Neutral Citation Number: [2022] EWHC 2885 (Ch)

Case No: BL-2019-000708

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 17/11/2022

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

ZUMAX NIGERIA LIMITED	**Claimant**
- and –	
FIRST CITY MONUMENT BANK PLC	**Defendant**

- -
- -

Mr Chukwuemeka Nduka-Eze as director of the **Claimant** company in person
Ms Poonam Melwani KC and Mr Paul Henton (instructed by Preston Turnbull LLP) for the **Defendant**
Mr Francis Collaço Moraes (instructed by Devonshires Solicitors LLP) for Samuna Limited, **an Applicant**

Hearing dates: 6-7 October 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE DAVIS-WHITE KC (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10am on 17 November 2022

HH Judge Davis-White KC :

1. The primary issue before me is whether or not, on the application of the defendant, the current proceedings should be struck out as an abuse of process. This arises in circumstances where an earlier set of proceedings, commenced in 2013 and between the same parties (the "2013 Claim"), has been struck out for failure to comply with an "unless" order. The "unless" order required the claimant ("Zumax"), among other things, to repay a sum of money of over £3.5 million. The vast majority of this sum was equal to a sum that Zumax had received from the defendant (the "Bank") in satisfaction of an order for summary judgment. The summary judgment had subsequently been set-aside, on appeal, by the Court of Appeal. That court also ordered the repayment of the sum paid by the Bank to Zumax under the judgment.

2. Following a sustained failure to repay the sum in question as ordered, the unless order was made by Miles J on 16 July 2020, following the handing down of his judgment on 14 July 2020 ([2020] EWHC 1852 (ChD) (the "1st Miles J Judgment")) and a judgment regarding consequential matters on 16 July 2020. Following continued failure to re-pay, the 2013 Claim was struck out, under the unless order, in August 2020.

3. The 2013 Claim concerned nine or ten transfers made between May 2000 and April 2002 by a company called Redsear Limited, a nominee for Zumax, for the account of Zumax The transfers were made to accounts held by a predecessor of the Bank with a correspondent bank, Commerzbank, in London, for Zumax as payee. Zumax claims that the Bank has never paid on or accounted for the value of the transfers.

4. As explained by Miles J in his 1st judgment of 14 July 2020 in relation to the 2013 Claim:

> *"[2] Zumax started these proceedings in October 2013 alleging that the Bank became a trustee for it of the monies received into the Commerzbank accounts. In November 2017 Barling J gave summary judgment in respect of nine of the transfers.*[1] *The Bank appealed his order. By the time of the appeal Zumax had received the judgment sum and amounts on account of its costs. In March 2019 the Court of Appeal allowed the appeal and held that the Bank was not a trustee of the sums received into the Commerzbank accounts. By its order of 13 March 2019, it required Zumax to repay the judgment sum and to pay further amounts on account of a proportion of the costs of the appeal and the hearing in the court below. The total, more than £3.68m, was payable in March and April 2019. Zumax has so far paid only £100,000. The Bank* [then applied] *for an order that unless Zumax pays the outstanding sums the claim shall be dismissed and that Zumax shall be debarred from commencing or continuing any further proceedings based on the same facts or causes of action" ("the sanctions application")."*
>
> *[3] The Court of Appeal held that the existing claim was unsustainable.*[2] *Zumax needs to amend if it is to proceed with the claim and it has issued an application for permission to amend to allege claims in debt, restitution, agency, breach of contract, tort, and breach of fiduciary duty.*

[1] [2017] EWHC 2804 (Ch).
[2] [2019] EWCA Civ 294.

> *[4] The Bank has also issued an application for security for costs, contingent on the application for permission to amend being successful.*
>
> *[5] The applications for permission to amend and for security for costs were listed to be heard at the same time as the Bank's sanctions application and the parties have submitted skeleton arguments addressing them all. At the hearing there was time only for the sanctions application. The parties agreed that the outcome of the amendment application is potentially relevant to the Bank's sanctions application. One course would have been to postpone deciding the sanctions application until the amendment application could be heard. But, as a pragmatic alternative, the Bank invited the Court to decide the sanctions application on the assumption (against itself) that Zumax will be permitted to amend its claim, while reserving its right to argue in due course that the amendments should not in fact be allowed. I shall proceed on this basis. The parties have also agreed that time shall not run against Zumax for limitation purposes until the amendment application has been heard*."

5. As indicated by Miles J, the sanction sought to be imposed before Miles J was not just the striking out of the 2013 Claim but the prevention of Zumax from commencing or continuing further proceedings based on the same facts or causes of action. The current proceedings, commenced in April 2019 and served on the Bank in October 2019 (the "2019 Claim"), was one such set of proceedings. The 2019 Claim asserts the same non-trust claims in relation to the ten payments as Zumax sought to introduce by amendment into the 2013 Claim. The 2019 Claim was expressly issued on the basis that it constituted "protective proceedings" to cover a potential limitation issue arising in the 2013 Claim. That issue was that amendment might not be permitted to the extent that, because of the doctrine of "relation back" of amendments, a permitted amendment might rob the Bank of an arguable limitation defence. The 2019 Claim was stayed by consent in November 2019. However, the Bank had filed an acknowledgement of service indicating an intention to contest jurisdiction should the stay be lifted.

6. By his Order dated 16 July 2020, Miles J granted an unless order but limited the sanction to the striking out of the 2013 Claim. As regards the extended sanction sought he said this:

> "*[136] The Bank seeks an order that if it fails to comply with the proposed sanction Zumax shall be prevented from taking or continuing with any other claim based on the same causes of action as in the present action. The Bank refers specifically to the second proceedings. It contends that it would be abusive for Zumax to continue that action where it is continuing breach of the order of the Court of Appeal in the present case. While I see considerable force in the Bank's submission, I was not taken to any of the authorities about a second action being abusive and heard no argument about it, and I am not prepared to make this order. Naturally by taking this course I am not to be taken to suggest that Zumax may properly continue the second proceedings without first complying with the Court of Appeal's order of 13 March 2018."*

7. The effect of this holding on the application to strike out the 2019 Claim (the "Strike Out Application") was one of the issues before me.

8. As well as the Strike Out Application, I also have before me an application purportedly by a third party entity to be joined to the proceedings and, thus, to be heard on the Strike Out Application. The assertion is that, by assignment, it is interested in the relevant causes of action asserted by Zumax. There is a dispute as to whether those acting for the third party are properly empowered to do so. That is why I have referred to the application being purportedly made by the entity in question.

9. In this judgment I have gone rather more fully than I might otherwise have done into the facts and background to this case. That is in part because of the history of this matter. That history includes a large number of court hearings in different jurisdictions and in different proceedings, disputes between the parties as to what some of the hearings decided or did not decide and an appeal by Zumax to the entire history of proceedings between Zumax and the Bank as grounds justifying a refusal to make the order sought by the Bank on the application before me.

10. In part I set out the history fully because, in certain respects, my understanding of what Mr Nduka-Eze, for Zumax, asserted to be the factual position was not the factual position as I understand it to be from the documents. In this respect, and by way of example, I refer to what is said by the Bank's solicitor in proceedings concerned with the registration in England of a judgment of the Nigerian Court of Appeal, Lagos Division. I need not set out the detail here, the facts highlight, stating the position at its most neutral, a complete disagreement between the Bank's solicitor (Mr Preston) and Zumax's then solicitor as to a number of key decisions in the current proceedings before me.

11. I suspect that the resolution of some of the factual detail as to what has been decided by various courts in the past does not substantively affect the result on the application before me. However, it is important that I make clear the basis upon which I am deciding the applications.

12. Finally, I set out the history fully because, in effect, Mr Nduka-Eze, appearing before me as sole director of the claimant, suggests that Miles J failed to do so.

Legal Representation and the hearing before me

13. Mr Nduka-Eze, as director, represented Zumax.

14. Mr Francis Collaço Moraes, instructed by Devonshires Solicitors LLP ("Devonshires"), represented (or purported to represent, there being a dispute as to their authority to act) a company now called Samuna Limited, formerly Zumax Estoppel Limited ("Samuna"). By application notice dated 10 February 2022, Samuna, under its former name, sought to be joined to the proceedings as second claimant (the "Joinder Application"). In this respect it relied upon a deed of assignment under which Zumax apparently assigned all rights and interest in the claims against the Bank in these proceedings, save for a £1 interest. The Joinder Application is resisted by both Zumax and the Bank. One of the grounds of opposition is that it is said that a Mr Coleman, who claims to be sole director of Samuna, is in fact but one of two directors, Mr Nduka-Eze

being the other and that the Joinder Application has not been properly authorised by Samuna.

15. Before me, the Bank was represented by Ms Poonam Melwani K.C. leading Mr Paul Henton and instructed by Preston Turnbull LLP.

16. I am grateful to all those who appeared before me and for their written and oral submissions.

17. Prior to the hearing, Mr Nduka-Eze invited the court to sit remotely so that he could address the court from Nigeria. The Bank objected. Unfortunately those communications were not provided to me until after I had ordered a remote hearing for other reasons. The other reasons related to the personal position of Mr Moraes and the impact of the ongoing Covid-19 pandemic. Had Mr Nduka-Eze's request been referred to me I would not have acceded to it.

18. Mr Nduka-Eze, in his 13th witness statement, confirms that he is a lawyer in Nigeria who has practised at the Criminal Bar in the United Kingdom and in the early 1990s was a Senior Crown Prosecutor with the CPS. He says that he has been involved in the matter from 2002, first as Zumax's lawyer and then, from 2005, as director and "*managing eye of the company*".

19. I mention Mr Nduka-Eze's history because at previous hearings he has been given permission to have the assistance of a McKenzie friend. By way of example, before Miles J he was assisted by the Mr Coleman that I have referred to earlier. In a judgment at an earlier stage of the applications before me, [2022] EWHC 604 (Ch), Mr Thompsell, sitting as a Deputy High Court Judge, commented:

> "[9] *…The Claimant had not secured legal representation, but requested that I allow Mr Jikoa Monu to speak for the Claimant acting as its McKenzie friend. Mr Monu is a practising solicitor but does not have rights of audience in the higher courts.*
> *[10] …. I sought to establish the reasons why the Claimant could not represent itself.*
> *[11] Mr Monu explained that this was because the director representing the Claimant, Mr Nduka-Eze, was concerned that he would be too emotional about the Claimant's case to present it effectively. Mr Monu explained that he was not acting on a commercial basis, and would not be paid for advocacy and that he had become involved because he was a cousin of a director of Zumax.*
> *[12] …*
> *[13] …I consented to Mr Monu speaking on behalf of the Claimant.*
> *[14] As it transpired, Mr Nduka-Eze did also himself speak on behalf of the Claimant. He did so in a calm and measured way such that, in hindsight, I concluded that Mr Monu's involvement as an advocate was not as necessary as I had originally been given to believe."*

20. In my assessment, Mr Nduka-Eze was well able to act as spokesperson for Zumax. He did not seek the assistance of a McKenzie friend and one was not necessary. That does

not mean that I did not find difficulties in following points that he made. A simple example follows.

21. During the hearing I asked if the Bank could forward to me certain skeleton arguments relating to consequentials that had been provided to Miles J, his subsequent decision being made on the papers, certain points having been made to me as to the points that had been raised. The historic skeletons were kindly provided after the hearing and, properly, without further comment by Counsel for the Bank.

22. Mr Nduka-Eze then sent me further submissions by email saying that he did so "following the post hearing submissions by the Defendant". In the accompanying document he suggested that:

> "*the Defendant was asked to make a post-hearing submission regarding interest and calculations of Bankers Acceptance submitted before Miles J at the previous hearing. The Court probably forgot to extend the same privilege to the Claimant*".

23. However, the defendant's submissions were not new ones but rather the provision of copies of the relevant parts of the written submissions made by each of the Bank and Zumax to Miles J so far as they related to a claim then put forward by Zumax regarding Bankers' Acceptances. Further, and in any event, Mr Nduka-Eze's submissions to me then went on to address a wide range of issues raised in the relevant hearing and not just the question of "interest and calculations of Bankers' Acceptances".

24. Mr Nduka-Eze also complained that he felt that my conduct at the hearing had been such that he had been prevented from putting forward his case properly. I am sorry that he should feel that. However, I hope that his further submissions being taken into account redresses, at least to some extent, his perception of imbalance.

25. At the hearing, Mr Nduka-Eze indicated that he would be providing the media with documents from the court case. He having raised that with the court, I made clear that the transcripts of the hearing should not be released or used for purposes other than the proceedings themselves without further court order. Mr Nduka-Eze then indicated that he wanted to release the written submissions to the media and not the transcripts of the hearing. He asked if I would agree to that. I said that I would not make any ruling on that matter without further argument as there was authority dealing with that area on which I would want to be addressed, there was limited time and the Bank was not ready. However, I said that my recollection was that, once deployed, the Skeleton arguments in a case would normally be made available to the public. The matter was not addressed further. I had also indicated that I would prefer it if Mr Nduka-Eze did not take further steps in this regard until he had obtained the ruling he seemed to be seeking. In particular, I should stress that I was concerned that Mr Nduka-Eze should not construe anything that I said as giving him court consent or encouragement to hand over documents within the proceedings to the press. He did not raise the matter again at the end of the hearing and I assumed it would be addressed (if at all) post judgment. Instead, in his post-hearing submissions he refers to having been "gagged" improperly. I should make clear that I have made no order on the point but (as I indicated) I am prepared to consider the matter further with the benefit of submissions if he wishes the court to make a relevant ruling.

26. By way of a post-script to the last paragraph, having received a draft of this judgment, Mr Nduka-Eze informed me that I was wrong in suggesting that he wanted to make public any other party's skeleton argument. All that he wanted to release to the press was, he said, his own skeleton argument on behalf of Zumax. I accept that at the hearing before me itself he referred to Zumax's skeleton argument but the background to all of this was his skeleton argument in which he stated:

> "*Zumax also wishes to place on record that the earlier notice given to the Defendants that submissions made in this hearing will be published post the ruling for the benefit of the UK and Nigerian public was not a threat. The reason for publication is that some of the matters to be addressed in this hearing have a public interest bias and also involves issues of public policy."*

For present purposes I simply emphasise the reference to publication being after "the ruling" and to the reference to "submissions made in this hearing" which, to me at least, connoted both oral submissions (or a record of them) and all written submissions.

Procedural History of the applications before me

27. Following the striking out of the 2013 Claim, the 2019 Claim remained in a state of limbo. In those circumstances the Bank decided to apply to strike out the 2019 Claim. By application notice dated 7 April 2021, the Bank sought orders lifting the stay on the 2019 Proceedings, confirming that the Bank's proposed Strike Out Application did not amount to a submission to the jurisdiction and directions in relation to the proposed Strike Out Application (the "Stay Lifting Application").

28. By application notice dated 10 February 2022, the company then named Zumax Estoppel Limited and now called Samuna Limited, made an application to be joined as additional claimant on the basis that it was the assignee of the relevant claims from Zumax and that it stood in Zumax's shoes save for an interest of £1 in the claims, retained by Zumax (the "Joinder Application").

29. Both the Joinder Application and the Stay Lifting Application came before Mr Nicholas Thompsell, sitting as a High Court Judge, on 16 March 2022. The hearing was conducted remotely. On 17 March 2022, Mr Thompsell handed down judgment.

30. He refused to deal with the Joinder Application on the twin bases that (1) it had been served very late and even by the time the hearing commenced, the Bank had not seen the documentation supporting the application and (2) it was by no means clear that the application had been properly approved by the directors of Samuna.

31. As to the latter point, at that stage, Mr Thompsell's understanding was that there were two directors, Mr Nduka-Eze (who appeared before him with a McKenzie friend on behalf of Zumax) and a Mr Ebo Coleman. Both these gentlemen were present at the relevant remote hearing. Mr Nduka-Eze denied that he supported the Joinder Application as a director of Samuna. He also confirmed that the application was not supported by the Claimant. The Judge set out in his judgment (on the basis of his understanding that there were two directors of Samuna) that he had:

> " *[19] …informed Mr Coleman that the court would wait to see a board resolution supported by both directors of ZEL before hearing the application. In*

> *view of the complex nature of this litigation and the relationship between the 2019 Claim and the 2013 Claim (and in particular the outstanding amount due from Zumax under the CA Order), I do not consider it is suitable for this joinder application to be considered on paper. If it is pursued, this should be at a hearing where the Defendant and the Claimant, as well as ZEL, may be heard*".

32. In fact, by email dated 17 May 2022 to Mr Ebo Coleman (copied to the other parties), Mr Thompsell had explained that he was in the course of making corrections to his judgment and that he had taken on board some points raised by Mr Coleman. He made the points that he had not made a ruling on the Joinder Application and that was for two reasons. Those two reasons are repeated in his judgment. As regards the issue of whether the board of Samuna "actually supported" the application that had been made, he made a suggestion:

> "*Once this* [ ] *matter has been clarified, (I suggest by means of a board resolution signed by both directors)* [that Samuna] *has a right for its application to be heard*"

33. The order as drawn (or the only one produced to me) dealt only with the Stay Lifting (and Strike out) Applications and did not mention the Joinder Application and its adjournment, nor any further directions in relation to the same.

34. As regards the Stay Lifting Application, Mr Thompsell: (1) refused Zumax's then application for an adjournment; (2) lifted the stay; (3) agreed with the Bank that the jurisdictional challenge could, as a matter of case management, conveniently be dealt with after the Strike Out Application rather than before or at the same time and that the Strike Out Application did not amount to a submission to the jurisdiction of the court and made a declaration accordingly; (4) extended the time for the making of an application by the Bank raising any jurisdictional challenge. He then gave directions for the hearing of the Strike Out Application. The directions required, among other things, (a) the issue and filing by the Bank of the Strike Out Application with the filing of supporting evidence by 4pm on 1 April 2022; (b) the filing and service of evidence in answer of Zumax by 4pm on 15 July 2022; (c) the filing and service of the Bank's evidence in reply by 4pm on 2 September 2022 and the listing of the application for a two-day hearing after 3 October 2022.

35. The reason for a period of in excess of 3 months for service of evidence in answer to a draft application and evidence served back in April 2021 was that:

> "*I have accepted the Claimant's request that it should be given a lengthy period in order to obtain new legal counsel and give its counsel time to get up to speed."*

36. The Strike Out Application was issued by Application Notice dated 30 March 2022 (the "Strike Out Application"). By that application the Bank sought, in the alternative, the striking out of the 2019 Claim or a further unless order in relation to the payment of the sums previously ordered to be paid, with the sanction of strike out if not complied with.

37. Following the hearing before Mr Thompsell, Zumax did not instruct lawyers who came on the record. Its evidence was late and came in tranches. Initial evidence (Mr Nduka-

Eze's 14th witness statement[3]) was served three weeks late (6 August 2022 rather than 15 July 2022) with a consequential knock-on effect on service of the Bank's evidence. The Bank's evidence was served two weeks late (on 16 September 2022 rather than 2 September 2022). So far as necessary, I extend the time for the service of the Bank's evidence. Thereafter, Zumax served a series of further "exhibits", on 5 September 2022 and 23 September 2022, though I am not clear that they were exhibits to actual witness statements as they should have been. Further evidence, in the form of a 15th witness statement of Mr Nduka-Eze, was served on 23 September 2022, with the exhibits following on 26 September 2022. A further tranche of evidence, by way of "exhibits" was received by the Bank after hours on 26 September 2022.

38. Meanwhile, by email to the court dated 7 June 2022, Mr Coleman, purportedly acting for Samuna, asked that the Joinder Application be listed before a Master. The matter was referred to Deputy Master Marsh. He directed, as notified to the parties on 8 June 2022, that the Joinder Application should be listed with the Strike Out Application, "*to be disposed of either at that hearing or in accordance with the Judge's directions*."

39. The Bank's solicitors responded to this direction by emails to the court copied to Mr Coleman dated 10 (and CE Filed 13) June 2022, asserting that there was no evidence of a board resolution supported by both directors as "ordered" by Mr Thompsell. In fact, no such order had been made. What Mr Thompsell had made plain, however, was that in circumstances where there were apparently two directors and one was said not only not to have agreed to the application being made but to oppose it, then the position would have to be clarified to demonstrate the application as being properly brought in Samuna's name. The suggested clarification was a board resolution passed by both directors. In any event, the "clarification" could only come by way of further evidence.

40. The existing listing of the Joinder Application was retained, as directed by Deputy Master Marsh. This was confirmed by letter from the court dated 21 June 2022.

41. On 27 June 2022, Mr Preston of the Bank's solicitors wrote to Mr Nduka-Eze to ascertain whether an appropriate resolution of the board of directors of Samuna had been passed. Mr Nduka-Eze wrote back as follows:

> "*Please regarding the above i thought the ruling at the last hearing By Deputy Judge Thompsell is that Mr Coleman must not pursue this application for joinder without obtaining proper consent from Zumax Estoppel ltd and in particular getting a resolution signed by the 2 directors ie Mr Coleman and myself. Mr Coleman has not obtained that resolution because he does not have my consent to act on behalf of Zumax Estoppel Ltd or to pursue any application for joinder on behalf of Zumax Estoppel Ltd. I note that Mr Coleman did not appeal Deputy Judge Thompsell 's ruling or direction.*
> *In those circumstances this renewed application is obviously an abuse of process. The last communication from Mr Coleman was just last week when he wrote to me to seek my consent for the dissolution of the same Zumax Estoppel Ltd and he was reminded that the dissolution consent has already been forwarded to him 5 months ago."*

[3] The numbers of his witness statements follows on from the number of his witness statements in the 2013 Claim.

42. On 28 June 2022, Mr Nduka-Eze wrote to the Court to similar effect.

43. The evidential position that I have outlined above was set out in Mr Preston's 4th witness statement dated 16 September 2022.

44. In his 15th witness statement (2nd in the 2019 Claim), Mr Nduka-Eze set out his position (and that of Zumax) that the Joinder Application was not properly before the court and went on to say:

> *"Mr Coleman had been advised and indeed had agreed to dissolve Zumax Estoppel Ltd following the receipt last March 2022 of Defendants Notice that the Receivership placed on Zumax has now been lifted. Zumax could not give security or enter into any credit relations whilst she remained under receivership hence our decision at the time to use Zumax Estoppel Ltd. Mr Coleman's conduct has so far been quite curious and it is clearly intended to confuse and muddy the issues the Court is required to deal with between Zumax and the Defendants. Zumax Estoppel Ltd is presently dormant and inactive and Mr Coleman had agreed to dissolve it going forward. We therefore find this development quite interesting and will reveal why and what motivated it."*

45. On 29 September 2022, Mr Coleman sent the Bank's solicitors an email saying that he was in the process of instructing solicitors and counsel to represent Samuna at the hearing in October and enclosing various documents which he said that they should already have. These included (among other documents) three witness statements of Mr Coleman dated respectively 10 February 2022 (1st witness statement) and 15 March 2022 (2nd and 3rd witness statement.) The first witness statement was quite short and referred to and exhibited the alleged assignment of causes of action to Samuna dated 24 September 2021 (the "Assignment"). The 2nd witness statement went into a number of reasons why the Bank should not obtain the relief it sought under both the Stay Lifting Application and its, then proposed, Strike Out Application. The 3rd witness statement put forward reasons why the Assignment was a sensible course for Zumax and Samuna to have entered into and that it had not been entered into for a "wrongful purpose" as, it was said, the Bank's solicitors had asserted. These latter witness statements were provided on the day before the hearing before Mr Thompsell and I have dealt with his comments about the late service of them. The email also attached other documents which, I am told, would have made up a lever arch file.

46. Following service and lodging of the Bank's skeleton argument dated 29 September 2022 for the hearing before me, scheduled to commence on 6 and complete on 7 October 2022, further documents were served by Samuna on 3 and 4 October.

47. As complained of by the Bank, and the complaint seems to me to be justified, the material from Samuna came in "dribs and drabs" from which, together with the skeleton argument lodged on behalf of Samuna, the Bank had to piece together Samuna's case.

48. On 4 October 2022, Mr Pack of Devonshires, Samuna's new solicitors who came on the record that day, made a witness statement in support of the Joinder Application. In that witness statement he confirmed that Devonshires had "historically" acted for Mr Coleman, in his personal capacity, in respect of a future application by Samuna to obtain

funding for the 2019 Claim. The bundle before me contained a copy of a letter from Devonshires advising about litigation funding and the Assignment as long ago as 10 March 2022.

49. In a very short paragraph, under the heading "Background" Mr Pack asserted that Mr Coleman was the sole director of Samuna, Mr Nduka-Eze having resigned as a director as recorded at Companies House on 8 July 2022. Other than an exhibited print off from Companies House showing, among the directors' details, that Mr Nduka-Eze resigned on 8 July 2022 and a Companies House electronic return received for filing in electronic format on 8 July 2022, Mr Pack's witness statement does not provide any further source of his information as to this matter. He goes on to say in the same paragraph that on 11 July 2022, Samuna had ratified the making of the Joinder Application. In this respect he exhibited what purports to be a resolution of Mr Coleman as sole director of Samuna dated 11 July 2022. Again, no further source for such information is given. He then went on to say that Mr Coleman had informed him that Mr Nduka-Eze is a director of Zumax.

50. Also on 4 October, Mr Nduka-Eze made a further witness statement (his 16th) and Mr Preston, solicitor for the Bank made his 5th witness statement.

51. In his 16th witness statement, Mr Nduka-Eze, made the points that:

(1) He had never agreed to the change of name of Zumax Estoppel Ltd to Samuna Ltd;

(2) He had never resigned as a director of Samuna and the "resignation" was "improper and of no effect";

(3) That he was concerned that Mr Moraes of counsel had apparently been instructed on behalf of Samuna given that he had previously acted for Zumax and that Mr Coleman had advised that Mr Moraes' handling of earlier litigation in the 2013 Claim "left much to be desired".

(4) That the last conversation he had had with Mr Coleman had been about amending a proposed dissolution resolution for Samuna.

52. In his fifth witness statement, Mr Preston confirmed that there had been no contact from Mr Coleman or any legal representative on his or Samuna's behalf between the date of the hearing before Mr Thompsell and the service of the Bank's skeleton argument on the previous Wednesday, 28 September 2022. During the evening of 29 September (after the time for serving and filing of skeleton arguments had passed), Mr Coleman had sent three emails to Mr Preston's firm with no witness statement or skeleton argument to put them in context. The Bank's solicitors wrote to Mr Nduka-Eze and Mr Coleman for clarification on 30 September and received no reply from Mr Coleman. Mr Nduka-Eze in his reply repeated his previous position and sent further documents about the matter during the day.

53. The documents included the following:

(1) A draft board resolution for the dissolution sent by Mr Coleman to Mr Nduka-Eze for agreement on 19 June 2022. The covering email stated:

> "*I understand from your WhatsApp message that you wish me to request Companies House to dissolve Zumax (Estoppel).*
> *Companies House will only act to dissolve if they have proof of formal consent for this action from the collective board of directors. They will not act upon requests contained in text messages etc. (This is to prevent fraudulent applications to remove companies from the register.) As explained, dissolution of a company also requires that formalities with HMRC etc. are completed.*
> *In order for me to be able to achieve your wish, kindly therefore sign the attached resolution for the company to be dissolved. Companies House will then be able to act as per your express wish".*

The attached resolution was apparently a board resolution.

(2) A response from Mr Nduka-Eze dated 23 June 2022 in which he said:

> *"I have made the request for dissolution of zumax spv as clear as any reasonable person can understand. The relationship of trust between us broke down over 7 months ago and i asked and u agreed to dissolve Zumax Estoppel Ltd. The company has not done anything, owed nobody and has never functioned – indeed the only objective for which we formed it has now been over taken by events. The company is also dormant and will be struck off in any event in due course.*
> *Despite all the above you have tried all sorts of tricks to avoid carrying tru out our joint decision to dissolve the company. The company has no debts, creditors or any other outstanding obligations - unless perhaps the type you incurred for yourself personally.*
> *The sooner you respect our joint agreement to dissolve the company the better. All these ploys about given you a mandate to indulge irrelevant issues like settling creditors have nothing to do with zumax estoppel. So please do get real."*

54. Only at about 2pm 3 October 2022 did the Bank's solicitors receive a bundle of documents and subsequently a skeleton argument and authorities on behalf of Samuna.

The Joinder Application

55. The evidence on the Joinder Application was received late and there was not time to deal with it at the hearing before me. Furthermore, there was a dispute as to the relevant facts which is likely only be capable of being resolved following cross-examination. Accordingly I adjourned the Joinder Application.

56. My understanding was that the Bank and Zumax opposed the Joinder Application. The Bank asserts (among other things) that the Assignment is invalid as offending against principles of maintenance and champerty and/or that it is an abusive device employed to attempt to "get around" the effect of Miles J's order in relation to the 2013 Claim. Both the Bank and Zumax challenge the factual assertion that Mr Nduka-Eze resigned as director of Samuna and the latter asserts that he has not agreed to the Joinder Application being made and that accordingly Mr Coleman (and solicitors and counsel) act without authority. Furthermore, there is a legal issue as to whether, even if Mr Coleman is now the sole director of Samuna, he has power under the constitution of

Samuna to do anything more than call meetings to appoint more directors to bring the number of directors to at least two. Mr Moraes asserted all these matters were straightforward and could be resolved in favour of Mr Coleman before me. As I have said, I did not accept this submission.

57. For completeness I should mention that, in his skeleton argument, Mr Moraes moved from the position taken in the evidence purportedly filed and served by Samuna that Mr Nduka-Eze had resigned as a director of Samuna in July 2022. The new position was an assertion that Mr Nduka-Eze had resigned some time prior to 15 March 2022. The latter proposition was based on evidence in the form of the second witness statement dated 15 March 2022 of Mr Monu, filed on behalf of Zumax in resisting (among other things) the Strike Out Application and the Stay Lifting Application. Mr Monu acted as McKenzie friend to Mr Nduka-Eze before Mr Thompsell. Mr Monu's witness statement referred to Zumax having:

> "*sent Mr Coleman a resolution cancelling the spv [Samuna] which the latter has received along with Mr Nduka-Eze's letter of resignation from the board of the SPV as agreed. Mr Coleman undertook in due course to contact the UK companies house to amend both the name of the SPV and also remove the object for which the SPV was formed*".

58. The reference to a letter appears to have been a reference to an email from Mr Nduka-Eze dated 12 February 2022 in which he said:

> "*Hello Ebo - pls could u amend the spv to change its name by removing any reference to Zumax. Then pls change the object of the company by removing zumax and any reference to zumax nig ltd uk claim against fcmb.*
> *Once this is done pls accept my resignation from the spv. My only involvement in the spv is on account of zumax nig ltd - so once zumax is removed as agreed my involvement ceases. I trust this will be sufficient for dealing with this issue.*
>
> *Thank you, chuck nduka-eze*"

59. Mr Moraes' submission regarding Mr Monu's evidence raised more questions than it answered, not least given that Samuna's position had been that Mr Nduka-Eze resigned in July 2022. Further, at the hearing before Mr Thompsell my understanding was that it had been common ground between Mr Coleman and Mr Nduka-Eze that, at that date, Nduka-Eze remained a director of Samuna. When a draft of this judgment was circulated, Mr Moraes submitted that my understanding that it was common ground before Mr Thompsell that Mr Nduka-Eze remained a director of Samuna at that time was simply wrong. I do not need to resolve that issue.

60. My summary of the position above regarding the disputes on the Joinder Application are to explain why, on the material before me, I considered it right to adjourn the Joinder Application. Nothing I have said should however be taken as limiting the parties from any submissions that they might make on the Joinder Application if the point ever arises.

61. Although the adjournment of the Joinder Application meant that the standing of Samuna to make submissions on the Strike Out Application was not established, I also decided that *de bene esse* I would hear submissions from Mr Moraes on that application. As it happened, at the start of the afternoon on the first day of the hearing before me Mr Moraes informed me that, given my ruling on the Joinder Application and that Mr Nduka-Eze intended to rely on points put forward by Mr Moraes, in his skeleton argument, resisting the Strike Out Application, he and his client had decided that the court's time would be better spent without hearing further from him. He then withdrew from the hearing.

The History: general overview

62. To understand the submissions of Mr Nduka-Eze it is necessary to set out in some detail the history of matters as between Zumax and the Bank, including the various legal proceedings and hearings that Mr Nduka-Eze relies upon. As I shall explain, Mr Nduka-Eze's submissions appeared to me, in the main, to traverse ground that had already been considered by Miles J and by the Court of Appeal when considering the question of permission to appeal from the judgment of Miles J. For that reason I quote heavily from previous judgments in this case.

The background to the 2013 Claim

63. I start by setting out the background to the 2013 Claim and, as did Miles J, gratefully adopt the summary of Newey LJ in the Court of Appeal ([2019] EWCA Civ 294) when overturning the summary judgment orders of Barling J:

> *"[2] Zumax is a Nigerian company which formerly provided engineering and other services to oil companies. It is based in Warri, Nigeria.*
>
> *[3] The defendant, First City Monument Bank plc ("[the Bank]"), is a Nigerian bank. As a result of a merger with Finbank plc, which had itself come into being as a result of a merger involving, among others, IMB International Bank plc ("IMB"),* [the Bank] *has inherited the rights and obligations of IMB.*
>
> [4] *The* [2013 Claim] *relates to some bank transfers dating from 2000 to 2002. At that time, Zumax's main banker was IMB, with which it held a ₦-denominated account in Lagos. Zumax also had ₦-denominated accounts with Warri branches of Citibank Nigeria, Standard Trust Bank and Equitorial Trust Bank.*
>
> *[5] IMB, too, had a ₦-denominated account in Nigeria with Standard Trust Bank, as well as ones with Guaranteed Trust Bank and Citizens Bank. It also held two US dollar denominated accounts, numbered 160122964015 and 160122964010, at the London branch of Commerzbank. A third US dollar-denominated account with Commerzbank ("the IMB Morgan Account") was held by an entity associated with IMB, IMB Morgan plc ("IMB Morgan", formerly known as "IMB Securities plc"), and for the purposes of this appeal* [the Bank] *accepts that no distinction is to be drawn between IMB and IMB Morgan. All three Commerzbank accounts were "correspondent" accounts.*

[6] At least in part, the oil companies for which Zumax undertook work would be invoiced in US dollars and asked to pay the money into an account that Redsear Limited ("Redsear"), a company incorporated in the Isle of Man, held with Chase Manhattan International ("Chase") in London. Barling J described Redsear as a nominee of Zumax, and it was common ground before us that Redsear held the funds that it received from Zumax's customers on trust for Zumax. Money in the account ("the Redsear Account") would be used to meet Zumax's US dollar business needs, with any surplus funds being transferred to Nigeria.

[7] The accounts that IMB and IMB Morgan held with Commerzbank had a central role in these arrangements. Where money was to go to Nigeria, either to Zumax itself or (say) to one of the company's suppliers, it would in the first instance be transferred from the Redsear Account to one or other of the Commerzbank accounts. In the case of money destined for Zumax, the plan, according to Zumax, was that it should be credited with ₦ to a corresponding value on its account with IMB in Lagos. [The Bank]*, in contrast, maintains that Zumax would often prefer to use an informal "parallel" market which offered a more attractive exchange rate than the official rate. Mr Toyin Owolabi, who was IMB's treasurer and head of treasury/business development between 2000 and 2004, has said in a witness statement that in such circumstances:*

> *"IMB would pay through its local NGN [i.e. ₦] account with Citizens Bank, by issuing a cheque to the customer or paying into one of the customer's local current accounts with another bank in Nigeria or direct to a third party (such as a supplier) as the customer wishes".*

[8] *The* [2013 Claim] *concerns ten transfers from the Redsear Account to the Commerzbank accounts that were made between May 2000 and April 2002. The transfers were as follows:*

Number	*Date of receipt*	*Amount*
1	*10 May 2000*	*$205,000 (less $15 charge)*
2	*11 May 2000*	*$105,000 (less $15 charge)*
3	*12 May 2000*	*$205,000 (less $15 charge)*
4	*24 July 2000*	*$505,000 (less $15 charge)*
5	*8 January 2001*	*$355,000 & $250,000 (less $15 charge on each transfer)*
6	*10 August 2001*	*$901,000 (less $15 charge)*
7	*23 October 2001*	*$410,000*
8	*24 December 2001*	*$155,000 (less $15 charge)*
9	*27 February 2002*	*$251,000 (less $15 charge)*
10	*23 April 2002*	*$410,000 (less $15 charge)*

[9] Five of the transfers were into the IMB Morgan Account and the remainder into one or other of IMB's own accounts. In each instance, save in respect of the third transfer, Chase received manuscript instructions from Mr Edwin Chinye, who was a director of Redsear and the signatory on its account with Chase. Mr Chinye was also the managing director of [the Bank] (and a director of Zumax), but it is common ground that he was not acting on behalf of [the Bank] *in signing the Redsear instructions (see paragraph 66(vii) of the judgment). To a substantial extent, Mr Chinye's instructions were then reflected*

in the relevant entries in the statements that Commerzbank produced for the three accounts.

64. For the purposes of this judgment, I refer to all the previous relevant incarnations of the Bank as the "Bank" without distinguishing between them.

65. As regards the 10th payment referred to above, I should mention that there were interpleader proceedings brought by Commerzbank Aktiengesellschaft against IMB Morgan plc and Ors regarding the ownership of sums held in certain Commerzbank accounts opened by it as correspondent bank. Zumax was one of the claimants to sums and made a claim in respect of the 10th transfer. Judgment was given by Lawrence Collins J (as he then was) in November 2014 ([2004] EWHC 2771 (Ch)). It was anticipated that dollar claimants in the position of Zumax would only receive a very small sum, a maximum of 9% of their claim.

66. In due course, in the 2013 Claim, Zumax sought summary judgment on the basis (and only on the basis) that the sums received by the Bank into the Commerzbank accounts were held by the Bank on trust for Zumax. It said that the Bank had misappropriated those amounts by treating them as their own (see Miles J Judgment paragraph [8]).

Other disputes with the Bank and the 2005 Settlement

67. Meanwhile, quite separately, a dispute had developed between Zumax and the Bank regarding the state of account between Zumax and the Bank, quite apart from the transfers the subject of the 2013 Claim. In brief, the position was as follows.

68. On 17 December 1998 Zumax entered into an all-assets debenture in favour of the Bank.

69. In December 2002, the Bank represented to Zumax that it, Zumax, was indebted to it in the sum of c. ₦465m (about $4m at that time). Having made demand, the Bank placed Zumax into receivership for non-payment, under the debenture.

70. Negotiations took place between the receivers, the Bank and Zumax. In the course of the receivership, the Bank represented that it had recovered only about ₦230m, such that Zumax remained a debtor for about ₦309m. The Bank brought proceedings in the High Court of Lagos State, Nigeria (claim number LD/115/005) against Zumax claiming the ₦309m (the "115 Proceedings"). The proceedings were commenced in January 2005.

71. Following further negotiations, the Bank agreed to compromise its ₦309 m. claim for a lesser sum of ₦150m. The receivership was terminated in April 2005 and a compromise agreement dated 23 May 2005 was entered into. The latter agreement was incorporated into a consent order of the Nigerian High Court dated 15 July 2005 (the "2005 Consent Order") in the 115 Proceedings. The terms included a term releasing and discharging all claims of Zumax other than those arising under the Settlement Agreement.

72. Zumax's position (at least as at the time of the hearing of the summary judgment application before Barling J in January-March 2017, as recorded in his judgment) was that:

> "[30] … *in agreeing to the 2005 Agreement and the* [2005] *Consent Order, it relied upon the representations which it says* [the Bank] *made to it in the course of the settlement negotiations about the outstanding level of Zumax's indebtedness. Zumax contends that thereafter it discovered that, contrary to* [the Bank's] *representations,*[the Bank] *had recovered from the receivers within the first nine months of the receivership a sum in the region of ₦ 709 million, and that over the whole course of the receivership* [the Bank] *recovered very considerably more than it was owed. On this basis Zumax submits that the 2005 Agreement and the* [2005] *Consent Order were procured by fraudulent misrepresentation, and/or that there was no consideration for the 2005 Agreement…."*.

73. Barling J went on:

> *"[33] In 2009 Zumax began proceedings against* [the Bank] *in the Lagos High Court under claim number LD/1668/2009 ("the 1668 Proceedings"), seeking to set aside the Consent Order on the grounds that it was procured by fraudulent misrepresentation, and declaration that Zumax was entitled to recover from* [the Bank] *the sum of nearly ₦ 250 million together with interest."*

74. Thereafter:

> "*[33] … In 2010* [the Bank] *applied to strike out the 1668 Proceedings. The application came before Mrs Justice Nicol-Clay who dismissed it by order dated 24 June 2010. She recorded in her order that she had given careful consideration to the affidavit filed on behalf of* [the Bank] *in support of the application but in her view there was evidence of fraudulent misrepresentation and concealment of facts by* [the Bank] *which gave Zumax "grounds for setting aside the consent judgment".* [The Bank] *sought to appeal on the ground that in making that finding Mrs Justice Nicol-Clay had wrongly determined the merits of the set-aside application. Zumax stated in its skeleton argument that the appeal is dismissed. I have not been shown the relevant order or judgment of the appeal court, but* [the Bank] *has not taken issue with Zumax's statement*."

75. The 2013 claim was issued on 3 October 2013. It claimed a declaration that the Bank was liable to account "as trustee" for the total of the 10 transfers that I have mentioned (viz. $3,752,000), an order for the Bank to pay the sum found due on the taking of such account, and a claim for interest.

76. On 5 March 2014, Zumax applied for summary judgment. The application was stayed to await the outcome of a dispute as to jurisdiction. The application challenging jurisdiction, together with other applications, were heard in May 2014 and dismissed by Mr Charles Hollander QC, sitting as a deputy judge of the High Court. His judgment was handed down on 1 July 2014.

77. The Bank's appeal against the decision of Mr Charles Hollander QC was heard in May 2016. It was dismissed in a reserved judgment handed down on 23 June 2016 ([2016] EWCA Civ 567).

The judgment of Barling J

78. The summary judgment application was heard by Barling J on certain dates in January 2017 and March 2017. Further relevant ancillary applications, regarding admission of transcripts of oral evidence given in the High Court of Lagos State, followed later that year.

79. The Judge identified five main defences relied upon by the Bank (see paragraph 48 of his judgment).

(1) Although denying receipt of the third payment, the Bank contended that it had paid or accounted to Zumax for nine of the transfers in the sum of over US$3.5 million.

(2) The Bank contended that the relevant claims were compromised under the 2005 Agreement, as contained in the 2005 Consent Order.

(3) The Bank contended that the claims were assigned and charged to it pursuant to the relevant debenture.

(4) The Bank contended that the proceedings were statute barred in that they claimed what the Bank said were ordinary debts rather than trust monies.

(5) The Bank contended that it was an abuse to claim the sums by way of the 2013 Claim because they could and should have been claimed in other proceedings in Lagos brought by Zumax against the Bank and a former director of Zumax.

80. Barling J held that the Bank had no real prospect of successfully defending Zumax's claim that the Bank received 9 (out of the 10) transfers due to be credited to Zumax, that such funds were impressed with an express, alternatively a *Quistclose* trust in favour of Zumax and that the Bank had not discharged its duty as trustee by paying or otherwise accounting for the funds to Zumax. He held that there was no other compelling reason for the claims in respect of the 9 payments to be disposed of at trial and awarded summary judgment accordingly.

81. He adverted to the fact that the Bank had originally denied having received the funds at all and that this "no receipt" defence was only abandoned following disclosure of Commerzbank statements by order of Master Teverson in February 2004. The "evolving" case of the Bank on this area ("did it receive the sums?", "did it pay them on to Zumax?") is spelled out clearly by Barling J in paragraphs [105] to [113] and following of his judgment, where he also characterises a number of the Bank's submissions as examples of "clutching at straws". He also adopted the observation of Mr Hollander QC in his earlier judgment in which he said that he:

> "*deprecate*[d] [the Bank's] *attempts to rely on ..any conceivable point they could think of, whatever its merit..I increasingly formed the view that* [the Bank was] *willing to take any point to avoid a judgment and that no proper sifting process*

> *had been carried out to determine whether any of the points raised were factually correct, relevant or arguable*."

82. As regards reliance on the 2005 Agreement and 2005 Consent Order, Barling J found that there was no consideration for the same and this was known to the Bank. Quite apart from conflicting bank statements, he referred to evidence that the Bank had received ₦ 270 million of Zumax's money before the receivership began which had not been brought into the account (the evidence having been obtained by cross-examination in the 1668 Proceedings), a sum of ₦ 250 million debited to Zumax's account in April 2002 and the failure to bring into account/disclose the sums found by Barling J to be due in respect of the ten transfers that he was dealing with (see paragraphs [149] – [154]).

83. Barling J also dealt with the issue of fraudulent misrepresentation. As well as dishonest misrepresentation as to the state of account between Zumax and the Bank flowing from (a) the nine unaccounted for transfers that Barling J found to be established, (b) the ₦ 250 million debit in April 2002, (c) the ₦ 270 million received before the receivership and (d) the differing account statements, he also focussed on the extent of the recoveries made in the receivership. As regards such recoveries, he found fraudulent misrepresentation by reason of an assertion at the time by the Bank of a recovery of some ₦ 215-230 million as against actual recoveries of some ₦ 603 million. He found that neither the 2005 Agreement nor the 2005 Consent Order provided a defence to the claims made against the Bank.

84. In conclusion, Barling J felt unable to reject a defence in relation to the third transfer as being hopeless. As regards the remaining nine transfers, he granted summary judgment of just over £2.6 million (the sterling equivalent of US$3,507,450 on 10 November 2017) and left the extent of the liability for interest to be determined in a subsequent accounting exercise.

Satisfaction of Barling J's judgment, the judgment of Obadina J and the barges

85. The subsequent history can conveniently be taken from the judgment of Miles J:

> "*[14] After Barling J gave judgment in November 2017 Zumax obtained a worldwide post-judgment freezing order against the bank for a maximum sum of £20.3m (to include an allowance for costs and interest). On 15 December 2017 the Bank paid £20.3m into Court and the freezing order was discharged. On 8 February 2018 Barling J refused a stay of execution and ordered that the judgment sum of £2,659,675 (plus interest) and an amount of £385,000 (plus interest) on account of costs should be paid to Zumax from the funds in Court.*
>
> *[15] On 6 March 2018 David Richards LJ granted a stay of execution pending the Bank's application for permission to appeal. On 27 April 2018 Kitchin LJ granted permission to appeal and continued the stay of execution.*
>
> *[16] On 5 October 2018 Obadina J gave judgment for Zumax in the 1668 proceedings following a trial of issues regarding the enforceability of the settlement and consent order of 2005. She held that the settlement and consent order were unenforceable for fraud and ordered the Bank to pay Zumax ₦*

> *602.3m (at that time c.$2m). The Bank filed an appeal and sought a stay of execution*."

86. I turn to the judgment of Obadina J in more detail because of submissions made in connection with it by Mr Nduka-Eze who makes a number of points about claims that Zumax has or has made against the Bank.

87. First, there is a sum of ₦ 250 million which was transferred to the Bank's Head Office account on 15 April 2020. The Judge deals with this sum in paragraph [12] of her judgment, and records also an admission by the Bank's witness that in the English proceedings the court was informed that the transfer was still being investigated. The Judge took this ₦ 250 million into account, as being a sum in effect received by the Bank and which it owed Zumax, in calculating what sum was due to Zumax. Barling J also dealt with this sum in paragraph [150] of his judgment. He reached the same conclusion as Obadina J, which was that the debit to Zumax's account formed part of the sum of ₦ 465 million which was said to be owing to the Bank at the outset of receivership when in fact the Bank owed the ₦ 250 million to Zumax.

88. Secondly, there was a sum of ₦ 270 million (equivalent of US$2m received before the receivership and not accounted for by the Bank to Zumax). This sum was dealt with in paragraph [13] of the Obadina J judgment and paragraph [151] of the Barling J judgment. Again, both judges made what was in essence the same finding. Obadina J again took this sum into account in calculating the award she made in favour of Zumax as being due from the Bank.

89. As regards several Bankers' Acceptances, complained about by Zumax and which the relevant Bank witness agreed were made without Zumax's approval, Obadina J said that she did not go into the same. As I understand it, that was because there was, at least before her, no monetary claim in respect of the same (see the commencement of her judgment setting out the pleaded claims) and that she had enough evidence regarding misrepresentation such that the 2005 Consent Order should be set aside without needing to go into the issue of Bankers' Acceptances.

90. As regards the calculations of the monetary judgment that was granted by Obadina J, the calculations were as follows. The starting point was Zumax's claim that the Bank was indebted to it for the payments received by the Bank in excess of Zumax's alleged indebtedness. As regards this the Judge found (page 29 of her judgment) that the Bank admitted recovering ₦441,775,000 during the receivership. To be added to this was a sum of ₦106,154,909, received by the Bank from Zumax's Citibank account, making a total of ₦547,929,909. Adding in the sums of ₦250 million and ₦ 270 million referred to by me above the total was ₦1,067,929,909. The sum said to be owed as at December 2002 was ₦465,633,070. The excess payment due to Zumax was therefore determined to be ₦ 602,296,839. Interest was awarded at the statutory rate of 10% from the date of the judgment. The judge was unable to award interest at 20% as claimed to have been agreed due to lack of proof of the relevant alleged agreement. She awarded Zumax the costs of the action calculated as being ₦2 million.

91. Returning to the judgment of Miles J:

> *"[17] On 16 October 2018 Zumax's then solicitors, Mordi & Co, sent a letter contending that the stay of execution ordered by Kitchin LJ should be lifted. They*

said that, when applying for a stay of Obadina J's order, the Bank had said on affidavit that paying the judgment debt (of ₦ 602.3m) would adversely affect its ability to meet its obligations to its depositors. Mordi & Co's letter contended that this imperilled the protection given by the payment into Court and that, with interest, the judgment sum and payments on account of costs (now amounting to about £3.25m.) should be released to it. They went on to say that Zumax needed the funds to enable it to recover and repair two vessels which had been abandoned at Chevron flow-stations in Nigeria some 15 years earlier. Chevron was said to have issued an ultimatum in August 2018 for Zumax to remove the vessels, failing which they would be scrapped. They said that unless Zumax could recover, repair, and use the vessels it might not be able to continue the proceedings. They said that the order of Obadina J requiring the payment of ₦ 602.3m meant that the Bank could no longer contend that Zumax was impecunious. They invited the Bank to agree that the stay should be lifted.

[18] The Bank did not agree and Zumax made an application on 31 October 2018 for the stay to be lifted, supported by the eleventh witness statement of Mr Mordi ("Mordi 11"). He set out Zumax's arguments for lifting the stay, based on the decision of Obadina J, and what the Bank had said on affidavit in Nigeria about its own financial position. He said that, on the Bank's own evidence, there were now serious concerns about its solvency. He said that, in light of the judgment debt of ₦ 602.3m, the Bank could no longer say that Zumax was impecunious. He also said that any earlier impecuniosity (which he did not admit) was the result of the Bank's own wrongful actions in appointing receivers in 2002 and fraudulently procuring the consent order in 2005 (among other things). He advanced various arguments for saying that the appeal to the Court of Appeal from Barling J's order had limited prospects of success.

[19] Mr Mordi then gave further details about Zumax's "pressing need" to use some of the monies sought to enable it to recover the two vessels from Chevron, repair them and put them to profitable use. He said that Zumax had already been able to recover another of its barges from Chevron and repair it. He put the cost of recovery and repair of the two remaining vessels at $1.96m and their surveyed value after repair at $3.4m. Zumax had received an indicative bid of $14,000 a day for one of its operational barges, M.V. Zumax- 1, and Zumax estimated that it could hire the two remaining vessels (which were larger) for c.$15-18,000 each per day. Mr Mordi said that Zumax was "plainly in a good position to make good and profitable use of the judgment monies and … the value of [Zumax] *would plainly be enhanced by the use of the judgment monies." He said that one of the two vessels could alone earn $5.4m a year. Zumax was prepared to give undertakings to the Court as to the use of the judgment debt monies if the stay were lifted. Mordi 11 said nothing about the means by which Zumax had funded the litigation or about any other intended uses of the monies if the stay was lifted. There was no evidence of Zumax having any significant outstanding liabilities to any third parties.*

[20] After further correspondence the parties agreed the terms of a consent order on 14 November 2018 lifting the stay of execution. The order included undertakings by Zumax that (a) it would use the monies received pursuant to the order (other than in respect of its legal costs as ordered by Barling J) only for the purposes of Zumax, "including for the purposes and assets set out in paragraphs 33-40 of

> *[Mordi 11] (and not for the purpose of funding these proceedings), until the determination of the* [appeal to the Court of Appeal]*"; (b) Zumax would not take any steps to divest itself of the two vessels pending the appeal; and (c) if and to the extent that the appeal were determined in favour of the Bank such that any of the monies were required to be repaid to the Bank, Zumax consented to any enforcement action against the assets identified in those paragraphs of Mordi 11.*
>
> *[21] The Bank wrote an open offer to Zumax on 8 November 2018 saying that if (a) the Bank succeeded in appealing Barling J's decision that it was a trustee, but (b) the Bank failed in its payment defence (i.e. that it had in fact paid equivalent sums to Zumax in Nigeria), and (c) Zumax accepted that it had no other claims, the Bank would pay the equivalent of the transfers (other than the third) plus interest at Libor + 2.5% from the date of Zumax's demand for repayment in 2013.*
>
> *[22] On 9 November 2018 Barling J dismissed Zumax's further application for judgment on the alternative basis of a claim in debt.*
>
> *[23] Pursuant to the consent order of 14 November 2018 the sum of £3.28m odd was released to Zumax from the funds in Court on 10 December 2018."*

The Court of Appeal Decision on the appeal against Barling J

92. Returning to the judgment of Miles J:

> *"[24] The argument before the Court of Appeal took place on 13-14 February 2019. On 14 February 2019 the Court of Appeal indicated that the appeal would be allowed on the trust point. Judgment was given on 1 March 2019.*
>
> *[10] By the time of the appeal the Bank was no longer relying on the 2005 consent order as on 5 October 2018 Obadina J gave judgment in the High Court of Lagos State ("the 1668 proceedings"), declaring that the consent order had been vitiated by fraudulent misrepresentation and concealment. I shall return to this below. The Bank continued to contend that it had real prospects of establishing its payment defence and it relied on the evidence of Mr Owolabi (as recited by Newey LJ at [7]).*
>
> *[11] I should say a little more about the Court of Appeal's decision. It decided that the transfers to the Commerzbank accounts created a relationship of debtor and creditor, not that of trustee and beneficiary. It held that the relationship between the parties was governed by principles illustrated by the well-known case of Foley v Hill (1848) 2 HLC 28. It concluded that the international transfers through Commerzbank as a correspondent bank did not change the nature of the legal relationship between the parties. When the money was transferred from Redsear to one of the Bank's correspondent accounts at Commerzbank, the credit balance in that account was the Bank's property and it was under no obligation to segregate it as a separate fund for Zumax. The Bank no doubt became subject to a personal obligation to pay or credit Zumax, but not as a trustee.*

[25] The parties made post-judgment submissions about the form of the Court of Appeal's order. The Bank sought the repayment of the monies released to Zumax in December 2018 and payments on account of its costs. Zumax argued (among other things) that (a) it should not be required to repay the judgment sum, on the footing that this would equate to conditional leave to defend the claims (which it said was the just outcome); alternatively (b) any repayment should be paid into Court as a condition of defending; (c) there should be a set-off of the sums claimed by the Bank from Zumax against the liabilities of the Bank under the order of Obadina J in the 1668 proceedings; and (d) there should be a stay of execution pending an application for permission to appeal to the Supreme Court.

[26] Zumax did not submit to the Court of Appeal that it could not repay the sums or pay amounts on account of costs.

[27] Zumax also invited the Court of Appeal to consider bank statements it had recently obtained for the ₦ accounts held by it with three other banks at Warri (as referred to by Newey LJ at [4]). There had been some discussion during the hearing of the appeal about what these might show and their relevance to the issues. The Bank submitted that the statements for the Warri accounts might show receipts of ₦ corresponding to the transfers into the Commerzbank accounts. Newey LJ summarised the rival arguments at [60]-[62] and said at [63]

> *There is undoubtedly force in the points that [counsel for Zumax] made. Should statements for Zumax's Warri accounts for the relevant period become available and prove to lend no support to [the Bank]'s case, it may need to re-evaluate its position. As matters stand, however, I have concluded, on balance, that [the Bank] does have a real prospect of defeating the claim as regards the first, second, fourth, fifth, seventh, eighth and ninth transfers on the strength of the payment defence."*

[28] In its post-judgment submissions, Zumax sent the Warri bank statements to the Court and submitted that they did not show any relevant receipts by Zumax of ₦ into its Warri accounts. It was partly on this basis that it sought to persuade the Court of Appeal that no repayment of the judgment sum should be ordered.

[29] Zumax also served draft Amended Particulars of Claim on 11 March 2019.

[30] On 13 March 2019 the Court of Appeal ordered the repayment of the judgment sum (and interest) to the Bank, required Zumax to make certain payments on account of costs, refused to make an order setting off these sums against the order of Obadina J, and refused permission to appeal.

[13] The Court of Appeal ordered Zumax to repay to the Bank within 28 days the sums paid to it pursuant to the order of Barling J (including a sum of £3,286,807.32 received by Zumax in December 2018). It also ordered Zumax to pay £211,548.42 and £180,652.71 on account of the costs of the appeal and the hearing below (and, under the CPR, those sums became payable after 14 days).

[12] As to the payment defence, the Court of Appeal's order of 13 March 2019 recorded that the Bank admitted that it had not paid or accounted for the funds the subject of the tenth transfer and declared that, in the event that Zumax seeks

and obtains permission to amend its Particulars of Claim, save as regards the tenth transfer, the Bank has a real prospect of successfully establishing at trial that it has (on the balance of probabilities) paid over and/or otherwise accounted for the funds under the transfers."

Events in England after the Court of Appeal Judgment

93. Again, I gratefully adopt the account of Miles J:

[31] On 19 March 2019 Zumax replaced its existing solicitor and barrister team with a new one (consisting of Quinn Emanuel and leading and junior counsel from a leading commercial set of chambers).

[32] On 27 March 2019 the deadline for payment of the costs order made by the Court of Appeal passed without any payment. Zumax did not apply for an extension of time. The Bank pressed for payment.

[33] On 29 March 2019 Zumax provided a fresh draft Amended Particulars of Claim settled by their new leading and junior counsel and supported by a long draft witness statement from Mr Bunting of Quinn Emanuel. It sought to introduce claims based on debt, restitution, breach of contract, tort, and breach of fiduciary duty.

[34] On 10 April 2019 the deadline set out in the order of 13 March 2019 for repayment of the judgment sum passed without payment or an application for further time. The Bank again pressed for payment.

[35] On 10 April 2019 Zumax issued a second set of proceedings [the 2019 Claim]*, said to be a protective claim (to cover potential limitation issues), seeking materially the same relief as the draft amended Particulars of Claim provided in the present proceedings on 29 March 2019.*

[36] On the same day, 10 April 2019, Zumax served an application to appeal to the Supreme Court from the order of the Court of Appeal."

94. At this point I should say a little more about the 2019 Claim. As I explain later in this judgment, it was not served on the Bank, in Nigeria, until October 2019.

95. I return to the judgment of Miles J and the position in April 2019 onwards:

[37] On 11 April 2019 Quinn Emanuel stated in correspondence that "Zumax does not have the funds to meet the orders made against it by the Court of Appeal and is not able to raise those funds from third parties associated with it". Nothing was said in that letter about what had happened to the £3.28m odd that had been paid to Zumax in December 2018 from the Court funds office.

[38] Zumax then made a series of proposals to the Bank about payment, which the Bank did not accept.

[39] The Bank made an application to the Supreme Court on 26 April 2019 for an order that any permission to appeal should be conditional on the payment of the

> *outstanding amounts under the Court of Appeal's order of 13 March 2019. On 2 May 2019 the Supreme Court ordered Zumax to file a full response to the Bank's application.*
>
> *[40] In response, on 13 May 2019 Zumax served the eighth witness statement of Mr Nduka-Eze ("Nduka-Eze 8"). This disclosed that no part of the judgment sum received by Zumax in December 2018 had been used to recover and repair the two vessels identified in Mordi 11, but instead the monies had been paid to Cosmopolitan Alliance Limited ("Cosmopolitan") and Kasa Partners ("Kasa"), which (it was said) had funded Zumax's operations and litigation for many years.*
>
> *[41] On 31 May 2019 the Bank served evidence in rebuttal from Mr Preston (Preston 10).*
>
> *[42] On 29 June 2019 Zumax offered to pay £196,105 by 11 July 2019 in respect of the amounts ordered by the Court of Appeal. On 8 July 2019 it said that it would not meet its own 11 July 2019 deadline but anticipated paying the first sum by 23 July 2019. It did not do so, but, after further correspondence and demands, on 15 August 2019 Zumax paid £100,000 on account of the amounts ordered by the Court of Appeal.*

96. At this point I return to the 2019 Claim. As I have said, that was served on the Bank in October 2019.

97. The details endorsed on the 2019 claim form mirrored the causes of action which Zumax sought by amendment to introduce by amendment into the 2013 Claim. Those claims, in relation to the ten payments referred to earlier, included claims in debt, restitution, breach of contract/duty as agent, tort and fraudulent breach of fiduciary duty under Nigerian law. Further amendments were made in July 2019.

98. Zumax obtained permission, ex parte, to serve the 2019 Claim out of the jurisdiction on the Bank in the Summer of 2019 and service took place on the Bank in Nigeria in October 2019.

99. Only on 25 October 2019, after request, were the application to serve out and supporting evidence provided to the Bank, together with a letter seeking a stay of the 2019 Claim.

100. The evidence in support of the application to serve out was a witness statement of Mr Bunting dated 24 July 2019. Mr Bunting was a solicitor and partner in the firm of Quinn Emanuel Urquhart & Sullivan UK LLP, the firm then acting for Zumax. In that witness statement Mr Bunting explained that, for the reasons that he gave, Zumax's claim in debt proposed to be made in the 2013 Claim could arguably have become time-barred on 17 April 2019. Accordingly, the 2019 Claim was issued on 10 April 2019 but:

> "[Zumax's] *intention remains to proceed with the* [2013 Claim] *as its primary route to recovery against the* [Bank]." (see paragraph 15).

> " *it is only intended to pursue the claims in the* [2019 Claim] *if and to the extent that it becomes necessary to do so because the claims contained in it cannot be brought by way of amendment to the Claimant's Particulars of Claim in the Existing Proceedings."* (see paragraph 16).
>
> "*although the claims in the* [2019 Claim] *mirror claims that the Claimant seeks to pursue in the* [2013 Claim], *there is no intention on the part of* [Zumax] *to pursue both claims in parallel. Rather,* [Zumax's] *position is as set out in paragraphs 15-17 above, such that I believe there is no abuse involved in the present application nor other procedural impediment to service out of the claim form" (paragraph 37).*

101. It is clear that Mr Bunting had clearly in mind the principles of "relation back" regarding amendment to pleadings, with the result that amendments in the 2013 Claim might be refused if their effect would be to deprive the Bank of an arguable limitation defence. In such circumstances, the issue of a second protective claim was the course of action suggested in *Chandra v Brooke North* [2014] TCLR 1 at paragraphs [65]-[67].

102. On 6 November 2019, the 2019 Claim was stayed by consent by Deputy Master Arkush (the Bank reserving its position with regard to jurisdiction).

103. I return to the history set out by Miles J:

> "*[44] On 19 November 2019 the Supreme Court refused Zumax's application for permission to appeal.*
>
> *[45] On 19 March 2020 Zumax issued its application for permission to amend the Particulars of Claim, supported by a final version of Mr Bunting's first statement. These documents contained some differences from the drafts served in March 2019.*
>
> *[46] On 30 March 2020 the Bank issued the sanctions application and on 20 April 2020 issued its contingent application for security for costs. The evidence for the sanctions application is a witness statement of Mr Preston of 30 March 2020 ("Preston 11"); a witness statement of Mr Nduka-Eze of 15 June 2020 ("Nduka-Eze 11"); and Mr Preston's response of 22 June 2020 ("Preston 15"). The electronic bundle for the hearing ran to about 2,000 pages."*

Miles J determination

104. The sanctions application, the amendment application and the contingent application for security for costs came before Miles J on 1-2 July 2020. Further written submissions were received on 8-9 July 2020. Judgment was handed down on 14 July 2020.

105. I deal with the judgment in some detail because, as I understood them, Mr Nduka-Eze's submissions in large part covered the same points that he had raised before Miles J and which are dealt with in the latter's judgment.

106. As regards the sums released to Zumax from the funds held in court, Miles J, in painstaking detail, addressed the evidence in paragraphs [47] to [59] of his judgment. As he there explains,

"*none of the monies were used by Zumax in recovering or repairing the two vessels identified in Mordi 11. Instead the funds were paid, on dates which are not disclosed in the evidence, to Cosmpolitan and Kasa*".

107. He decided that it was not necessary to determine whether or not, as alleged by the Bank, relevant payments by Zumax from the sums released from court were in breach of the undertaking given in the order of 18 November 2018. However, he also said that he considered that, in applying for the lifting of the stay, Zumax did not provide the court with a full and fair picture. He also accepted that there was real force in the Bank's submission that at least part of the monies released from court was used by Zumax for the purposes of funding the proceedings. However:

"*What is material is that Zumax received and paid out £3.28 million shortly before the hearing of the appeal knowing that there was a real risk that the appeal would succeed and that it would have to return the money*."

108. Zumax's opposition to the imposition of a debarring condition with regard to payment of the sums ordered to be paid by the Court of Appeal was based on four matters:

"*[67] Zumax accepts that it should have complied with the order of the Court of Appeal. It says, however, that it would be wrong to impose a debarring condition. It says, first, that the merits of the claim are so strongly in its favour that the Court should refuse to impose a condition at all; secondly, that Zumax has been rendered impecunious through the Bank's fraudulent conduct and it would be unfair and oppressive to impose the proposed sanction; thirdly, that Zumax is unable to pay the owed amounts from its own resources and is unable to raise the money from third parties so that to apply a sanction would unjustly stifle the claim and deprive it of access to justice; and, fourthly, that it would be unfair to impose the condition sought as the Bank owes it money under the order of Obadina J, and other sums*."

109. Miles J proceeded on the basis (for the purposes of the sanctions application only) to assume that Zumax would be permitted to amend its claim.

110. As regards the merits, he rejected the submission of Zumax that it was able to establish, to a standard which would pass the test for the grant of summary judgment, that it was entitled to interest on the relevant payments the subject of the English proceedings on a generous basis and dating back to the moment of receipt rather than from the date of its demand for repayment. As he concluded on this point:

"[77] ...I am unable to accept Zumax's attempts to suggest that the Bank has conceded that it is under a wide-ranging, fiduciary, obligation to account dating back to the time of receipt of the transfers. I do not accept that Zumax is able to establish the existence of such a duty to the summary judgment standard."

111. He also considered that an argument that if the Bank was not a fiduciary agent it was nevertheless under an obligation to account as agent, added nothing of substance to the claims.

112. As to the claims in debt, Miles J recorded that the Bank accepted (but subject to its arguments about whether permission to amend should be granted) that it had no defence in respect of the tenth transfer which, after giving an agreed credit in respect of the sum in question, left a balance of $370,450.

113. As regards the other nine transfers:

> "*80. As for the other transfers, as Barling J held there is a dispute about whether the third transfer was even received into the Commerzbank accounts and there is no reason to question that conclusion. As to the remaining eight transfers, the Court of Appeal recorded in its order that apart from the tenth transfer, the Bank had a real prospect of establishing its defence that it had paid Zumax."*

114. Miles J considered the then submissions of Zumax and the Bank regarding the defence of payment. The matters went well beyond simply the Warri bank statements and included (by way of example only), the Bank's offer before the English Court of Appeal hearing and a disputed document referred to as the "Warri Schedule". He concluded that:

> "*Zumax is unable to show (even on the working assumption of this hearing that it will be permitted to amend) that it would be entitled to summary judgment in respect of the transfers other than the tenth".*

115. As regards the $370,000 referred to, Miles J, for the reasons he sets out, applied interest to that sum at a certain rate and for a certain period and came to the conclusion as regards such sum that:

> *"[93]… it would not be right to impose a sanction requiring the repayment of £603,022 of the judgment sum as a condition of Zumax being allowed to continue with the proceedings."*

116. As regards the Bank's conduct, Miles J set out Zumax's position as follows (and which sets out the nub of Zumax's case before me):

> "*[94] Zumax says that the Bank is seeking to use the proposed unless order as an instrument of oppression. It makes wide-ranging allegations about the Bank's conduct. In summary, it says that in the early 2000s Zumax was a highly profitable business, with large international oil companies as clients, and a multi-million dollar annual turnover. The Bank then dishonestly claimed that Zumax owed it large amounts of money and, in December 2002, appointed receivers under a debenture. It became clear that the receivership was damaging the business and the parties entered into negotiations to seek to find a way of lifting the receivership. According to Zumax, the Bank continued to mispresent the state of account between them, claiming that Zumax was a debtor when, on the true state of account, it was a substantial creditor of the Bank. The receivership was lifted in April 2005 and in*

> *May 2005 the parties entered into a settlement agreement, embodied in a consent order of the Nigerian Court, under which Zumax agreed to pay sums to the Bank and not to challenge the agreed state of account between them.*
>
> *[95] Zumax says that it has never recovered from the damage to its business caused by the Bank's false demands and the wrongful imposition of the receivership*."

117. Miles J then went on to set out the history of the matter in more detail including the Nigerian proceedings I have referred to, the two receiverships, complaints to various Nigerian authorities, the obtaining of freezing orders and garnishee orders by the Bank against Zumax in Nigeria, alleged false reports about Zumax to the regulators in Nigeria and of professional misconduct against Mr Nduka-Eze, libel actions brought by the Bank, the findings of Barling J that as late as October 2016 the Bank was making demands for repayment of sums it knew were not due and that this was done for tactical reasons, and the findings of Obadina J.

118. Miles J went on to say:

> *"[103] Zumax says, in summary, that the Bank's conduct, which has continued over the best part of two decades, has severely damaged its business. Before 2002 the business was flourishing but the appointment of the receivers in 2002 wrecked Zumax's ability to trade. Customers did not wish to deal with a company in receivership and other Banks would not lend to it. Zumax says that this led to a severe depletion of its assets, including to its inability to recover the two valuable vessels from Chevron. Since 2005 it has been tied up by the Bank in expensive litigation, including the 1668 proceedings, which was finally resolved in its favour in 2018 when the Court concluded that the Bank had been guilty of fraud. It says that the lifting of the first receivership did not allow it to trade, because the Bank was continuing to assert its false claims and, indeed, imposed the second receivership, and then obtained freezing orders and garnishee orders on the same false basis that Zumax owed it money when the opposite was the case.*
>
> *[104] Zumax says that the Bank should be disabled by this conduct from seeking to impose sanctions. Zumax says that it cannot pay the amounts ordered by the Court of Appeal and that this is the fault of the Bank. To require the payment of those amounts as a condition of continuing the action would, it says, to turn the order of the Court of Appeal into an instrument of oppression. It draws an analogy with cases on security for costs such as Aquila Design v Cornhill Insurance [1998] BCLC 134.*
>
> *[105] I cannot accept Zumax's submission that (on the current facts) it would be oppressive or unfair to impose the conditions or that the Bank's past conduct is a ground for refusing to impose sanctions. While there appears to be force in at least some of Zumax's complaints about the Bank's conduct over many years there is a short answer. In December 2018 Zumax had the £3.28m odd released from the Court funds office. It knew that the appeal was imminent and that it might succeed. It knew too that it would have to repay the judgment sum if the appeal succeeded. Mordi 11 indeed addressed this possibility and explained that*

> *Zumax would provide undertakings in relation to the use of the money to guard against the case where it was necessary to repay. The undertakings were given on the assumption that Zumax might lose the appeal and be required to repay. But rather than retaining the funds pending the appeal or using them to recover and repair the barges, Zumax chose instead to disburse them to Cosmopolitan and Kasa.*
>
> *[106] On Zumax's own case the informal loans from Cosmopolitan and Kasa had been outstanding for many years. There is no evidence that they were pressing for repayment. Mr Nduka-Eze does not suggest that there was any pressure (and indeed the evidence suggests that, as the 85% owner of Cosmopolitan, he was in a position to influence its decisions concerning the advances to Zumax). All he says is that the directors of Zumax (including of course himself) considered there was a "moral obligation" to pay, whatever that might mean. Zumax gambled on the outcome of the appeal and lost. This is a not to my mind a case where the imposition of a sanction would be oppressive or unfair by reason for the past conduct of the Bank. This does not of course mean that the evidence about Zumax's current financial position is irrelevant (far from it). However, in my judgment its relevance is to the stifling argument, to which I now turn.*

119. As regards the argument that a debarring condition would stifle the proceedings, Miles J concluded that the authorities required Zumax to demonstrate that such a condition would deprive it of access to justice and that not only it had insufficient resources of its own but also that it could not raise money from third party backers.

120. Having concluded that there was little hard evidence about Zumax's financial position, that there had been some impact on it by reason of the second receivership imposed in 2007 but that the effect had been overstated, he went on to consider the several areas where Zumax's evidence about its own resources was incomplete and unsatisfactory. These included: the absence of accounts for the period after March 2019; the absence of evidence about whether barges had been hired out and the associated costs in circumstances where the gross revenues from two barges in question appeared to have been over $5 m a year (based on evidence about hirings and offers of hirings); lack of explanation as to how Zumax had been funding its legal costs (which must have been substantial) such that it was reasonable to infer that Zumax had access to funds to meet the fees and that it had not presented a full and frank account of its finances to the court.

121. As regards third party funding, Miles J pointed out there was simply no evidence about the means or willingness to fund of two of the three shareholders. As regards Mr Nduka-Eze, he did not say in his witness statements that he was unwilling to fund Zumax or that Cosmopolitan or Kasa were not willing to do so, and the evidence (as set out by Miles J) pointed in the other direction. Further, as he explained, there were strong financial incentives on the directors of Zumax and other backers to continue to back Zumax in the proceedings, subject to having the means to do so.

122. As regards means, the evidence about Mr Nduka-Eze's ability to provide funding was far from full and detailed but, such as it was, suggested that he was a man of some substance including the ownership of a 30-hectare site in Nigeria which he said was conservatively valued at ₦2 bn (c $5.5 m). There was no detailed evidence as to why he was not able to raise money against that property. He also held an 85% interest in

Cosmopolitan which had recently advanced over £3.5 million to Zumax but there was no primary evidence about its means or ability to raise money from other sources. There was evidence that Cosmopolitan owned some land underlying a property development project which project was said to have a value of ₦ 825m (about $2.3 million). There was no cogent or detailed evidence as to why Cosmopolitan could not raise money against the project or of any actual efforts to do so. General allegations about the difficulties of raising money in light of the Bank's past conduct were found to be unpersuasive.

123. As regards the other financial backer of Zumax, Kasa, there was almost no evidence regarding its assets or ability to raise funds though there was evidence of the advancement of loans to Zumax, by it and Cosmopolitan, in the knowledge of its historical trading difficulties and its troubled relationship with the Bank.

124. On this area he concluded:

> "*[128] In summary, Zumax has not provided a full and transparent account of its ability to meet the order for payment. There are many gaps in the evidence about its own means and those of Mr Nduka-Eze, the other shareholders, and its historical backers, Cosmopolitan and Kasa. There is no suggestion that they are unwilling to do so (subject to having the means). There are no details about what became of the monies released to Zumax in December 2018 or what efforts have been made to recover them since the order of the Court of Appeal. There is no evidence about Zumax's trading since March 2019 or whether it has generated revenues on its vessels. Zumax has not disclosed how it has paid its own lawyers since March 2019. There is, on the other hand, evidence suggesting that Cosmopolitan is a substantial business and that Mr Nduka-Eze is a reasonably wealthy man but the evidence about his assets is exiguous. Cosmopolitan and Kasa were able and willing to provide Zumax with funding until 2018 and there is no reason, given the evidence, to conclude that they would not be able to provide similar funding now.*
>
> *[129] The burden of showing that it will be denied justice if the Court of Appeal's order is enforced by a sanction is on Zumax. The Court is entitled, indeed required, to scrutinise the evidence with a careful eye and to draw adverse inferences from obvious gaps (of which there are many). Zumax has failed to persuade me on the balance of probabilities that it will be unable to pay the amount owing under the Court of Appeal order if a debarring sanction is imposed."*

125. Finally, as regards the sums owed under the judgment of Obadina J, Miles J said as follows:

> *[130] Zumax contends that it would be wrong to impose a sanction for its failure to pay the sums owing under the Court of Appeal's appeal when the Bank has failed to pay the ₦ 602.3m due under the order of Obadina J. (Zumax says that there are in fact further substantial sums owing to it by the Bank, but the only one established by an order of a Court is that contained in the order of Obadina J.)* (emphasis supplied)

> *[131] The Bank has appealed that order and has sought a stay from the Court of Appeal.*
>
> *[132] Zumax's argument based on Obadina J's order point is closely related to the set off argument advanced to the Court of Appeal in the post-judgment submissions. The Court of Appeal decided to impose the requirement to repay the full amount of the judgment sum despite the order of Obadina J. In my judgment the order of the Court of Appeal is to be regarded as an unconditional and independent obligation, without linkage to any sums payable by the Bank to Zumax. I consider that any issues there may be about the enforcement the Nigerian judgment debt are properly to be addressed in Nigeria. I do not consider that the existence of Obadina J's order is a reason for refusing to enforce the Court of Appeal's unconditional order by imposing a sanction.*

126. The overall conclusion of Miles J was as follows:

> "*[135] The Court of Appeal made its order on 13 March 2019 and so far £100,000 has been paid. Orders of the Court should be generally complied with and, if necessary, enforced by appropriate sanctions. The Court of Appeal considered a number of the points now relied on by Zumax (such as the set off argument and Zumax's arguments about the Warri bank statements). Zumax had £3.286 million in its hands in December 2018 but, with the hearing of the Court of Appeal imminent, rather than holding the monies pending the outcome or investing the funds in valuable assets, it chose to pay off advances to funders. Though it complains about two decades of conduct by the Bank, Zumax itself chose to pay out the judgment sum without making reserves. Zumax has failed to discharge the burden of establishing that its claim will be stifled by the sanction sought. Nor is there any obvious alternative way of enforcing the order. I consider that it is appropriate to impose the sanctions sought in the application save in respect of the amount of £603,022 (see [93] above); on the working assumption of this application (that Zumax will be permitted to amend) that is a sum to which the Bank has no arguable defence."*

127. Following the handing down of the Miles J judgment, written submissions were lodged by both parties regarding the form of order and consequential matters arising from the hand down. Those submitted for Zumax included a request that Miles J also take into account a claim against the Bank in respect of Bankers' Acceptances which Obadina J had found to have been made without Zumax's approval. The claim was said to result from an abstraction of some ₦ 200 m (about $1.8 million). In its written submissions the Bank invited the court to ignore this claim to a further ₦ 200 m which had been raised for the first time and which, it was said, had not been claimed in Nigeria or in England.

128. In his consequentials judgment of 16 July 2020, Miles J did not in terms deal with the claim of Zumax in respect of Bankers' Acceptances though I note that it would in any event and in principle fall within paragraph [130] of Miles J's main judgment (even if he was not specifically made aware of this claim prior to the hand down).

129. Miles J did deal with the question of the timing at which the "unless order" should become effective:

> *"[3] Zumax submits that the unless order should become effective only 8 weeks after the determination of the re-amendment application. As a fall-back, Zumax appears to ask (in the alternative) for 8 weeks to pay in any event. It also submits that its application to re-amend should be listed for an urgent hearing.*
>
> *[4] Zumax says (through a number of emails from Mr Nduka-Eze) that it is negotiating with a litigation funder and that its prospects of obtaining funding would be enhanced if permission to amend were granted. It therefore asks for the conditional order referred to above. It says in any event that the negotiations will take some time and asks for 8 weeks to pay. (I note that Zumax asked me to read in unredacted form a proposal from the potential funder which was provided only in redacted form to the Bank. I have not done this as I consider it would be wrong for me to read material from one side which is not available to the other. I also note that there are some suggestions in the emails from Zumax that the discussions must have started before the hearing before me. Nothing was said about any discussions with a funder in Zumax's evidence at the hearing.)"*

130. Miles J ordered that the period for payment should be 28 days from his judgment after which time the sanction would bite. As drawn up the Order required repayment of £3,337,296.55 by 4pm on 11 August 2020

Appeal from Miles J

131. By Appellant's notice dated 4 August 2020, Zumax sought to appeal the order of Miles J and sought permission to appeal and a stay of execution. The evidence in support of the application for a stay asserted that Zumax was impecunious but making strenuous efforts to raise the funds necessary to comply with the Miles J order.

132. On consideration of the papers without an oral hearing on 6 August 2022, Coulson LJ refused the application for a stay. Among the points made were that no reason had been given for the "abject failure" to repay the almost £3.5m as ordered in March 2019:

> *"[3] The papers disclose no factual or legal basis on which this court could grant a stay of execution. On the contrary, the papers demonstrate that Zumax ought to have paid these monies over a year ago, and are currently in breach of an order by this court, as well as the order by Miles J, in not doing so.*
>
> *[4] Zumax can no longer seek to rely on proceedings in the High Court and the Court of Appeal, whilst at the same time deliberately flouting the orders which those courts have made."*

133. On 11 August 2022, on a reconsideration of the matter pursuant to CPR 52.24(6), Newey LJ confirmed the decision of Coulson LJ and refused a stay. He identified that the key question was whether Zumax would be unable to pursue the appeal if no stay was granted and that "the materials before the court do not show that":

> *"On top of that, it is right to have in mind, as Coulson LJ pointed out, that this Court ordered the appellant to repay almost £3.5 million in March 2019. There*

> *was no question of that obligation being dependent on the merits of the appellant's claims in the proceedings. The appellant was to repay the money within 28 days. If it is unable to do so, that can be attributed to its decision to pay out some £3.28 million shortly before the Court of Appeal hearing despite knowing that there was a real risk that the appeal would succeed and that it would have to return the money.*
> *The interests of justice do not call for the grant of a stay."*

134. On 23 October 2020, Rose LJ (as she then was) refused permission to appeal on the papers without an oral hearing. That decision is final and cannot be further reviewed or appealed (see CPR r52.2 and section 54(4) Access to Justice Act 1999).

135. Grounds 1 to 3 were all rejected by Rose LJ. They were, in summary:

(1) Ground 1: the Judge was wrong to conclude that it was possible for the Bank to resist a summary judgment application in respect of 7 of the transfers;

(2) Ground 2: the Judge was wrong to conclude that the quantum of Zumax's claim in respect of the 10th transfer did not exceed the sums claimed by the Bank;

(3) Ground 3: was that the Judge had erred in his decisions regarding agency of the Bank.

136. Ground 4 of the proposed appeal was that Miles J had wrongly rejected Zumax's submission that it would be unfair to demand it to repay the judgment debt when the order of the Nigerian court was outstanding. As to this Rose LJ said:

> "*Ground 4 argues that the judge was wrong to reject the set off of the amounts ordered by the Lagos High Court. I do not accept that the judge merely decided that because the Court of Appeal had ordered the repayment of the judgment debt despite the existence of the Lagos order, that it was also not a reason for refusing to grant a debarring order. The judge clearly exercised his own discretion on this point and arrived at a conclusion he was entitled to reach."*

137. Ground 5 of the proposed appeal relied on the principle that 'fraud unravels everything'. It was as follows:

> *"A. The learned Judge wrongly ignored and gave no consideration to the binding findings of Barling J. that* [the Bank] *had defrauded Zumax. The learned Judge accordingly failed to apply the overriding principle that fraud unravels everything and that 'No court in this land will allow a person to keep an advantage which he has obtained by fraud.*'
>
> *B. The learned Judge should have applied the above principle and on the basis of the binding findings of Barling J. should have determined that by reason of its fraudulent misrepresentations* [the Bank] *had, inter alia, obtained the unlawful advantage of being in possession of an all assets debenture granting* [the Bank] *security over all of Zumax's assets.*

> *C. Having found that* [the Bank]*'s possession and enforcement of the debenture constrained Zumax's ability to borrow conventionally from banks, the learned Judge should have applied the above principle and presumption that [the Bank]'s frauds had caused the victim damage.*
>
> *D. Further, and on the principle that it is unjust for a person found to be a fraudster retaining his benefits while seeking to enforce Court Orders, the learned Judge should accordingly have either declined to make an unless order or suspended the operation of an unless order until* [the Bank*] had surrendered and cured all its breaches and wrongful actions deriving from its fraudulent conduct."*

138. Ground 6 of the proposed appeal overlapped with proposed ground 5 (and other proposed grounds, including proposed ground 1 which was to the effect that Zumax could make out claims on a summary judgment basis). Ground 6 was as follows and relied upon the decision being unjust because of a procedural or other irregularity:

> "*A. The learned Judge's failed to take into account and consideration that* [the Bank] *is subject to binding findings by Barling J.'s summary judgment of 10 November 2017 that its conduct and documents were fraudulent.*
> *B. In particular, the learned Judge permitted* [the Bank] *to rely on evidence (including its statements of Zumax's bank account) which Barling J. found to be fraudulent, dishonest and erroneous (which finding was not appealed and so remains binding), in support of* [the Bank]*'s case that:*
>
> > *i)* [the Bank] *could prove at trial that it has a valid payment defence in respect of $2,236,000 in transfers (i.e. excluding the 3rd, 6th and 10th transfers); and*
> > *ii) Zumax is indebted to* [the Bank] *by over ₦13.4 billion ($40 m. equivalent), so that* [the Bank] *was justified in retaining security over Zumax's assets under a debenture, notwithstanding that such retained security prejudices Zumax's ability to comply with Court orders.*
>
> *C. The learned Judge failed to apply the overriding principle that fraud unravels everything and accordingly bar [the Bank] from relying on its fraudulent evidence. The learned Judge also failed to exclude such evidence on the grounds of issue estoppel.*
> *D. Had the learned Judge barred* [the Bank]*'s reliance upon evidence already found to be fraudulent and false, Zumax would not have had to effectively re-litigate issues and points already decided in its favour.*
> *E. By reason of the learned Judge's errors the decision reached by the learned Judge was unfair and unjust, being a decision resting upon the purported correctness of evidence already adjudged false. Further, by reason of the time wrongly spent in the hearing re-litigating already decided points Zumax, which was not legally represented, was unfairly prejudiced in that there was insufficient time at the hearing to permit Zumax to properly advance its case showing that it could obtain summary judgment on its claims. Zumax was also unable to advance its re-amendment application*."

139. Of proposed grounds 5 and 6, Rose LJ said:

> "*Ground 5, relying on the principle that 'fraud unravels everything' is misconceived since it does not avoid the need for the kind of careful scrutiny that the judge gave to the issues. Ground 6 is largely repetition of the previous grounds."*

140. Proposed ground 7 was that there was some other compelling reason for the appeal to be heard being the obtaining of guidance from the Court of Appeal on the law regarding banking and the relationship between bank and customer and the principle that fraud unravels all. This ground was also rejected.

141. Significantly, none of the proposed grounds raised any issue regarding the Judge's determinations regarding stifling or impecuniosity of Zumax.

142. Rose LJ concluded:

> "*The Judge's reasons for making the order are clear and unimpeachable and none of the grounds of appeal has any prospect of success. There is no other compelling reason for an appeal to be heard."*

The Court of Appeal (Lagos) determination of the appeal against the orders of Obadina J and the further appeal to the Supreme Court of Nigeria

143. On 10 December 2021, the Court of Appeal Lagos Judicial Division handed down judgment on the Bank's appeal, and Zumax's cross-appeal, against the orders of Obadina J.

(1) It found that the original awards of Obadina J of just under ₦ 603 million should be reduced to ₦ 496,141,930. This was on the basis that the sum of just over ₦ 106 million relating to the Citibank account which formed part of the award of ₦ 603 million was not proved on admissible evidence by Zumax.

(2) It set aside the award of the costs of the action in the sum of ₦ 2 million.

(3) It dismissed the cross appeal that Zumax should have been additionally awarded ₦ 239,851,089.90 (plus interest) as due based on admissions and the further sum of ₦ 302,184,681.39 as being admitted earnings of the Bank from illegally trading on Bankers' Acceptance Transactions with Zumax's account. As regards both these matters the Court of Appeal could find no evidence of any such alleged admissions.

(4) It dismissed the cross-appeal for interest at 20% on the basis that the factual basis had neither been pleaded nor evidenced.

(5) It dismissed a cross-appeal regarding currency conversion of part of the award.

(6) It dismissed a cross appeal that interest should have been awarded at 20%.

144. By notice of appeal dated 10 December 2021, the Bank appealed the decision of the Court of Appeal, Lagos Judicial Division to the Supreme Court of Nigeria (other than so far as it reduced the judgment sum ordered by Obadina J). By notice of motion the

same day an order staying execution of the Court of Appeal's Order, pending determination of the appeal to the Supreme Court, was sought from the Appeal Court.

Registration of the Court of Appeal, Lagos Judicial Division in England

145. By application notice dated 12 July 2022, Zumax applied without notice for the registration of the Nigerian Court of Appeal judgment as a judgment of the High Court of Justice of England and Wales, Queen's Bench Division (as it then was). The evidence in support was a witness statement of a Femi Ogunshakin of Nexa Law, a solicitor instructed by Zumax.

146. On 20 July 2022, an order for registration was made, with liberty to the Bank to apply to set it aside,

147. By application notice issued on 15 August 2022, the Bank applied to set aside registration of the Nigerian Court of Appeal judgment. Among the grounds relied upon for setting aside the registration were that a mandatory pre-condition for registration under s9(2)(e) of the Administration of Justice Act 1920, namely that there is no pending appeal against the order sought to be registered, was (and is) not met and that Zumax's supporting evidence had failed to comply with CPR Part 74 (not least in failing to confirm that the Nigerian judgment was not one which may not be registered under s9 of the AJA 1920). Under CPR r74.9(2), no steps may be taken to enforce the Nigerian Judgment whilst the set aside application is pending.

Abuse of process: the relevant law

148. The Court has power to strike out proceedings under both its inherent jurisdiction and pursuant to CPR r3.4(2)(b).

149. As regards the inherent power to strike out proceedings, this is a power:

> "*which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people*";
>
> Further: "*The circumstances in which abuse of process can arise are very varied*".
>
> See *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 esp at 536 and *Harbour Castle v David Wilson Homes Limited* [2019] EWCA Civ 505 esp at [8].

150. CPR 3.4(2)(b) provides that the Court may strike out a statement of case where it is:

> "*an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings*."

151. As regards the question of whether a second claim initiating proceedings will amount to an abuse of process in circumstances where an earlier set of proceedings claiming the same relief has been struck out, without any substantive adjudication or settlement, most of the relevant cases are helpfully dealt with in the White Book at the notes at paragraph 3.4.8.

152. The starting point is that the question of whether the second set of proceedings amounts to an abuse of process will be a question not of discretion but will be an evaluative assessment to which there is only one answer. The burden lies on the party asserting that the second set of proceedings is an abuse to establish that this is so. If the second set of proceedings is an abuse then the court has a discretion to strike them out. However, once satisfied that they are an abuse, then it is likely that the court will strike them out (see e.g. *Harbour Castle v David Wilson Homes Ltd* [2019] EWCA Civ 505 at [6]).

153. A claimant's desire to have a "second bite of the cherry" has to be weighed with the overriding objective of the CPR in mind and the Court's need to allot its resources to other cases (*Securum Finance Ltd v Ashton* [2001] Ch 291).

154. The court must take a broad view of the reasons why the original claim was struck out and the stage at which it is struck out. The reason why it was struck out will be an important factor (*Cranway v Playtech Ltd* [2008] EWHC 550 (Pat)).

155. Usually, a second set of proceedings will only constitute an abuse of process where the first set of proceedings were struck out in circumstances of abuse of process or equivalent misconduct which is inexcusable, such as intentional and contumelious conduct or want of prosecution or wholesale disregard of the rules of court (see dicta of Rix LJ in *Aktas v Adepta* [2010] EWCA Civ 1170, and contrast the facts in that case (a negligent failure to serve a claim form in the first set of proceedings), with that in *Securum* (inordinate and inexcusable delay) and *C(A Child) v CPS Fuels Ltd* [2001] EWCA Civ 1597 (a number of failures to comply with orders resulting in an unless order which was also not complied with and a failure to engage with the case management process)). In *Kishore v Revenue and Customs Commissioners* [2021] EWCA Civ 505, Newey LJ looked more widely at the circumstances where a second set of proceedings might amount to an abuse of process, and considered among other situations and by way of example, cases where there had been an adjudication in the first set of proceedings or where they had been discontinued. So far as relevant for present purposes, he identified the relevant principle that he took from the authorities to be as follows (at paragraph [26])

> "*Where a civil claim has been struck out as an abuse of process on account of intentional and contumelious conduct, want of prosecution or wholesale disregard of rules of Court or, perhaps, struck out by reason of other "inexcusable" procedural failure on the part of the claimant, a second claim covering the same subject matter will be struck out unless there is special reason not to do so."*

156. To similar effect is the judgment of HH Judge Cawson QC sitting as a Judge of the High Court in *889 Trading Limited v Clydesdale Bank plc* [2021] EWHC 850 at [86]:

> *"The overall conclusion that I draw from the authorities is that where a first action has been struck out by reason of the failure to comply with an unless order, whilst*

> *that is not in itself sufficient to lead to the conclusion that a subsequent action whereby the claimant seeks to have a "second bite at the cherry" is abusive, if a deliberate decision was taken not to comply with the unless order then that is liable to make the second action abusive, at least if it can be said that the party in question ought to have used the opportunity provided by the first action to resolve its dispute with the other party."*

157. The reference to "special reason" is derived from the *Securum* case. In *C (A Child) v CPS Fuels*, Judge LJ (as he then was) agreed with Bodey J that the words "some special reason" were not a fixed formula and that other terms such as "very good reason" or "powerful" or "sufficient" reason, expressed the same principle.

158. In cases where the first set of proceedings were struck out following breach of a peremptory order for the payment of money (or security), the court will bear in mind that such a peremptory order is not normally made if such an order would stifle a claim. As such, where the court in the first action has properly considered the issue of stifling and has determined that a peremptory order should be made which the claimant does not comply with then "*on that basis one would expect* [the] *second action to be regarded as an abuse of process*" (*Harbour Castle* at [9]-[10]).

Is the issue open to be taken by the Bank?

159. Both Zumax and Samuna submitted that the refusal of Miles J to extend to the 2019 Claim the sanction that he applied to the order requiring payment, meant that the Bank was prevented from pursuing the current strike out application. Indeed, Mr Moraes went so far as to submit, in his written skeleton argument, that the Bank was "estopped by res judicata" from pursuing its application.

160. The relevant passage is at paragraph [136] of the Miles J judgment which I set out at full near the start of this judgment.

161. It is clear to me that Miles J, far from deciding that the 2019 Claim would not be an abuse of process in the event that the sanction that he imposed came into effect with regard to the 2013 Claim, simply decided that he was unable to decide the point. As he said, he was far from suggesting that continuation of the 2019 Claim would be proper without complying with the Court of Appeal judgment.

162. The submissions of Zumax and Samuna in this respect seem to me to lack legal or indeed any other merit.

Is it the position that "special reason" has to be shown to permit the 2019 Claim to proceed?

163. First, in my assessment it is clear that the 2019 Claim covers the same subject matter as the 2013 Claim. This is not a case where there is really any room for argument to the contrary.

164. Secondly, it is clear to me that the 2013 Claim was struck out as an abuse of process or for equivalent misconduct. The sanction imposed by Miles J followed a sustained failure by Zumax to comply with the original order of the Court of Appeal. This is not a case where, for example, the sanction was imposed for a one-off breach in

circumstances akin to those in e.g. *Davies v Carillon Energy Services Limited* [2017] EWHC 3206 (QB).

165. Furthermore, as I shall go on to explain, in my assessment this is a case where the only inference on the evidence is that non-compliance with the order of Miles J was itself deliberate (as there is no evidence to show that circumstances changed such that, for example, Zumax was simply unable to pay the sum in question). As such, it therefore is a situation such as that envisaged by David Richards LJ (as he then was) in the *Harbour Castle* case.

166. Finally, there are the circumstances in which the 2019 Claim was initiated and pursued: that is as being ancillary to the 2013 Claim in case there were limitation issues with proposed amendments to the 2013 Claim. Had that not been the position the 2019 Claim would itself have been an abuse. Among "right thinking people" it would, in my judgment, seem odd if a set of proceedings which was initially launched and pursued on the express basis that they were ancillary to the 2013 Claim should be elevated into substituted proceedings in circumstances where the "main" proceedings are themselves struck out for a prolonged failure to comply with a court order, where the relevant sanction imposed had been strike out.

167. In conclusion, in my judgment, a "special reason" has to be shown as to why, notwithstanding the strike out of the 2013 Claim, the 2019 Claim should nevertheless be permitted to proceed.

Is there a "special reason" which would permit the continuation of the 2019 Claim?

168. Although I do not complicate the test of "special reason" by applying a "relief from sanction" test under the jurisprudence following *Denton v T H White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296, in practice it seems to me that in the situation facing me it is likely that a "special reason" is only likely to arise in similar circumstances to that where relief from sanctions would be granted in relation to the striking out of the 2013 Claim.

169. The circumstances in which a special reason might arise may be myriad but, again in broad terms, are likely to arise either by reason of one or more matters arising before the order for sanctions was made or by reason of subsequent developments.

Matters before Miles J judgment

170. To a large extent the submissions of Mr Nduka-Eze mirrored the arguments before Miles J as to why an order imposing the sanction that he did should not be made. Thus, in opening Zumax's case before me he said as follows:

> "*Can I trouble you and take a minute to try and see if we can save some time. We tried to get across to the other side that there is probably very little point in spending a whole day going through the entire previous proceedings because the way Zumax is putting its case on this second application is essentially that in all the circumstances, i.e., events pertaining between the parties over the years, and the fact that there are orders and considerable fraud findings both in the UK and Nigeria, references have been given about them, and that we have evidence showing*

> *that not less than $20 million of Zumax's money is actually illegally and fraudulently held by the defendants. We say in the light of that, for them to be able to obtain an unless order, whilst holding those funds which were extracted illegally, we say there is something unjust about that. That is why I have gone into the history of the matter. So, we are not talking about stifling here, we are not talking about impecuniosity; we are just saying that no right thinking person would consider it fair and just for the defendants to retain $20 million which we can prove both by court findings, we can prove by admissions made by them, there is actually evidence before the court that in excess of $20 million without accounting for interest has been held by them since 2003. So, we say, if you take that into account and consider that $3.5 million attracted a deposit into court of £20.3 million between both parties just a few years ago, £20 million gives you a sense of what the value of £20 million would be today if interest were 9 to be given. Zumax says in the light of all that it is unfair.*
> *THE JUDGE: Yes.*
> *MR. NDUKA-EZE: That is actually the case we are running."*

171. I had understood Mr Nduka-Eze, as had Ms Melwani, to be saying that he was not relying on impecuniosity of Zumax, arising after the judgment of Miles J, as a new factor that had prevented Zumax paying the relevant sums under the Miles J unless order such that it could be said the non-payment was not deliberate. However, on the second day of the hearing he backtracked on this position and said that he <u>was</u> relying on the fact that Zumax was impecunious and unable to pay the sum ordered to be paid, in addition to the wider case that it was not fair to shut Zumax out from proceedings with the 2019 Claim because of the previous fraudulent conduct of the Bank both in retaining sums owed to Zumax but also in hiding the same and resisting the claims of Zumax falsely in legal proceedings.

Impecuniosity, non-compliance with payment order not "deliberate"

172. The submissions of Mr Nduka-Eze did not however reveal any change of position since Miles J had considered the matter in detail. The proposed appeal from his order did not, it will be recalled, raise as a ground of appeal that Miles J had incorrectly determined that Zumax had not demonstrated insolvency such that it could not meet the order for payment. I turn to points raised by Mr Nduka-Eze but not necessarily in the order that he raised them.

173. First, Mr Nduka Eze submitted that the Bank's case was that Zumax was insolvent and so there was no issue before the court as to insolvency: it was an admitted fact. In this connection he relied upon his eighth witness statement dated 13 May 2019 and prepared in connection with a proposed appeal by Zumax to the Supreme Court from the decision of the English Court of Appeal. That witness statement is stated to be made in opposition to the Bank's application that, if the Supreme Court were minded to grant permission to appeal, then it should only do so on conditions namely that Zumax should (a) provide security for the costs of the appeal and (b) should repay the sums ordered to be repaid by the Court of Appeal on 13 March 2019. In the witness statement, he refers to an affidavit made by the Legal Officer of the Bank in the Nigerian proceedings in October 2018 in support of a stay of the Order of Obadina J. In paragraph 68 he refers to the stated belief of the Legal Officer that Zumax is "*cash flow insolvent and*

that its total net worth is less than the judgment sum (i.e. less than approximately USD 1.9m)."

174. The eighth witness statement of Mr Nduka-Eze was before Miles J. Indeed, much of the evidence that he refers to about the barges was contained in that witness statement. Nevertheless he made the detailed findings that he did and reached his conclusion that he was not satisfied that Zumax was unable to make the payment that he ordered to be made subject to the sanction for non-compliance. In those circumstances, in my judgment, Zumax cannot re-open the point before me. In any event, even if it could, I would reach the same conclusion on the issue as Miles J did for the reasons that he gives. Further, the position has not changed since then in terms of the available evidence.

175. The second point that Mr Nduka-Eze raised was that the Bank's conduct had caused the insolvency of Zumax by reason of the retention of the sums claimed, both for which judgment had been given and those for which judgment had not been given. Again, these points were made before Miles J. This is subject to one point regarding the claim in respect of Bankers' Acceptances which appears to have been sought to be raised before Miles J after he handed down judgment. As regards this matter, which I deal with in more detail later in this judgment, it does not appear to me to alter the analysis of Miles J on the issue of the solvency of Zumax. Again, in my judgment Zumax cannot re-open the point before me. In any event, even if it could, I would reach the same conclusion on the issue as Miles J did for the reasons that he gives.

176. In short, the submission that Zumax is unable to comply with the order of Miles J is founded upon the same arguments put before Miles J as to why he should not make an unless order, based upon Zumax being said to be insolvent such that an unless order would unfairly stifle the 2013 Claim. Before me, there is no relevant new evidence as to insolvency or inability to meet the order of Miles J and no new evidence which even begins to address the evidence (and lack of evidence) which resulted in Miles J reaching the conclusion that he did as to Zumax's alleged insolvency. In those circumstances the inference to be made is that the failure to meet the Miles J order was deliberate and not involuntarily caused by Zumax being or becoming insolvent.

177. There is a further point, which is the issue that has been raised both before Miles J and now before me of potential funding being shortly in place so as to enable the unless order of Miles J to be satisfied in terms of payment. The first point is that this evidence does not negate the fact that Zumax has failed, both before me and before Miles J, to satisfy the court that it is in fact impecunious and unable to pay the sum subject to the Miles J sanction. As regards the position before Miles J he set a time by which the payment had to be made before the sanction would bite and that took into account the evidence before him as to alleged impecuniosity/stifling and the issue of raising funds. There is no new evidence throwing any different light on the consideration of the relevant issues by Miles J at the time that he had to consider them.

178. As regards the evidence before me, and whether therefore there has been a new development which might amount to "special circumstances" preventing the continuation of the 2019 Claim amounting to an abuse of process, it seems to me that in reality Zumax would have to be able to demonstrate that relief from the sanction imposed by Miles J was now appropriate. Whether or not that is correct, there is no

concrete evidence from Zumax itself as to an imminent payment to be made by it. Samuna, however, does raise the possibility that it will raise funding enabling the order to be met.

179. The evidence of Samuna is, however, far from satisfactory. First, it is not an offer to comply with Miles J's order but an offer to pay sums into escrow. Secondly, the evidence that sums will be available is extremely weak. Reliance is placed on non-binding offers to provide finance which are subject to caveats or preconditions which are unsatisfactory (such as that there will be a split trial with liability to be decided by June 2023). There will also need to be 8-10 weeks of due diligence and of course the resolution of the issue as to who controls Samuna. Miles J considered proposals which are not that dissimilar in their lack of specificity and need for more time for negotiations to be concluded and concluded that it would be wrong further to delay the imposition of sanctions.

180. I cannot see that the evidence of Samuna on this point begins to get off the ground a case for relief from sanctions as regards the 2013 Claim. I also do not consider that it provides any form of "special reason" why the 2019 Claim should not be struck out as an abuse of process in the light of the fate of the 2013 Claim.

Fraud unravelling all, general unfairness

181. I have set out earlier in this judgment Mr Nduka-Eze'sopening oral submission to me on the topic. It reflects an argument that he has deployed at various earlier stages of proceedings in this jurisdiction (see e.g. Mr Nduka-Eze's eighth witness statements for the Supreme Court referred to earlier in this judgment).

182. In my judgment, so far as he relies upon it before me, the fatal flaw in this submission is that it is an attack upon the original imposition of the order imposing sanctions made by Miles J. That order was unsuccessfully the subject of an application for permission to appeal to the Court of Appeal. The starting point, therefore, is that the 2013 Claim has been struck out in circumstances where the sanction has come about, or on the evidence is to be treated as coming about, because of a deliberate failure to comply with its terms. The question is not, as Mr Nduka-Eze would have it, whether the order of Miles J should have been made, but whether the striking out of the 2013 Claim pursuant to the Order of Miles J should in the circumstances result in the evaluation that the continuation of the 2019 Proceedings would be an abuse of the court's process as, in effect, being a way of getting round the order of Miles J.

183. There is no suggestion either that the order of the Court of Appeal, setting aside the Barling J judgment and ordering repayment, or the order of Miles J, making the relevant unless order in relation to the 2013 Claim, was procured by fraud or wrongdoing whether known of at the time or having subsequently come to light. In those circumstances, the submission based on fraud "unravelling all" is unpromising.

184. Part of Mr Nduka-Eze's submissions seemed to be that Miles J had not been taken through or had not dealt in detail with all the specific complaints that he makes of misconduct by the Bank not only in "holding on to Zumax's money" but also in what he describes as the fraudulent conduct in doing so and also what he describes as the misconduct of the Bank both in the proceedings before the English court but also more generally as evidenced, he would say, by the complaints, at various times, made by the

Bank to eg. the police and regulatory authorities in Nigeria and made or threatened to be made to authorities in the UK.

185. In my judgment, the short answer to this point is that Miles J (and the Court of Appeal) considered the *principle* as to whether fraud or other misconduct of the types alleged by Zumax should prevent the imposition of a debarring order by Miles J and came to the conclusion that they should not. For completeness, I have considered the matter afresh but would have come to the same conclusion. I also conclude that the matters in question are not such as to justify the 2019 Claim continuing in circumstances where the claim to which it was ancillary, the 2013 Claim, has been struck out in the circumstances that it has been.

186. This is tied into the question of "fraud unravelling all" which was relied upon by Zumax in the application before Miles J to impose sanctions and thereafter on the application for permission to appeal. Again, those arguments were rejected at all relevant levels as a matter of principle. Having, again for completeness, reconsidered the matter in relation to the continuation of the 2019 Claim I come to no different conclusion and conclude that such matters are not such as to justify the continuation of the 2019 Claim. In short, the concept of "fraud unravelling all" cannot be used as a "get out of sanction", or "get out of abuse", card unless the fraud has a sufficient causal relationship with, for example, the order imposing the sanction or the circumstances which led to the making of such order, or the circumstances in which the order imposing sanctions came not to be obeyed. As HH Judge Cawson QC said in the *88 Trading Limited* case:

> "*"…the principle that fraud unravels all does not mean that a party can simply allege fraud and use that to justify conduct that might otherwise have been regarded as abusive. As I see it, the principle that fraud unravels all generally has to be applied within the context of some recognised claim or cause of action that is pursued as such…"*

187. The overall submission of Mr Nduka-Eze made to me mirrors that considered in detail by Miles J as I have outlined above and in relation to which permission to appeal was refused. Again, for completeness, I have reconsidered the matter in the context of the continuation of the 2019 Claim but in my judgment these matters no more justify the continuation of the 2019 Claim than they did the refusal of a sanction in relation to the 2013 Claim as ordered by Miles J.

188. As I have indicated, Mr Nduka-Eze, submitted that the historical relationship between the Bank and Zumax was such that it would not be an abuse of process were the 2019 Claim to continue. In so far as he relied on matters that were expressly ventilated before Miles J, I do not consider that he can re-open arguments in relation to such matters though, as I have said, I have in fact reconsidered the matter in relation to the continuation of the 2019 Claim and reached the same conclusion as Miles J in relation to the 2013 Claim. In so far as Mr Nduka-Eze relies on matters that he says were not ventilated before Miles J (see e.g. the Bankers' Acceptances which I will come on to) or not dealt with in detail by Miles J, in my judgment those were matters to be raised on appeal from Miles J and there is no special reason to allow these matters to be raised now. Indeed, they are in any event covered by the decisions in principle made by Miles J. However, as I have said, I have reconsidered the matters in the context of the

continuation of the 2019 Claim and come to the same conclusion as Miles J that he reached in deciding that a sanction should be imposed.

189. Part of the difficulty with dealing with Mr Nduka-Eze's submissions is that what he describes as the factual position, in terms of claims that Zumax has and claims that he says Zumax can establish to a summary judgment standard, is not one that I agree with in whole. In practice, I think that the detail on this point does not affect the ultimate conclusion because much of the analysis is one of principle rather than determining precisely what category (e.g. established by judgment, bare claims etc) that the claims of Zumax fall into. Nevertheless, I turn now to some of the detail to make clear my findings on the submissions made.

190. Mr Nduka-Eze made much of a sum of $9 million which he said was due to Zumax by the Bank. This was said to be comprised of some ₦603m (said to be equivalent to $5 million), some ₦270m (said to be equivalent to some $2 million) and some ₦250m (said to be equivalent to some $2 million). As regards these sums, the claims for ₦250 million and ₦270 million were dealt with by Obadina J in the Nigerian proceedings, as I have set out above. The sum of ₦603m in fact took account of and included the claims in respect of the ₦250m and ₦270m. The ₦603m figure was later reduced by the Court of Appeal in Nigeria to ₦496m. This was the judgment sought to be registered in the English Kings Bench Division which with 10% judgment interest since 2018 is said to be approximately ₦650 million. There was some confusion between the sum awarded by Obadina J and a separate sum of a similar sum of money which the receivers of Zumax received. This whole sum was not a sum claimed by Zumax but was taken into account by Obadina J in calculating what was due to Zumax.

191. There are then other claims which Zumax has so far failed to establish before the courts but which Mr Nduka-Eze says that Zumax can establish.

192. First, there is a sum of $239 million which was referred to by Mrs Justice Nicol-Clay and then sought to be added to the Obadina J judgment sum before the Nigerian Court of Appeal. The Nigerian Court of Appeal refused to grant judgment for this sum, as I have explained. This was on the basis that that court was not satisfied that the Bank had admitted the claim, as was then asserted by Zumax. Before me Mr Nduka-Eze appeared to be asserting that new facts had recently come to light substantiating that claim. I regret that I could not understand what was new nor how it established to summary judgment standard that the Bank was liable for this sum. Be that as it may, if there is a claim then Zumax will no doubt be able to pursue it (whether or not the claim would succeed is not a matter I need decide). Even on the assumption that Zumax has a good claim it does not, in my judgment, undermine the order of Miles J nor provide a special reason why the 2019 Claim should not be struck out as an abuse of process.

193. Secondly, there is a sum of ₦302 million, said to have been wrongly debited from Zumax's accounts in connection with Bankers' Acceptances. As I have said, this matter appears to me to fall within the type of claims identified by Miles J and which he took into account in principle, even if this particular head of alleged loss was not raised with him until after his main judgment had been handed down. (At that point the claim was said to be about ₦200 m, equivalent to about $1.8 million). Again, a claim in respect of Bankers' Acceptances was in play in the Nigerian proceedings but, as I have earlier described, did not result in a monetary judgment, the matter being rejected by the

Nigerian Court of Appeal. Before me, Mr Nduka Eze sought to demonstrate that he had recently found out about convictions of Bank officials tied to the Bankers' Acceptances that affected Zumax. I was unable to trace through from the evidence before me (mainly historic press reports of charges and convictions) that the matters related to Bankers' Acceptances directly causing loss to Zumax or that these matters had only just come to Mr Nduka-Eze's attention by reference to the date one or more of the reports had been printed off: not least because complaint had been made about non-disclosure of the same at a date prior to that date(s). As regards alleged non-disclosure by the Bank. it was unclear to me what duty to disclose arose and when but I could not see that any such duty arise in connection with the English Court of Appeal order to re-pay the sum received in satisfaction of the judgment of Barling J nor the order of Miles J.

194. At the end of the day, the Bankers' Acceptances claim was advanced by Zumax in the Nigerian Court of Appeal where it failed. It had been raised as an issue before Obadina J which had decided that she did not need to go into the claim. I cannot see that the claim, nor the further materials put before me, are grounds to set aside or vary the Order of Miles J nor that it impacts upon the issue of whether proceeding with the 2019 Claim amounts to an abuse of process given the striking out of the 2013 Claim.

195. Finally, Mr Nduka-Eze raised an issue about a claim by Zumax in respect of losses of profits from not having the barges that I have referred to above. A claim in that respect had been included in the draft amendments to the 2013 Claim initially provided to the Bank in about March 2019 but which were removed from the proposed draft amendments when the new legal team was instructed by Zumax. To some extent these matters were touched upon by Miles J in his judgment. Again, I cannot see that these matters provide any grounds for impeaching or varying the order of Miles J and they do not provide special circumstances justifying a decision that proceedings with the 2019 Claim is not an abuse of process.

Discretion

196. Having reached the conclusion that the continuation of the 2019 Claim would amount to an abuse of process, I am not satisfied that there are any reasons to exercise my discretion other than by striking out the 2019 Claim.

Conclusion

197. The continuation of the 2019 Claim, in the circumstances in which the 2013 Claim has been struck out, would amount to an abuse of the court's process. There are no factors which as a matter of discretion would cause me not to strike out the 2019 Claim as an abuse of process and I accordingly do so.

198. In the circumstances in which I have struck out the 2019 Claim, it seems to me that the Joinder Application also falls to be dismissed. I have taken into account the arguments on the Strike Out Application raised by Samuna and, even if the lawyers purporting to act for it are properly authorised, those argument do not cause me to reach any different conclusion than that proceedings with the 2019 Claim would be an abuse and there are no factors which cause me to exercise my discretion other than by striking out the 2019 Claim. I will however, if necessary, hear any further argument on this point. Mr Moraes' sought to argue this point in his suggested corrections to the draft of this

judgment when circulated in accordance with usual practice. The points that he raises can be dealt with at the time of the consequentials hearing.

199. As this judgment has been handed down remotely, the Bank should make arrangements for a further short hearing, which will be remote, for the purposes of dealing with all consequential matters including the precise form of order. That hearing should be heard as soon as possible within the next few weeks.