



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

Applicant's Written Outline of Submissions

PART A: INTRODUCTION

1. The proceedings brought by the applicant (**SG**) are to be heard simultaneously with those brought by Westpac Banking Corporation and Westpac New Zealand Limited (collectively, **Westpac**), and SMBC Leasing and Financing, Inc (**SMBC**).
2. SG is a multinational investment bank and financial services company: *Affidavit of Gregory Thong sworn on 30 June 2021 (Thong 1) at [65] (CB tab D1); Affidavit of Nicolas Dumont sworn on 8 February 2022 (Dumont) at [3] (CB tab D4)*. SG 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. That state of affairs was put forward to SG to obtain money from it on the pretence the money would be used to fund the purchases.
3. 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 (*Thong 1 [13] (CB tab D1) and Ex. GT-8 (CB tabs C18 and C19); Dumont [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**).
4. That state of affairs was untrue. Veolia had never agreed to purchase such waste digesters and had never received them. Indeed, it is unclear whether the waste digesters even existed.
5. The main protagonist for representing that state of affairs to SG seems to have been 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) Ex. ITB-22 (CB tab C137) and ITB-23 (CB tab C138).*

6. On each day Forum Finance received money from SG, it transferred all of that money to FGFS: *FF Statements (CB tab C75); FGFS Bank Statement Extracts (CB tab C76).* 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] (CB tab D6) and Ex. JP-15 (CB tab C133) and JP-17 (CB tab C135).*
7. SG seeks declarations, and damages (including for breach of contract) or compensation.
8. The respondents are aware of the proceedings and have been served with all material: *Bolster at [5] (CB tab D7).* The corporate respondents have been relieved from filing defences. Mr Papas has not. He has not even filed an appearance. None of the respondents have served evidence.
9. Unfortunately, that means SG needs to address in this opening every issue - albeit briefly. SG's submissions are structured as follows:
 - (a) **Part B** sets out a background to the parties, the Master Agreement and the transactions: p3.
 - (b) **Part C** sets out the impugned conduct: p8.
 - (c) **Part D** sets out the true state of affairs: p10.
 - (d) **Part E** sets out the heads of loss and damage suffered by SG: p11.
 - (e) **Parts F to I** addresses each of the causes of action pleaded: p13.
 - (i) SG's **primary claims** are: the tort of deceit (**Part F**: p13), trust/fiduciary claims (**Part G**: p14); and contractual breaches and indemnities (**Part H**: p17).
 - (ii) SG's **secondary claim**, which does not arise and does not need to be considered if the court is satisfied on the primary claims, is misleading or deceptive conduct (**Part I**: p20).
 - (f) **Part J** addresses the questions of interest and costs: p22.

10. SG does not press its claim for the tort of injurious falsehood. In addition, in light of the primary claims and secondary claim set out above, and the present status of the evidence and pleadings, SG's claims for false or misleading representations and the tort of conspiracy by unlawful means do not need to be considered. If the status of the evidence and pleadings change, SG may seek to supplement these submissions at that time.
11. The **Schedule** contains a table summarising the causes of action and the respective claims for relief.

PART B: THE PARTIES, THE TRANSACTIONS AND THE MASTER AGREEMENT

Parties

12. Each respondent operated within a larger group of entities, including (**Iugis** Pty Ltd) (the **Forum Corporate Group**) that ran a business that, among other things, sold waste digesters to customers: *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]*. To fund the acquisition of waste digesters by customers, members of the Forum Corporate Group obtained equipment financing by, among other means, selling and assigning customer receivables to financiers: *Ireland at [7]-[8]*.
13. The equipment financing arrangements were brokered by third parties. Relevantly for this proceeding that was 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)*.
14. The groups within SG that were involved in the preparation and carrying out of the activities the subject of the Master Agreement and the Servicing Guidelines were the Corporate Coverage Group (including Gregory Thong (**Mr Thong**)) and the "Structured Solutions & Leasing" (**SSL**) group (including Nicolas Dumont (**Mr Dumont**)). Mr Thong was the Head of Corporate Coverage – Australia & New Zealand and Mr Dumont was a Front Office Originator: *Affidavit of Gregory Thong sworn on 14 December 2021 (Thong 2) at [1], [4]-[10] (CB tab D3); Dumont [6]-[9] (CB tab D4)*.

15. The relevant persons within EQWE were Luke Price (**Mr Price**) and Katrina Constable (**Ms Constable**).

Master Agreement and Transaction Documents

16. Pursuant to the Master Agreement, Forum Finance was able to offer to sell “Offered Receivables” to SG by delivering an “Offer Notice” to SG (Clause 2.1).
17. An “Offer Notice” was to set out the details of the account receivables (which were defined as the “Offered Receivables” (Clause 1.1 of each Offer Notice)) being offered for sale to SG, and include certain acknowledgements, agreements and confirmations by Forum Finance, including that:
- (a) the representations and warranties contained in clause 8.1 and 8.2 of the Master Agreement were repeated (paragraph 5(b) of each Offer Notice);
 - (b) the receivables described in the document were “true and correct in every respect” (paragraph 5(c) of each Offer Notice); and
 - (c) there was no “Event of Default or Potential Event of Default” persisting (paragraph 5(d) of each Offer Notice).
18. The Offer Notices are at: *Thong 1 Ex. GT-7 (CB tab C10), Ex. GT-11 (CB tab C31) and Ex. GT-15 (CB tab C46)*.
19. After receipt of an Offer Notice, SG had the ability (but not the obligation) to accept the offer contained in an “Offer Notice” by, and only by, payment by SG to Forum Finance of 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 purportedly being supplied to Veolia (i.e. the waste digesters).
20. The right of Forum Finance to give an Offer Notice was subject to Forum Finance also providing an executed Payment Schedule (**Payment Schedule**) (clause 7.1(b)(i) of the Master Agreement); an executed Notice of Assignment (**Notices of Assignment**) (clause 7.1(b)(ii) of the Master Agreement); and a registered financing statement on the Personal Property Securities Register (**Verification Statements**) (clause 7.1(b)(v)). On two occasions SG also received executed Certificates of Acceptance of Delivery (**Certificates of Acceptance**).

21. The Payment Schedule was the purported contract between Forum Finance and Veolia, as the ultimate purchaser of the products, by which Veolia allegedly agreed to pay amounts to Forum Finance. The Payment Schedules are at *Thong 1 Ex. GT-7 (CB tab C8)*, *GT-11 (CB tab C28)* and *GT-17 (CB tab C44)*. Each Payment Schedule was purportedly executed by Veolia (through Gurpreet Brar (**Ms Brar**), Veolia's then Chief Financial Officer) in two parts; and they included an annexure containing a list of the purported goods being supplied, including a serial number and location for each of those goods.
22. The Certificates of Acceptance were the documents allegedly demonstrating that Veolia had received and accepted the waste digesters the subject of the corresponding Payment Schedule. The Certificates of Acceptance are at *Thong 1 Ex. GT-7 (CB tab C9)* and *GT-11 (CB tab C29)*.
23. No Certificate of Acceptance was received in respect of the third transaction: *Thong 2 [31] (CB tab D3)*; *Dumont [24] (CB tab D4)*. 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)*.
24. The Notices of Assignment were the documents through which the receivables the subject of the corresponding offer notice (and arising from each of the corresponding payment schedules which were annexed) were assigned to SG. The Notices of Assignment are at: *Thong 1 Ex. GT-10 (CB tab C16)*; *Ex. GT-14 (CB tab C37)*; and *Ex. GT-17 (CB tab C58)*.
25. Under 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).
 - (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. The Master Agreement also included a term of indemnity requiring Forum Finance to indemnify SG:
- (a) as a result of, among other things, (i) the breach of any representation or warranty by Forum Finance; (ii) any Event of Default; or (iii) any failure by Forum Finance to comply with the law (clause 12.1 of the Master Agreement); and
 - (b) against any “Fixed Rate Termination Payment” incurred or reasonably expected to be incurred by SG in connection with “Fixed Rate Agreements entered into or deemed entered into by SG in relation to its interest rate exposure (clause 6.3 of the Master Agreement). These amounts were essentially amounts or losses associated with SG entering into swaps, as set out further below.
27. The Master Agreement also imposed an obligation on Forum Finance to, on demand, reimburse SG for all its expenses (including legal expenses) in relation to the preparation, execution and completion of the initial Transaction Documents (which includes the Master Agreement), including expenses reasonably incurred in retaining consultants to evaluate matters of material concern to SG on a full indemnity basis (Clause 19.5).

Delivery and receipt of the transaction documents

28. SG received the Offer Notices, Payment Schedules, Certificates of Acceptance and Notices of Assignment after Mr Papas, or his executive assistant, sent them to representatives of EQWE; and EQWE sent them to representatives of SG (most relevantly, Mr Thong and/or Mr Dumont). Those emails are at: *Thong 1 Ex. GT-7 (CB tab C14), GT-9 (CB tab C20), GT-10 (CB tab C26) and GT-10A (CB tab C11) (for the first transaction); GT-11 (CB tab C34), GT-13 (CB tab C34), GT-14 (CB tab C42) and GT-14A (CB tab C30) (for the second transaction); and GT-15 (CB tab C50), GT-16 (CB tab C54), GT-17 (CB tab C57) and GT-18A (CB tab C47) (for the third transaction).* The involvement of EQWE was consistent with it acting as the equipment finance broker pursuant to the Master Agreement and the Servicing Guidelines.

29. When the transaction documents were received by SG's representatives, they read them and formed certain beliefs and understandings. In particular, they understood and believed that they were legitimate and genuine and that:
- (a) contracts had been entered into between Veolia and Forum Finance to create genuine receivables that were payable by Veolia,
 - (b) the waste digesters the subject of the documents had been delivered to and accepted by Veolia;
 - (c) receivables were being offered to SG and being effectively assigned to SG;
 - (d) where a signature appeared purportedly by Ms Brar on behalf of Veolia, that she had in fact signed them;
 - (e) where Mr Papas had purportedly witnessed Ms Brar's signature, he had in fact seen Ms Brar sign the documents;
 - (f) Forum Finance had registered a valid and effective security interest against Veolia to secure payment of the receivables; and
 - (g) the documents were being provided to SG in accordance with the Master Agreement.
30. A more detailed description of the reviews carried out by SG's representatives for each of the documents, and the beliefs and understandings they obtained as a result of each of them, is set out in the affidavits of Mr Thong and Mr Dumont at *Thong 2 [11] and [17]-[25] (CB tab D3); Dumont [12]-[31] (CB tab D4)*.

The amounts paid by SG and subsequently received from Forum Finance.

31. After receiving and reviewing the documents, SG made the SG Payments to Forum Finance. The only exception to this is in respect of the first transaction where payment was made after receipt of the Offer Notice, the Payment Schedule and the Certificate of Acceptance, but prior to receipt of the Verification Statement (which was received later on the same day that payment was made) and the Notice of Assignment (which was received 3 days later). That payment was made as the "Acceptance Date" for the first Offer Notice (i.e. the date by which SG had to pay) arrived before those last two documents were received, and because it was the first transaction SG wanted it to be as smooth as possible: *Dumont [37] (CB tab D4)*. SG required EQWE (and therefore,

Forum Finance) to provide the Verification Statement and Notice of Assignment: *Thong 2 [28] (CB tab D3); GT-8 (CB tabs C22, C23 and C24) and GT-9 (CB tab C20)*. In those circumstances, and in light of the documents then being received promptly, nothing turns on the timing of the first payment. SG also did not receive a Certificate of Acceptance due to oversight, but for the reasons already given, nothing turns on that either.

32. Forum Finance has re-paid to SG \$252,000 in respect of the first transaction: *Thong 1 [18] (CB tab D1)* and \$46,800 in respect of the second transaction: *Thong 1 [27] (CB tab D1)*. Accordingly, SG remains \$8,688,398 out of pocket in respect of the three transactions (**Outstanding Payments**).
33. A more detailed description of the circumstances in which the payments were made, and the relevant receipts from Forum Finance is set out in *Thong 1 [11]-[40] (CB tab D1), Thong 2 [11]-[31] (CB tab D3) and Dumont [12]-[43] (CB tab D4)*.

PART C: THE IMPUGNED CONDUCT

34. 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), GT-14A (CB tab C30) 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.

35. In signing and providing each of the Offer Notices, further representations (as set out in the document itself) were also made. These included 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 Product 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 Product Schedules: SoC [85(o)].
36. It can be safely inferred that on each occasion documents were sent to EQWE, Forum Finance and Mr Papas knew and intended that those documents be passed on to SG. That can be inferred from the face of the emails, the context in which they were given, and the arrangements contained in the Master Agreement and the Servicing Guidelines. No other explanation has ever been proffered.
37. Each of the other representations contained in SoC [85] and SoC [86] are variations of the seven core representations above. 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.
38. In addition, whilst SG received the payments in paragraph 32 above, those payments were an element of the ruse being carried out and were intended to give legitimacy to the transactions being entered into. As the court can readily infer, their purpose 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 exposed.

PART D: THE TRUE STATE OF AFFAIRS

39. The true state of affairs, as deposed to 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 paragraphs 29 and 35. Her affidavit reveals that:
- (a) Ms Brar 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) Ms Brar never signed (and Mr Papas never witnessed Ms Brar signing) the Payment Schedules, the Certificates of Acceptance or the Notices of Assignment.
 - (c) Ms Brar did not handwrite her name on the first Notice of Assignment.
 - (d) 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.
 - (e) 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.
40. The consequence of the above is that (a) Veolia never entered into the transactions the subject of the Payment Schedules, the Certificates of Acceptance or the Notices of Assignment; (b) Veolia never executed those transaction documents; and (c) therefore 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

41. SG has suffered four categories of loss and damage. Not all heads of damage are available under each cause of action. Each head of damage claimed under the corresponding cause of action is identified below when addressing each cause of action. The relevant categories of loss and damage claimed for each cause of action are summarised in the **Schedule**.

Outstanding Payments

42. The first category of loss and damage are the amounts that SG remains out of pocket i.e. the Outstanding Payments referred to in paragraph 32 above of \$8,688,398.

Contract Loss

43. SG's contractual loss on the Master Agreement is \$10,278,999 (**Contract Loss**). This is the commercial benefit SG was to receive pursuant to the Master Agreement, as set out in each Offer Notice. To calculate the outstanding commercial benefit owing to SG, the total receivables amount needs to be discounted by:
- (a) the payments that SG has subsequently received (see paragraph 32 above); and
 - (b) the "Receivables Retention Amount" for the relevant receivables (see paragraph 25(b) above), which is stated in paragraph 3.1(b) of each Offer Notice (see *Thong 1 Ex. GT-7 (CB tab C10); Ex. GT-11 (CB tab C31); Ex. GT-15 (CB tab C46)*).

Master Agreement Expenses

44. SG engaged the law firms Dentons and Ashurst Australia to act for it in connection with the preparation, execution and completion of the Master Agreement, and in doing so incurred legal fees totalling \$49,267.09 excl. GST (**Master Agreement Expenses**): *Thong 2 [13] (CB tab D3) and Ex. GT-44 (CB tabs C5 and C7)*. It was a term of the Master Agreement that Forum Finance meet such an expense (Clause 19.5). SG has demanded payment of this amount, but it has not been paid: *Thong 2 [32]-[33] (CB tab D3) and Ex. GT-45 (CB tab C98)*.

Swaps Loss

45. SG has a number of different divisions, which include: (a) a "Treasury" division that, among other things, finances activities for business divisions within SG; (b) a "Global Markets" division that, among other things, undertakes financial market activities such as entering into swaps for business divisions within SG; and (c) the SSL group, which was the relevant business unit that was involved in the commercial activities, including in particular to manage and administer the arrangements under the Master Agreement such as arranging for SG to make the relevant payments to Forum Finance: *Dumont [4] and [7(b)] (CB tab D4)*.

46. When the SSL group requires money to fund commercial activities (e.g. making the payments for Forum Finance), like a normal client, it is required to obtain a “loan” from the Treasury division (which accrues interest), which the SSL group then repays when reaping the benefits from the commercial activities: *Dumont [44]-[46] (CB tab D4)*.
47. The SSL group took out three “loans” (one for each of the SG Payments), each of which had a variable rate, being the AUD Bank Bill Swap Rate 1 month interest rate (**BBSW rate**) plus a further percentage of 0.68% (for the first payment), 0.63% (for the second payment) and 0.61% (for the third payment): *Dumont [47] (CB tab D4)*.
48. As variable rates, there was interest rate exposure depending on whether the BBSW rate increased or decreased based on the prevailing market at the time: *Dumont [48] (CB tab D4)*. To hedge against those interest rate exposures, three separate swaps were entered into with the Global Markets team to swap each variable interest rate component with a fixed interest rate (**swaps**): *Dumont [49]-[50], [51]-[53] (CB tab D4)*. Among other things, this created interest rate certainty, and meant that if the variable interest rate increased the SSL group received a benefit (in not having to pay the higher variable rate): *Dumont [50] (CB tab D4)*.
49. By June 2021, SG ceased receiving any further payments from Forum Finance, and by 30 June 2021 this proceeding was commenced: *Dumont [54] (CB tab D4)* (see also paragraph 32 above).
50. At that time SG considered that it was unlikely that Forum Finance would make any further payments in the ongoing way contemplated by the contracts (as in fact turned out to be the case): *Dumont [55] (CB tab D4)*. Accordingly, as there was no longer any ongoing interest rate exposure to hedge against, SG terminated the three swaps that had been entered into: *Dumont [55] (CB tab D4)*. In terminating the three swaps, SG incurred break frees comprising of an interest rate differential break cost, and a funding break cost: *Dumont [56] (CB tab D4)*.
51. The total amount of the swap break frees across the three swaps was \$34,500 (**Swaps Loss**): *Dumont [56] (CB tab D4)*.
52. Mr Papas and Forum Finance knew at all relevant times that SG would enter into swaps for each transaction, and potentially suffer losses from the termination of those swaps.

That knowledge can be inferred by the fact that the Master Agreement specifically provided for SG to be indemnified for such losses, as set out in Part H below.

PART F: CLAIMS FOR TORT OF DECEIT

53. SG makes a claim against Forum Finance and Mr Papas pursuant to the tort of deceit: SoC [139]-[146], and [179]-[196], respectively.
54. The elements of the tort of deceit were set out in *Magill v Magill* (2006) 226 CLR 551 at 587-588 (per Gummow, Kirby and Crennan JJ). Each of the five elements described in *Magill* are satisfied in this case.
55. *First*, as set out in Part D, Ms Brar deposes that each of the representations referred to in paragraph 35 and 37 above are false.
56. *Second*, the evidence establishes that Forum Finance and 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 Mr Papas and Forum Finance.
57. *Third*, the evidence establishes that Forum Finance and 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.
58. *Fourth*, the affidavits of the then representatives of SG, Mr Thong and Mr Dumont, establish that they each relied on the representations. Both depose to reviewing the transaction documents and forming certain knowledge and beliefs based on their review

of the documents (see paragraph 29 and 30 above), which align with the representations that were made. Each of them has also deposed 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, and the sums of money involved, that evidence can be readily accepted.

59. *Fifth*, SG has suffered damages in the form of the Outstanding Payments and the Swaps Loss.
60. Under this cause of action, SG seeks and order that Forum Finance and Mr Papas pay SG damages for the Outstanding Payments and the Swaps Loss.

PART G: TRUST/FIDUCIARY CLAIMS

61. SG makes a claim against Forum Finance in trust and for breach of fiduciary duties: SoC [147]-[153]. It makes related claims against Mr Papas for knowing assistance (SoC [188]-[192]) and against FGFS for knowing assistance and knowing receipt (SoC [203]-[213]).

Forum finance held SG's funds as trustee and was subject to fiduciary duties

62. In light of the matters set out in Part F (Tort of Deceit) above, when each of the SG Payments were received by Forum Finance they became trust monies (see *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732 per Leeming JA (with whom Bathurst CJ and Sackville AJA agreed) at [36] and [39]-[40]). At that point in time, fiduciary obligations were imposed on Forum Finance that, among other things, required it to preserve and not dissipate the funds: see for example *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 at [114] (Allsop P with whom Campbell JA and Handley AJA agreed) and *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429 at [64] (per White J).
63. The transfers of the SG Payments by Forum Finance to FGFS on the days they were received (see paragraph 6 above) were in breach of Forum Finance's fiduciary obligations: *Heperu* at [114]; *Wambo Coal* at [64].

64. Accordingly, under this cause of action SG seeks orders for:
- (a) Forum Finance to account to SG for the SG Payments, or in the alternative, an order for equitable compensation for the Outstanding Payments and the Swaps Loss; and
 - (b) a declaration that Forum Finance 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, the sum of \$2,299,539, and any traceable property from those funds, on trust for SG; and
 - (iii) from 24 May 2021, the sum of \$2,558,902, and any traceable property from those funds, on trust for SG.

Mr Papas and FGFS knowingly assisted Forum Finance in the breach of its fiduciary duties

65. The relevant principles applicable to the second limb of *Barnes v Addy* (for knowing assistance) are met in the circumstances of this case (see, for example, ***Farah Constructions v Say-dee Pty Ltd*** (2007) 230 CLR 89 at [111]-[112], [174]-[179] and *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 at [152]-[161] and [173]; ***Grimaldi v Chameleon Mining NL (No 2)*** [2012] FCAFC 6; (2012) 200 FCR 296 at [556], [558]).
66. *First*, Mr Papas was directly involved and implicated in the deceit perpetuated against SG as set out in Part F (Tort of Deceit) above, and accordingly had the requisite knowledge.
67. *Second*, Mr Papas was the controlling mind and director of Forum Finance and FGFS. His knowledge is attributable to Forum Finance and FGFS.
68. *Third*, FGFS made available its accounts for the purposes of receiving the fruits of the deceit that had been perpetuated against SG. FGFS received all the payments made by SG – to the cent – on the same day they were received by Forum Finance. It then dissipated the funds.
69. *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: *Thong 1 Ex. GT-1* (CB tab C63), *GT-2* (CB tab C64) and *GT-3* (CB tab C73); *Bolster Ex. ITB-22* (CB tab C137) and *ITB-23* (CB tab C138); see also *Westpac*

s 50 Evidence Act summary (“Corporate Summary: Directorships, Shareholdings And Trusts”) and SMBC s 50 Evidence Act summary (“Corporate Summary: Directorships and Shareholdings”).

70. On the above basis, under this cause of action SG seeks equitable compensation for the Outstanding Payments and the Swaps Loss.

FGFS knowingly received trust funds in breach of fiduciary duty

71. 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].
72. As it is clear that FGFS received each of the monies that SG had paid to Forum Finance (see paragraph 31 above), then in the context set out in paragraphs 53 to 63 above, and paragraphs 67 and 68 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] (CB tab D6) and *Ex. JP-15* (CB tab C133) and *JP-17* (CB tab C135)), the Court should declare that the funds that FGFS received were the subject of a trust.
73. On the above basis, under this cause of action SG seeks:
- (a) equitable compensation for the Outstanding Payments and the Swaps Loss as described in Part E; 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, the sum of \$2,299,539, and any traceable property from those funds, on trust for SG; and
 - (iii) from 24 May 2021, the sum of \$2,558,902, and any traceable property from those funds, on trust for SG.

PART H: BREACHES OF THE MASTER AGREEMENT

74. SG makes a claim against Forum Finance for breaches of the Master Agreement (SoC [160]-[165], [170]-[178]).

Breaches of general provisions

75. Forum Finance has breached the general provisions of the Master Agreement as follows.

76. *First*, for the reasons set out in paragraph 55 above, Forum Finance breached the contractual representations given to SG.

77. *Second*, for the reasons set out in Part C (the impugned conduct), Part D (the true state of affairs) and Part F (tort of deceit) of these submissions, Forum Finance breached the contractual undertakings given to SG pursuant to clause 9.1 of the Master Agreement (*Thong 1 Ex. GT-6*) (*CB tab C3*), and relevantly set out in SoC [9(h)].

78. *Third*, Forum Finance has not made any payments to SG since June 2021.

79. *Fourth*, pursuant to clause 19.5 of the Master Agreement (*Thong 1 Ex. GT-6*) (*CB tab C3*), on demand, Forum Finance was to reimburse SG for all of SG's expenses (including legal expenses) in relation to the preparation, execution and completion of the initial Transaction Documents (which includes the Master Agreement), including expenses reasonably incurred in retaining consultants to evaluate matters of material concern to SG on a full indemnity basis. On 26 July 2021, SG through its solicitors sent a letter of demand to Forum Finance (**Demand**) demanding, among other things, immediate payment of the Master Agreement Expenses: *Thong 2 [32]* (*CB tab D3*) and *Ex. GT-45* (*CB tab C98*). Forum Finance has not complied with the Demand: *Thong 2 [33]* (*CB tab D3*).

80. In the above circumstances, at all relevant times, there was an "Event of Default" (or at least a "Potential Event of Default") as set out in clause 11.1(a),(b),(c),(g), (i) and (j) of the Master Agreement (*Thong 1 Ex. GT-6*) (*CB tab C3*).

81. Furthermore, by virtue of the above breaches of the Master Agreement, pursuant to clauses 3.2(a)(iii) and/or clauses 3.2(a)(iii) of the Master Agreement Forum Finance was deemed to have collected the "Outstanding Balance" (being the Contract Loss) and by virtue of clause 3.2(b) of the Master Agreement was required to pay those deemed

amounts (i.e. the Contract Loss) to SG promptly, which it has not done despite the Contract Loss being claimed in the Demand.

Contractual indemnification

82. Pursuant to clause 12.1 of the Master Agreement (*Thong 1 Ex. GT-6*) (*CB tab C3*), Forum Finance agreed to indemnify SG, on demand, from and against any and all “Indemnified Amounts” that SG may sustain or incur as a direct or indirect result of certain events, as relevantly set out in SoC [9(s)] (**general indemnity triggering events**).
83. The “Indemnified Amounts” were “any and all damages, losses, claims, liabilities and related costs and expenses including legal costs and expenses” (*Thong 1 Ex. GT-6*) (*CB tab C3*). It includes, among other things, the Contract Loss, the Swaps Loss and the Master Agreement Expenses.
84. By virtue of the matters referred to in Part C (the impugned conduct), Part D (the true state of affairs) and Part F (tort of deceit) above, and paragraphs 75 to 81 above, by at least 26 July 2021, one or more of the general indemnity triggering events had arisen.
85. Pursuant to clause 6.3 of the Master Agreement (*Thong 1 Ex. GT-6*) (*CB tab C3*), on demand, Forum Finance was to pay SG and indemnify SG against, any “Fixed Rate Termination Payment” incurred or reasonably expected to be incurred by SG in connection with a “Fixed Rate Agreement” entered into or deemed entered into by SG in relation to its interest rate exposure incurred from entering into and/or performing its obligations under the Master Agreement, including without limitation, as a consequence of certain events arising, as relevantly set out in SoC [9(n)] (**swaps indemnity triggering event**).
86. A “Fixed Rate Agreement” was defined in the Master Agreement as “*any interest rate swap agreement or other agreement or arrangement entered into or deemed entered into by SG in connection with [the Master Agreement] for the purpose of offering the Discounted Amount to [Forum Finance]*”: *Thong 1 Ex. GT-6* (*CB tab C3*). The swaps entered into (as discussed in paragraphs 45 to 48 above) are “Fixed Rate Agreements”.
87. A “Fixed Rate Termination Payment” was defined in the Master Agreement as “*with respect to any Fixed Rate Agreement, the amount of any swap breakage or termination payments (including but not limited to any loss of profit, loss, cost, fee, expense of*

liability incurred or reasonably expected to be incurred) ... payable ... or reasonably expected to be payable ... under such Fixed Rate Agreement as a result of any termination of or amendment to such Fixed Rate Agreement for any reasons whatsoever. For the avoidance of doubt, it shall be sufficient for [SG] for the purpose of determining and evidencing any Fixed Rate Termination Payment to demonstrate that such swap breakage termination payments ... would have been payable or received by it had it effectively entered into a Fixed Rate Agreement”: Thong 1 Ex. GT-6 (CB tab C3). The Swaps Loss (as discussed in paragraphs 49 to 51 above) are “Fixed Rate Termination Payments”.

88. By virtue of the matters referred to in Part C (the impugned conduct), Part D (the true state of affairs) and Part F (tort of deceit) of these submissions, and paragraphs 75 to 80, by at least 26 July 2021, one or more of the swaps indemnity triggering events had arisen.
89. On 26 July 2021, SG issued a Demand seeking payment of the Contract Loss, the Swaps Loss and the Master Agreement Expenses pursuant to clauses 12.2 of the Master Agreement (in respect of all amounts) and clause 6.3 of the Master Agreement (in respect of the Swaps Loss): *Thong 2 [32] (CB tab D3) and Ex. GT-45 (CB tab C98)*. In further breach of the Master Agreement, Forum Finance has not complied with the Demand: *Thong 2 [33] (CB tab D3)*.

Relief sought

90. By virtue of the matters set out above, under this cause of action SG seeks damages for the Contract Loss, the Master Agreement Expenses and the Swaps Loss.

PART I: MISLEADING OR DECEPTIVE CONDUCT CLAIMS

91. SG makes a claim against Forum Finance and Mr Papas for misleading or deceptive conduct contrary to section s12DA(1) of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)* and, in the alternative, section 18 of Schedule 2 of the *Competition and Consumer Act 2010 (Cth) (ACL)* and: SoC [156]-[157] and [195]-[197].
92. This claim will be unnecessary to deal with if the Court finds that any of SG’s claims against Forum Finance and Mr Papas as referred to in Part F (tort of deceit), Part G

(trust/fiduciary claims) and/or Part H (breaches of the Master Agreement) have been established.

93. The only reason for the alternative claims 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.
94. Having said this, for the sake of completeness SG contends that the ASIC Act applies (see sections 12BAB(1)(b) and (g) and 12BAA(7)(k) of the ASIC Act and Regulation 2B(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth)). This is because Forum Finance and Mr Papas 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) and each Payment Schedule met the definition of “credit” as set out in regulation 2B(1)(a) and (b)(i), (iii). 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

95. 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

96. 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], although where a Court finds that 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].

97. For the reasons in paragraphs 55 to 57 above, the representations referred to in Part C (the impugned conduct) above (and more specifically, SoC [85]-[86]) 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

98. As set out in paragraph 58 above, the representatives of SG relied on the various representations put forward in the decision to advance the SG Payments. In this way, the misleading conduct caused the money to be advanced and, to the extent it has not been repaid, lost.
99. The Court should award damages or compensation to SG pursuant to ss 12GF and/or 12GM of the ASIC Act or, in the alternative, ss 236 and/or 237 of the ACL. SG has suffered loss and damage in this context in the form of the Outstanding Payments and the Swaps Loss.

Position of Mr Papas

100. 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.
101. However, if there be any doubt as to Mr Papas' primary liability in that respect, ss 12FG and 12GM of the ASIC Act and ss 236 and 237 of the ACL enables the Court to order damages or compensation to a person who was "involved" in the contravention.
102. 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.

103. 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 and compensation can still be awarded as set out in paragraph 99 above.

PART J: INTEREST AND COSTS

Interest

104. SG seeks interest pursuant to ss 51A and 52 of the *Federal Court of Australia Act 1976* (Cth) (FCA) (SoC [167], [201], [215]).

Costs

105. In respect of SG’s claims against Forum Finance, SG seeks indemnity costs pursuant to clause 19.5(a)(iii) (SoC [168]). It provides that Forum Finance will reimburse SG, on a full indemnity basis, for all expenses (including legal expenses) of SG in relation to any enforcement of the Master Agreement or in relation to the “Accepted Receivables”.
106. In the alternative, and against all defendants, 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].

Date: 8 September 2022



Sinclair Gray

12th Floor Wentworth Chambers



Matthew Youssef

12th Floor Wentworth Chambers

SCHEDULE OF RELIEF SOUGHT FOR EACH CAUSE OF ACTION

#	Cause of Action	Against whom	Relief sought
1.	Tort of Deceit (Part F)	<ul style="list-style-type: none"> • Forum Finance • Mr Papas 	<ul style="list-style-type: none"> • Damages in the sum of \$8,722,898 (being the Outstanding Payments of \$8,688,398 and the Swaps Loss of \$34,500).
2.	Trust/Fiduciary claims (Part G)	<ul style="list-style-type: none"> • Forum Finance (breach of fiduciary duties) 	<ul style="list-style-type: none"> • Account of the Outstanding Payments of \$8,688,398, or in the alternative, equitable compensation for the Outstanding Payments of \$8,688,398. • Declaration that on receipt of each SG Payment, Forum Finance held the SG Payments on trust for SG.
		<ul style="list-style-type: none"> • FGFS (knowing assistance and knowing receipt) 	<ul style="list-style-type: none"> • Account of the Outstanding Payments of \$8,688,398, or in the alternative, equitable compensation of \$8,688,398. • Declaration that on receipt of each SG Payment from Forum Finance, FGFS held the SG Payments on trust for SG.
		<ul style="list-style-type: none"> • Mr Papas (knowing assistance) 	<ul style="list-style-type: none"> • Equitable compensation for the Outstanding Payments of \$8,688,398.
3.	Breach of the Master Agreement (Part H)	<ul style="list-style-type: none"> • Forum Finance 	<ul style="list-style-type: none"> • Damages in the sum of \$10,362,766.09 (being the Contract Loss of \$10,278,999, the Master Agreement Expenses of \$49,267.09 and the Swaps Loss of \$34,500).
4.	Misleading or deceptive conduct (Part I)	<ul style="list-style-type: none"> • Forum Finance • Mr Papas 	<ul style="list-style-type: none"> • Damages pursuant to s 236 of the ACL and/or s 12FG of the ASIC Act, or in the alternative, compensation pursuant to s 237 of the ACL and/or s 12GM of the ASIC Act, in the sum of \$8,722,898 (being the Outstanding Payments of \$8,688,398 and the Swaps Loss of \$34,500).

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2022 5:39:19 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Outline of Submissions
File Number: NSD642/2021
File Title: SOCIETE GENERALE (ABN 71 092 516 286) v FORUM FINANCE PTY LIMITED (ACN 153 301 172) & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2022 5:50:36 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.