

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 15/07/2021 1:07:53 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: | Submissions                                                                                                                               |
| File Number:     | NSD681/2021                                                                                                                               |
| File Title:      | SMBC LEASING AND FINANCE, INC. ARBN 602 309 366 v FORUM ENVIRO (AUST) PTY LTD (VOLUNTARY ADMINISTRATORS APPOINTED) ACN 607 484 364 & ANOR |
| Registry:        | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA                                                                                     |



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 15/07/2021 1:09:23 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.



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

No. NSD681/2021

**SMBC Leasing and Finance, Inc. ARBN 602 309 366**

Applicant

**Forum Enviro (Aust) Pty Ltd (voluntary administrators appointed) ACN 607 484 364  
and anor**

Respondents

## **APPLICANT'S OUTLINE OF SUBMISSIONS**

### **INTERLOCUTORY APPLICATION FILED 14 JULY 2021**

1. By interlocutory application filed 14 July 2021, the applicant (**SMBC L&F**) seeks:
  - (a) freezing orders against Basile Papadimitriou (also known as Bill Papas) (**Mr Papas**);
  - (b) the appointment of provisional liquidators, or alternatively liquidators, to Forum Enviro (Aust) Pty Ltd (**Forum Enviro**); and
  - (c) that the provisional liquidators, or liquidators, appointed to Forum Enviro be Jason Preston, Jason Ireland and Katherine Sozou of McGrathNicol.
2. The applicant relies on the following affidavits:
  - (a) affidavit of Roger Dobson sworn 13 July 2021;
  - (b) affidavit of Roger Dobson sworn 14 July 2021; and
  - (c) affidavit of Michael Timpany sworn 13 July 2021.
3. The proceedings are commenced by originating application filed 14 July 2021, seeking relief including damages against Mr Papas, and the appointment of liquidators to Forum Enviro.

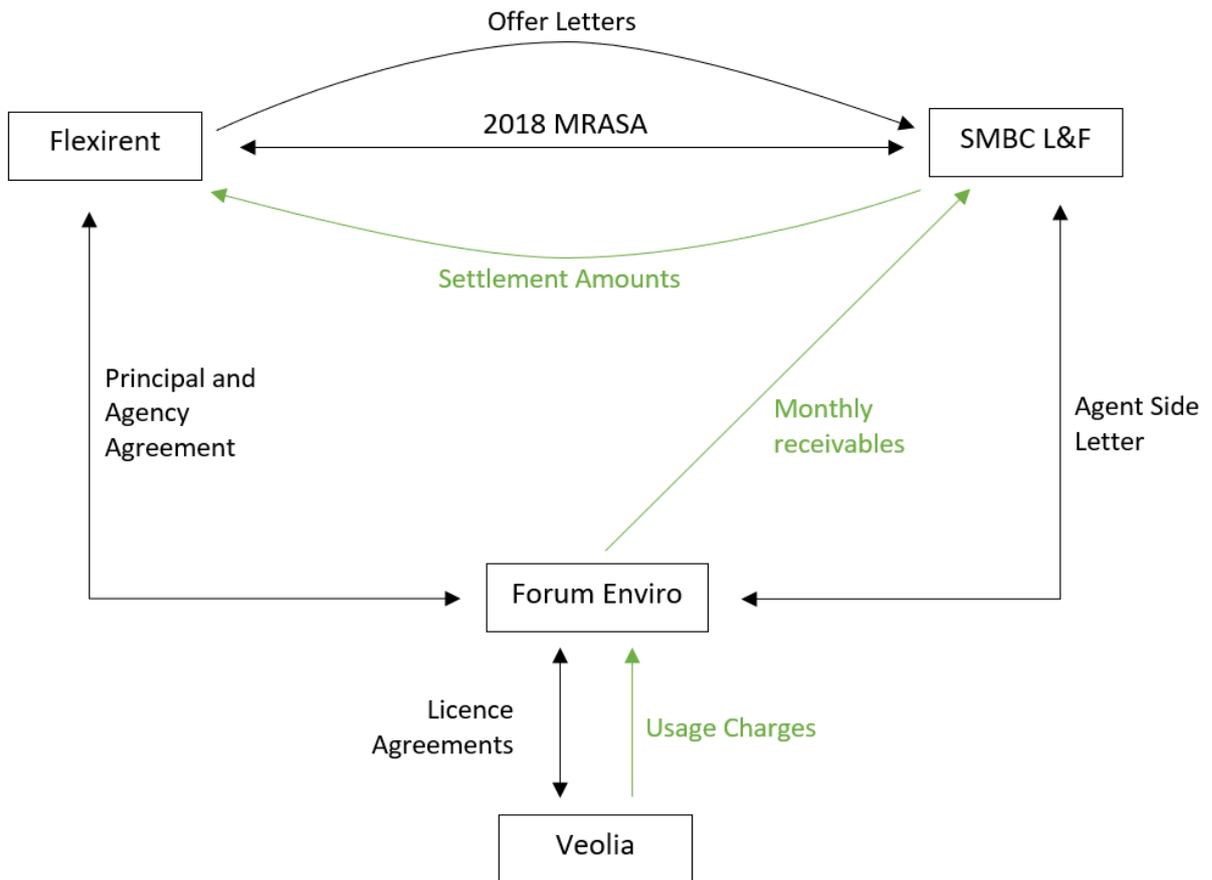
### **Summary of relevant contractual arrangements**

4. The proceedings arise out of the funding structure under four primary agreements:
  - (a) a principal and agency agreement (**Agency Agreement**) between Flexirent and Forum Enviro dated 13 June 2018 by which Forum Enviro was authorised to act as Flexirent's agent in relation to certain rental, lease and licence agreements that Flexirent was in the business of providing;

- (b) an Agent Side Letter between SMBC L&F, Flexirent and Forum Enviro dated 2 August 2018 by which Forum Enviro was authorised to act as SMBC L&F's collection agent in relation to the monthly receivables which arose from the various underlying leasing arrangements;
  - (c) a Master Receivables and Acquisition Servicing Agreement between Flexirent and SMBC L&F dated 2 August 2018 (**2018 MRASA**) under which:
    - (i) Flexirent could offer to sell to SMBC L&F customer receivables and related assets which arose from various leasing contracts between Forum Enviro, as Flexirent's agent, and its customers, in exchange for advancing finance; and
    - (ii) if the offer was accepted, there would be an equitable assignment of the receivables to SMBC L&F and rights granted to SMBC L&F in respect of the assets, in exchange for the finance provided; and
  - (d) a Master Receivables and Acquisition Servicing Agreement between Forum Enviro and SMBC L&F dated 17 July 2020 (**2020 MRASA**) under which:
    - (i) Forum Enviro could offer to sell to SMBC L&F customer receivables which arose from various leasing contracts between Forum Enviro personally and its customers, in exchange for advancing finance; and
    - (ii) if the offer was accepted, Forum Enviro would assign to SMBC L&F the right and title to the receivables in exchange for the finance provided.
5. The funding structure pursuant to the 2018 MRASA agreement was intended to operate as follows:
- (a) Forum Enviro, as an undisclosed agent of Flexirent, entered into Technology Licence Agreements with a customer (being Veolia Environmental Services (Australia) Pty Ltd (**Veolia**)) under which Forum Enviro purportedly leased waste management and disinfectant systems to Veolia. The terms of those agreements required monthly payments, described as "usage charges", to be paid by Veolia to Forum Enviro;
  - (b) Flexirent provided SMBC L&F with Offer Letters which proposed the sale of receivables and related assets under purportedly executed Technology Licence Agreement in exchange for financing;

- (c) SMBC L&F, if agreeable, would advance the settlement sum to Flexirent in exchange for an equitable interest over the receivables and related assets; and
- (d) Forum Enviro would receive the monthly usage charges from the customer in respect of the lease arrangements, as a collection agent of SMBC L&F, and remit those funds to SMBC L&F in accordance with the Agent Side Letter.

6. The funding structure in relation to the 2018 MRASA was intended to operate in the manner set out in the diagram below:

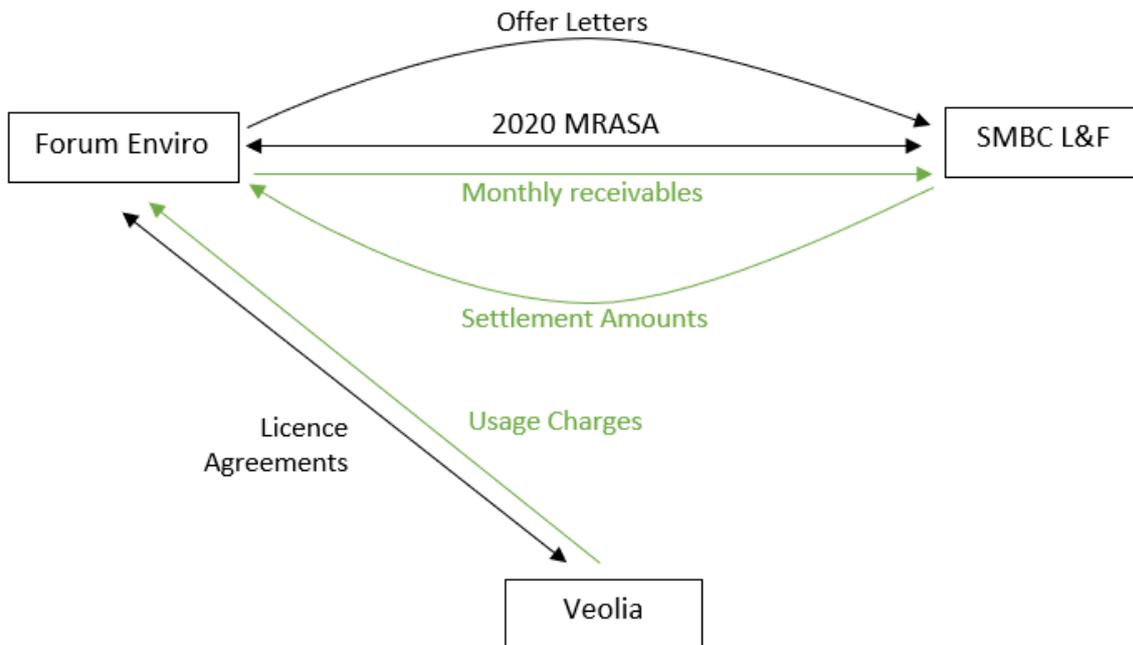


7. The funding structure pursuant to the 2020 MRASA agreement was intended to operate as follows:

- (a) Forum Enviro entered into Technology Licence Agreements with a customer (being Veolia) under which Forum Enviro purportedly leased waste management and disinfectant systems to Veolia. The terms of those agreements required monthly usage charges to be paid by Veolia to Forum Enviro;

- (b) Forum Enviro provided SMBC L&F with an Offer Letter proposing the sale of receivables under the purportedly executed Technology Licence Agreement in exchange for financing; and
- (c) SMBC L&F, if agreeable, would advance the settlement sum to Forum Enviro in exchange for a legal interest in the receivables.

8. The funding structure in relation to the 2020 MRASA was intended to operate in the manner set out in the diagram below:



### Results of investigations by SMBC L&F and Veolia

9. Forum Enviro failed to make a payment of \$2,139,000 due on 30 June 2021.<sup>1</sup> On learning of the missed payment, Michael Timpany of SMBC L&F emailed Forum Enviro personnel, including Bill Papas.<sup>2</sup> Various emails were exchanged between Mr Timpany and Forum Enviro staff on 1 and 2 July. On 2 July, Mr Papas emailed Mr Timpany stating that “significant issues” had arisen in their business and asking SMBC L&F to await an update on 5 July before taking action.<sup>3</sup> Mr Timpany replied on the same day seeking further information and received no response.<sup>4</sup>

<sup>1</sup> Timpany [12].

<sup>2</sup> Timpany [13].

<sup>3</sup> Timpany [15], MT1 pp 33-34.

<sup>4</sup> Timpany [16], MT1 p 33.

10. Around lunchtime on 2 July, Mr Timpany became aware of media reports regarding the Westpac proceedings against Forum Finance Pty Ltd (**Forum Finance**).<sup>5</sup>
11. After obtaining the necessary consent from Flexirent to speak with Veolia directly,<sup>6</sup> Mr Timpany had a call with Preet Brar, CEO of Veolia India and former CFO of Veolia on 5 July.<sup>7</sup> On that call, Ms Brar indicated that Veolia had not entered into a July 2020 Master Technology Licence Agreement with Forum Enviro, and emails purporting to have been sent by her confirming receipt or acknowledging the assignment of receivables to SMBC L&F were likely forged.<sup>8</sup>
12. On 7 July, Mr Timpany emailed 27 relevant documents to Veolia including 18 contractual documents and 9 purported confirmation emails.<sup>9</sup> On 8 July, Ms Brar responded by email stating:<sup>10</sup>

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

...

*These e-mails have been fabricated.*

13. Mr Timpany emailed 5 further contractual documents (being the purported Technology Licence Agreements) to Veolia on 8 July.<sup>11</sup> Ms Brar responded the same day confirming that she did not sign these documents or approve the use of her electronic signature on them.<sup>12</sup>
14. Mr Papas' name and apparent signature appear as signatory, and sometimes both witness and signatory, on each of the 23 contractual documents that purport to have been signed by Ms Brar.<sup>13</sup> Each of the 9 purported email confirmations were forwarded by Mr Papas to SMBC L&F.<sup>14</sup>

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<sup>5</sup> Timpany [21].

<sup>6</sup> Timpany [23]-[24].

<sup>7</sup> Timpany [25].

<sup>8</sup> Timpany [27].

<sup>9</sup> Timpany [29], MT1 pp 35-171.

<sup>10</sup> Timpany [32], MT1 p 172; see also Timpany [34], MT1 pp 175-176.

<sup>11</sup> Timpany [33], MT1 pp 175-176.

<sup>12</sup> Timpany [34], MT1 p 175.

<sup>13</sup> MT1 pp 38-113; RD1 pp 193-240.

<sup>14</sup> MT1, pp 118-143.

## Freezing orders

### *Arguable case for final relief*

15. Having regard to the evidence summarised above, in particular the compelling evidence as to the falsification of numerous contractual documents and emails, and Mr Papas' apparent close involvement in creating and providing the falsified documents to SMBC L&F, there is a strong prima facie case for final relief against Mr Papas for his involvement in the fraud, for fraudulent misrepresentation, unlawful means conspiracy, deceit or having been knowingly concerned in Forum Enviro's misleading or deceptive conduct.

### *Danger or risk of unsatisfied judgment*

16. A court can grant a freezing order even though the risk of dissipation of the assets is less probable than not.<sup>15</sup>
17. Where a prima facie case has been established against a defendant of fraudulent misappropriation of a large sum of money, an inference will readily arise that, absent an order for restraint, the defendant would dispose of assets in order to defeat any judgment which might be obtained against him.<sup>16</sup> As recently noted by Anderson J in *Spotlight Pty Ltd v Mehta* [2019] FCA 1796 (at [23]):

*[w]here, as here, allegations made against the respondents contain allegations of serious dishonesty, evidence of that nature is capable of satisfying the Court of the existence of the requisite danger to dispose of, deal with or dissipate assets.*

18. The existence of danger that any judgment would go unsatisfied if the freezing orders are not granted can be readily inferred from the following:
  - (a) the complexity of the fraud (involving sophisticated commercial customers and many detailed fraudulent documents provided over the course of two and a half years);
  - (b) the total number of the fraudulent contracts;

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<sup>15</sup> *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325 (Gleeson CJ); *Deputy Commissioner of Taxation v Hua Wang Bank* (2010) 273 ALR 194; [2010] FCA 1014 at [9]-[10] (Kenny J); *Severstal Export GmbH v Bhushan Steel Limited* (2013) NSWLR 141 at 156-158 (Bathurst CJ, Beazley P and Barrett JA agreeing).

<sup>16</sup> *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325 (Gleeson CJ), 326 (Meagher JA), 330-331 (Rogers AJA).

- (c) the quantum of funds paid to Forum Enviro by SMBC L&F pursuant to those false contracts;
  - (d) that Mr Papas was involved in the creation or provision to SMBC L&F of every one of the fraudulent documents uncovered thus far, including the Technology Licence Agreements, the acknowledgments of delivery, and the acknowledgments of assignments;
  - (e) the failure of Mr Papas to proffer any explanation to this court in response to the evidence provided by SMBC L&F; and
  - (f) the failure of Mr Papas to proffer any explanation to this court in response to the evidence of fraud provided by Westpac and Société Générale in their proceedings in this Court relating to similar frauds involving Mr Papas.
19. In all of the above circumstances, there is a real risk that any judgment against Mr Papas would be wholly or partly unsatisfied because assets may well be moved, or disposed of, in some way if the freezing orders are not made. There is a compelling case that Mr Papas has acted dishonestly, and there is a real prospect that he will do so again to defeat a judgment.
20. Although Westpac had already obtained freezing orders in respect of Mr Papas, it is submitted that there is utility in granting freezing orders in favour of SMBC L&F where:
- (a) the Westpac freezing orders are limited to the amounts claimed by Westpac and Société Générale;
  - (b) SMBC L&F should have the benefit of orders for provision of information by Mr Papas contained within the proposed freezing orders; and
  - (c) SMBC L&F should be heard as of right on any application to vary or vacate the freezing orders.

**Appointment of provisional liquidators, or liquidators**

21. SMBC L&F seek orders for the appointment of provisional liquidators to Forum Enviro. Alternatively, SMBC L&F seek orders that Forum Enviro be wound up on the just and equitable ground (*Corporations Act*, s 461(1)(k)), and that the advertising requirement in the rules be waived.

22. SMBC L&F seeks the appointment of Jason Preston, Jason Ireland and Katherine Sozou of McGrathNicol as the provisional liquidators, or liquidators.

*Application of s 440A*

23. Forum Enviro was placed into voluntary administration on 8 July 2021, along with its parent company The Forum Group of Companies Pty Ltd and a number of other subsidiaries of The Forum Group of Companies Pty Ltd. Mr Papas being the sole director of Forum Enviro, the necessary inference arises that Mr Papas placed Forum Enviro into administration and chose the administrators, being Messrs Calabretta, Ward and Trafford-Jones of Mackay Goodwin.
24. The appointment was made the day before the Westpac and Société Générale proceedings against Forum Finance (another subsidiary of The Forum Group of Companies Pty Ltd) and Mr Papas were due to come before the Court on 9 July 2021, on an application for appointment of provisional liquidators to Forum Finance.
25. In its interlocutory process, SMBC L&F applies for leave under s 440D, to the extent such leave is required. Although it was held in *Hall v Mercury Information Technology (South Australia) Pty Ltd*<sup>17</sup> that provisional liquidation fell within s 440D, the contrary view has since prevailed. The preponderance of authority indicates that leave under s 440D is not required in respect of an application for the appointment of provisional liquidators or liquidators, because s 440A applies instead.<sup>18</sup> It is submitted that leave under s 440D is not required. However, if such leave is required, it is submitted that it should be granted in the circumstances of this case, and that the relevant factors are those set out in s 440A(2) and (3).
26. Section 440A(2) and (3) provide that:
- (2) *The Court is to adjourn the hearing of an application for an order to wind up a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up.*
- (3) *The Court is not to appoint a provisional liquidator of a company if the company is under administration and the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than have a provisional liquidator appointed.*

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<sup>17</sup> [2002] FCA 272; (2002) 20 ACLC 496 at [14].

<sup>18</sup> *Australian Prudential Regulation Authority v Rural & General Insurance Ltd* (2004) 136 FCR 149; [2004] FCA 185; *Evans and Mullumbimby News Pty Ltd* [2008] NSWSC 240 at [6]; *Re Plutus Payroll Australia Pty Ltd* [2017] NSWSC 1041 at [14].

27. Given the extent of the allegations of fraud in respect of Forum Enviro, it is difficult to see how the voluntary administrators of Forum Enviro could satisfy the Court that it is in the interests of Forum Enviro's creditors for the administration to continue. As in *Re Plutus Payroll Australia Pty Limited*,<sup>19</sup> there is not a realistic probability of a deed of company arrangement being proposed or any benefit to creditors arising in that way.
28. Courts have often expressed their disinclination to defer winding up proceedings where directors have left it to the last minute to place a company into administration.<sup>20</sup> It is submitted that that disinclination will be stronger where, as here, there are cogent allegations of fraud in respect of the company and its sole director.<sup>21</sup>
29. Forum Finance is already in liquidation, with Jason Preston, Jason Ireland and Katherine Sozou of McGrathNicol as the liquidators. SMBC L&F seeks the appointment of the same persons as provisional liquidators, or alternatively liquidators, of Forum Enviro.
30. There is a strong prima facie case for a winding up order in respect of Forum Enviro, justifying the appointment of provisional liquidators in circumstances where:
  - (a) there is evidence of an extensive fraud in respect of which SMBC L&F has suffered damages in excess of \$98 million; and
  - (b) there is evidence that the sole director of Forum Enviro was intimately involved with that fraud.
31. Further, Forum Enviro has already been placed into voluntary administration. That necessarily required a declaration by Mr Papas that the company is insolvent or likely to become insolvent. In *Re Plutus Payroll Australia Pty Limited*, Brereton J took this into account in finding a strong prima facie case for winding up on either the just and equitable ground or on the grounds of insolvency.<sup>22</sup>
32. In respect of the alternative application for the appointment of liquidators, it is submitted that it is appropriate to make that order in circumstances where, in addition to the factors identified at paragraph 30 and 31 above:

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<sup>19</sup> [2017] NSWSC 1041 at [20].

<sup>20</sup> *Re Plutus Payroll Australia Pty Limited* [2017] NSWSC 1041 at [16] (Brereton J); *Re Reid Constructions Australia Pty Ltd* [2012] NSWSC 1045; *Offshore and Ocean Engineering Pty Ltd v Greenwich Contractors Pty Ltd* [2012] NSWCA 371.

<sup>21</sup> As in *Re Plutus Payroll Australia Pty Limited* [2017] NSWSC 1041 (Brereton J).

<sup>22</sup> [2017] NSWSC 1041 at [8]-[9].

- (a) there is no evidence before the court contradicting the evidence of the extensive fraud, nor any suggestion that such evidence might be forthcoming;
- (b) similar frauds perpetrated on Westpac and Société Générale have already led to this Court winding up Forum Finance;
- (c) Forum Enviro is already in voluntary administration, with no apparent prospect of a better return to creditors in that voluntary administration than could be achieved by liquidators; and
- (d) liquidators not appointed by Mr Papas will be in the best position to investigate the fraud, and to maintain the confidence of the creditors of Forum Enviro.

15 July 2021



**E L Beechey**

New Chambers

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