Neutral Citation Number: [2017] EWHC 2804 (Ch)

Case No: HC-2013-000590

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2017

Before :

THE HONOURABLE MR JUSTICE BARLING

- -

Between :

Zumax Nigeria Limited **Claimant**

- and –

First City Monument Bank plc **Defendant**

- -
- -

Mr Francis Moraes (instructed by **Mordi & Co**) for the **Claimant**
Dr Fidelis Oditah QC and **Mr Phillip Aliker** (instructed by **Alan Taylor & Co**) for the **Defendant**

Hearing dates: 24-26 January and 6-10 & 13 March 2017

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JUDGMENT

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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MR JUSTICE BARLING

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Glossary of Defined Terms

Term	Paragraph where first defined	Definition
Bliss	**13**	*Bliss International Limited, a shareholder in Zumax*
CBN	**14**	*the Central Bank of Nigeria*
Chase	**7**	*JP Morgan Bank, formerly Chase Manhattan International Limited*
FCMB	**3**	*First City Monument Bank plc successor to IMB & Finbank*
Finbank	**3**	*Finbank plc*
IMB	**3**	*IMB International Bank plc*
IMB Morgan	**3**	*IMB Morgan plc, formerly IMB Securities plc*
Redsear	**7**	*Redsear Ltd, a company incorporated in the Isle of Man*
the 115 Proceedings	**25**	*A claim by IMB in the Lagos High Court (LD/115/05) against Zumax for Naira 309 million, in which the Consent Order was made*
the 1668 Proceedings	**33**	*Proceedings brought in the Lagos High Court (LD/1668/2009) by Zumax against Finbank, seeking to set aside the Consent Order*
the 2004 Agreement	**24**	*A settlement agreement between IMB and Zumax, which was aborted by the parties before it came into effect*
the 2005 Agreement	**24**	*An agreement between IMB and Zumax dated 23 May 2005, the terms of which were later incorporated into the Consent Order*
the 784 Proceedings	**34**	*Proceedings brought in Nigeria by Zumax against Mr Chinye and Finbank*
the Biu Proceedings	**24**	*Proceedings brought against IMB in Nigeria by one of the receivers of Zumax contending that the 2004 Agreement represented a fraud on Zumax as its debt to IMB had been discharged during the receivership*

the Consent Order	**29**	*A consent order dated 15 July 2005 in the 115 Proceedings, incorporating the terms of the 2005 Agreement*
the Court of Appeal Judgment	**9**	*A judgment of the Court of Appeal on FCMB's appeal against the decision of Mr Charles Hollander QC in FCMB's challenge to the jurisdiction of the English court in the present claim, handed down 23 June 2016*
the Debenture	**16**	*A debenture dated 17 December 1998 to secure an overdraft by Zumax from IMB through Zumax's Naira Account*
the Hollander Judgment	**9**	*The Judgment of Mr Charles Hollander QC of 1 July 2014 in FCMB's challenge to the jurisdiction of the English court in the present claim*
the IMB Commerzbank Accounts	**4**	*Bank accounts nos. 160122964010 & 160122964015 held in the name of IMB at the London branch of Commerzbank AG*
the IMB Morgan Commerzbank Account	**4**	*Bank account no 160210002200 held in the name of IMB Morgan at the London branch of Commerzbank AG*
the Interpleader Proceedings	**76(v)**	*Proceedings brought by Commerzbank against IMB Morgan, in which the judgment of Lawrence Collins J is at [2004] EWHC 2771 (Ch)*
the Redsear Account	**7**	*A US dollar bank account held by Redsear at the London branch of Chase*
the SimmonsCooper Letter	**36**	*A letter from FCMB's solicitors dated 24 June 2013 in response to Zumax's letter before action in the present claim*
the Summary Report	**18**	*Report of Zumax's auditor, Chief Edoja, dated 30 July 2003*
the Warri Schedule	**110**	*Schedule entitled "Naira Disbursements to Warri: December 2000- July 2002" produced by Mr Chinye*
Zumax	**1**	*Zumax Nigeria Limited, the Claimant*
Zumax's Naira Account	**5**	*Bank Account no 0101020000026 held in the name of Zumax at the Lagos branch of IMB*

Introduction

1. This is an application by the Claimant, Zumax Nigeria Limited ("Zumax"), for summary judgment on the claim and counterclaim.

2. Zumax is a Nigerian company previously engaged in the supply of engineering and other services to various multi-national oil companies in Nigeria. Zumax's premises are located in Warri, said to be the oil capital of Nigeria.

3. The Defendant, First City Monument Bank plc ("FCMB"), is a Nigerian registered bank. It is the result of a series of mergers with other Nigerian banks, including IMB International Bank plc ("IMB") and Finbank plc ("Finbank"). FCMB assumed all the liabilities and obligations of those banks. IMB Morgan plc ("IMB Morgan") was a subsidiary of IMB. IMB Morgan was formerly called IMB Securities plc. In this judgment I refer to "FCMB" or "IMB" or "Finbank" without distinction.

4. At all material times, IMB held two U.S. dollar denominated correspondent bank accounts (no.160122964010 and 160122964015), at the London branch of Commerzbank AG ("the IMB Commerzbank Accounts"). At the same branch there was also a U.S. dollar denominated correspondent bank account (no.160210002200) in the name of IMB Morgan ("the IMB Morgan Commerzbank Account").

5. IMB were Zumax's main bankers, and at all material times Zumax held with IMB in Lagos an account denominated in Naira numbered 0101020000026 ("Zumax's Naira Account").

6. The managing director of IMB was a Mr Edwin Chinye. He also became a director of Zumax in circumstances to which I will refer in due course.

7. Zumax invoiced its oil company clients, at least in part, in US dollars. Redsear Limited ("Redsear"), a nominee of Zumax incorporated in the Isle of Man, received dollar payments in a US dollar account held in its name at the London branch of Chase Manhattan International Limited, which subsequently became JP Morgan Bank, ("Chase"). The dollar funds in this account ("the Redsear Account") were used by Zumax for the needs of its business, for example to purchase equipment, with any surplus funds being transferred to Nigeria for use in its business there.

8. The claim, brought on 3 October 2013, is for US$3,752,000 plus interest. It is Zumax's contention that between May 2000 and April 2002 funds totalling US$3,752,000 belonging to Zumax were remitted by ten transfers for the benefit of Zumax to IMB/IMB Morgan at their London accounts with Commerzbank. The claim is a proprietary one for the recovery of what Zumax submits to be trust property. It is made against FCMB as successor in title to IMB and on the basis that IMB Morgan was IMB's agent/nominee and under its control. At at least one stage in these proceedings FCMB appeared to accept that IMB Morgan was controlled by IMB.[1]

9. The claim was served out of the jurisdiction on FCMB on 8 October 2013, pursuant to an Order by Deputy Master Nurse dated 20 September 2013. In December 2013

[1] Defendant's written submissions on costs, permission to appeal and stay of judgment pending appeal, dated 30 June 2014, paragraph11. [1/242] *__Note__: Square-bracketed references in footnotes are to [bundle/page] of the hearing bundles.

FCMB applied to challenge jurisdiction. That and other applications were heard in May 2014 and dismissed by Mr Charles Hollander QC, sitting as a Deputy Judge of the High Court, in a reserved judgment on 1 July 2014 ("the Hollander Judgment"). FCMB's appeal was heard in May 2016 and dismissed in a reserved judgment handed down on 23 June 2016 ("the Court of Appeal Judgment").

10. On 5 March 2014 Zumax issued the present application for summary judgment, which was stayed pending the outcome of FCMB's jurisdiction challenge. Following the Court of Appeal Judgment, FCMB filed a defence and counterclaim on 19 July 2016. Further information about that pleading was filed on 28 July 2016 pursuant to a request by Zumax. A reply and defence to counterclaim was filed on 3 August 2016.

11. The present application first came before me in January 2017 with a time estimate of four days, including one day's reading. That estimate proved inadequate for a case of this complexity and unsurprisingly the hearing went part heard until a date in March this year when a further 6 days were required, making ten days in all. After the completion of the hearing, I gave directions on 21 July 2017 in respect of an application by Zumax to introduce (with the consent of FCMB) further evidential material, in the form of a transcript of oral evidence given in the Lagos High Court following the hearing before me. In accordance with my directions, brief written submissions relating to the contents of the transcript material were sent to me by the parties in August 2017.

Background

12. Before addressing the parties' submissions on Zumax's application for summary judgment, it is necessary to set out the background in a little more detail.

13. Board minutes of IMB[2] show that in December 1996 Mr Chinye disclosed to the board of that bank, of which he was managing director/CEO, that he had been appointed a director of Zumax to represent the interests of Bliss International Limited ("Bliss") which had a 40% equity interest in Zumax. The minutes go on to record that the board of IMB approved the appointment, and stated that any loans to Zumax would not be regarded as inappropriate "since [Mr Chinye] does not have an equity interest in either [Bliss] or [Zumax]".

14. It appears that Mr Chinye became a director of Zumax in 1989, at about the same time as Bliss was incorporated and acquired its shareholding in that company. Zumax maintains that Mr Chinye was the beneficial owner of Bliss through nominees and that IMB's board were also aware, and approved, of their CEO having an equity interest in Zumax through Bliss. Zumax points to a written submission of FCMB of 13 May 2014, where that proposition is "not disputed".[3] Zumax informed[4] the Central Bank of Nigeria ("CBN") of its belief that Mr Chinye was the sole owner of Bliss in

[2] [7/174-8, at 177]
[3] Paragraph 52. [4/223] This is said by FCMB to be the result of a misreading of a letter by Mr Chinye to Zumax dated 3 January 2003. [5/233-4] See paragraph 251 of this judgment.
[4] [7/157]

its complaint to the regulator in 2003. Zumax also told the regulator that Mr Chinye had requested shares in Zumax as compensation for his efforts in sourcing a loan facility for the company.

15. In 2003 CBN found[5] that Mr Chinye was in breach of Nigerian legislation in serving as managing director of IMB when he was a director of an unrelated company. The regulator also found that IMB's board should not have approved his appointment as a director of Zumax without the prior approval of CBN, and cautioned the bank. IMB was further penalised for its granting a facility which was "director-related" because of Mr Chinye's position.

16. It appears that in 1996 Zumax applied to IMB for, and was granted, an overdraft facility of Naira 50 million. In 1998 IMB agreed to grant Zumax an increased facility of Naira 200 million. This was secured by the terms of an all asset debenture dated 17 December 1998 ("the Debenture"). The facility was operated through Zumax's Naira Account.

17. By 2002 Zumax's indebtedness to IMB was said to be in the order of Naira 400 million. At about this time the other directors of Zumax had also become suspicious of the manner in which Mr Chinye had dealt with the funds in the Redsear Account, of which he was the sole signatory. Zumax therefore instructed its auditors, Peter Edojariogba & Co, to carry out an audit of the account.

18. The auditors' principal, an accountant known as Chief Edoja, produced a report dated 30 July 2003 ("the Summary Report"). He found that over the period from January 1998 to 30 June 2002 a sum in excess of US$ 15.3 million had been paid into the Redsear Account. In relation to that sum, he found that Mr Chinye, had provided him with an explanation for payments from the account amounting to over US$ 7.9 million, and that there was a shortfall of US$ 7,367,595 for which Mr Chinye had been unable to provide an explanation.

19. As the Court of Appeal Judgment noted,[6] the audit did not purport to address the ultimate destination of the payments of over US$ 7.9 million which had been authorised by Mr Chinye. This was confirmed by Chief Edoja in a sworn witness statement dated 27 July 2009[7] in which he stated that "our audit covered only Dollar payments by Chevron into [Zumax's] Redsear offshore Accounts for January 1998 to June, 2002 only". In the same witness statement he also stated that no audit could be conducted in respect of Zumax's Naira Account because IMB refused to provide statements for the same. The minutes of a Zumax board meeting on 3 December 2002,[8] at which Chief Edoja reported to the directors (including Mr Chinye), record that Mr Chinye, as managing director of IMB, had himself been responsible for that refusal, and that at the board meeting Mr Chinye proposed that owing to IMB's failure to provide the requested information, the report could not properly form the basis of an opinion of Zumax's indebtedness to IMB.

20. The auditor's unsuccessful attempts to obtain from IMB the further documents and information he required in order to ascertain the extent of Zumax's debt to IMB, are

[5] [7/146-162]
[6] Paragraph 55.
[7] Made in other legal proceedings brought by Zumax in Nigeria. [4/53-5]
[8] [4/195]

documented in correspondence between them in November 2002. The requested material included copies of IMB's credit/debit notes for all entries on Zumax's Naira Account.

21. In the wake of that correspondence, on 29 November 2002, IMB wrote to Zumax requesting payment within 14 days of Naira 200 million to "bring your account in line with the approved sum of N200 million…" This demand implied that, as at that time, Zumax owed Naira 400 million. On 6 December 2002 IMB gave notice demanding repayment of the debt, which was stated to be in excess of Naira 465 million. The loan was not repaid within the stipulated time, and on 18 December 2002 IMB appointed receivers under the terms of the Debenture. Shortly afterwards, Mr Chinye was removed as a director of Zumax, and it appears that in the course of 2003 he resigned or was removed as managing director and CEO of IMB.

22. In 2004 the directors of Zumax began negotiations with the receivers and IMB with a view to bringing the receivership to an end. Zumax maintains that during the course of these negotiations it sought from IMB and the receivers a full and proper statement of account, that such a statement was never provided and that IMB represented to it that no more than Naira 230 million had been recovered during the course of the receivership. It is clear that at the start of 2005, while the settlement discussions were ongoing, IMB was contending that about Naira 309 million was owing. For in January 2005 IMB issued a claim for over that amount against Zumax in the Lagos High Court.[9]

23. I will need in due course to refer to the evidence now available as to the amount recovered by the receivers. Zumax contends that, unbeknown to it at the time, and contrary to what Zumax alleges were IMB's fraudulent misrepresentations, an amount in excess of the alleged debt of Naira 465 million, and probably very significantly in excess – up to nearly Naira 800 million – had been recovered.

24. Returning to the narrative, correspondence between the directors of Zumax and IMB in the summer of 2004 shows the former making proposals for the ending of the receivership. Zumax's proposals were expressly based on the receivers having recovered US$ 2 million – roughly equivalent to Naira 230 million.[10] In its response IMB did not question or correct Zumax's understanding of the amount recovered and referred to a debt of Naira 289 million as outstanding at February 2004. In the event, a settlement agreement was reached in October 2004 ("the 2004 Agreement"), pursuant to which IMB would lift the receivership and Zumax would pay IMB Naira 150 million in instalments. I do not need to go into the precise terms of this agreement because it is common ground that it did not come into effect, was aborted and replaced by a new agreement entered into on 23 May 2005 ("the 2005 Agreement"). It seems that the 2004 Agreement was aborted as a result of a dispute between IMB and one of the receivers, Mr Biu (who declined to sign the agreement), which resulted in court proceedings ("the Biu Proceedings"). Mr Biu contended that the 2004

[9] Claim No LD/115/2005.
[10] Zumax letter 30 June 2004. [6/2]

Agreement represented a fraud on Zumax as the latter's debt to IMB had been discharged during the receivership.[11]

25. The 2004 Agreement having been aborted, and the receivership remaining in place, on 28 January 2005 IMB commenced an action against Zumax in the Lagos High Court (Claim no. LD/115/2005), claiming that the latter owed about Naira 309 million as at 17 December 2004 ("the 115 Proceedings"). The receivers were not apparently made a party to this claim. It was in due course the subject of a consent order incorporating the terms of the 2005 Agreement.

26. While these proceedings, and the Biu Proceedings, were continuing, Zumax wrote to IMB on 9 February 2005 pointing out that the delay in lifting the receivership was damaging the company's business, and pressing IMB to provide it with copies of the receivers' statements of account. The letter also inquires whether there was any basis for a claim, apparently made by the receivers, that in excess of Naira 700 million had been recovered by them. No contemporaneous response by IMB to that letter has been drawn to my attention.

27. The receivership was lifted by IMB by a deed dated 27 April 2005. As mentioned above, the 2005 Agreement was entered into on 23 May 2005.

28. By the terms of that agreement Zumax agreed to pay to IMB over an 18 month period the sum of Naira 150 million, which was said to represent the balance due and owing to IMB under the terms of the loan facility. By clause 17, the 2005 Agreement provided:

> "Upon the final effectiveness of this Terms of Settlement and the termination of the law suit as provided herein and the fulfilment of all the obligations stipulated therein, the parties shall and hereby do hereby fully release and discharge each other, their parent companies, affiliated companies and subsidiaries henceforth from any and all damages, suits, claims, debts, demands, assessment, obligations, liabilities, costs, expenses, rights or action [sic] and causes of actions of any kind or character whatsoever, accrued prior to the date of execution of these terms, whether known or unknown that now exist or at any time existed, except that this release does not apply to any term arising out of this Terms of Settlement [sic]."

29. As already mentioned, the 2005 Agreement was made the subject of a consent order dated 15 July 2005 in the 115 Proceedings ("the Consent Order").

30. Zumax maintains that in agreeing to the 2005 Agreement and the Consent Order, it relied upon the representations which it says IMB 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 IMB's representations, IMB had recovered from the receivers within the first nine months of the receivership a sum in the region of Naira 709 million, and that over the whole course of the receivership IMB recovered very considerably more than it was owed. On this basis Zumax submits that the 2005 Agreement and the Consent Order were procured by fraudulent misrepresentation, and/or that there was no consideration for the 2005 Agreement, and that FCMB is therefore not entitled to rely upon them as a defence to the present claim.

[11] Witness statements of Patrick Okeze dated 22nd and 25 April 2005 [7/241-243]; and pages 24-26 of exhibit AT5 to 6th witness statement of Alan Taylor.

31. FCMB rejects this argument on the basis, *inter alia*, that there was no reliance by Zumax on the alleged representations. This issue, relating to the extent of the Zumax directors' knowledge, in the period prior to the 2005 Agreement, of the amount recovered by the receivers, was the subject of an application made to me during the present hearing by Dr Oditah QC who, with Mr Aliker of counsel, appeared for FCMB. The application was to admit two further witness statements (the 6th and 7th) of Mr Alan Taylor, FCMB's solicitor. These statements concern the question whether or not any of the directors of Zumax were served with affidavits and other documents in the Biu Proceedings, containing details of Mr Biu's allegations about the amount recovered in the receivership. The application was opposed by Mr Moraes of counsel, who appeared for Zumax. After hearing argument, I granted the application and admitted this further evidence, to which I will refer again when addressing the issue concerned.

32. No payments were made by Zumax pursuant to the 2005 Agreement and the Consent Order. In 2009 FCMB issued *ex parte* a garnishee application against Zumax in the 115 Proceedings. That application was eventually struck out and a *Mareva* injunction that had been obtained by FCMB was lifted in September 2012.

33. In 2009 Zumax began proceedings against Finbank (the successor to IMB's obligations and liabilities) in the Lagos High Court under claim number LD/1668/2009 ("the 1668 Proceedings"), seeking to set aside the Consent Order on the ground that it was procured by fraudulent misrepresentation, and a declaration that Zumax was entitled to recover from Finbank the sum of nearly Naira 250 million together with interest. In 2010 Finbank 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 Finbank in support of the application but in her view there was evidence of fraudulent misrepresentation and concealment of facts by IMB which gave Zumax "grounds for setting aside the consent judgment". Finbank 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.[12] Zumax stated in its skeleton argument that the appeal was dismissed. I have not been shown the relevant order or judgment of the appeal court, but FCMB has not taken issue with Zumax's statement.

34. In the meantime, in 2009 Zumax had also begun proceedings in Nigeria against Mr Chinye and Finbank in claim FHC/L/CS784/2009 in which it asserted that Mr Chinye had, in breach of his fiduciary duty to Zumax, without authorisation caused monies amounting to nearly US$7.4 million to be paid out of the Redsear Account with Chase to persons and entities directed and controlled by him ("the 784 Proceedings"). No substantive relief seems to have been sought against Finbank, and Zumax maintains that the bank was joined as a party only for enforcement-related reasons, to ensure that any order freezing Mr Chinye's assets would be effective. This claim was dismissed by the Nigerian court on grounds which included limitation.

35. On 23 April 2013 Zumax's solicitors wrote to FCMB in London a letter before action in the present case. In this letter the solicitors asserted that a series of transfers of dollars had been made from the Redsear Account to the IMB Commerzbank Accounts

[12] [4/96-100]

and the IMB Morgan Commerzbank Account for the purpose of transferring the funds on to Zumax but that these monies had been fraudulently retained/diverted by FCMB. At this stage Zumax's solicitors intimated a claim for US$3,097,450, consisting of eight of the ten transfers now claimed. Compound interest was also sought on that sum. The letter identified the amount and date of each of the eight transfers. Two further transfers were thereafter added, making the present claim $3,712,450 plus interest.

36. Two months later, on 24 June 2013, FCMB's solicitors, SimmonsCooper Partners, wrote in response. Their letter ("the SimmonsCooper Letter"), stated that "IMB/Finbank denies receiving the funds allegedly transferred from the Redsear account." It went on to contend that Zumax was aware that the funds in question "were never remitted to" IMB/Finbank. It also stated that IMB Morgan "is a totally distinct and separate legal entity from IMB" and FCMB cannot be sued for its acts "[e]ven if" it is a subsidiary of FCMB. Finally the letter stated that the funds in question "were never remitted to Zumax's account with IMB/Finbank [ie Zumax's Naira Account]. Finbank has no records of such money lodgments."

37. In its evidence in the jurisdiction challenge, FCMB maintained that IMB Morgan "is not and never has been a subsidiary of the Bank." The same witness statement also appears to confirm the SimmonsCooper Letter's denial of receipt of the funds.[13] However, disclosure of the relevant Commerzbank account statements, pursuant to an order of Master Teverson on 4 February 2014 under the Bankers Books Evidence Act 1879, revealed that the funds in question had been paid into the Commerzbank accounts. In the light of that disclosure FCMB filed further evidence in the jurisdiction challenge stating that Zumax

> "could not have been remotely misled or surprised by the results of the disclosure order and they could not have believed for a moment that the Bank had not received the alleged US$3.5million transfers as mistakenly stated by SimmonsCooper in its letter dated 24 June 2014…The CommerzBank disclosure appears to confirm that the funds were received in the IMB CommerzBank correspondent account and the Audit Report shows to the satisfaction of Zumax and expert Auditors….that the money had been remitted to Zumax."[14]

38. As adumbrated in that passage, it has since then been FCMB's case that the funds in question were received by FCMB and remitted to Zumax.

39. On any view FCMB's suggestion that Zumax should not have given any credence to FCMB's unequivocal denial of receipt of any of the funds, is extraordinary. No satisfactory explanation for the alleged mistake on the part of SimmonsCooper has been given. In his oral submissions Dr Oditah told me that it was written by the solicitors "without instructions". The SimmonsCooper Letter, and FCMB's subsequent *volte face* following disclosure of the relevant Commerzbank account statements (which would always have been available to it, as the holder of the relevant accounts), are relied upon by Zumax as indicating a willingness on the part of FCMB to make any assertion, regardless of its truth, which FCMB considers will assist it.

[13] Witness statement of FCMB's in-house solicitor, Adebimpe Nkontchou, 5 February 2014, paragraphs 8 and 56.
[14] Witness statement of FCMB's in-house solicitor, Adebimpe Nkontchou, 19 March 2014, paragraphs 8 and 9.

The present application for summary judgment

The relevant principles

40. There is no dispute as to the principles which the court should apply in an application such as this, although naturally the parties have emphasised different aspects of those principles in their submissions.

41. Summary judgment is governed by CPR 24.2. This rule provides that the court may give summary judgment against a defendant if it is satisfied that (a) the defendant has no real prospect of successfully defending the claim, and (b) there is no other compelling reason why the case should be disposed of at a trial. Zumax accepts that it carries the overall burden of proof of establishing that FCMB's defence and counterclaim have no real prospect of success, and that there is no other compelling reason for trial: *ED&F Man Liquid Products Limited v. Patel* [2003] EWCA Civ 472 at [7-10].

42. The test of whether a case (or issue) is fit for trial is whether there is a real prospect of it succeeding. In this context 'real' is equivalent to 'realistic' and is to be contrasted with 'fanciful: *Swain v. Hillman* [2001] 1 All ER 91, per Lord Woolf MR at page 92j. 'Fanciful' connotes entirely without substance or hopeless: *ED&F Man Liquid Products Limited v. Patel* (above) at [5]. It follows that a party defending an application for summary judgment does not have to show that he or she will probably succeed in his claim or defence at trial.

43. An application for summary judgment should be made only in plain and clear cases. The court's power under CPR 24.2 is not intended to be exercised by a minute and protracted examination of documents and facts of the case in order to see whether the defendant does indeed have a defence. To do that is to usurp the position of the trial judge and to produce a trial on paper without disclosure and without oral evidence tested by cross examination in the ordinary way: *Wenlock v Moloney* [1965] 1 WLR 1238 at 1244B-C; *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 at 261A-H.

44. CPR 24.2 was not meant to dispense with the need for a trial where there are issues that should be investigated at the trial. The proper disposal of an application for a summary judgment should not involve a mini-trial: *Swain v. Hillman* (above), at page 95. However, the respondent's case must carry some degree of conviction; the court, while not conducting a mini-trial, is not required to accept without question any assertion the respondent makes and is entitled to reject assertions of fact which have no real substance: *ED&F Man Liquid Products Limited v. Patel* (above), per Potter LJ at [10]:

> "… that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable ..."

45. The court should also take account of any evidence which could reasonably be expected to be available at a trial: *Royal Brompton Hospital NHS Trust v Hammond (No. 5)* [2001] EWCA Civ 550 CA.

46. FCMB submits that in this case there are significant differences between the parties so far as factual and legal matters are concerned, involving a prolonged and detailed argument, and that the court should not conduct a mini-trial by entertaining the application.

47. Zumax submits that, as recognised in the Hollander Judgment,[15] this claim is in essence a simple one, and the evidence in the application is lengthy due to the number of defences raised by FCMB, with new defences being put up to replace those that have been shown to be untenable. Zumax points out that the claim was issued in October 2013, but this summary judgment application could only be listed after FCMB had lost its jurisdiction challenge both at first instance and in the Court of Appeal. Zumax submits that the latest substantive defence of FCMB, raised for the first time in September 2016, that it has paid the funds claimed (save for the 10th transfer) by bankers' drafts, is untenable and that there is no realistic prospect of FCMB succeeding on any of its other defences or the counterclaim, and no other compelling reason why the claim or counterclaim should be proceed to a trial.

The defences and counterclaim pleaded

48. There are five main defences pleaded by FCMB:

(a) *Payment*: Although FCMB now accepts that it received nine of the transfers in a total of US$3.547m, it contends that it has paid or accounted to Zumax in that sum. FCMB denies receiving the 3rd transfer (US$205,000).

(b) *Consent Order*: FCMB contends that pursuant to the 2005 Agreement, Zumax compromised and released all its claims against FCMB (including the US$3.75m claimed in these proceedings) in return for FCMB accepting a reduced amount – Naira 150million – in full and final settlement of all the debt owed to it by Zumax. The 2005 Agreement was embodied in the Consent Order, which FCMB submits is valid and constitutes a complete defence to these proceedings.

(c) *the Debenture*: FCMB contends that all the claims in these proceedings were assigned and charged to it pursuant to clause 2 of the Debenture. On 14 October 2016, FCMB demanded repayment from Zumax and took possession of all cash and cash equivalents charged by the Debenture including these proceedings, to the extent that the proceedings are valid. FCMB contends that Zumax therefore has no locus to continue these proceedings and cannot give a valid discharge in respect of the claims asserted in them.

(d) *Limitation*: FCMB contends that these proceedings are statute barred, having been commenced 11 years after the last transfer was made to IMB in April 2002. FCMB submits that the transfers gave rise, not to a trust in favour of Zumax, but to ordinary debts. This was either because the transfers were made and received by IMB in the ordinary course of its business as a banker or because the claim represents proceeds of foreign exchange (dollars) sold by Zumax to IMB.

(e) *Abuse of process*: FCMB submits that if Zumax has a claim against FCMB, it should have asserted it in the 784 Proceedings, given that the monies claimed against

[15] At paragraph 89.

Mr Chinye in those proceedings (US$7.4m) and the US$3.75m claimed against FCMB in these proceedings have the same source (ie the US$15.3million received into the Redsear Account between January 1998 and June 2002), that the same time period was involved, that similar evidence was/is relied on by Zumax in both sets of proceedings, and that IMB/Finbank was the second defendant in the 784 Proceedings. In 2009 the evidence would have been fresh and witnesses readily available. Zumax should not be allowed to split its claim and pursue it piecemeal.

49. In addition, FCMB's counterclaim, pleaded at paragraphs 18 to 21 of its Amended Defence and Counterclaim, seeks to recover damages against Zumax on the basis that it dishonestly assisted Mr Chinye to breach his fiduciary duties to IMB by concealing from the bank his conflict of interest, as a result of which the bank granted credit facilities and funds to Zumax, which have not been recovered.

50. Dr Oditah submitted that Zumax has no prospect of satisfying this court that all these defences are hopeless, and that the counterclaim is similarly so without merit that there is no other compelling reason for a trial within the meaning of CPR 24.2(b). He emphasised that FCMB need only show a realistic case on any one of these matters, whereas Zumax must succeed on all of them otherwise the application for summary judgment must fail.

The transfers in question

51. Details of the ten transfers from Redsear into the IMB/IMB Morgan Commerzbank accounts are set out at Annex 1 to this judgment.[16] With the single exception of the 3rd transfer, it is now common ground that these transfers took place, and that the manuscript instructions to Redsear's bankers (Chase), recorded in the 3rd column of the table at Annex 1, were written by Mr Chinye who, as well as being the managing director/CEO of IMB, was also a director of Zumax and Redsear, and was in sole control of the Redsear Account. It is not disputed that the manuscript instructions themselves indicate that they were sent by Mr Chinye using the fax at the office of IMB/IMB Morgan.

52. It is also common ground that the Commerzbank statements of account do not show any of these payments being paid out to Zumax.

53. In the light of FCMB's evidence[17] it appeared not to be in dispute that no remittance referable to any of these funds had been paid into Zumax's Naira Account. However, in the course of Zumax's opening submissions, Dr Oditah intervened to say that this was disputed. I believe his interjection was a mistake, as will become clear when I come to consider issue (c) below.

[16] The table at Annex 1 is taken from the Claimant's skeleton argument. With the exception of the 3rd transfer, no issue was taken with the accuracy of the table.
[17] For example, 4th witness statement of Alan Taylor, of 17 October 2016, paragraphs 79 and 129. See also the SimmonsCooper Letter, which stated that the funds in question "were never remitted to Zumax's account with IMB/Finbank [i.e. Zumax's Naira Account]. Finbank has no records of such money lodgments."

The issues

54. In the light of the parties' submissions, the application for summary judgment raises the following main questions that have to be determined by applying the test referred to earlier:

(a) Were the monies comprised in the ten transfers from the Redsear Account into the relevant Commerzbank accounts held by IMB on trust for Zumax or were they governed by a simple debtor-creditor relationship between IMB and Zumax? Under this head I propose also to deal with a discrete issue relating to the 3rd transfer, of $205,000 made on 12 May 2002.

(b) Did IMB control the IMB Morgan Commerzbank account?

(c) Were the funds in question repaid to Zumax by bankers' drafts? Under this head I will also deal with a discrete issue relating to the 10th transfer.

(d) Does the 2005 Agreement or the Consent Order bar these proceedings?

(e) Is this claim an abuse of the process of this court, or otherwise precluded, because of the 784 Proceedings?

(f) Does the Debenture deprive Zumax of title to sue for the funds?

(g) Is this claim time-barred by statute or laches?

(h) Does the counterclaim have a realistic prospect of success?

(a) Was there a trust?

The parties' submissions

55. Mr Moraes made clear at the outset of his submissions that the claim is a proprietary one and this application is made solely on the basis that a trust in favour of Zumax exists. Whether a trust exists is relevant to the defence of limitation relied on by FCMB.

56. Dr Oditah submitted that any trust was governed by Nigerian law. However he accepted for the purpose of this summary judgment application that the Nigerian law of trusts, including the *Quistclose* principle, is the same as in this jurisdiction.

57. It is not in dispute that the funds in question were paid into the Commerzbank accounts on the manuscript instructions of Mr Chinye to Redsear's bankers (Chase). The text of each of those instructions is set out in the table at Annex 1 (with the exception of the third transfer). Zumax submits that it was clearly the common intention of those concerned, i.e. of Zumax, acting through its nominee Redsear, as settlor, and of FCMB (formerly IMB) as trustee, that the funds were to be held by FCMB for the benefit of Zumax, and that FCMB was to have no beneficial interest in them.

58. As evidence of that intention, Zumax points to the objective construction of both the manuscript instructions and the corresponding designations by Commerzbank in its

account documents, and the context, including the conduct of the parties. Mr Moraes submitted that in the light of these there was a clear purpose - to hold the funds for the benefit of an identified person. Zumax's primary case is that there is an express trust in favour of Zumax, but that in any event there is a *Quistclose*[18] trust. He submitted that in either case Zumax, as beneficiary, is entitled to enforce it.

59. In response, Dr Oditah accepted that the transfers in question were not made as a gift to FCMB, but submitted that no trust exists, and that the relationship between Zumax and FCMB is the ordinary banker/customer relationship, i.e. that of debtor/creditor. Thus, the bank received the dollars transferred to the Commerzbank accounts in the ordinary course of its business as purchaser of foreign currency in return for Naira or as borrower and, on either analysis, its legal obligation is not that of a trustee but of one who is liable to pay a debt to Zumax on demand. In this respect he referred to *Foley v Hill* [1848] HLC 28, at 35-37, and *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 118-119. In the former, the Lord Chancellor stated:

> "The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it…"

60. Dr Oditah submitted that when a bank is collecting funds on a customer's behalf, once the money arrives in the bank's account the collection process ends and the funds are mingled or pooled with the bank's other funds. The bank then holds the proceeds as a borrower/debtor and not on trust for the customer. This, he submitted, would be the position irrespective of how the collection is performed.

61. FCMB submitted that the same principles applied where, as here, the funds were transferred to a correspondent bank, such as to Commerzbank in London. It was common ground that Zumax had no dollar account in its own name in London or elsewhere, and it followed that, given the banker/customer relationship, IMB was obliged to account for any debt owed to Zumax in Lagos, where Zumax's Naira Account was held. London was a mere staging post and nothing of significance had happened there. There was no trust there or anywhere. Dr Oditah submitted that there was a contract to exchange Zumax's dollars for Naira, payable in Lagos, with the result that a debt, and not a trust, arose in Lagos. Failure to pay in those circumstances sounded in damages or debt, and not by reference to a trust.

62. In this context Dr Oditah referred to a decision of the Court of Appeal in *Camdex International Limited v Bank of Zambia* [1997] C.L.C. 714, a case dealing with the distinction between foreign currency as a medium of exchange and as a commodity. This decision seems, at best, tangential to the issue confronting me. The circumstances bore little relationship to the present case.

63. He also referred to the speech of Lord Templeman, giving the decision of the Privy Council in *Space Investments Limited v Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Limited* [1986] 1 WLR 1072. However, that authority provides little assistance to FCMB's argument. At pages 1073-4 Lord Templeman said:

> "A bank in fact uses all deposit moneys for the general purposes of the bank. Whether a bank trustee lawfully receives deposits or wrongly treats trust money as on deposit from trusts, all the moneys are in fact dealt with and expended by the bank for the general purposes of the bank. In

[18] *Barclays Bank Limited v Quistclose Investments plc* [1970] AC 567.

> these circumstances it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank. But equity allows the beneficiaries, or a new trustee appointed in place of an insolvent bank trustee to protect the interests of the beneficiaries, to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank. Where an insolvent bank goes into liquidation that equitable charge secures for the beneficiaries and the trust priority over the claims of the customers in respect of their deposits and over the claims of all other unsecured creditors… "If a man mixes trust funds with his own, the whole will be treated as the trust property, . . . that is, that the trust property comes first; . . ." per Sir George Jessel M.R. in *In re Hallett's Estate* (1880) 13 Ch.D. 696, 719, adopting and explaining earlier pronouncements to the same effect. Where a bank trustee is insolvent, trust money wrongfully treated as being on deposit with the bank must be repaid in full so far as may be out of the assets of the bank in priority to any payment of customers' deposits and other unsecured debts."

64. That case distinguishes between a bank's obligations *qua* deposit holder, and *qua* trustee, and also considers the effect on the latter obligations of a specific provision in the trust instrument (see per Lord Templeman at page 1075). It is helpful background but does not provide support for the proposition that there cannot be a trust imposed on FCMB in circumstances such as the present.

65. FCMB pointed out, by reference to comments of the House of Lords in *Westdeutsche Bank v Islington LBC* [1996] AC 669,[19] that the courts are generally reluctant to impose a trust in routine commercial relationships such as deposits of money into a bank account or sale and purchase of currency, and have warned against the wholesale importation into commercial transactions of equitable principles and trust obligations inconsistent with the certainty and speed essential for the orderly conduct of financial markets.

66. It further argued that, in the absence of a trust document, Zumax's case rests upon oral testimony, which can only be adduced at trial. Moreover, even if its pleaded allegations were to be established by credible evidence at trial, they could not in law give rise to a trust for the following additional reasons:

(i) All the 9 transfers were charged by the bank's debenture which remains valid and extant. The bank cannot be the owner and trustee of the transfers at one and the same time.

(ii) None of the transfers had any designated or special purpose. They were ordinary payment instructions and created an ordinary debtor/creditor relationship.

(iii) Even if a purpose had been specified, that would not have been sufficient to create a *Quistclose* trust. In support of this submission, reference was made to the decision of Treacy J (as he then was) in *Abou-Rahmah v Abacha* [2006] 1 All ER 247 (Comm). There an argument that a *Quistclose* trust had arisen, failed on the specific facts.[20] The learned judge held that the claimants, who had paid monies into the defendants' HSBC bank account, had parted with the monies unconditionally, without retaining any beneficial interest as it had been retained in *Twinsectra Ltd v Yardley* [2002] 2 AC 164. This was because the Swift transfer document completed by the claimants simply instructed HSBC to pay the monies into a particular account. It was held that there was therefore no failure of purpose such as would engage the

[19] In particular per Lord Browne-Wilkinson at p.704-5.
[20] Paragraphs 78-80.

Quistclose principle. This case is instructive but, again, the facts are distinct from those of the present case.

(iv) There was no certainty of intention as required for the creation of an express trust.

(v) If, contrary to FCMB's primary contention, there was a *Quistclose* trust, Redsear rather than Zumax would be the settlor, so the resulting trust would be for its benefit not that of Zumax.

(vi) The person whose intention fell to be attributed to Redsear would be Mr Chinye who signed each of the transfer instructions on behalf of that company and/or possibly on behalf of Zumax. However, no witness statement has been procured from Mr Chinye to ascertain his intention.

(vii) Further, in so signing the instructions Mr Chinye was not acting on behalf of IMB. (This proposition was common ground.) Therefore, any knowledge he acquired could not be attributed to IMB. Although the purpose of the manuscript instructions was to tell IMB to whom it should attribute the monies being transferred, IMB would not have seen those manuscript instructions but only the corresponding statements by Commerzbank which reflected them.[21] In this regard reliance was placed on comments of the House of Lords in *Westdeutsche Bank v Islington LBC* (above), as to the requirement for knowledge on the part of a trustee of the facts giving rise to the trust.[22]

67. At one point in his oral submissions, Dr Oditah stated that Zumax had given IMB an express undertaking to deposit all its dollars with the bank in order to facilitate recovery of its debt to the bank. I pointed out that as far as I was aware this point was a new one which was not referred to in the defence or in evidence. It also appeared to be inconsistent with FCMB's submission (referred to above) that there was an arrangement to exchange Zumax's dollars for Naira, payable in Lagos. The matter was not pursued by Dr Oditah.

68. Naturally, in the course of their submissions both sides took me to the statements of principle in both *Quistclose* itself and *Twinsectra*. In *Twinsectra* a lender had lent funds to an agent for the purpose of investing in property. The monies were in fact paid to a solicitor purporting to act for the agent on written conditions, which included an express undertaking to retain the funds until they were invested in property for the client, and to use the funds "solely for the acquisition of property on behalf of our client and for no other purpose."

69. It is appropriate to set out the oft-quoted passages from the speech of Lord Millett in *Twinsectra*:

> "68. Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will

[21] This is a reference to the words in the final column of the table at Annex 1 to this judgment.
[22] Per Lord Browne-Wilkinson, at pp. 705C – 706B.

enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases.

69. Such arrangements are commonly described as creating "a Quistclose trust", after the well-known decision of the House in *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567 in which Lord Wilberforce confirmed the validity of such arrangements and explained their legal consequences. When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee-in-bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case.

70. In the present case Twinsectra contends that paragraphs 1 and 2 of the undertaking which Mr Sims signed on 24 December created a *Quistclose* trust. Mr Leach denies this and advances a number of objections to the existence of a trust. He says that Twinsectra lacked the necessary intention to create a trust, and relies on evidence that Twinsectra looked exclusively to Mr Sims' personal undertaking to repay the loan as its security for repayment. He says that commercial life would be impossible if trusts were lightly inferred from slight material, and that it is not enough to agree that a loan is to be made for a particular purpose. There must be something more, for example, a requirement that the money be paid into a segregated account, before it is appropriate to infer that a trust has been created. In the present case the money was paid into Mr Sims' client account, but that is sufficiently explained by the fact that it was not Mr Sims' money but his client's; it provides no basis for an inference that the money was held in trust for anyone other than Mr Yardley. Then it is said that a trust requires certainty of objects and this was lacking, for the stated purpose "to be applied in the purchase of property" is too uncertain to be enforced. Finally it is said that no trust in favour of Twinsectra could arise prior to the failure of the stated purpose, and this did not occur until the money was misapplied by Mr Yardley's companies.

Intention

71. The first two objections are soon disposed of. A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them. Whether paragraphs 1 and 2 of the undertaking created a *Quistclose* trust turns on the true construction of those paragraphs.

72. The fact that Twinsectra relied for its security exclusively on Mr Sims' personal liability to repay goes to Twinsectra's subjective intention and is not relevant to the construction of the undertaking, but it is in any case not inconsistent with the trust alleged. Arrangements of this kind are not intended to provide security for repayment of the loan, but to prevent the money from being applied otherwise than in accordance with the lender's wishes. If the money is properly applied the loan is unsecured. This was true of all the decided cases, including the *Quistclose* case itself.

The effect of the undertaking

73. A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cash-flow. Commercial life would be impossible if this were not the case.

74. The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used *exclusively* for the stated purpose, for as Lord Wilberforce observed in the *Quistclose* case [1970] AC 567, 580:

> "A necessary consequence from this, by a process simply of interpretation, must be that if, for any reason, [the purpose could not be carried out,] the money was to be returned to [the lender]: the word 'only' or 'exclusively' can have no other meaning or effect."

In the *Quistclose* case a public quoted company in financial difficulties had declared a final dividend. Failure to pay the dividend, which had been approved by the shareholders, would cause a loss of confidence and almost certainly drive the company into liquidation. Accordingly the company arranged to borrow a sum of money "on condition that it is used to pay the forthcoming dividend". The money was paid into a special account at the company's bank, with which the company had an overdraft. The bank confirmed that the money

> "will only be used for the purpose of paying the dividend due on 24 July 1964".

The House held that the circumstances were sufficient to create a trust of which the bank had notice, and that when the company went into liquidation without having paid the dividend the money was repayable to the lender.

75. In the present case paragraphs 1 and 2 of the undertaking are crystal clear. Mr Sims undertook that the money would be used *solely* for the acquisition of property *and for no other purpose;* and was to be retained by his firm until so applied. It would not be held by Mr Sims simply to Mr Yardley's order; and it would not be at Mr Yardley's free disposition. Any payment by Mr Sims of the money, whether to Mr Yardley or anyone else, otherwise than for the acquisition of property would constitute a breach of trust.

76. Mr Leach insisted that such a payment would, no doubt, constitute a breach of contract, but there was no reason to invoke equitable principles merely because Mr Sims was a solicitor. But Mr Sims' status as a solicitor has nothing to do with it. Equity's intervention is more principled than this. It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract. As North J explained in *Gibert v Gonard* (1884) 54 LJ Ch 439, 440:

> "It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose."

The duty is not contractual but fiduciary. It may exist despite the absence of any contract at all between the parties, as in *Rose v Rose* (1986) 7 NSWLR 679; and it binds third parties as in the *Quistclose* case itself. The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust."

Discussion of the trust issue

70. In my view the transfers into the Commerzbank accounts did not even arguably give rise to the debtor/creditor relationship between FCMB and Zumax that normally exists between a banker and its customer. The bank into which the transfers were paid

was Commerzbank, not FCMB, and the accounts in question were those of FCMB,[23] not Zumax. Therefore, the transfers were demonstrably not simple deposits into a current account between banker (FCMB) and customer (Zumax). Whatever the correct analysis of the transactions which took place (I note the observations and illustrations given by Mr Nduka-Eze in his evidence[24]), it is simply not possible to apply the principles in cases such as *Foley v Hill* in the present case. I would, however, add that even if a debtor/creditor relationship existed, that would not exclude the creation of a trust: see *Quistclose*, per Lord Wilberforce at 581D-582B, and *Twinsectra* per Lord Millett, at paragraphs 68-69. Similarly, even if, as FCMB also contends, there was a contract between Zumax and FCMB to sell the dollars in return for Naira, a trust would not be precluded. However, no evidence of such a contract has been drawn to my attention.

71. As Lord Millett said in *Twinsectra*, the question whether, on the transfer of funds, the transferor is "merely a loan creditor" or a trust is created "depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case." Here the terms of the instructions are simple and unequivocal: "for further credit to Zumax" or, in the case of three of the transfers "for final credit to Zumax". In two cases there is a reference to Redsear as well as Zumax. In my view this makes no difference, for the reasons stated later in this judgment.

72. In my view those unequivocal instructions, conveyed by Redsear/Zumax to Redsear's bank (Chase), and passed on by the latter to FCMB's bank (Commerzbank), which recorded them in its own account documents, are (subject to any relevant context which points the other way) capable of only one sensible construction, namely that they evince a clear intention on the part of those concerned, and in particular Mr Chinye, that the funds transferred should be held by FCMB in its Commerzbank accounts, not for its own benefit but for the benefit of Zumax. That is the only reasonable, objective interpretation of the instructions. I accept Mr Moraes's submission that there was a clearly specified purpose and a clearly specified beneficiary.

73. I do not accept Dr Oditah's argument that evidence from Mr Chinye is required in order to ascertain, *inter alia*, his intention. The test of intention is an objective one: it is irrelevant what Mr Chinye's subjective intention may have been when he gave the instructions for the transfers. Moreover, it is common ground, as I understand it, that Mr Chinye is a fraudster. The suggestion that his evidence is required to take the matter further is a fanciful one.

74. Not only were the purpose of the transfer and identification of the beneficiary expressly acknowledged by Commerzbank by the designation in its own documents, which reflected the instructions of Mr Chinye, but by the same token the funds were segregated by being so identified on the face of the Commerzbank account statements.[25] It is clear beyond argument that both Commerzbank and the account holder were aware of this, at the latest, when the funds reached the account.

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[23] I deal later in this judgment with the IMB/IMB Morgan issue.
[24] Paragraphs 65 and 66 of the 6th witness statement of Mr Nduka-Eze dated 3 October 2016, and paragraph 121 of the 7th witness statement of Mr Nduka-Eze dated 15 November 2016.
[25] *Twinsectra* (above), at paragraph 70.

75. Further, there is clear and uncontroverted support in the evidential material before me that funds transferred to the accounts in question were treated by FCMB and Commerzbank as identifiable and segregated.[26]

76. The following material makes clear that the funds in question were also regarded by FCMB as belonging to Zumax:

(i) In a letter to Commerzbank dated 27 June 2002, Mr Ronen Pawar (IMB's deputy managing director and chairman of IMB Morgan) described the transfer made on 23 April 2002 in the sum of $410,000 – the 10th transfer – as "… Belonging to Zumax Nigeria Ltd."[27] The letter also states "…you have been receiving payments on [Zumax's] behalf over the years."

(ii) FCMB's defence dated September 2016 contends that (save for the 3rd transfer) the monies in question were paid to Zumax by bankers' drafts, a contention which indicates that they belonged to Zumax.

(iii) The witness statement of Toyin Owolabi dated 17 October 2016 (which describes the working of the "informal parallel" foreign exchange market in which FCMB operated off the record and outside the scrutiny of the banking regulator) explains[28] that IMB treated customer funds lodged in the Commerzbank accounts as being held separately for the benefit of each such customer, and that they only 'belonged' to IMB after IMB had paid the customer the equivalent in Nigeria. The same would follow if, as FCMB contends (but as to which no evidence has been shown to me), there was a contract between Zumax and FCMB to sell the dollars in return for Naira.

(iv) Mr Nduka-Eze explains[29] that when some of Zumax's funds were transferred from the IMB Commerzbank account to the IMB Morgan Commerzbank account, the funds in question were expressly designated for the benefit of Zumax.[30] This indicates that FCMB treated the monies as belonging to Zumax.

(v) In *Commerzbank v IMB Morgan* [2004] EWHC 2771 (Ch), interpleader proceedings brought by Commerzbank against IMB Morgan ("the Interpleader Proceedings"), it was held by Mr Justice Lawrence Collins (as he then was) that Zumax had a proprietary interest in the 10th transfer, which had been transferred into IMB Morgan's Commerzbank Account. The court also recorded that IMB Morgan itself had made no claim to the monies.[31] Mr Moraes points out that, in the jurisdiction challenge in this court, FCMB admitted that the decision of Mr Justice Lawrence Collins in *Commerzbank v IMB Morgan* is binding on it.[32]

Do the funds belong to Redsear?

[26] See, for example, paragraphs 37 and 38 of the 7th w/s of Mr Nduka-Eze dated 15 November 2016, dealing with the sums transferred into the Commerzbank account 160122964015 for, among other entities, Fariog Nigeria Limited. A sum paid into the account for the credit of that company on 13 January 2000 is shown as paid out in favour of the company 12 days later.
[27] [4/150]
[28] Paragraph 17(c).
[29] Seventh witness statement dated 15 November 2016, paragraph 37.
[30] [4/281-5]
[31] Paragraphs 36-7, and the last paragraph in Part B of Schedule 1 to that judgment.
[32] Paragraph 11 of FCMB's skeleton argument in that challenge.

77. As seen, FCMB submits that if a trust exists, Redsear rather than Zumax would be the settlor, so the resulting trust would be for its benefit not that of Zumax. Although in its pleading[33] FCMB does not admit that Redsear was the nominee of Zumax, and denies that the sums in the Redsear Account belonged to Zumax, these submissions are in my view untenable. There is overwhelming evidence to the contrary, quite apart from the fact that this denial is entirely inconsistent with FCMB's current defence that it repaid these sums to Zumax by providing bankers' drafts in Nigeria.

78. In written submissions to this court[34] FCMB has described Redsear as "a special purpose company incorporated…to receive Zumax receipts". In a letter dated 29 December 2003 to the receivers appointed by FCMB, FCMB stated that it had recovered $2 million (said to be Naira 270 million equivalent) "from Chevron contract proceeds paid into Redsear's account" in reduction of the alleged debt of Zumax to FCMB. Audited accounts to 31 August 2004 produced by the receivers disclosed[35] receipts in the amount of Naira 603,626,099 of Zumax's funds from Redsear. FCMB has accepted in its evidence that these funds were received.[36] Adebimpe Nkontchou, a solicitor acting for FCMB, describes Redsear as "Zumax's special purpose company….which received all the Zumax's foreign receipts.(sic)"[37] Finally, in the "summary of facts" in his expert report[38] on behalf of FCMB, Dapo Akinosun (a lawyer at SimmonsCooper) stated (presumably in accordance with instructions he had received from FCMB) that: "Redsear was incorporated to receive US dollar payments from Chevron and Shell, on behalf of Zumax. Redsear was incorporated because prior to its incorporation in 1989, it was not permitted to have a foreign currency account in Nigerian banks."[39]

79. FCMB has shown me nothing to counterbalance this material. On the evidence before me (and there is no reason to suppose that anything to the contrary would become available at a trial) it is unarguable that Redsear was anything other than a nominee and/or agent of Zumax, incorporated by the latter simply for the purpose of receiving dollar payments due to Zumax from its clients and dealing with those funds in accordance with Zumax's instructions. The funds in the Redsear Account clearly belonged to Zumax, and FCMB's denial is untenable.

80. To the extent that FCMB submitted that Redsear rather than Zumax was the settlor of any trust and therefore it alone has the right to enforce the trust, I consider that such a submission is unsustainable. First, I consider that the settlor was clearly Zumax, acting through its agent/nominee Redsear. But even if the settlor was Redsear, I can see no principled reason why, in the present circumstances, Zumax, as the sole and express beneficiary, is not entitled to enforce the trust. I am fortified in that view by the decision of Mr Michael Crystal QC, sitting as a Deputy High Court Judge, in *Re Magaretta Limited* [2005] BCC 506 at paragraphs 15-30. See also *Carreras Rothmans v Freeman Matthews Treasure Limited* [1985] Ch 207 at 222F-223G per Peter Gibson

[33] Paragraphs 3 and 9 of the defence.
[34] Submissions dated 25 March 2014. [1/226]
[35] [6/21-37]
[36] Paragraph 48 of Alan Taylor's fourth witness statement of 17 October 2016.
[37] 1st witness statement of 5 February 2014, footnote 4. See also the same deponent's 2nd witness statement of 19 March 2014, paragraph 20, and 4th witness statement of Alan Taylor dated 17 October 2016, paragraph 14(6).
[38] Which was excluded by order of Deputy Master Matthews in February 2014 in the jurisdiction challenge.
[39] As recorded in paragraph 86 of the 6th w/s of Mr Nduka-Eze dated 3 October 2016.

J, and *General Communications Limited v Development Finance Corporation of New Zealand Limited* [1992] LRC (Comm) 247 at 257-260.

Does the Debenture preclude a trust?

81. As I have said, FCMB submits that all the transfers (except the 3rd transfer) were charged by the Debenture, and the bank cannot be the owner and trustee of the transfers at one and the same time. Dr Oditah did not really develop this point, although it was included in his and Mr Aliker's skeleton argument. FCMB makes a separate point based on the Debenture, which is based on the demand made by FCMB in October 2016. I deal with that argument later in this judgment. As to the argument recorded above, all the transfers in question were made before the receivership began in December 2002. Dr Oditah has not explained how the existence of the Debenture can have affected whether a trust of those funds arose. There is nothing in this point.

Conclusion on trust issue

82. In the light of the evidential material shown to me, I consider that all the criteria are satisfied for the transfers in question to be impressed with a trust in favour of Zumax at the stage when the funds arrived in the relevant Commerzbank accounts. In my view the trust constitutes an express trust, but failing that it is a *Quistclose* trust. For the avoidance of doubt it is *not* a constructive or remedial trust such as described by Lord Sumption in *Williams v Central Bank of Nigeria* [2014] 2 WLR 355,[40] as contended by Dr Oditah.

83. I am also satisfied that at a trial there would be no realistic prospect of the court reaching a different conclusion. There is nothing in the available material to set against the unequivocal meaning of the manuscript instructions and circumstances surrounding the transfers. Nor do I consider that any such material could reasonably be expected to be available should the matter go to trial. I do not consider that there is anything of substance in FCMB's arguments against the existence of such a trust. There was no lack of certainty relating to the purpose of the trust or the intended beneficiary. The funds in the Redsear Account clearly belonged to Zumax, and the beneficial interest in the sums transferred to Commerzbank was clearly Zumax's, and was unequivocally treated as such by IMB/IMB Morgan. There is nothing relating to this issue which is fit to go to trial.

The 3rd transfer - on 12 May 2000 for $205,000

84. A separate issue arises with respect to the 3rd transfer, in the sum of $205,000. The Commerzbank account statements[41] show that this sum (less commission of $15) was credited to one of IMB's Commerzbank Accounts (no. 160122964015) on 12 May 2000 and was debited to that account on 17 May 2000. They also show that the funds came from the Redsear Account ("B/O Redseas (sic) Ltd") and had been paid into the Commerzbank account against "your tested fax Dated 12.5.00", and that the funds were for the benefit of Zumax ("Favour Zumar" (sic)).

[40] Paragraph 9 of Lord Sumption's judgment.
[41] [4/267]

85. Zumax does not have a copy of the instructions directing payment of this transfer from the Redsear account into the IMB Commerzbank Account. However, it is reasonable to assume that they came from Mr Chinye, since he had sole control of the Redsear Account and had given the instructions in all the other similar transfers in this period. Zumax contends that the "tested fax" reference is clearly to the manuscript instructions by him.

86. This transfer was not originally included in the claim, as it was only discovered by Zumax when FCMB disclosed the un-redacted statements of the account in September 2016. (Zumax contends - and FCMB did not, as far as I am aware, dispute - that FCMB had been in possession of these statements since January/February 2016[42]).

87. Zumax submits that in the light of the Commerzbank records,[43] the absence of the manuscript instructions makes no difference, as it is clear that this transfer is identical to the other nine transfers. Accordingly that sum is held on the same trust.

88. FCMB, however, suggests that this transfer was a mistake. FCMB refers to the entry on 17 May 2000 in the Commerzbank account statements, where Commerzbank debits IMB's account with the sum in question, and records on the statement of account "Internal transfer …Funds credited to your account in error Refer telephone call Loraine/Mohammed. Our apologies Account for incoming transfer from abroad c/o foreign department London branch"[44].

89. Zumax submits that there is no evidence or even a suggestion that the money was re-credited to Chase, the remitting bank for this transfer by Redsear, as would have occurred if the monies had been sent and received in error. Zumax points to the fact that what occurred on the 17 May was an "internal transfer" and argues that the funds must have been re-credited to an account of FCMB, namely the "Account for incoming transfers from abroad". Zumax also points to the failure to date of FCMB to provide any explanation as to what happened to this transfer.[45]

90. Given the context, it seems not at all improbable that the sum in question was re-credited to another account of FCMB, but that is not the test. Although the material before me points strongly to this transfer being treated identically to the other nine, in an application for summary judgment I do not feel able to reject FCMB's defence in relation to this transfer as hopeless, implausible or without any realistic prospect of success. If further material becomes available, in particular further disclosure (or evidence) from Commerzbank, the matter may be able to be resolved. If the 3rd transfer was in fact re-credited to FCMB (rather than, for example, being returned to Chase), then my conclusions in relation to the other nine transfers would apply equally to this one.

[42] See paragraph 10 of the 3rd w/s of Alan Taylor dated 30 September 2016. [2/344]
[43] [4/263 and 267]
[44] [4/267]
[45] 3rd w/s of Anthony Mordi dated 22 November 2016, paragraph 13.

(b) Did IMB control the IMB Morgan Commerzbank Account?

91. In Zumax's submission, the evidence shows that there is no realistic prospect of a court finding that FCMB did not control the IMB Morgan Commerzbank Account or that IMB Morgan was not its agent or nominee in respect of the funds transferred.

92. In its evidence[46] FCMB states that it severed its relationship with IMB Morgan in 1997. The SimmonsCooper Letter stated that IMB Morgan "is a totally distinct and separate legal entity from IMB" and that FCMB cannot be sued for its acts "[e]ven if it is a subsidiary of FCMB." In its evidence in the jurisdiction challenge, FCMB maintained that IMB Morgan "is not and never has been a subsidiary of the Bank."[47]

93. However, in its skeleton argument for this application FCMB does not address this issue (although reference is made to an assertion in Zumax's evidence that IMB "founded IMB Securities Plc (its subsidiary) to conduct foreign exchange operations in London…") Nor do I have a note of, or recall, Dr Oditah dealing with it in his oral submissions.

94. FCMB's stance on this issue has not been consistent. In paragraph 9 of its defence[48] in other proceedings in the Nigerian Federal High Court, FCMB stated:

> "…[FCMB] admits paragraph 51 of the statement of claim but only to the extent that IMB Securities [renamed IMB Morgan] is a subsidiary of [FCMB]."

95. Also, as Zumax points out, in the present claim FCMB has asserted to the court that FCMB and IMB Morgan "are one and the same"[49], and that "[FCMB] controlled IMB Morgan"[50]

96. There is, furthermore, a striking inconsistency between the case FCMB is now making by way of its substantive defence, namely that the nine transfers which it accepts were received by it, in the total sum of $3.547million, were paid by FCMB to Zumax in Nigeria by means of bankers' drafts, and the denial that FCMB had some control over the IMB Morgan Commerzbank Account. For of that total sum, about $2.5 million had been transferred by Redsear into the IMB Morgan Commerzbank Account. FCMB has not explained why it should account to Zumax for obligations owed by an entirely separate entity.

97. Particularly significant are the communications between FCMB and Commerzbank. In a SWIFT message dated 30 April 2002 from Commerzbank to George Omunubi, IMB's deputy general manager, Commerzbank requested authority from FCMB to debit the IMB Morgan account in the sum of $146,801.[51] In a fax of 2 July 2002 FCMB referred to the IMB Morgan Account as "our account" and requested Commerzbank to make a payment from it.[52] In his letter dated 27 June 2002[53] to which I have already referred, Ronen Pawar (IMB's deputy managing director and

[46] Paragraph 20 of Alan Taylor's 2nd witness statement dated 26 September 2016.
[47] 1st witness statement of Adebimpe Nkontchou, of 5 February 2014, paragraph 56.
[48] Paragraph 9 of the defence filed by FCMB on 5 August 2005 in suit number FHC/L/CS/721/2005. [4/20-22]
[49] Paragraph 29 of FCMB's skeleton argument dated 13 May 2014. [4/218]
[50] Paragraph 11 of FCMB's skeleton argument dated 30 June 2014.[1/242]
[51] [3/238]
[52] [3/257]
[53] [4/150]

chairman of IMB Morgan) writing on IMB Morgan letterhead to Commerzbank, stated that the sum of $409,985 (the 10th transfer, made into the IMB Morgan Commerzbank Account on 23 April 2002) "belong[ed] to Zumax" and requested its transfer to "our account" with Belgolaise Bank. The latter was an account in the name of IMB.[54] Mr Pawar's letter also shows that IMB and IMB Morgan shared senior staff, and operated from the same office building in Lagos,[55] even using the same fax machine.

98. As a further indication of control, Zumax also points to the fact that (as already described) some of the transferred funds, recorded on the bank documents as being Zumax's money, was moved by an 'internal transfer' from the IMB Commerzbank Account to the IMB Morgan Commerzbank Account.

99. Further indications of FCMB's intimate relationship with IMB Morgan are to be found in the judgment in the Interpleader Proceedings, where Lawrence Collins J. states:

> "IMB Morgan is a subsidiary of IMB International Bank Plc ("IMB"), formerly known as International Merchant Bank Plc, which is also based in Lagos."[56]

100. The learned judge also records[57] that on the 2 May 2002 IMB's deputy general manager, George Omunubi, called the London branch of Commerzbank to enquire whether a $350,000 ransom payment had been received into the IMB Morgan Commerzbank Account. The judgment states that "Commerzbank advised Mr Omunubi that no funds had been received". The judgment records[58] that Commerzbank refused to answer a similar query by a Mr. Hurvitz on the ground that he was not the account holder.

101. The fact that IMB was privy to the details of expected payments into the IMB Morgan Account, and that Commerzbank revealed to IMB what would otherwise be confidential information of IMB Morgan, is in my view a further indication of the control exercised by IMB.

102. Finally, the judgment[59] shows that, when the IMB Morgan Commerzbank Account was frozen because of allegations of money laundering, discussions and correspondence about the disposal of the frozen funds were conducted between Commerzbank and IMB, rather than with IMB Morgan. The clear implication is that prior to the freezing order IMB had been in a position to control payments out of the IMB Morgan Commerzbank Account.

103. In the light of this material, and despite FCMB's contentions to the contrary, I conclude that there is no aspect of this issue which justifies a trial. The evidence points overwhelmingly to one conclusion, which is that IMB/FCMB controlled the IMB Morgan Commerzbank Account and/or IMB Morgan was the nominee agent of

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[54] [8/311]
[55] FCMB's letter to Zumax dated 29 November 2002. [5/193] I have noted Mr Toyin Owolabi's evidence in his w/s 17 October 2016, paragraph 8, including that their offices were said to be on different floors.
[56] Paragraph 1 of the judgment.
[57] Paragraph 14 of the judgment.
[58] Paragraph 12 of the judgment.
[59] Paragraph 25, and Schedule 1, Part A, under the heading "Vine, Terence/Hawick Plant Auctions".

IMB/FCMB with respect to it. There is no realistic prospect of a court deciding otherwise.

(c) The payment defence: Were the funds in question repaid to Zumax by bankers' drafts?

104. I have already described the first manifestation of what has been an evolving defence on the part of FCMB. When the claim was first intimated, FCMB, by the SimmonsCooper Letter sent over 2 months later, denied having received the funds transferred from the Redsear Account, and maintained (consistently with that denial) that none of those funds had been remitted by FCMB to Zumax. Allied to that contention was the assertion, in a witness statement filed some 10 months after the intimation of the claim, that the funds in question formed part of the $7,367,595 which Zumax claimed against Mr Chinye in the 784 Proceedings.[60]

105. The "no receipt" defence was abandoned only when Zumax obtained disclosure of redacted Commerzbank statements by order of Master Teverson in February 2004. Up to that point, FCMB alone had access to the Commerzbank statements of account and FCMB, with knowledge of its denial of receipt of the funds, maintained that it would be "inappropriate" to disclose the statements[61] and resisted Zumax's Bankers Books Evidence Act application.

106. The disclosure of these statements, showing receipt by FCMB of the transfers, generated FCMB's observation, which I mentioned earlier, that Zumax should have realised there was no truth in FCMB's denial of receipt of the monies. FCMB also stated that the denial was a mistake, and that the funds had all been remitted to Zumax.[62] However, in the same witness statement, it is stated that the funds were "not necessarily remitted" to Zumax.[63] Further on in the same statement,[64] the witness says that FCMB "accounted to Zumax for the money", but "never in fact received and retained the Funds transferred from the Redsear accounts" which were received by Mr Chinye.

107. In the jurisdiction challenge FCMB asserted at first instance that it did not know what happened to the funds deposited in the IMB and IMB Morgan Commerzbank Accounts.[65] However, in the Court of Appeal FCMB stated that the transferred funds had been sold to FCMB, but was not able point to any sums credited to Zumax' Naira Account.

108. In its defence and counterclaim of 19 July 2016, (along with other elements of its defence case), FCMB formally admitted that it had received the transferred funds (paragraph 10(a) of the pleading), and denied that it had failed to account to Zumax therefor (paragraph 1(b)). FCMB also asserted that it was not intended that the funds would be credited into any identified account of Zumax (paragraph 10(e) of the

[60] 1st w/s of Ms Nkontchou dated 6 February 2014, paragraph 7.

[61] Letter 20 December 2013 from FCMB's solicitors. [6/305-6]
[62] Paragraph 9 of the 2nd w/s of Ms Nkontchou of 19 March 2014.
[63] Paragraph 29 of the 2nd w/s of Ms Nkontchou of 19 March 2014.

[64] Paragraph 42 of the 2nd w/s of Ms Nkontchou of 19 March 2014.

[65] Paragraph 8 of FCMB's skeleton argument dated 1 May 2014. [4/162]

Defence), and that Zumax had received the Naira equivalent (paragraphs 13(b) and (e)).

109. In its response of 28 July 2016 to Zumax's request for further particulars of the pleading, FCMB appeared to resile from its earlier contention, and to accept that the transfers did *not* form part of the $7,367,595 claimed against Mr Chinye in the 784 Proceedings.[66]

110. In September 2016, for the first time FCMB stated in evidence[67] that it had paid the $3.575 million by way of bankers' drafts in Naira to Zumax, relying upon a schedule entitled "Naira Disbursements to Warri: December 2000-July 2002" which had been produced by Mr Chinye ("the Warri Schedule").[68] The witness stated that Naira proceeds of sales of dollars by Zumax were generally not intended to be credited into Zumax's Naira accounts but paid by issuance of bank drafts by FCMB to Zumax, and that FCMB's case was that such drafts were issued to Zumax "in settlement of each of the 9 transfers claimed by [Zumax] in these proceedings…"[69] The witness continued:

> "The background data to these figures is listed in [the Warri Schedule]…For the months July 2001 (Naira 100 million), October 2001 (Naira 20 million) and December 2001 (Naira 11 million) a total of Naira 131 million is shown to have been disbursed to Warri. The sum correlates exactly with the sum shown in the schedule of funds transferred from Lagos."[70]

111. Thus, the new defence (not pleaded) centred on a contention that the Warri Schedule showed the amounts of bankers' drafts provided in Naira by FCMB to Zumax in settlement of the dollar funds now accepted to have been transferred to the Commerzbank accounts. On FCMB's case, these amounts did not pass through Zumax's Naira Account with FCMB because they were paid by bankers' drafts directly to Zumax, as shown in the Warri Schedule.[71]

112. However, it is clear that the Warri Schedule does not represent payments to Zumax in settlement of the dollar transfers into FCMB's Commerzbank accounts, but rather sums which were *debited* to Zumax's Naira Account with FCMB, and which can be seen to increase Zumax's overdraft.[72] The payments recorded in the Warri Schedule, and debited to Zumax's Naira Account, were presumably made by arrangement with a clearing bank, as IMB did not issue its own cheques/drafts.

113. Set out at Annex 2 to this judgment is a table produced by Mr Moraes during the hearing. This table, the accuracy of which was not questioned by Dr Oditah, is an expanded version of a table in Zumax's skeleton argument. The Annex 2 table sets the amounts identified in the Warri Schedule against debit entries in Zumax's Naira Account statements. Surprisingly, there are no fewer than three different versions of those statements. The first was provided to Zumax by IMB in 2002, before the

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[66] Response 6(d). [1/39-40]
[67] 1st and 2nd witness statements dated 5 and 12 September 2016 of Ms Jacqueline Burke, a solicitor in the firm of Alan Taylor & Co.
[68] [5/154]. 1st witness statement of Ms Burke, paragraphs 28-43.
[69] Ibid, paragraph 29.
[70] Ibid, paragraph 39. See also paragraph 42,
[71] Paragraph.29 of Ms Burke's 1st w/s (above). See also the 4th w/s of Alan Taylor of 17 October 2016, paragraphs 76-79, and FCMB's skeleton argument for this application, paragraph 26.
[72] See, for example, the bank statement at [10/142] in respect of the 4 December 2000 debit of Naira 30 million.

receivership began; the second was provided to the receivers; and the third was produced by FCMB in 2014, after these proceedings had begun.

114. The first version of the bank statements shows 9 Naira debits from Zumax's Naira Account corresponding by date and amount to 9 out of the 10 disbursements shown in the Warri Schedule. However, the missing debit (for Naira 20 million in June 2002) is shown in the second and third versions of the bank statements dated 25 June 2002. Three debits shown in the first version (Naira 11 million in December 2001, 19 million in January 2002, and 30 million in February 2002) are not shown in the second and third versions of the bank statements. So far as I am aware FCMB has provided no satisfactory explanation for those discrepancies in the statements it produced.

115. In the case of one entry in the Warri Schedule (Naira 30 million in April 2002) there is a debit in each version of the bank statements, but Zumax's directors' board minutes of 19 August 2002[73] record that:

> "Peter Dowds, the [Zumax] CEO pointed out that in IMB Statement of Account for 2000 to July 2002 the figure of N30 million which reflected in the April 2002 [sic.] was not received by the Company. Also for June 2002 the figure of N20 million was also not received from the IMB. The bank should clarify the entries. Mr. Chinye promised to refer the matter to the bank officials."

116. It is significant that Mr Dowd is recorded as querying the non-receipt of the April amount, and not the fact that it was *debited* to Zumax. This contemporaneous evidence, including FCMB's own bank statements, clearly demonstrates that the Warri Schedule reflects payments or expected payments which were debits to Zumax's Naira Account with FCMB, and not payments to Zumax in return for the Commerzbank dollars. The clear link between the Warri Schedule and the amounts queried by Mr Dowd is acknowledged by FCMB in its evidence.[74]

117. Therefore, I consider that the new defence cannot be supported by the Warri Schedule. At the hearing Dr Oditah did not seek to maintain the argument that the Schedule represented payments by FCMB in exchange for the dollar transfers. Further, it is apparently accepted by FCMB that there are no entries in the statements of Zumax's Naira Account which show payments in respect of any of the 10 dollar transfers.[75] What basis is there in these circumstances for FCMB's defence that it has paid/accounted for the dollar transfers? FCMB faces the obvious difficulty that, if the Warri Schedule drafts cannot be relied on (those being the original foundation for the new bankers' drafts defence), FCMB needs to be able to point to a second set of bankers' drafts which were provided to Zumax in the same period.

118. FCMB has been able to produce not the slightest record or trace of any such bankers' drafts, notwithstanding the size of the sums that would have been involved. When on 3 November 2016 (pursuant to an order of this court on 20 October 2016) FCMB gave disclosure in respect of its bankers' draft case, it was unable produce a copy of any relevant draft, related document or account record. All it was able to disclose were statements for FCMB's account with Citizen International Bank for the period

[73] [4/25]
[74] Paragraphs 76-79 of the 4th w/s of Mr Taylor dated 17 October 2016.
[75] 4th w/s of Alan Taylor, paragraph 85.

14 March 2002 to 31 December 2002.[76] According to FCMB's evidence,[77] that bank is one on which the bankers' drafts would have been drawn, but the statements show nothing relevant. Because of the period they cover, they could only have assisted in relation to the 10th transfer of $410,000 on 23 April 2002. However, the statements do not show a bankers' draft for the Naira equivalent of that amount.

119. In the course of his oral submissions, Dr Oditah accepted that FCMB had no records of how the payments to Zumax were made. He said that once the transactions in question were achieved "everyone goes away". This, he said, was because of the "informal" nature of the market. I note Mr Owolabi's evidence that documents were rarely destroyed by IMB/IMB Morgan, albeit they were "not well preserved".[78]

120. I should say that the 10th transfer of $410,000 on 23 April 2002 poses another difficulty for FCMB's proposed defence. That transfer could not have been the subject of a currency exchange transaction under which Zumax had been paid the Naira equivalent in Nigeria as FCMB contends, because Mr Pawar's letter of 27 June 2002, to which I referred earlier, confirmed that the funds in question "belong" to Zumax. Moreover, in the Interpleader Proceedings IMB Morgan made no claim to that sum, as it surely would have done if the sum had been exchanged for Naira. For the same reasons, the suggestion by Ms Nkontchou[79] that the 23 April 2002 $410,000 transfer was paid to Zumax by two separate transfers of $165,000 and $240,000 on 18 April 2002 (5 days before the $410,000 was transferred and a lesser sum by $5,000) is not plausible.

121. FCMB places considerable reliance on the Summary Report (prepared by Chief Edoja, Zumax's auditor). [80] I have already referred to the contents of this report and the circumstances in which it was produced.[81] In short, the auditor found that over the period from January 1998 to 30 June 2002 Zumax earned and received into the Redsear Account, of which Mr Chinye was the sole signatory, US$15,337,796. In relation to that sum, the auditor stated that Mr Chinye had provided him with an explanation for payments from the account amounting to US$7,970,201, leaving a balance of US$7,367,595 for which Mr Chinye had not provided an explanation. Chief Edoja has since confirmed on oath that his audit was only able to cover dollar payments *into* the Redsear Account for January 1998 to June, 2002. I note, too, that the Court of Appeal Judgment stated:[82]

> "that Mr Chinye, who was the sole signatory of the account, had authorised payments from the account amounting to over US$ 7.9 million and that there was a shortfall of nearly US$ 7.4 million for which Mr Chinye was unable to account. It is important to note that the audit did not purport to address the ultimate destination of the payments of over US$ 7.9 million which had been authorised by Mr Chinye."

[76] [10/175-352]
[77] Mr Toyin Owolabi's w/s of 17 October 2016.
[78] Paragraph 27, w/s of 17 October 2016.

[79] Paragraph 23 of her 2nd w/s, dated 20 March 2014.
[80] [4/188-191]
[81] See paragraphs 17-20 of this judgment.
[82] Paragraph 55.

122. Despite these findings, FCMB maintains that the Summary Report supports the contention that the sums the subject of this claim were properly paid, or accounted for, to Zumax in Nigeria.

123. FCMB originally prayed in aid the Summary Report as confirming its submission that the relevant payments were made to Zumax through Zumax's Naira Account.[83] That contention (along with reliance on the Warri Schedule bankers' drafts) has now been abandoned, since FCMB now accepts that the payments in question are not to be found going through that account. In fact the auditor had stated in evidence that no audit could be conducted in respect of Zumax's Naira Account because IMB (in the person of Mr Chinye) refused to provide bank statements for the same.[84]

124. FCMB's payment defence now rests on other schedules, which in addition to the Warri Schedule Mr Chinye provided to the auditor and Zumax's board to try and explain what had happened to c.US$15.3 million of Zumax's earnings in the Redsear Account. These schedules of Mr Chinye were headed Appendix IV for the year 2000[85], Appendix V for 2001,[86] and Appendix V1 for 2002 up to June.[87] Mr Chinye apparently claimed that some of the sums referred to in those appendices had been paid in Naira to Zumax. This information provided by Mr Chinye was included in Chief Edoja's (2002) audit report.[88] It is clear from the correspondence between the auditor and IMB in November 2002, to which I referred earlier,[89] that the auditor, having been unable to find evidence that these amounts were paid into Zumax's Naira Account, asked IMB for further information in order to verify Mr Chinye's statements.

125. In the letter of 12 November 2002 the auditor asked the following about certain transfers from the Redsear Account in 2000-2002: "at what rate was the FX sold and did the amount pass through the IMB Account?" FCMB rely upon this as indicating, at least arguably, that the auditor was satisfied that the dollars were converted to Naira and paid to Zumax. The same point is made with respect to a later request[90] to IMB (Mr Chinye) for information, in a letter from Mr Nduka-Eze, Zumax's lawyer: "How was the Dollar inflow from the Company's offshore account converted and credited to IMB. Did the Bank agree the rates with Zumax?"

126. FCMB also rely upon (1) the fact that the auditor annexed some of the information in Mr Chinye's schedules to his (2002) audit report, and that the total of the dollar amounts about which the auditor was raising questions in his 12 November letter is similar to the sum being claimed by Zumax in these proceedings, and (2) the language used in the Summary Report, describing the $7.9 million as "expenditure" and the $7.4 million which had been claimed against Mr Chinye in the 784 Proceedings as "not accounted for"; the point being that the auditor (and Zumax's board) must have accepted that the $7.9 million (of which the present claim forms part) was somehow repaid or accounted for. Dr Oditah also made much of Mr Nduka-Eze's language in a

[83] Ms Nkontchou's 2nd w/s, paragraph 9.
[84] Paragraphs 19 and 20 of this judgment.
[85] [5/269-270]
[86] [5/271-2]
[87] [5/273]
[88] [5/135-6]
[89] Paragraph 20.
[90] Letter 9 December 2002 [5/221-2]

witness statement[91] made in 2009 on behalf of Zumax in the 784 Proceedings, where he referred to the shortfall of c. $7.4 million between the sums paid into the Redsear Account and the amounts "duly accounted for by" Mr Chinye, the defendant in those proceedings.

127. In making these and other similar points, FCMB is clutching at straws. It is clear from the contemporaneous material that the auditor, having been told by Mr Chinye that payments of $1,255,000 in year 2000, $1,471,000 in 2001 and $976,000 in 2002 ($3,702,000 in total) had been made in Nigeria, and having no evidence that such sums had been received by Zumax, in his letter of 12 November 2002 was seeking verification. In that letter he also asked for the vouchers for Zumax's Naira Account. On 14 November, he sent a chasing letter to IMB, and asked for comprehensive final statements of Zumax's Naira Account. IMB's response on 19 November 2002 was to say that it did not accept instructions from accountancy firms.

128. Since we now know that the sums in question were *not* paid through Zumax's Naira Account, it follows that the auditor's inquiry should have been answered "The payments were not made through Zumax's account but by separate bankers' drafts". No such response was ever given.

129. The points made by FCMB about the Summary Report ignore the fact that in it the auditor makes no findings whatsoever about the use or destination of the $7.9 million, and that he later made clear that his only finding related to the receipts into the Redsear Account, as the Court of Appeal confirmed. Nor is it in the least surprising that the auditor should append to his report the information provided by Mr Chinye. The question asked in the letter of 12 November 2002 cannot possibly provide an indication of a finding or belief on the part of the auditor as to what had happened to the dollar transfers; on the contrary the auditor was clearly not satisfied with whatever explanation he had been given, and was seeking further information from IMB. The same applies to the question posed by Mr Nduka-Eze. It was because IMB (Mr Chinye) refused to provide the information requested that the findings of the audit were so limited. I note that neither in the Summary Report nor in any correspondence nor in minutes of board meetings at which the auditor was present, is there any mention by him of c.US$ 3.5 million having been paid to Zumax by bankers' drafts separate from the Warri Schedule.

130. The implausibility of the new bank transfer defence can be seen by examining the 8th transfer for $155,000. The original Warri Schedule defence suggested that the payments shown in that Schedule of Naira 11 million in December 2001 and/or Naira 19 million in January 2002 were in respect of the 8th transfer. However, with the abandonment of that argument and the acceptance that the amounts shown in the Warri Schedule represent debits, it is necessary for a further separate bankers' draft in favour of Zumax to have existed in a sum of about Naira 20 million and at about the same time as Zumax was drawing down c.Naira 30 million and increasing its overdraft with IMB correspondingly. Not only is there no trace of any such draft or any evidence that such drafts were purchased by IMB (as one would have expected given the size of the sums), but it would have been absurd for Zumax to have increased its overdraft when equivalent sums were available to it through sale of its dollars to IMB.

[91] W/S 27 July 2009, at paragraph 51. [3/204]

131. In the face of these factors, the loose use of language by Zumax's lawyer in the 784 Proceedings against Mr Chinye describing amounts which were *not* the subject of those proceedings as "duly accounted for" does not assist FCMB. It is a further example of clutching at straws.[92]

The 10th transfer: $410,000

132. At this stage it is necessary to return to Zumax's claim in respect of the 10th transfer for $410,000, received in the IMB Morgan Commerzbank Account on 23 April 2002. FCMB submits that its defence raises a triable issue of fact: why in the Interpleader Proceedings Zumax informed Mr Justice Lawrence Collins that the US$410,000 claimed at paragraph 8.9 of its Amended Particulars of Claim formed a part of the US$7.4m allegedly misappropriated by Mr Chinye, whereas in the present proceedings the same amount is claimed as part of the US$7.9m. Although Dr Oditah and Mr Aliker did not develop the point in their skeleton argument, in oral submissions it was submitted that Zumax was trying to recover this sum for the third time in this claim: first, in the Interpleader Proceedings in 2004, then in the 784 Proceedings in 2009, and third, in the present claim.

133. FCMB rely upon the following statement in Zumax's evidence in the Interpleader Proceedings:[93]

> "3. I make this witness statement as directed by [the judge]… to furnish evidence required as proof of claim by Zumax Nigeria Limited to recover U.S.$441,000.00… presently standing on account in the Supreme Court Funds Office…
>
> 4. …Zumax claims the U.S.$441,000.00 as funds owing to it because the money has been ordered by Redsear …to be transferred from Redsear's account….through [IMB Morgan]'s account with Commerzbank….to Zumax's account in Nigeria for use by Zumax in its oilfield supply business…
>
> 5. The U.S.$441,000 is part of a total of U.S.$7,400,000 for which Zumax's principals are pursuing a Mr Edwin Chinye…"

134. It is clear from the above extract that Zumax did not in the Interpleader Proceedings claim the 23 April 2002 $410,000 transfer, or assert that it was part of the $7,367,595 claimed from Mr Chinye. It is clear from the witness statement, read alongside the judgment of Mr Justice Lawrence Collins, that Zumax was claiming a quite different sum of $441,000, but the judge had access to documents referring to the 23 April 2002 $410,000 transfer. Presumably these included the Commerzbank statements of the account, which were not at this time available to Zumax. As the judge was willing to grant Zumax the sum of $410,000, it understandably did not press a claim for the difference between the two sums.[94] In fact only c.$39,500 or 9% was recovered, as the amount available in the Commerzbank account was limited and had to be shared in proportion with the other successful claimants.

135. In his evidence in this case,[95] Mr Nduka-Eze explains that in 2004 the information available to Zumax was limited, and that it was the court not Zumax who identified

[92] See, for example, the Court of Appeal Judgment, paragraphs 65-6.
[93] Witness statement of Mr Nduka-Eze, Zumax's lawyer, dated 1 October 2004, paragraphs 3-5. [7/201]
[94] Schedule 1, Part B of the judgment.
[95] Paragraph 86(d) of the 7th w/s of Mr Nduka-Eze dated 17 November 2016.

the receipt of $410,000 into the IMB Morgan Commerzbank Account, and confirmed that Zumax had a proprietary right to the sum. As I have already noted, there can be no doubt that the $410,000 belonged to Zumax and had not been paid to that company. This had been acknowledged by IMB Morgan, both in the Interpleader Proceedings (in which IMB Morgan made no claim itself nor disputed Zumax's), and in Mr Pawar's letter to Commerzbank of 27 June 2002. At that time the sum was trapped in IMB Morgan's Commerzbank Account which had been frozen since May 2002, as IMB/FCMB must have been aware throughout.

136. I add that it is clear from the above that the statement[96] given by Mr Chinye in 2003, in the context of a Redsear shareholders' action brought against him by Chief Uzor (a director of Zumax, now deceased), that a payment in Naira reflecting the $410,000 had been made by IMB into Zumax's Naira Account in 2002, is obviously false. It is inconsistent with IMB Morgan's letter of June 2002, and also with the acceptance by FCMB that the dollar transfers are not reflected in the statements of Zumax's Naira Account.[97]

137. There is, therefore, no substance in FCMB's objections to the claim in respect of this transfer. I see no reason why Zumax, which has only recovered 9% of this sum, should not pursue FCMB for the balance by way of its trust claim.

Conclusion: the payment defence

138. In my view there is no substance whatsoever in the current version of this defence, based on a notional set of bankers' drafts which were said arguably to have been issued at about the same time and in the same amounts as, and in addition to, the drawdown payments referred to in the Warri Schedule. There is no evidence that any such additional bankers' drafts existed, and the suggestion that they did is wholly implausible in the circumstances. There is no reason to suppose that further relevant material would become available at a trial or that oral evidence would make a difference. FCMB have identified no issue in this regard which requires a trial. The current bankers' draft defence is hopeless.

139. FCMB have only been constrained to rely on this point because their two earlier defences (the initial denial of receipt of the transfers, and the subsequent Warri Schedule defence) have been shown to be false. FCMB's inability to point to any real evidence in support of the latest defence inevitably falls to be seen in the context of those earlier assertions, which were vigorously made and later abandoned. I would respectfully adopt the observation of Mr Hollander QC, and "deprecate FCMB's attempts to rely on…any conceivable point they could think of, whatever its merit…I …increasingly formed the view that FCMB were 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."[98]

140. I record that the report[99] of FCMB's expert witness, Mr Anthony Ofili, as to the working of the foreign exchange markets in Nigeria at the material time, does not

[96] Paragraph 40 of Mr Chinye's w/s dated 13 August 2003. [7/59]
[97] 4th w/s of Mr Taylor of 17 October 2016, paragraph 85; 1st w/s of Ms Burke of 28 April 2016, paragraph 29; 2nd w/s of Ms Burke of 5 September 2016, paragraph 3.
[98] Paragraphs 91 and 95 of the Hollander Judgment.
[99] Substantially excised pursuant to an order of Master Teverson of 5 January 2017.

affect my view that the current defence is hopeless. The main theme of Mr Ofili's evidence is that much foreign exchange of dollars into Naira was carried out using the "parallel" or "informal" (i.e. illegal) market rather than the official one. This was done in order to avoid levies by the regulator, and to obtain a better rate of exchange. Records of such transactions were not kept by the Nigerian banks in order to avoid penalties. This latter point is not really consistent with the evidence of Mr Owolabi about IMB's and IMB Morgan's practice in relation to the preservation of documents.[100] In any event, I do not see how it could assist FCMB to suggest that they might have made payments to Zumax but kept no record of doing so as the transactions were illegal.

141. Zumax criticised FCMB's expert evidence on additional grounds, including alleged lack of independence. Zumax also submits that FCMB asked the expert to opine on matters which were prohibited by the order of Nugee J dated 16 September 2016. However, I do not need to address any of these additional points, as they do not affect the conclusion I have reached.

(d) Does the 2005 Agreement or the Consent Order bar these proceedings?

142. I have set out at paragraphs 22 to 33 above how the 2005 Agreement and the Consent Order came into existence. Also summarised in those paragraphs are the main arguments of the parties in relation to this defence. In summary, FCMB contends that by the 2005 Agreement, Zumax compromised and released all its claims against FCMB (including the present one) in consideration for FCMB accepting Naira 150 million in full and final settlement of the (allegedly greater) debt said to be owed to it by Zumax. The 2005 Agreement was later embodied in the Consent Order, which FCMB submits is valid and constitutes a complete defence to the present claim.

143. FCMB's skeleton also contained a submission that the whole legal rights and obligations of the parties are embodied in and concluded by the Consent Order, and that the 2005 Agreement and any conditions set out in it ceased to have an independent existence and effect, so that only the Consent Order can be enforced. Section 34 of the Civil Jurisdiction and Judgments Act 1982 was also cited.

144. I assume (although I have no note of Dr Oditah so submitting) that the point about the merging of the 2005 Agreement into the Consent Order is to meet Zumax's objection that there was a total failure of consideration for the 2005 Agreement. I deal with this (assumed) argument below. As to section 34, I see no way in which that provision can assist FCMB here. Dr Oditah did not take me to section 34 or develop either of these submissions in his oral argument.

145. Zumax contends that FCMB has no prospect of enforcing either the 2005 Agreement or the Consent Order, and that the latter is not a bar to this claim, for the following reasons:

(i) FCMB is barred from relying on the 2005 Agreement or the Consent Order, having accepted the binding effect of the ruling of Mrs Justice Nicol-Clay on 24 June 2010.

[100] Paragraph 119 of this Judgment.

(ii) There was no consideration for the 2005 Agreement.

(iii) The 2005 Agreement was obtained by fraudulent misrepresentations on the part of FCMB (as recognised by the Court of Appeal in the jurisdiction challenge).

(iv) In any event, the 2005 Agreement is subject to pre-conditions which have not been satisfied and consequently there is no 'release and discharge'.

Effect of the ruling of Mrs Justice Nicol-Clay on 24 June 2010?

146. I explained earlier that Zumax brought the 1668 Proceedings in Nigeria, seeking to set aside the 2005 Agreement and the Consent Order, and that on FCMB's strike out application Mrs Justice Nicol-Clay held that Zumax's claim was not barred by issue estoppel and declined to strike it out, making instead the finding recorded at paragraph 33 above, which FCMB sought (unsuccessfully) to appeal. In its notice of appeal FCMB itself interpreted Mrs Justice Nicol-Clay's finding as being a determination that Zumax had established grounds for setting aside the Consent Order, i.e. fraudulent misrepresentation and concealment of facts. FCMB's answer to this point was that Mrs Justice Nicol-Clay's finding was not final or binding because it was made on a strike out application and not after a hearing of the set aside application itself. This does not meet the point that FCMB's appeal against her ruling was on the premise that the Judge had made a finding which FCMB accepted was binding on it subject to the appeal. In my view there is considerable merit in Zumax's submission that FCMB cannot go behind its recognition of the finding, which was apparently upheld on appeal. However, I have not been shown any order or judgment of the appeal court, and am told that the 1668 Proceedings are still on foot. I will therefore turn to consider the other arguments raised by Zumax.

There was no consideration for the 2005 Agreement?

147. There is some overlap between this submission and the next one, that the 2005 Agreement/Consent Order were obtained by fraudulent misrepresentations.

148. Under this head Zumax contends that the only possible consideration for the 2005 Agreement was the abandonment by FCMB of the 115 Proceedings, and that a worthless claim cannot constitute consideration. In this respect Zumax referred to Chitty on Contracts, 32nd Edition, at 4-051, *Wade v Simeon* (1846) 2 CB 548 at 564 per Tindal CJ, and *Miles v New Zealand Alford Estate Co* (1886) 32 Ch 266 per Cotton LJ at 283-284. The case law indicates that the claimant must know that his claim is worthless.

149. As explained earlier in this judgment, the 115 Proceedings were in respect of an alleged debt of Zumax of Naira 309,106,986.87 as at 17 December 2004. This sum was calculated on the basis that Naira 465 million had been due and owing to FCMB at about the time of the receivership in December 2002. However, the effect of my conclusions on the trust issue and the payment defence is that FCMB failed to disclose receipt of $3,547,000 ($3,752,000 less the 3rd transfer of $205,000[101]) which they held in trust for Zumax. In the evidence for this application Zumax, without comment from FCMB, used an exchange rate of c.Naira 127/$1 to estimate the value

[101] I have been unable to reach a firm conclusion as to the 3rd transfer, of $205,000.

of these sums at December 2002. At that exchange rate, $3,547,000 is equivalent of c.Naira 450 million, excluding any interest (which Zumax estimated at Naira 321.4 million on its claim for $3,752,000). It is clear beyond reasonable argument that FCMB, with access at all times to the Commerzbank account statements, must have known of the receipt of the nine transfers, and that they belonged to Zumax. That being so, at the time when the 115 Proceedings were begun and when they were settled by the 2005 Agreement, FCMB must also have known that the claim made in those proceedings for Naira c.309 million was baseless, as FCMB had already received at least Naira c.450 million belonging to Zumax for which it had not accounted.

150. Furthermore, although it is not part of the present claim, FCMB has been unable to provide any explanation[102] for a sum of Naira 250 million which FCMB debited to Zumax's Naira Account on 15 April 2002. This debit formed part of the Naira 465 million said to have been owing to FCMB at the outset of the receivership. It is not in dispute that this debit is not shown on the version of the bank statements provided by FCMB to Zumax prior to the receivership,[103] but appears on the statements provided after the receivership.[104] Leaving aside the implications of these factors for the validity of FCMB's actions in placing Zumax into receivership in 2002, they mean that far from Zumax owing Naira 309 million as claimed in the 115 Proceedings, Zumax was in fact FCMB's creditor by a considerable margin, both when those proceedings were instituted and when they were settled.

151. It is convenient here to deal with a matter raised in the further evidence and written submissions filed with my permission after the end of the hearing.[105] It relates to cross-examination evidence given on 14 July 2017 at a hearing of the 1668 Proceedings in the Lagos High Court by Mr Niyi Osinkolu, a witness for FCMB, who has also provided evidence in this application. I have seen a transcript of that evidence, in which Mr Osinkolu accepts that FCMB received Naira 270 million of Zumax's money (said to be the equivalent of US$2 million) and that these monies did not appear in any of the versions of the bank statements for Zumax's Naira Account then before the Lagos High Court, and "will not appear".[106] It is not disputed that these monies were received by FCMB before the commencement of the receivership.[107] (These monies were also referred to in a letter from FCMB to the receivers dated 29 December 2003 to which I refer at paragraph 167 of this judgment.) Zumax submits that, on the basis of these admissions, FCMB received *before the receivership began* a further sum of Naira 270 million of Zumax's money for which it has failed to account. In its written submission of 26 July 2017, FCMB has not provided any explanation for the Naira 270 million. In these circumstances Zumax submits that FCMB's *own evidence* establishes that on the eve of the receivership the bank owed Zumax Naira c.520 million (the Naira 250 million removed from Zumax's Naira Account on 15 April 2002 plus Naira 270 million).

[102] W/s of Mr Osinkolou of 17 October 2016, paragraphs 5-6; 7th w/s of Mr Nduka-Eze of 15 November 2016, paragraphs 50-51.
[103] [10/144]
[104] [10/158]
[105] See paragraph 11 of this judgment.
[106] Pages 15-16 of the transcript of evidence taken by the Hon Mrs Justice Obadina in the 1668 Proceedings on 14 July 2017.
[107] FCMB's solicitors' letter to this court 26 July 2017.

Thus, it is submitted, at no time prior to, during or after the receivership was Zumax indebted to FCMB.

152. Quite apart from these factors, Zumax has identified other reasons to impugn the debt of Naira 465 million alleged by FCMB to exist as at November 2002. I have already referred to the three separate, and conflicting, versions of the statements for Zumax's Naira Account which FCMB provided at different times.[108] Zumax points to the fact that, as at June 2002, the version provided to the auditor, Chief Edoja, shows a debt of Naira 373,958,101;[109] the version provided to the receivers shows a debt of Naira 99.5 million;[110] and the version provided on 5 April 2012 shows a credit of Naira 25,043,923.[111] In relation to the latter version, FCMB's evidence[112] states that the explanation for the credit is that the individual who generated the statements did not enter an opening balance. This may be correct, but in the circumstances one could hardly have confidence that the opening balance itself would have been accurate and/or would not have been subject to change at a later date.

153. Further, in the same version of the bank statements the debt, as at 30 November 2002, is recorded as Naira 341.1 million, not 465 million, as claimed by FCMB. I also note that a further assessment of Zumax's indebtedness, prepared by FCMB in 2014,[113] shows a debit balance of Naira 49 million as at 30 June 2002. These summary account statements show all of Zumax's receivership debt repaid by June 2003, and a credit balance of Naira 50 million.[114]

154. In the light of the above, I conclude that FCMB has no plausible or realistic answer to the submission that there was no consideration for the 2005 Agreement, and that the same must have been known by FCMB. I agree with Zumax that FCMB cannot rely on the release and discharge of the receivers as consideration, for that occurred prior to the 2005 Agreement which was concluded on 23 May 2005. In any event, the ending of the receivership did not form part of the 2005 Agreement.

155. I have no record of Zumax addressing FCMB's (assumed) argument that the absence of consideration does not assist Zumax, because the 2005 Agreement was incorporated into an order of the court. Although I have not had the benefit of developed argument on this point from either party, I would hold that FCMB's point is a bad one. The authors of the passage from *Chitty on Contracts* cited above, state that the refusal of the courts to enforce the compromise of a claim known to be worthless is based on public policy. They refer to the dictum in *Wade v Simeon* (above) that it

> "is almost *contra bonos mores* and certainly contrary to all the principles of natural justice that a man should institute proceedings against another when he is conscious that he has no good cause of action."

156. In principle, it seems obviously wrong that the court should be obliged to enforce the terms of an agreement which is invalid and unenforceable as contrary to public policy

[108] Paragraphs 113-114 of this judgment.
[109] [5/140]
[110] [10/155]
[111] [10/159]
[112] Mr Osinkolou's w/s of 17 October 2016, paragraphs 7 and 8.
[113] FCMB's summary account statements, disclosed in December 2016. [10/170]
[114] [10/172]

and natural justice, simply because the agreement has been incorporated in a consent order. Just as it would refuse to enforce the agreement, in my view the same reasons would preclude the court from lending its assistance by enforcing the order, contrary to public policy.

Were the 2005 Agreement/Consent Order induced by fraudulent misrepresentations?

157. It is trite law, and is not in dispute in this application, that a foreign judgment obtained by the fraud of a party cannot afterwards be enforced by that party in an English court: *Abouloff v Oppenheimer* (1882) 10 Ch 295 at 301 and 303 per Lord Coleridge CJ and at 305-6 per Brett LJ.

158. Zumax contends that there were false and dishonest representations by FCMB, both as to Zumax's outstanding debt and as to the sums which had been recovered in the receivership.

159. FCMB submits that the allegation that it made fraudulent misrepresentations in order to induce Zumax to enter into the 2005 Agreement and the Consent Order is a serious allegation. FCMB denies there was any misrepresentation, and submits that no court has found after a trial that any misrepresentations were made by FCMB to Zumax. It further submits that the issues of whether a misrepresentation was made, whether the falsity was deliberate, and whether it was relied upon by Zumax, are factual issues which cannot be resolved in a summary judgment application without the benefit of discovery and cross examination, and must therefore go to trial.

Representation as to Zumax's indebtedness

160. I do not accept FCMB's submissions. So far as the outstanding debt of Zumax is concerned, as I have already described in detail, FCMB clearly represented to Zumax, not least by means of its Statement of Claim in the 115 Proceedings, that there was a debt of Naira 309,106,986.87 outstanding as at 17 December 2004.[115] For the reasons given at paragraphs 149-150 above, that representation was false, in that FCMB had received the nine transfers of dollars without accounting for the same to Zumax, and had also debited Zumax's Naira Account in the sum of Naira 250 million on 15 April 2002 without being able to provide any lawful excuse. Moreover, that takes no account of the Naira 270 million of Zumax's funds received by FCMB before the receivership,[116] or the account statements produced by FCMB at various times, some of which show a credit balance in favour of Zumax.[117]

161. Further, as explained in those paragraphs, FCMB must have known the representation to be false, or made it without any real belief in its truth, and FCMB failed to inform Zumax of the true position. The representation was, therefore, dishonest.

Representation as to the extent of recoveries in receivership

162. I turn to Zumax's contention that FCMB also fraudulently misrepresented to it the extent of recoveries that had been made in the receivership.

[115] [7/80-83]
[116] See paragraph 151 of this judgment.
[117] See paragraphs 152-3 of this judgment.

163. There is no dispute that all the recoveries in the receivership were made by October 2003. As I have noted, the summary statements of account, prepared by FCMB in 2014 and disclosed to Zumax in late 2016 (see above), indicate that the debt had been repaid with a surplus of Naira 50 million by June 2003.

164. It is clear that when, in June 2004, in the course of negotiations to end the receivership, Zumax wrote[118] to FCMB referring to Zumax's understanding that $2 million was all that had been recovered in the receivership, FCMB did not in its response of 9 July 2004[119] correct or comment on that figure, which was then the equivalent of Naira 215-230 million. That Zumax's understanding was based on the figure it had been given by FCMB is clear from affidavits sworn on behalf of FCMB in 2006 and 2007,[120]in which Naira 215 million is referred to as the total amount recovered.

165. As to whether the representation was false as alleged, it is accepted by Mr Taylor on behalf of FCMB[121] that recoveries amounted to Naira 603,626,098.93. Further, the Nigerian Economic and Financial Crimes Commission wrote to Zumax on 23 September 2009 stating that Mr Idigbe (one of the two receivers) had informed the Commission that recoveries were Naira 603 million.[122] Although Mr Osinkolu[123] states that the figure of Naira 603 million (which Mr Taylor accepts as correct) is based on a mistake, Mr Osinkolu accepts that recoveries between 6 February 2003 and 13 June 2003 amounted to Naira 441,775,000, a figure approximately double the amount represented by FCMB to Zumax as the total recovered. I note, too, that the Lagos High Court in Nigeria has found it "uncontroverted" that Naira 781 million was recovered.[124]

166. In the light of this it is, in effect, accepted by FCMB that a false representation was made. In any event, I consider that a denial would have no realistic prospect of being accepted at a trial.

167. Zumax also contends that there is no realistic possibility of a court concluding that FCMB was ignorant of the falsity of the representation or had a real belief in its truth. Zumax argues that FCMB was aware, both before and whilst making the said representation, of the actual sums recovered. In this respect it points to a letter dated 10 October 2003 from the receivers to FCMB showing receipts of Naira 603,626,098.93,[125] and a letter from FCMB to the receivers dated 29 December 2003 querying the receivers' figure and stating that the inflow into the account from January 2003 to the date of the letter was Naira 441,775,000.[126] On 20 January 2004 the receivers wrote to FCMB enclosing a Statement of Affairs of the Receivership to 31 October 2003. This showed total recoveries of Naira 781,445,166.[127] A further

[118] [6/2-4]
[119] [6/L/7]
[120] Paragraph 16 of the affidavit of Ms Kalu dated 10 March 2006; [4/232] and paragraph 11 of the affidavit of Mr Asuquo dated 7 February 2007. [4/235].
[121] Paragraph 48 of Mr Taylor's 4th w/s dated 17 October 2016.
[122] [4/293]
[123] Paragraph 2(d) of his w/s dated 17 October 2016.
[124] [4/203]
[125] [5/295-311]
[126] [5/335] This sum was said by FCMB to include the Naira 270 million received by FCMB before the receivership: see paragraph 151 of this judgment.
[127] [5/338-340]

letter from the receivers to FCMB of 16 August 2004[128] stated the figure recovered at Naira 709,781,008.

168. In the Biu Proceedings,[129] (a dispute between one of the receivers, Mr Biu, and FCMB in which Mr Biu contended that the 2004 Agreement represented a fraud on Zumax as the latter's debt to IMB had been discharged during the receivership) an affidavit of Patrick Okeze[130] on behalf of Mr Biu disclosed total receivership receipts of Naira 790 million as per October 2004 receivership accounts.

169. In the background section of this judgment I referred to the letter Zumax wrote to FCMB on 9 February 2005 asking for copies of the receivers' statements of account, and inquiring whether there was any basis for a claim, apparently made by the receivers, that in excess of Naira 700 million had been recovered by them. There appears to have been no contemporaneous response to that letter. Certainly none has been drawn to my attention. Zumax's evidence[131]is that there was no reply in writing, but that at all subsequent meetings FCMB maintained its denial that more had been recovered than the Naira equivalent of $2 million. This has not, as far as I am aware, been denied in FCMB's evidence in these proceedings.

170. In the light of this I agree with Zumax that there is no realistic prospect of a court at trial concluding that at the material times FCMB was ignorant of the falsity of its representation or had a real belief in its truth. There is no issue of fact which needs to be the subject of a trial, as no realistic prospect exists that a court would find otherwise.

171. Although, as FCMB submits, the allegations made by Zumax are serious and it is unusual for a finding of fraud to be made in the context of a summary judgment application, so that particular caution should be exercised by a court before doing so, in my view the finding is fully justified in the circumstances of this case.

No reliance/inducement?

172. I turn to consider FCMB's contention that in any event there was no reliance by Zumax on the representations in question, and therefore no inducement to enter the 2005 Agreement or agree the Consent Order, because before it did so Zumax already knew what the receivers were saying about the quantum of the recoveries.

173. In this respect, Dr Oditah relies upon Mr Nduka-Eze's letter of 9 February 2005, already referred to, in which the writer asks FCMB whether there is any basis for claims that more has been recovered than $2 million. FCMB also relies upon an affidavit dated 22 April 2005[132] of Mr Patrick Okeze, who acted for the claimant in the Biu Proceedings, in which Mr Okeze alleges that more than Naira 603 million had been recovered by the receivers and that the 2004 Agreement was a fraud on Zumax. Reliance was also placed upon the affidavit of Mr Nduka-Eze[133] dated 27 July 2011 filed in proceedings brought by Zumax against Mr Idigbe, one of the receivers, for

[128] [6/17-18]
[129] See paragraph 24 of this judgment.
[130] Dated 25 April 2005. [7/241-3]
[131] 7th w/s of Mr Nduka-Eze dated 15 November 2016, paragraph 74.
[132] [11/204]
[133] [7/254]

breach of fiduciary duty in *inter alia* concealing from Zumax the true extent of recoveries. Dr Oditah drew attention to paragraphs 12 and 13, in which Mr Nduka-Eze states that Zumax "was unaware of all these acts and dealings of [Mr Idigbe] until … [Mr Biu] instituted a suit against [FCMB] claiming for his commission…based on the amount recovered." Mr Nduka-Eze then refers to an affidavit of Mr Biu in those proceedings, which may well be the affidavit referred to in his letter of 2 February 2005. Also relied upon by FCMB as establishing Zumax's knowledge in this respect are the witness statements which I admitted during the hearing, and to which I refer at paragraph 31 above.

174. In the light of this, Dr Oditah submits that there is a clear issue whether Zumax already knew about the allegations that Naira 603 million had been recovered when it entered the 2005 Agreement. He argues that there must be a trial so that, for example, there can be disclosure and Mr Nduka-Eze can be cross-examined about the state of his knowledge when he wrote the letter in February 2005.

175. Mr Moraes realistically accepts that, in the light of this material, the court should proceed for summary judgment purposes on the basis that there is an issue whether Zumax's directors saw the affidavits which referred to the amounts alleged to have been recovered in the receivership (even though his instructions are that they did not in fact see those documents).

176. Mr Moraes referred to *Zurich v Hayward* [2016] 3 WLR 637[134] for the proposition that, where it is proved that there is a false representation, there is a strong presumption (which it is very difficult to rebut) that the representee was thereby induced to enter into the agreement in question. The same authority makes clear that it is sufficient that the representation is an inducing cause, it is not necessary for it to be the sole cause.[135]Nor does the representee have to believe that the representation was true - a qualified belief or disbelief as to the truth of the representation does not rule out inducement.[136]

177. Zumax submits that in the light of these principles, and in particular the presumption of inducement, it does not assist FCMB even if Zumax was aware of the material containing allegations about the amount recovered. There is, it is submitted, no realistic prospect of a court at trial finding that the misrepresentations were not *an inducing cause* of Zumax entering into the 2005 Agreement. The representation about the amount recovered was false and known by FCMB to be so. Further, FCMB not only made the misrepresentation initially, but stood by it, maintaining its version of recovery, including in affidavits sworn in 2006.

178. I agree with those submissions, and consider that FCMB's contention that there was no material inducement to Zumax would be bound to fail at trial. Zumax was faced with a situation where its bank was maintaining that Naira 215-230 million had been recovered whereas one of the two receivers was disputing that amount. There were ongoing proceedings between FCMB and that receiver, leading to Zumax's inquiry to FCMB in the letter of February 2005, following which the unchallenged evidence

[134] Paragraphs [34-35] and [37-38] per Lord Clarke.
[135] Per Lord Clarke, at paragraph 33.
[136] Per Lord Clarke at paragraphs 18 and 40; per Lord Toulson at paragraph 68.

shows that FCMB maintained its position about quantum of recovery. Zumax had no separate source of information.

179. Moreover, there was (as I have found) a second fraudulent misrepresentation – Zumax was being misinformed about the extent of its indebtedness to the tune of Naira 450-700 million.

180. It is in my view simply untenable to suggest that, if Zumax had been told that its indebtedness to FCMB was in fact Naira 450-700 million less than had been represented (so that in all probability FCMB owed Zumax money, rather than the other way round), and if it had been sure that recovery in the receivership had been significantly more than the c.Naira 230 million represented to it by FCMB, it would have entered into the 2005 Agreement which, *inter alia* required Zumax to pay Naira 150 million. The suggestion that neither of these fraudulent misrepresentations was an inducing cause, or that there is a realistic possibility of a court finding that Zumax entered the 2005 Agreement knowing that both the representations were false is fanciful.

Conclusion: Whether the 2005 Agreement/the Consent Order were induced by fraudulent misrepresentations

181. It follows that in my judgment both the 2005 Agreement and the Consent Order were induced by each of the two fraudulent misrepresentations described above, and for that additional reason neither the 2005 Agreement nor the Consent Order can be enforced in this court, and neither constitutes a bar to the present claim. There is no realistic prospect that if the issue went to trial a court would hold otherwise.

182. It is noteworthy that this conclusion is consistent with the judgment of Mrs Justice Nicol-Clay in the Lagos High Court, a decision which was apparently unsuccessfully challenged on appeal.

The 2005 Agreement/Consent Order is subject to unsatisfied pre-conditions

183. Zumax also submits that the 2005 Agreement/Consent Order are subject to conditions precedent which have been not been satisfied, and consequently there is no 'release and discharge' pursuant to its terms. In view of my conclusion that on more than one ground these cannot constitute a bar to this claim, I shall deal with this issue relatively briefly.

184. The relevant provision, clause 17 of the 2005 Agreement (set out in full at paragraph 28 of this judgment), provided that

> "Upon the final effectiveness of this Terms of Settlement and the termination of the law suit as provided herein and the fulfilment of all the obligations stipulated therein, the parties shall and hereby do hereby fully release and discharge each other…"

185. Zumax submits that the obligations of the 2005 Agreement have not been fulfilled and therefore the Consent Order did not become effective and enforceable because "the law suit" was not terminated. It is common ground that, Zumax not having made any payment towards the Naira 150 million it agreed to pay under those terms, in the 115 Proceedings FCMB brought garnishee proceedings against a substantial number of business debtors of Zumax, and also obtained a *Mareva* injunction against Zumax.

The garnishee proceedings were struck out, and the *Mareva* was lifted, in September 2012.

186. Zumax submits that by those actions, and by its misrepresentations and concealment, FCMB repudiated the "Terms of Settlement". Zumax has not paid any of the Naira 150 million. As a result, it is contended that the Terms of Settlement did not become effective, and there has been "no release or discharge" - which would only come into effect upon the final fulfilment of all those terms. Consequently, this claim is not barred by the 2005 Agreement/Consent Order.

187. FCMB argues that the question whether, and if so, which obligations under the Consent Order remain to be performed is one of fact on which there are significant differences between the parties' positions. Whereas Zumax says that the obligations are conditional, FCMB submits that the obligations are unconditional. Further, it submits that Zumax cannot rely upon its own wrongful failure to perform any of its obligations in order to make the Consent Order ineffective, as this would enable it to profit by its own wrongdoing. It is argued that FCMB kept its side of the bargain, by discharging the receivership, but it appears that Zumax never intended to perform its obligations, and merely used the Consent Order as a ploy to get FCMB to discharge the receivership. Moreover, FCMB contends that Zumax's claim that the Consent Order is ineffective because FCMB issued legal proceedings to enforce the compromise is untenable. The only way to enforce a consent order is by legal proceedings. The bringing of such proceedings by FCMB to enforce the Consent Order did not thereby render the Order ineffective.

188. It must be said that the idea of a party being in a position to engineer the ineffectiveness of a settlement agreement/consent order it no longer likes is unattractive. On the other hand, clause 17 is explicit in stipulating that fulfilment of all obligations, which include the termination of the law suit (which in my view can only mean the 115 Proceedings, constituting the claim that was being settled) as well as the payment of Naira 150 million, are pre-conditions for the release and discharge of the parties. Presumably the parties drafted the terms in that way to make sure that all claims against each other would be preserved until everything agreed had been achieved.

189. As for the other points made by FCMB, there are no issues of fact connected with this point that require a trial – the only relevant facts are common ground. The issue is otherwise one of construction. As to the point about the obligations being conditional or unconditional, this reveals a misconception in FCMB's argument. It is not the obligations that are said by Zumax to be conditional but the release and discharge of claims. The obligations are clearly unconditional, but that is not the point. As to the assertion that FCMB fulfilled its side of the bargain by discharging the receivership and Zumax used the Consent Order as a ploy to achieve that end, these points are also misconceived. The receivership was not part of the bargain reached in the 2005 Agreement, and was discharged on 27 April 2005, nearly a month before the 2005 Agreement and some two and a half months before the Consent Order.

190. I should also add that FCMB itself has clearly treated the settlement as ineffective, given its counterclaim in the present proceedings. This point seems to have been

acknowledged by FCMB in its evidence during the jurisdiction challenge.[137] Further, the demand made by letter dated 14 October 2016 provides further confirmation.[138]

191. I would therefore hold that, because of the failure of the parties to discharge their respective obligations, the settlement was ineffective and the release and discharge did not take place. For this reason, too, the Consent Order does not prevent the present claim.

(e) Is this claim an abuse of the process of the court, or otherwise precluded, because of the 784 Proceedings?

192. As indicated earlier, under this head FCMB submits that if Zumax has a claim against FCMB, it should have included it in the 784 Proceedings. FCMB relies upon the fact that the monies claimed against Mr Chinye in those proceedings (US$7.4 million) and the US$3.75 million claimed against FCMB in these proceedings both come from the US$15.3 million of Zumax's earnings received into the Redsear Account between January 1998 and June 2002. FCMB also points out that the same time period was involved, that similar evidence was/is relied on by Zumax in both sets of proceedings, and that IMB/Finbank was the second defendant in the 784 Proceedings. It further submits that in 2009 the evidence would have been fresher and witnesses more readily available. It contends that Zumax should not be allowed to split its claim and pursue it piecemeal, relying on the principles in *Henderson v Henderson*.[139]

193. Zumax submits that in so arguing FCMB faces the problem that it took this point in its jurisdiction challenge and lost, both at first instance and on appeal to the Court of Appeal, and is therefore precluded by issue estoppel from rearguing it. It is not entirely clear to me whether this was the point being dealt with by the Court of Appeal in the passages at paragraphs 52 to 66 of the Court of Appeal Judgment which were cited by Zumax. The court appears to have been dealing with an argument that Zumax had impliedly admitted that the $7.9 million, from which the present claim derives, was "duly accounted for" and therefore the present claim was hopeless – a point which, like the Court of Appeal, I have rejected.

194. However, regardless of whether the present abuse of process argument was also dealt with by the Court of Appeal, such an argument is not a defence; it is an objection to an action being brought at all.[140] Therefore, since the Court of Appeal has ruled that it was proper to bring this claim, it is difficult to see how FCMB can now go behind that decision. It is clear from the passages in their Judgment cited by Zumax, that the Court was well aware of the scope and contents of the claim, the parties thereto, and the timing of each of the present action and the 784 Proceedings – in other words they had before them all the main features now relied upon by FCMB in order to claim an abuse.

195. Quite apart from that objection, I do not accept that there is, even arguably, an abuse of process in *Henderson* terms or otherwise.

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[137] 2nd witness statement of Ms Bimpe Nkontchou of 20 March 2014, paragraph 44, penultimate sentence.
[138] Paragraph 201ff of this judgment.
[139] (1843) 3 Hare 100.
[140] *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 34B.

196. The 784 Proceedings were concerned with an entirely different dispute, involving a claim against Mr Chinye in respect of unauthorised transfers from the Redsear Account for the benefit of various of Mr Chinye's nominees,[141] and not for the benefit/credit of Zumax. The claim in the present action, on the other hand, is for sums that were authorised to be transferred from the Redsear Account to the three relevant Commerzbank accounts of IMB/IMB Morgan, for the benefit/credit of Zumax.[142] I note that in its evidence in the jurisdiction challenge[143] FCMB asserted that in the present claim Zumax was seeking "the very same sums of money" as it was claiming in the 784 Proceedings against Mr Chinye. This argument was at some point abandoned by FCMB: it is now common ground that the claims are for distinct funds.[144]

197. As Zumax has observed, the Statement of Claim[145] in the 784 Proceedings makes it clear that the claim in that action is for $7,367,595 of Zumax's monies removed by Mr Chinye from the Redsear Account "otherwise than … in the interest of [Zumax], to further its business …" and "unlawfully appropriated by" Mr Chinye "to his personal use". On the other hand, the authorised transfers from the Redsear Account which are the subject of this claim were expressly for the benefit of Zumax, and are not part of the $7,367,595 claimed in the 784 Proceedings. I have already explained[146] that Zumax did not in fact assert in the Interpleader Proceedings that the 10th transfer for $410,000 was part of the claim against Mr Chinye.

198. Thus, the substance of the two claims do not overlap, precluding any abuse on that ground: *Stuart v Goldberg* [2008] 1 WLR 823 at [47] per Lloyd LJ.

199. As far as parties are concerned, it is common ground[147] (and clear in any event) that in substance the claim in the 784 Proceedings was against Mr Chinye alone, and that while FCMB was a party to those proceedings, it had been so joined as a matter of procedural formality to facilitate enforcement against Mr Chinye. I agree with Zumax that, since FCMB is not a substantive party, it cannot be said that by the present claim the bank is being "vexed twice in the same matter",[148] nor that the claim is "oppressive". Nor do I consider that any of the other matters raised by FCMB as indicating an abuse of process have any realistic prospect of success whether individually or cumulatively. I find that no abuse arose by virtue of commencement of the present claim.

200. Moreover, the argument put by Mr Taylor in his evidence[149] that an issue estoppel or some other preclusive effect arose by reason of the decision of the Lagos High Court

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[141] See, for example, the manuscript instruction of Mr Chinye to Chase to transfer US$255,000 from the Redsear Account to Commerzbank for the benefit of Blue Marine and Union Inc (one of Mr Chinye's nominees). [3/273]
[142] See, for example, the manuscript instruction of Mr Chinye to Chase to transfer from the Redsear Account US$410,000 to Commerzbank for the benefit of Zumax (the 10th transfer). [3/90]
[143] W/s of Adebimpe Nkontchou of 5 February 2014, paragraph 7.
[144] See, for example, paragraph 66 of the Court of Appeal Judgment.
[145] [3/157-173]
[146] Paragraph 134 of this judgment.
[147] See the SimmonsCooper Letter. [3/152] See also w/s of Adebimpe Nkontchou of 5 February 2014, paragraph 7.

[148] *Johnson v Gore Wood & Co* (above), per Lord Bingham at 31A-B, setting out the underlying purpose of the rule.
[149] 4th w/s of 17 October 2016, paragraph 14(4).

on 10 October 2014,[150] is untenable. That decision, striking out the 784 Proceedings on *inter alia* limitation grounds, has no bearing whatsoever on the present claim which, as seen, is entirely distinct as to subject matter and cause of action. Nor was FCMB a "substantive" party to that action.

(f) Does the Debenture deprive Zumax of title to sue for the funds?

201. FCMB contends that the present claim, along with other assets of Zumax, was assigned and charged to it pursuant to clause 2 of the Debenture. On 14 October 2016, FCMB demanded repayment from Zumax, and claims that it thereby took possession of all cash and cash equivalents charged by the Debenture including these proceedings, to the extent that they are valid. FCMB contends that Zumax therefore has no *locus* to continue these proceedings and cannot give a valid discharge in respect of the claims asserted in them.

202. More particularly, Dr Oditah stated that for present purposes FCMB was content to assume that the Debenture created a floating rather than a fixed charge. The real issue, he said, related to the effect of the unsatisfied written demand in the letter of 14 October 2016. In his skeleton he submitted that the effect of the demand is that all assets charged by the Debenture, including the present claim, are assigned to FCMB, the letter constituting written notice of the assignment within the meaning of section 136(1) of the Law of Property Act 1925. Thus, the assignment of the claim was converted into a legal or statutory assignment, the effect of which was stated by Lord Esher MR in *Read v Brown*[151]:

> "the words mean what they say; they transfer the legal right to the debt as well as the legal remedies for the recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right being taken from him; the assignee becomes the assignee of a legal debt and is not merely an assignee in equity, and the debt being his, he can sue for it, and sue in his own."

203. In his oral submissions Dr Oditah put the position slightly differently. He submitted that the court must deal with the effect of the October 2016 demand on the basis of section 178 of the Companies and Allied Matters Act 1990 (which did not appear to be referred to in his skeleton). This provision so far as relevant states:

> "178 (1) A floating charge means an equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until –
>
> (a) the security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the same, appoints a receiver or manager or enters into possession of such assets; or
>
> (b) the court appoints a receiver or manager of such assets on the application of the holder; or
>
> (c) …
>
> (2) On the happening of any of the events mentioned in subsection (1) of this section, the charge shall be deemed to crystallise and to become a fixed equitable charge on such of the

[150] [7/103-142]
[151] (1882) 22 QBD 128, at p.132.

> company's assets as are subject to the chargee, and if a receiver or manager is withdrawn with the consent of the chargee, or the chargee withdraws from possession, before the charge has been fully discharged, the charge shall thereupon be deemed to cease to be a fixed charge and again to become a floating charge."

204. Dr Oditah submitted that the question was whether FCMB had "enter[ed] into possession" of the claim within the meaning of section 178(1) by virtue of the demand, so that the charge was "deemed to crystallise" pursuant to the provision. Entering into possession was not defined by the legislation and so the general law applied. In that regard, Dr Oditah said that the assumption was that English and Nigerian law were the same. He submitted that giving notice by way of the demand was the closest thing to entering into possession of a chose in action such as the claim.

205. FCMB also argues that if, contrary to its primary case, the transferred funds were to be regarded as mere claims by Zumax against FCMB, the position would be the same, since an "all assets" debenture, such as this, catches the proceeds of claims and causes of action that the chargor/assignor has against third parties. Nor would it matter if the assignment effected by the written demand was merely equitable. The written demand constitutes enforcement by FCMB of its "all assets" debenture, and Zumax has no title to the sums claimed, and cannot give a valid discharge in respect of them, or bring proceedings to recover them without the consent of FCMB. FCMB alone has the right to do so. In this respect FCMB referred to *Lightman and Moss.*[152] FCMB submits that this is a complete defence to the claim.

206. FCMB further contends that even if, contrary to these submissions, the Debenture is not a complete answer, this defence raises factual and legal issues which ought to go to trial. For example, although Zumax disputes that it owes the bank any money, in its written demand FCMB has demanded more than US$30m, and no court has determined that Zumax is not indebted to FCMB.

207. Clause 2 of the Debenture states:

> "The company as BENEFICIAL OWNER hereby charges with the payment and discharge of ALL moneys for the time being owing under this security (including any expenses and charges arising out of or in connection with the acts authorised by Clauses 8 and 9 hereof) ALL its Assets, including its Plants & Machinery, undertaking goodwill and movable property for the time being both present and future wherever situate including its uncalled capital stocks raw materials works in progress finished works materials stock equipment by whatever name and book debts (hereinafter called "the said assets") and such charge shall be a first charge so that the Company is not at liberty to create any further mortgage or debenture or charge upon and so the said assets without the prior written consent of the Bank. PROVIDED that any debentures mortgages or charges created by the Company over the said assets (otherwise than in favour of the Bank) shall be expressed to be subject to this Debenture."

208. Although reference was also made by FCMB to clause 13, that provision merely contains an indemnity and does not assist FCMB's argument in relation to assignment and crystallisation.

Discussion and conclusions on the Debenture issue

[152] The Law of Administrators and Receivers of Companies (5th ed, 2011), 31.

209. It is not suggested by FCMB that the Debenture itself resulted in an automatic assignment of the claim. As noted earlier, it is common ground for present purposes that the charge created by clause 2 was a floating charge over the book debts and/or choses in action of Zumax. As such, it is "a security interest created without any transfer of title or possession to" the grantee, FCMB.[153]

210. It is worth recalling the salient dates: on 17 December 1998 the Debenture was entered into; by May 2002 all the monies claimed had been transferred into the Commerzbank correspondent accounts; on 18 December 2002 FCMB appointed receivers over assets of Zumax; on 27 April 2005 the receivership was terminated and the receivers were discharged by FCMB; and on 14 October 2016 the written demand was made.

211. The October 2016 demand states[154] that pursuant to clause 13 of the Debenture it is seeking the costs of enforcing the Debenture in Nigeria and England, being, in the latter case, the costs incurred by FCMB of defending these proceedings. It is difficult to see how defending the present claim could represent enforcement of the Debenture. However, there are more substantial objections to the submission that this demand represents a bar to the present claim.

212. The premise for FCMB's primary argument based on the Debenture is that the monies claimed in these proceedings do represent Zumax's assets, and that FCMB is liable to pay the sums in question to Zumax. It follows that the premise of this defence is that the payment defence has failed (as indeed it has). This however creates a problem for FCMB for it means that, well before the receivership, the bank had received Zumax's funds which have neither been repaid nor accounted for to Zumax.

213. At the time the receivers were appointed on 18 December 2002, FCMB was alleging that it was owed Naira 465 million by Zumax. I have found that in fact at that time FCMB had already received dollars belonging to Zumax equivalent to at least about Naira 450 million for which it had not accounted. In addition, in April 2002 it had debited Zumax's Naira Account in a sum of Naira 250 million for which it had not accounted. It is therefore clear that at the time the receivership commenced Zumax did not owe FCMB anything – the reverse was the position – and the appointment of the receivers was unjustified.

214. Consequently, on the date of the appointment of the receivers there could have been no valid assignment of the funds the subject of this claim - there was a credit due to Zumax on that date. On any view FCMB should have terminated the receivership immediately. In any event, on the termination of the receivership on 27 April 2005 the security (if still valid and in operation) at best reverted to a floating charge, in accordance with ss.178(2) of the Nigerian Companies and Allied Matters Act 1990.

215. Zumax contends, with justification, that the receivership was kept in being fraudulently until April 2005. I have found that at the time of the 2005 Agreement FCMB was aware of the falsity of its representations to Zumax, both as to the latter's indebtedness and as to the extent of recovery in the receivership. In the light of my

[153] *In re Bank of Credit and Commerce (No 8)* [1998] AC 214, per Lord Hoffman at 226F-G. See also *In re Spectrum Plus Limited* [2005] 2 AC 680 at [52-53] per Lord Hope, [110-111] per Lord Scott.
[154] [7/264]

findings, it is clear that the demand in the 14 October 2016 letter was tactical, fraudulent and invalid. No court would give effect to such demand in those circumstances. In reaching this conclusion I have not taken into account the further sum of Naira 270 million referred to in paragraph 151 above, nor the other reasons (identified at paragraphs 152-3) for impugning the debt of Naira 465 million which FCMB claimed to exist in December 2002.

216. Further, I am unable to accept FCMB's argument that the October 2016 demand amounts to entering into possession of the chose in action and crystallisation of the floating charge (if the latter is still effective at all) for the purposes of the legislation. The giving of notice does not crystallise a floating charge: see *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979.

217. Nor is there anything in the terms of the Debenture, or in the authorities shown to me, which supports an argument that the written demand results in an assignment. The authority relied upon by FCMB, *Ward and Pemberton v Duncombe* [1893] AC 369, does not assist its argument. The issue there was whether the trustees of a settled fund which included a wife's share, had priority in relation to that share over the interest created by a subsequent mortgage, the mortgagee having had no notice of the prior incumbrance. Thus, the issue related to the competition between different *existing* interests. The reference by Lord Macnaghten, at p.387, to a notice given by an assignee to the trustee of a fund being similar to taking possession of the fund, is in the context where an assignment has already taken place, and it is a question of priority over other rights. This has no bearing on the present question, which is whether there has been an assignment at all i.e. whether there is any existing legal right.

218. Nor can I accept that in the absence of a legal or statutory assignment, Zumax would still be unable to maintain this claim in the face of the October 2016 demand. The passage from the Law of Administrators and Receivers of Companies (5th ed, 2011)[155] relied upon by FCMB is taken out of context. The learned authors are considering the position where receivers have been appointed, which is not the case here. In fact, the Lagos High Court has made an order against FCMB "directing maintenance of the status quo and suspension of all actions and processes calculated to overreach the determination" of the pending 1668 Proceedings to set aside the Consent Order.

219. For these reasons, I am satisfied that FCMB is not entitled to rely upon the Debenture as providing a bar to this claim. The point is entirely without merit. There is nothing which would require a trial of this defence. In those circumstances it is not necessary to address Zumax's further objection, that the Debenture was stamped only to Naira 50 million and is accordingly valid at best only for that amount.

(g) Is this claim time-barred by statute or laches?

220. Dr Oditah accepted that if there was an express trust or a *Quistclose* trust then, since the laws of Nigeria followed the Limitation Act 1980, the limitation defence was not

[155] See footnote 151 above.

available in the light of subsection 21(1) of that Act.[156] He also accepted that, subject to laches and concealment points, there are no additional factual areas in relation to Zumax's allegation of an express trust that would need to be explored at a trial.

221. In view of my finding that (with the exception of the 3rd transfer) the transferred funds which are the subject of this claim are subject to an express trust and/or a *Quistclose* trust (as distinct from a purely remedial constructive trust), section 21(1) applies, and the limitation defence therefore fails.[157]

222. Further, in *Gwembe Valley Development Company Limited v Koshy* [2003] EWCA Civ 1048, the Court of Appeal held that where no limitation period is prescribed by the 1980 Act, the defence of laches is also unavailable.[158]

223. In these circumstances it is not necessary for me to consider what the position would be if an express/*Quistclose* trust had not come into existence. However, as the parties addressed me on these questions, I will state my conclusions briefly.

Accrual of cause of action in absence of a trust

224. On the assumption that, contrary to his primary case, the normal 6 year limitation period applied, Mr Moraes, in a brief oral submission, argued that on the basis of a simple lender/borrower relationship for which FCMB contended, the cause of action for repayment to Zumax of the funds in question would not have arisen until a demand for payment was made. He submitted that no such demand was made until the letter before action in April 2013, and the claim was therefore brought well within the limitation period.

225. I have no record of Dr Oditah responding to this particular submission at any stage. The point has attractive simplicity. However, very little argument having been addressed to it, I would not be inclined to decide the point without hearing further argument.

Concealment – section 32 of the 1980 Act

226. Zumax also relied upon section 32 of the Limitation Act 1980, which provides:

> (1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> The action is based upon the fraud of the defendant; or
>
> Any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> The action is for relief from the consequences of the mistake;

[156] This was also the position taken by FCMB in the jurisdiction challenge: see the *Hollander Judgment*, paragraphs 73-78.
[157] *Williams v National Bank of Nigeria* [2014] A.C. 1189, at paragraph 9.
[158] Paragraph 140.

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

227. Zumax alleges that even if the basic limitation period was applicable, and would otherwise have expired, the claim is not statute-barred because FCMB deliberately concealed both its receipt of the transferred funds and its breach of duty, being facts relevant to Zumax's right of action. In this respect Zumax relies upon subsections 32(1) and (2), and upon the following factors.

228. Zumax points out that FCMB denied, and concealed from Zumax, its receipt of the funds until Zumax had obtained (in the face of resistance from FCMB) redacted copies of the IMB and IMB Morgan Commerzbank Account statements in March 2014, pursuant to the order of Master Teverson. Zumax argues that even then it was only in FCMB's defence, served on 19 July 2016, that the bank admitted unequivocally that it had received US$3.547 million of the transferred funds. Zumax submits that until it obtained copies of those redacted statements it could not ascertain whether the monies in question had been received into those accounts – a fact which FCMB was continuing to deny.

229. Further, Zumax contends that in refusing to disclose un-redacted copies of the bank statements, FCMB has deliberately concealed its breach of duty, for Zumax was unable to ascertain what had happened to the monies. Zumax also points out that it was only upon disclosure of the un-redacted Commerzbank statements that the 3rd transfer on 12 May 2000 for $205,000 was discovered. These un-redacted versions were not disclosed to Zumax until (in the case of the IMB Commerzbank Account statements) September 2016 and (in the case of the IMB Morgan Commerzbank Account statements) October 2016. This is despite their being in FCMB's possession since January/February 2016, and despite its ability to obtain them at any time.

230. In these circumstances Zumax submits that, by virtue of section 32 of the Limitation Act 1980 the claim would not be time-barred even if the limitation period was applicable.

231. In response, FCMB submits that Zumax is not entitled to extend the limitation period. It states that Zumax was aware of the transfers in question in August 2003, when the manuscript transfer instructions, written by Mr Chinye, were disclosed by Chase in the context of a Redsear shareholders' derivative action brought by Chief Uzor against Mr and Mrs Chinye. Zumax could, with reasonable diligence, have discovered FCMB's alleged fraud: the disclosure of the unredacted Commerzbank account statements added nothing to the case, and Zumax had already issued the present proceedings in September 2013, before it had obtained the redacted Commerzbank statements in March 2014. If Zumax was able to obtain those documents in March 2014, then it could have done so between August 2003 (when the manuscript transfer

instructions were disclosed by Chase) and 2008 when the limitation period expired. FCMB submits that, in any event, this issue raises factual questions which can only be resolved at a trial.

232. It is clear from my findings earlier in this judgment that FCMB has, from the beginning, pursued a course of conduct calculated to withhold from Zumax an accurate picture of the state of account between the parties - not just in relation to these transfers, but also in relation to the extent of recoveries in the receivership and the state of Zumax's indebtedness to FCMB generally. In the light of the exiguous trickle of information - much of it inaccurate or conflicting - fed to Zumax by FCMB since 2002, it is not at all surprising that some years passed before proceedings began. Moreover, it is clear that the claim was on thin ground until the successful bankers' books application to Master Teverson in March 2014. As Zumax points out, that is an application which can only be made after a claim has been begun.

233. In my judgment there is no real answer to the argument that FCMB deliberately concealed from Zumax facts relevant to its right of action, namely that the funds had been transferred into Commerzbank accounts held or controlled by FCMB, and that they had not been paid out to or for the benefit of Zumax or otherwise been accounted for to Zumax. I do not consider that the disclosure of the manuscript instructions by a third party (Chase) to another third party (Chief Uzor) in proceedings between the latter and other non parties (Mr and Mrs Chinye) can be relied upon as providing Zumax with notice of the contents of the documents in question. In any event, the documents would not have enabled a person with access to them to know whether Mr Chinye's instructions had been acted upon, so that the funds had been duly received by FCMB in the Commerzbank accounts. Still less would that person have known what had happened to the funds. The instructions indicated that the transferred amounts were funds belonging (and to be credited) to Zumax. That of itself would not necessarily have raised justifiable suspicions of breach of trust or fraud.

234. In my view there is no realistic prospect of a court at trial rejecting the contention that FCMB deliberately committed a breach of trust in circumstances where the breach was unlikely to be discovered for some time, and deliberately concealed from Zumax facts relevant to its right of action for that breach. For this reason I would hold that the claim is not time-barred even if, contrary to my conclusion, the limitation period is applicable. There are no factual issues relating to section 32 which require a trial.

Laches

235. This point, too, only arises if my conclusion that section 21 of the 1980 Act applies is wrong.

236. It is trite law that laches will only be considered a bar to a claim if in all the circumstances it would be unconscionable for a party to be permitted to assert his beneficial right: *In re Loftus, decd* [2006] EWCA Civ 1124 at [42-47].

237. FCMB's case on laches was really a reiteration of the general points made in relation to concealment and limitation generally. Dr Oditah submitted that, on the strength of what was contended to be Zumax's lack of due diligence in pursuing its claim albeit it knew the salient facts, it would be unconscionable for the court now to entertain that claim.

238. I approach this issue on the basis, as I have found, that FCMB received the funds in question and had an obligation to account to Zumax for them, with which it failed to comply.

239. In my view there is no realistic prospect of FCMB showing that it would be unconscionable for Zumax to recover the US$3.547 million which FCMB now admits it has received, and for which I find it has failed to account.

240. I bear in mind that Zumax's financial resources have been significantly depleted by the actions of FCMB. Although not part of the present claim, the sum of Naira 250 million referred to earlier was deducted from Zumax's account by FCMB without any explanation, and formed part of the alleged debt upon which the receivership was based. Further, a minimum of Naira 603 million was recovered in the receivership. No part of the Naira 250 million was credited against the alleged debt. Rather, as I have found, $3.5 million or more in funds belonging to Zumax was abstracted by FCMB.

241. Also, relevant is the fact that although there was actually no indebtedness to FCMB at the time the receivership was imposed, the receivership was nevertheless maintained until April 2005. Thereafter, threat of re-imposition of receivership was made when questions were raised about Zumax's indebtedness.[159] Further, the garnishee and freezing orders were imposed in 2009 and maintained until released in 2012.

242. In addition to these resource-depleting and other inhibiting factors, when these proceedings were begun in 2013 there was a jurisdiction challenge by FCMB which lasted for about 2 years, and in which, as the judge at first instance said,[160] FCMB was willing to take any point regardless of merit. A similar approach has been taken by FCMB in this summary judgment application.

243. In my judgment these factors, together with those to which I referred in the context of the concealment issue, would render hopeless an argument that it is unconscionable for Zumax now to assert its claim for the transferred funds.

(h) Does the counterclaim have a real prospect of success?

244. Finally, FCMB relies upon its counterclaim, pleaded at paragraphs 5, 6 and 18 to 21 of its Amended Defence and Counterclaim, as defeating this application for summary judgment. By that pleading FCMB seeks damages from Zumax on the basis that it dishonestly assisted Mr Chinye to breach his fiduciary and statutory duties to IMB by entertaining a conflict of interest, as a result of which the bank granted credit facilities and funds to Zumax, which have not been recovered.

245. The evidence in support of this contention is at paragraphs 17 to 40 of Mr Taylor's 4th witness statement, and in the documents there referred to. Dr Oditah summarised the case in his submissions to me as follows. Zumax is the author of its own misfortunes in that, with knowledge that Mr Chinye was Managing Director of IMB, Zumax appointed him as its Finance Director and Chief Financial Officer, with sole control of several Zumax bank accounts, including the Redsear Account, and gave Mr Chinye 40% of the equity in Zumax. Zumax did this because it wanted to obtain a loan from

[159] [6/61]
[160] The Hollander Judgment, paragraph 95.

IMB to which it wasn't entitled. At the same time Zumax helped and/or allowed Mr Chinye to conceal from IMB his beneficial interest (and corresponding conflict of interest) as the largest shareholder of Zumax, by putting the shareholding into the name of Bliss. If IMB had been aware of the conflict of interest it would have appointed independent officers to monitor the operations of Zumax's bank accounts and facilities. As a consequence FCMB has suffered loss, or Zumax caused the loss it now claims.

246. Dr Oditah submitted that Zumax has no prospect of satisfying this court that there is no realistic prospect of the counterclaim succeeding at trial and/or that there is no other compelling reason for a trial within the meaning of CPR 24.2(b). In FCMB's submission it is inevitable that there should be a trial, as such allegations of fraud against Zumax cannot be disposed of in a mini-trial at a summary judgment application without the benefit of disclosure or cross examination.

247. I am unable to accept FCMB's submissions. In my judgment the counterclaim, and therefore this aspect of the defence, have no real prospects of success and are bound to fail.

248. Although FCMB at one stage contended[161] that IMB had not been aware of Mr Chinye's directorship of Zumax, FCMB has admitted, and it is in any event clear beyond argument, that the board of IMB were aware by 4 December 1996 at the latest that Mr Chinye was a director of Zumax and that he had been appointed to that position in order to represent the interests of a major shareholder in Zumax, namely Bliss.[162]

249. In his letter to Zumax of 3 January 2003,[163] Mr Chinye wrote to Zumax as follows:

> "My directorship of Zumax is official to IMB and same is officially documented by the Board. For your information, the [Central Bank of Nigeria] does not have a law that forbids [bank] directors, executive or non executive from having [1] interest or [2] holding board positions in another company. Credit and Loans can be granted to any company in which a [bank] director has interest."

250. As I noted earlier,[164]it is Zumax's understanding (and is asserted by FCMB) that Bliss is beneficially owned by Mr Chinye through a nominee, and is controlled by Mr Chinye. Zumax points to a written submission made on behalf of FCMB as confirmation that IMB's Board was content for Mr Chinye to have an equity interest in Zumax through Bliss. That submission stated:

> "[52] …The observation made by Zumax that the directors of [IMB] were aware of and approved his directorship and shareholding is not disputed."[165]

251. In relation to the reference to Mr Chinye's shareholding, this concession is now said by FCMB to be a mistake, caused by a misreading by FCMB of Mr Chinye's letter

[161] [4/210] referring to FCMB's skeleton argument 1 May 2014, paragraph 7. See also paragraph 6 of the Amended Defence and Counterclaim, where it is denied by FCMB that the bank was informed of, or consented to, Mr Chinye's directorship of Zumax.
[162] See paragraphs 13 of this judgment, and the documents footnoted thereto.
[163] [5/233-4]
[164] See paragraph 14 of this judgment.
[165] [4/223]

quoted above. However, it is unnecessary for this issue to be resolved. For, in the light of FCMB's acknowledgment that IMB's Board approved Mr Chinye's *directorship* of Zumax - a directorship to which they knew he had been appointed specifically to represent the equity interest of a major shareholder of Zumax - FCMB was at all material times indisputably aware of, and approved, Mr Chinye's conflict of interest, notwithstanding that it was held by the regulator to be a breach of the bank's statutory obligations. That conflict of interest is, in essence, the conflict upon which FCMB now seeks to rely as the basis for its counterclaim. Therefore, the bank's board knew everything that was material, and a claim based on the allegedly concealed conflict of interest cannot possibly succeed against Zumax. There is no reason to hear any oral evidence on this issue.

252. There is another insuperable obstacle in the way of FCMB's counterclaim. It relates to causation. FCMB contends that had it been aware of the conflict of interest of Mr Chinye (of which, as I have said, it was in fact well aware) FCMB would have taken appropriate steps. This contention is manifestly baseless. As Zumax points out, even after FCMB had been informed of Mr Chinye's conflict of interest in 1996, no steps were taken by FCMB to supervise Mr Chinye, whether by appointing independent officers to monitor the operations of Zumax's bank accounts and facilities or otherwise. Further, when in October 2003 Mr Chinye was required by the CBN to resign as managing director of FCMB, FCMB proposed that Mr Chinye should be appointed its Chairman.[166] Therefore, Zumax is correct in submitting that there is no real prospect of FCMB establishing the requisite element of causation of any loss shown to have been suffered by FCMB.

253. Finally, in view of my findings in this judgment as to the extent (or lack) of indebtedness on the part of Zumax, there is in any event no real prospect of FCMB establishing any loss for the purposes of its counterclaim.

254. For these reasons the defence based on the alleged concealment by Zumax of Mr Chinye's conflict of interest has no prospect of success at trial. Nor is there any other compelling reason for the counterclaim to go to trial.

Conclusion on Zumax's application for summary judgment

255. For the reasons set out in this judgment, I find that FCMB has no real prospect of successfully defending Zumax's claim that (1) FCMB received in Commerzbank accounts which it controlled the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 10th transfers referred to in the schedule at Annex 1 to this judgment, (2) those funds were impressed with an express alternatively a *Quistclose* trust in favour of Zumax, and (3) FCMB has not discharged its duty as trustee by paying or otherwise accounting for the funds to Zumax. I also conclude that there is no other compelling reason why the claim in respect of any those transfers should be disposed of at a trial.

256. I am conscious that at first sight there is a paradox when the hearing of a summary judgment application takes some nine days in court, and requires detailed analysis of the documents and written evidence. One might have been tempted simply to hold that there were too many documents and issues to enable the court to avoid an inappropriate "mini trial" on the papers. However, in my view this is one of the cases

[166] [5/294]

where it would have been wrong to shrink from looking carefully into whether there existed any substance in the defences and other objections raised by FCMB. Save possibly in relation to one issue relating to the 3rd transfer, I have been able to conclude that the defences are entirely without merit, and a trial of this case (which would have taken many months of court time and huge financial resources) is wholly unwarranted in respect of any of the issues raised by FCMB in opposition to the claim.

Next steps

257. I will hear the parties on the appropriate course to be adopted in respect of the 3rd transfer in the sum of $205,000 on 12 May 2000. The only outstanding issue so far as that transfer is concerned is what became of the sum in question, and in particular whether it was re-credited to another account under the control of FCMB. If it was then, in the light of my conclusions on the other issues raised by way of defence, Zumax would also be entitled to summary judgment for this amount.

258. In view of my conclusions, and in the absence of any agreement between the parties, it will be necessary to hear their submissions on the issue of Zumax's entitlement to interest on the sums claimed, which was left over to await the outcome of the application.

259. I invite the parties to seek to reach agreement on as many aspects of the consequential order as possible.

Annex 1

1. The following table details the transfers and receipts into the Commerzbank accounts:

	Date of receipt	**Amount**	**Manuscript transfer instructions by Redsear (date)**	**Bank account**	**Purpose specified in the Commerzbank account**
1.	10 May 2000	$205,000 (less charge of $15)	"for further credit to Zumax" (8 May 2000)	Commerzbank (IMB) account number 6012296401015	"for further credit to Zumax"
2.	11 May 2000	$105,000 (less charge of of$15)	"for further credit to Zumax" (11 May 2000)	Commerzbank (IMB) account number 6012296401015	"for further credit to Zumax"
3.	12 May 2000	$205,000 (less charge of $15)		Commerzbank (IMB) account number 6012296401015	"Favour Zumax"
4.	24 July 2000	$505,000	"for final credit to Zumax" (20 July 2000)	Commerzbank (IMB) account number 60122964010	"for final credit to Zumax"
5.	8 January 2001	$355,000 &$250,000 (less charge of $15 of each transfer)	"for final credit to Zumax" (5 January 2001)	Commerzbank (IMB Morgan plc) account number 160210002200	"for final credit to Zumax"
6.	13 August 2001	$901,000 (less charge of $15)	"for further credit to Redsear/Zumax" (8 August 2001)	Commerzbank (IMB Morgan plc) account number 160210002200	"favour Redsear Zumax"
7.	23 October 2001	$410,000	"for further credit to Redsear/Zumax" (22 October 2001)	Commerzbank (IMB Morgan plc) account number 160210002200	"by order of Redsear"
8.	24 December 2001	$155,000 (less charge of $15)	"for final credit to Zumax" (20 December 2001)	Commerzbank (IMB) account number 60122964010	"by order of Redsear"
9.	28 February 2002	$251,000 (less charge of	"for further credit to Zumax"	Commerzbank (IMB Morgan plc) account number	"FFC Zumax"

		$15)	(26 February 2002)	160210002200	
10.	23 April 2002	$410,000 (less charge of $15)	"for further credit to Zumax" (22 April 2002)	Commerzbank (IMB Morgan plc) account number 160210002200	"FFC Zumax"

Annex 2

Zumax's bank account with FCMB in Nigeria ("Zumax's Naira Account")

	Naira Disbursements Schedule **5/L/154** "the Warri Schedule")			Statements of Zumax's Bank Account with FCMB acc no. 010102000026			
				2002 version 10/M/142-145		**Version provided to receivers 10/M/146-157**	**Version produced by FCMB in 2014 10/M/164-173**
	Date	Amount (₦)		Date of Debit	**Debit (₦)**	**Page references for debit entries**	**Page references for debit entries**
1.	Dec. 2000	30 m.		04/12/00	30,001,050.00	**10/M/147**	**10/M/165**
2.	July 2001	100 m.		16/07/01	100,001,050.00	**10/M/150**	**10/M/166**
3.	Oct. 2001	20 m.		15/10/01	20,001,050.00	**10/M/151**	**10/M/167**
4.	Dec. 2001	11 m.		20/12/01	11,000,000.00	*No entry*	*No entry*
5.	Jan. 2002	19 m.		08/01/02	19,000,000.00	*No entry*	*No entry*
6.	Feb. 2002	30 m.		15/02/02	30,000,000.00	*No entry*	*No entry*
7.	Apr. 2002	30 m. *		08/04/02	* 30,000,420.00	**10/M/153**	**10/M/169**
8.	May 2002	20 m.		07/05/02	20,000,420.00	**10/M/154**	**10/M/169**
9.	June 2002	20 m. *		*	*No entry*	25th June **10/M/154** Note: entry reversed on 26/6	25th June **10/M/169** Note: entry reversed on 26/6
10.	July 2002	15 m.		24/06/02	15,000,000.00	**10/M/154**	**10/M/169**