17 (JP-17 (Alternative Tracing Model)(520489108.1))*), the Court should declare that the funds that FGFS received were the subject of a trust.

*The breach of fiduciary duties*

69. By virtue of the SG Payments becoming trust monies in the hands of Forum Finance, fiduciary obligations were imposed on Forum Finance that, among other things, required it to preserve and not dissipate the funds. In *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 Allsop P (with whom Campbell JA and Handley AJA agreed) said at [114]: “...*The obligation of a fiduciary even a defaulting one (here a thief, as constructive trustee, dealing with stolen funds) is to preserve, not dissipate, the property of others wrongly obtained. That it may not be the actual intention of the wrongful fiduciary to act with propriety does not affect equity's concern with what he or she should do*”.
70. In breach of its fiduciary duties, Forum Finance failed to preserve the SG Payments that were wrongly obtained, and dissipated them by immediately transferring them – to the cent – to FGFS (as set out in paragraph 44 above).

*Relief*

71. Having regard to the matters set out above, SG is entitled to and seeks:
- (a) An order for equitable compensation from Forum Finance for the Outstanding Payments of \$8,688,398.
  - (b) A declaration that Forum Finance held on trust for SG:
    - (i) from 9 March 2021, the sum of \$4,128,757, and any traceable property from those funds, limited to the sum of \$3,876,757 (being the sum of \$4,128,757 less the amount already received of \$252,000);
    - (ii) from 6 May 2021, and in addition to the amount in (i), the sum of \$2,299,539, and any traceable property from those funds, limited to the sum of \$2,252,739 (being the sum of \$2,299,539 less the amount already received of \$46,800); and

- (iii) from 24 May 2021, and in addition to the amount in (i) and (ii), the sum of \$2,558,902, and any traceable property from those funds.

**Secondary Claim: Misleading or Deceptive Conduct**

72. If the Court is satisfied that SG's primary claim for breach of fiduciary duties is made out then it need not consider SG's secondary claim against Forum Finance.
73. SG's secondary claim against Forum Finance is for misleading or deceptive conduct (*SoC [156]-[157] (CB tab A3)*) contrary to:
- (a) section s12DA(1) of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)* which provides: "*A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive*"; and
  - (b) in the alternative, section 18 of Schedule 2 of the *Competition and Consumer Act 2010 (Cth) (ACL)* which provides: "*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*".
74. The only reason for the alternative claims under the ASIC Act and the ACL is whether there is some issue as to whether the relevant conduct and representations relate to financial services (in which case s 12DA(1) of the ASIC Act applies) or not (in which case s 18 of the ACL applies) (see s 131A of the *Competition and Consumer Act 2010 (Cth)*). Either way, the same considerations apply under both provisions.
75. Having said this, for the sake of completeness SG contends that the ASIC Act applies. In that respect:
- (a) Section 12BAB(1)(b) and (g) of the ASIC Act relevantly provides that a person provides a financial service if they: "*deal in a financial product*" (subsection (b)); or "*provide a service (not being the operation of a derivative trade repository) that is otherwise supplied in relation to a financial product (other than an Australian carbon credit unit or an eligible international emissions unit)*" (subsection (g)).
  - (b) Section 12BAA(7)(k) provides that, subject to subsection (8) (which is not presently relevant), "a credit facility (within the meaning of the regulations)" is a financial product.
  - (c) Regulation 2B(1)(a) of the *Australian Securities and Investments Commission Regulations 2001 (Cth)* provides that for s 12BAA(7)(k) of the ASIC Act, the provision of credit: for any period; and with or without prior agreement between the credit provider

and the debtor; and whether or not both credit and debit facilities are available, is a credit facility.

(d) Regulation 2B(3) defines “credit”, relevantly, as a contract, arrangement or understanding:

(a) *under which:*

(i) *payment of a debt owed by one person (a debtor) to another person (a credit provider) is deferred; or*

(ii) *one person (a debtor) incurs a deferred debt to another person (a credit provider); and*

(b) *including any of the following:*

(i) *any form of financial accommodation;*

...

(iii) *credit provided for the purchase of goods or services;*

...

76. In the above context, SG submits that the ASIC Act applies because Forum Finance engaged in conduct and made representations regarding the Payment Schedules (or the purported receivables created by them) and/or the Notices of Assignment (or the purported assignment of receivables pursuant to it). The Payment Schedules (and therefore each purported receivable the subject of it) met the definition of “credit” as set out in regulations 2B(3)(a), 2B(3)(b)(i) and 2B(3)(b)(iii) because the Payment Schedules:

- (a) were a purported contract, arrangement or understanding;
- (b) between Forum Finance (as a credit provider) and Veolia (as a debtor);
- (c) that deferred the payment of a debt (i.e. the full contract price); and
- (d) in that respect, provided credit to Veolia for the purchase of goods, and was a form of financial accommodation.

*Trade or commerce*

77. The concept of trade or commerce merely requires that dealings occurred in the course of activities or transactions which, of their nature, bear a trading or commercial character: *Concrete*

*Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603. That is the case here, noting the circumstances described above.

*The representations were misleading or deceptive*

78. Misleading or deceptive conduct requires that conduct has a tendency to lead into error: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [39]; *ASIC v Westpac Banking Corp* (2022) 159 ACSR 381 at [41]. Whether conduct is misleading or deceptive is not dependent on there being intent to mislead or deceive (and so even acts done honestly and reasonably may be misleading or deceptive): *Yorke v Lucas* (1985) 158 CLR 661 at 666; *ASIC v Westpac* at [42]. However, where there was an intention to deceive the court will more readily infer that the intention has been effected: *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [33]; *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) 49 ACSR 369 at [63]. For the reasons set out in paragraphs 63 to 67 above, the Court should find there was an intention on the part of Mr Papas and Forum Finance to deceive.
79. For the reasons in paragraphs 63 to 67 above, the representations referred to in Part C (the impugned conduct) above (see also more specifically, SoC [85]-[86] (*CB tab A3*)) were misleading or deceptive, and therefore contrary to s12DA of the ASIC Act and, in the alternative, s 18 of the ACL.

*The representations were the cause of loss*

80. As set out in paragraph 67 above, the representatives of SG relied on the various representations put forward in the decision to advance the SG Payments. By reason of relying on those representations which were misleading, money was advanced and, to the extent it has not been repaid, SG has suffered loss and damage.

*Relief*

81. Having regard to the matters set out above, SG is entitled to and seeks an award of damages against Forum Finance for the Outstanding Payments of \$8,688,398 pursuant to s 12GF of the ASIC Act or, in the alternative, s 236 of the ACL.

**PART G: CLAIMS AGAINST FGFS**

**Primary Claim: Claim for Breach of Fiduciary Duties and Trust**

82. SG's primary claim against FGFS is its claim for breach of fiduciary duties: *SoC [203]-[213]* (*CB tab A3*).

83. As set out in paragraphs 69 to 70 above, in breach of its fiduciary duties, Forum Finance failed to preserve the SG Payments that were wrongly obtained. As set out in paragraph 44 above, on each day Forum Finance received the SG Payments it immediately transferred them – to the cent – to FGFS.
84. FGFS (and each subsequent recipient) having received monies from a thief is liable to account to SG, as the victim, for the monies it received as those monies were held on constructive trust: *Black v S Freedman & Co* (1910) 12 CLR 105 at 110 (per O'Connor J); *Wambo Coal* at [64]; *Fistar* at [36], [39]. No issues of knowledge arise in respect of SG's claim against FGFS in circumstances where Mr Papas was at all relevant times a director and controlling mind of FGFS (as addressed in [4] of these submissions) and, indeed, Mr Papas had strict control of the financial affairs of the group (see paragraph 99 below).
85. In the circumstances set out in paragraphs 62 to 67 above, upon FGFS receiving those funds it was held on trust for SG in accordance with the principles set out in paragraphs 60 to 61 above. As the funds remain traceable into the hands of third parties (*Preston 2* at [33], [36], [39], [41], [44], [52], [55], [56], [57], [61] (MIN.5000.0006.1616) and Ex. JP-15 (JP-15 (Revised Tracing Model)(520489107.1)) and JP-17 (JP-17 (Alternative Tracing Model)(520489108.1))), the Court should declare that the funds that FGFS received were the subject of a trust.
86. In addition, in accordance with the principles set out in paragraph 69 above, FGFS owed SG fiduciary duties in respect of the monies it held on trust. It breached those fiduciary duties by failing to preserve the funds, and by dissipating the funds to, among others, Mr Papas and his associated entities (*Preston 2* at [33], [36], [39], [41], [44], [52], [55], [56], [57], [61] (MIN.5000.0006.1616) and Ex. JP-15 (JP-15 (Revised Tracing Model)(520489107.1)) and JP-17 (JP-17 (Alternative Tracing Model)(520489108.1))); see also, for example the s50 summaries contained in MIN.5000.0005.0165, MIN.5000.0005.0256, MIN.5000.0005.0238, MIN.5000.0005.0220, MIN.5000.0005.0221 and MIN.5000.0005.0214).
87. On the above basis, SG is entitled to and seeks:
- (a) equitable compensation for the Outstanding Payments of \$8,688,398; and
  - (b) a declaration that FGFS held:
    - (i) from 9 March 2021, the sum of \$4,128,757, and any traceable property from those funds, on trust for SG, limited to the sum of \$3,876,757 (being the sum of \$4,128,757 less the amount already received of \$252,000);

- (ii) from 6 May 2021, and in addition to the amount in (i) the sum of \$2,299,539, and any traceable property from those funds, on trust for SG, limited to the sum of \$2,252,739 (being the sum of \$2,299,539 less the amount already received of \$46,800); and
- (iii) from 24 May 2021, and in addition to the amount in (i) and (ii) the sum of \$2,558,902, and any traceable property from those funds, on trust for SG.

**Secondary Claim: Claim for Knowing Receipt**

88. If the Court is satisfied that SG's primary claim for breach of fiduciary duties is made out then it need not consider SG's secondary claim against FGFS.
89. SG's secondary claim against FGFS is for knowing receipt (*SoC [207]-[208] and [211]-[213] (CB tab A3)*).
90. A party is liable under the first limb of *Barnes v Addy* (for knowing receipt) where they receive the trust property with knowledge of the breach of trust: *Farah Constructions* at [112]; *Grimaldi* [259]. On receipt, that party may become liable as constructive trustee: *Hasler* at [73]; *Grimaldi* [253]-[255], [555]. The knowledge requirements are no more onerous (and are arguably more lenient) than for a claim for knowing assistance: *Grimaldi* [263]-[269].
91. As it is clear that FGFS received each of the monies that SG had paid to Forum Finance, then in the context set out in paragraphs 62 to 67 above, FGFS is liable for knowing receipt. As the funds remain traceable into the hands of third parties (*Preston 2 at [33], [36], [39], [41], [44], [52], [55], [56], [57], [61] (MIN.5000.0006.1616) and Ex. JP-15 (JP-15 (Revised Tracing Model)(520489107.1)) and JP-17 (JP-17 (Alternative Tracing Model)(520489108.1))*), the Court should declare that the funds that FGFS received were the subject of a trust.
92. On the above basis, SG is entitled to and seeks:
- (a) equitable compensation for the Outstanding Payments of \$8,688,398; and
  - (b) a declaration that FGFS held:
    - (i) from 9 March 2021, the sum of \$4,128,757, and any traceable property from those funds, on trust for SG;
    - (ii) from 6 May 2021, and in addition to the amount in (i) the sum of \$2,299,539, and any traceable property from those funds, on trust for SG; and
    - (iii) from 24 May 2021, and in addition to the amount in (i) and (ii) the sum of \$2,558,902, and any traceable property from those funds, on trust for SG.

## PART H: CLAIMS AGAINST MR PAPAS

### Primary Claim: Claim for Knowing Assistance and Trust

93. SG's primary claim against Mr Papas is its claim for knowing assistance: *SoC [203]-[213]* (CB tab A3).
94. As set out in:
- (a) paragraphs 59 to 70 above:
    - (i) Upon Forum Finance's receipt of the SG Payments from SG, Forum Finance held those amounts on trust and had fiduciary duties to preserve and not dissipate those funds.
    - (ii) Forum Finance breached those fiduciary duties by virtue of it failing to preserve the funds, and also by dissipating those funds to FGFS on the same day that they were received.
  - (b) paragraphs 82 to 86 above:
    - (i) Upon FGFS's receipt of the SG Payments from Forum Finance, FGFS held those amounts on trust and had fiduciary duties to preserve and not dissipate those funds.
    - (ii) FGFS breached those fiduciary duties by virtue of it failing to preserve the funds, and also by dissipating those funds to, among others, Mr Papas and his associated entities.
95. The relevant principles applicable to the second limb of *Barnes v Addy* (for knowing assistance) can be shortly stated as follows:
- (a) A party must have knowingly assisted in a dishonest and fraudulent design on the part of the party owing the fiduciary duties: *Farah Constructions v Say-dee Pty Ltd* (2007) 230 CLR 89 at [111]-[112].
  - (b) The principle extends to breaches of trust and breaches of fiduciary duties that are dishonest and fraudulent: *Farah Constructions* at [179].
  - (c) The requisite knowledge that the party must have is either: actual knowledge; wilfully shutting one's eyes to the obvious; wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; or knowledge of circumstances which would indicate the facts to an honest and reasonable person: *Farah Constructions* at [174]-[178].



- (d) Where the role or actions of the third party is to induce or procure a breach of trust or breach of fiduciary duty, then that is sufficient to establish liability: *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 at [152]-[161].
- (e) Where the party is the alter ego or “nominee” of the fiduciary/trustee, or act in concert to secure a mutual benefit, then the party is jointly and severally liable with the fiduciary: *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [556], [558].
96. The elements of the second limb of *Barnes v Addy* (for knowing assistance) are met in the circumstances of this case.
97. *First*, Mr Papas was directly involved and implicated in the deceit perpetuated against SG as set out in Part C and paragraphs 63 to 67 above, and accordingly had the requisite knowledge.
98. *Second*, Mr Papas was the controlling mind and director of Forum Finance and FGFS. His knowledge is attributable to Forum Finance and FGFS.
99. *Third*, Mr Papas had strict control of the financial affairs of the group. Mr Bouchahine has given evidence of Mr Papas’ role in respect of payments (which SG submits should be accepted insofar as it confirms Mr Papas’ role in approving and directing payments (whether or not the Court finds anyone else had a similar role)). This includes a role of approving payments to be made (see for example T568.12-17, T582.24-27, T582.29-T583.10, T588.23-27, T589.19-20, T590.9-12, T593.5-12)). This extended to Mr Papas directing the SG Payments to be transferred from the FF Account to the FGFS Account (*MIN.5000.0012.0010 at \_0016 (T16.36-38, T17.1-3); T594.37-39; T602.23-39 and T604.15-19 (albeit in respect of Westpac’s payments, but the Court can readily infer extended to payments to SG)*). It also extended to Mr Papas directing and authorising funds to be paid out of the FGFS Account (*see also in addition to the references above, MIN.5000.0008.0049; FOG.1002.0002.0001 at .0006 (T68.40-43, T69.9-11)*).
100. *Fourth*, Mr Papas acted not only as a director of Forum Finance, but also a director of FGFS, for his own benefit, and as a director or officer of recipients who received funds from FGFS (see [86] above).
101. Furthermore, having regard to the principles set out in paragraphs at [60] to [67] above, Mr Papas having ultimately received some of the SG Payments holds those payments on trust for SG.
102. On the above basis, SG is entitled to and seeks equitable compensation for the Outstanding Payments of \$8,688,398. SG is also entitled to, but does not seek a declaration that Mr Papas holds any sum and any traceable proceeds, from those funds, on trust for SG. This is not pressed

because, insofar as SG is concerned, Mr Papas took steps to ensure that any amount he personally received directly was de minimis.

**Secondary Claim: Claim for Misleading or Deceptive Conduct**

103. If the Court is satisfied that SG's primary claim for knowing assistance is made out then it need not consider SG's secondary claim against Mr Papas.
104. SG's secondary claim against Mr Papas is for misleading or deceptive conduct: SoC [195]-[197] (*CB tab A3*).
105. SG's claim for misleading or deceptive conduct is similarly as put against Forum Finance as set out in paragraphs 72 to 80 above.
106. In respect of the claim against Mr Papas, SG submits that he is primarily liable as a relevant person engaging in conduct and making the representations in contravention of s12DA(1) of the ASIC Act or s 18 of the ACL.
107. However, if there be any doubt as to Mr Papas' primary liability in that respect, s 12GF of the ASIC Act and s 236 of the ACL enables the Court to order damages to a person who was "involved" in the contravention.
108. A person will be involved in a contravention where that person has: (a) aided, abetted, counselled or procured the contravention; (b) induced, whether by threats or promises or otherwise; the contravention; (c) been in any way, directly or indirectly, knowingly concerned in, or a party to, the contravention; or (d) has conspired with others (e.g. Forum Finance) to effect the contravention.
109. 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): *Yorke* at 667 and 669-670, 674.
110. Mr Papas meets each of the definitions required for a person to be "involved" in a contravention by virtue of the matters described in Part C (the impugned conduct) above, and therefore even if not primary liability (contrary to SG's submissions), then he is accessorially liable and damages can still be awarded.
111. Having regard to the matters set out above, SG is entitled to, and seeks, an award of damages against Forum Finance for the Outstanding Payments of \$8,688,398 pursuant to s 12GF of the ASIC Act or, in the alternative, s 236 of the ACL.

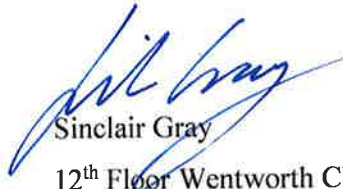
**PART I: INTEREST AND COSTS***Interest*

112. SG seeks interest pursuant to ss 51A and 52 of the *Federal Court of Australia Act 1976* (Cth) (FCA) (SoC [167], [201], [215] (*CB tab A3*)). The calculation of interest is not straightforward and will be provided to the Court at the time of judgment.

*Costs*

113. SG seeks costs on an indemnity basis under general law principles: *Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd (No 2)* (2019) 369 ALR 185 at [8], [15]-[16]. This aspect of the claim only arises if the Court finds that the primary causes of action succeed. For the reasons propounded above those claims should succeed and, in accordance with the principles set out in *Neville's Bus Service* the Court should make an order for indemnity costs.

**Date: 21 February 2023**



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