

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION

Royal Courts of Justice

7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 14/07/2020

Before:

MR JUSTICE MILES

Between:

ZUMAX NIGERIA LIMITED

Claimant

- and -

FIRST CITY MONUMENT BANK PLC

Defendant

The Claimant appeared by a director, **Chukwuenmeka Nduka-Eze** (assisted by **Ebo Coleman**)

Poonam Melwani QC and Paul Henton (instructed by **Preston Turnbull LLP**) for the **Defendant**

Hearing dates: 1-2 July 2020
Written submissions on 8-9 July 2020

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 14 July 2020.

Mr Justice Miles:**Introduction**

1. Between April 2000 and May 2002 a company called Redsear Limited, a nominee for the claimant (“Zumax”), made a series of nine or ten transfers to accounts held by a predecessor of the Defendant (“the Bank”) with a correspondent bank, Commerzbank, in London for Zumax as payee. Zumax claims that the Bank has never paid on or accounted for the value of the transfers.
2. Zumax started these proceedings in October 2013 alleging that the Bank became a trustee for it of the monies received into the Commerzbank accounts. In November 2017 Barling J gave summary judgment in respect of nine of the transfers. The Bank appealed his order. By the time of the appeal Zumax had received the judgment sum and amounts on account of its costs. In March 2019 the Court of Appeal allowed the appeal and held that the Bank was not a trustee of the sums received into the Commerzbank accounts. By its order of 13 March 2019, it required Zumax to repay the judgment sum and to pay further amounts on account of a proportion of the costs of the appeal and the hearing in the court below. The total, more than £3.68m, was payable in March and April 2019. Zumax has so far paid only £100,000. The Bank now applies for an order that unless Zumax pays the outstanding sums the claim shall be dismissed and that Zumax shall be debarred from commencing or continuing any further proceedings based on the same facts or causes of action (“the sanctions application”).
3. The Court of Appeal held that the existing claim was unsustainable. Zumax needs to amend if it is to proceed with the claim and it has issued an application for permission to amend to allege claims in debt, restitution, agency, breach of contract, tort, and breach of fiduciary duty.
4. The Bank has also issued an application for security for costs, contingent on the application for permission to amend being successful.
5. The applications for permission to amend and for security for costs were listed to be heard at the same time as the Bank’s sanctions application and the parties have submitted skeleton arguments addressing them all. At the hearing there was time only for the sanctions application. The parties agreed that the outcome of the amendment application is potentially relevant to the Bank’s sanctions application. One course would have been to postpone deciding the sanctions application until the amendment application could be heard. But, as a pragmatic alternative, the Bank invited the Court to decide the sanctions application on the assumption (against itself) that Zumax will be permitted to amend its claim, while reserving its right to argue in due course that the amendments should not in fact be allowed. I shall proceed on this basis. The parties have also agreed that time shall not run against Zumax for limitation purposes until the amendment application has been heard.

6. The Bank was represented by Ms Melwani QC and Mr Henton. Zumax has until recently had solicitors (Quinn Emanuel) on the record, and they have been involved in producing some of the witness statements for the applications, but Zumax was not represented by lawyers at the hearing. It appeared by Mr Nduka-Eze, a director, who was assisted by a long-standing acquaintance, Mr Coleman (who is qualified as a barrister but has not practised). At a recent procedural hearing Zumax told the Court that, owing to the Covid-19 pandemic, it has faced difficulties exchanging Naira into sterling to pay its lawyers, but intended to instruct lawyers again as soon as conversion of currency can be achieved. Zumax asked to address me through Mr Coleman and, in the exceptional circumstances, I agreed. This permission will not of course bind the Court for future hearings.

The parties and the transfers

7. It is convenient to take the factual background about the parties and the transfers from the judgment of Newey LJ ([2019] EWCA Civ 294).
 2. Zumax is a Nigerian company which formerly provided engineering and other services to oil companies. It is based in Warri, Nigeria.
 3. The defendant, First City Monument Bank plc ("FCMB"), is a Nigerian bank. As a result of a merger with Finbank plc, which had itself come into being as a result of a merger involving, among others, IMB International Bank plc ("IMB"), FCMB has inherited the rights and obligations of IMB.
 4. The proceedings relate to some bank transfers dating from 2000 to 2002. At that time, Zumax's main banker was IMB, with which it held a Naira-denominated account in Lagos. Zumax also had Naira-denominated accounts with Warri branches of Citibank Nigeria, Standard Trust Bank and Equitorial Trust Bank.
 5. IMB, too, had a Naira-denominated account in Nigeria with Standard Trust Bank, as well as ones with Guaranteed Trust Bank and Citizens Bank. It also held two US dollar-denominated accounts, numbered 160122964015 and 160122964010, at the London branch of Commerzbank. A third US dollar-denominated account with Commerzbank ("the IMB Morgan Account") was held by an entity associated with IMB, IMB Morgan plc ("IMB Morgan", formerly known as "IMB Securities plc"), and for the purposes of this appeal FCMB accepts that no distinction is to be drawn between IMB and IMB Morgan. All three Commerzbank accounts were "correspondent" accounts.
 6. At least in part, the oil companies for which Zumax undertook work would be invoiced in US dollars and asked to pay the money into an account that Redsear Limited ("Redsear"), a

company incorporated in the Isle of Man, held with Chase Manhattan International ("Chase") in London. Barling J described Redsear as a nominee of Zumax, and it was common ground before us that Redsear held the funds that it received from Zumax's customers on trust for Zumax. Money in the account ("the Redsear Account") would be used to meet Zumax's US dollar business needs, with any surplus funds being transferred to Nigeria.

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

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

8. The present proceedings concern ten transfers from the Redsear Account to the Commerzbank accounts that were made between May 2000 and April 2002. The transfers were as follows:

| <u>Number</u> | <u>Date of receipt</u> | <u>Amount</u> |
|---------------|------------------------|---|
| 1 | 10 May 2000 | \$205,000 (less \$15 charge) |
| 2 | 11 May 2000 | \$105,000 (less \$15 charge) |
| 3 | 12 May 2000 | \$205,000 (less \$15 charge) |
| 4 | 24 July 2000 | \$505,000 (less \$15 charge) |
| 5 | 8 January 2001 | \$355,000 & \$250,000 (less \$15 charge on each transfer) |
| 6 | 10 August 2001 | \$901,000 (less \$15 charge) |
| 7 | 23 October 2001 | \$410,000 |
| 8 | 24 December 2001 | \$155,000 (less \$15 charge) |

| | | |
|----|------------------|------------------------------|
| 9 | 27 February 2002 | \$251,000 (less \$15 charge) |
| 10 | 23 April 2002 | \$410,000 (less \$15 charge) |

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

The decision of the Court of Appeal

8. Zumax sought summary judgment on the basis (and only on the basis) that the sums received by the Bank into the Commerzbank accounts were held by the Bank on trust for Zumax, and said that the Bank had misappropriated those amounts by treating them as their own. Barling J agreed, save in respect of the third transfer, which he accepted may have been credited to the Commerzbank accounts in error. He gave judgment for £2,659,576, the sterling equivalent of \$3,507,450, with the Bank's liability to pay interest to be determined later.
9. As well as arguing that it was not a trustee of the transfers into the Commerzbank accounts, the Bank raised a number of other defences, including that it had a real prospect of showing that it had made payments to Zumax in respect of all the transfers other than the third (which it said was recorded in the Commerzbank statements in error) and the tenth, which the Bank accepted it had not accounted for. It also contended that Zumax's claims had been settled by a consent order made in Nigerian proceedings in 2005.
10. By the time of the appeal the Bank was no longer relying on the 2005 consent order as on 5 October 2018 Obadina J gave judgment in the High Court of Lagos State ("the 1668 proceedings"), declaring that the consent order had been vitiated by fraudulent misrepresentation and concealment. I shall return to this below. The Bank continued to contend that it had real prospects of establishing its payment defence and it relied on the evidence of Mr Owolabi (as recited by Newey LJ at [7]).
11. I should say a little more about the Court of Appeal's decision. It decided that the transfers to the Commerzbank accounts created a relationship of debtor and creditor, not that of trustee and beneficiary. It held that the relationship between the parties was governed by principles illustrated by the well-known case of Foley v Hill (1848) 2 HLC 28. It concluded that the international transfers through Commerzbank as a correspondent bank did not change the nature of the legal relationship between the parties. When the money was transferred from Redsear to one of the Bank's correspondent accounts at

Commerzbank, the credit balance in that account was the Bank's property and it was under no obligation to segregate it as a separate fund for Zumax. The Bank no doubt became subject to a personal obligation to pay or credit Zumax, but not as a trustee.

12. As to the payment defence, the Court of Appeal's order of 13 March 2019 recorded that the Bank admitted that it had not paid or accounted for the funds the subject of the tenth transfer and declared that, in the event that Zumax seeks and obtains permission to amend its Particulars of Claim, save as regards the tenth transfer, the Bank has a real prospect of successfully establishing at trial that it has (on the balance of probabilities) paid over and/or otherwise accounted for the funds under the transfers.
13. The Court of Appeal ordered Zumax to repay to the Bank within 28 days the sums paid to it pursuant to the order of Barling J (including a sum of £3,286,807.32 received by Zumax in December 2018). It also ordered Zumax to pay £211,548.42 and £180,652.71 on account of the costs of the appeal and the hearing below (and, under the CPR, those sums became payable after 14 days).

Release of the funds from the Court account to Zumax

14. The sum of £3.28m odd referred to in the order of the Court of Appeal of 13 March 2019 was paid to Zumax as follows. After Barling J gave judgment in November 2017 Zumax obtained a worldwide post-judgment freezing order against the bank for a maximum sum of £20.3m (to include an allowance for costs and interest). On 15 December 2017 the Bank paid £20.3m into Court and the freezing order was discharged. On 8 February 2018 Barling J refused a stay of execution and ordered that the judgment sum of £2,659,675 (plus interest) and an amount of £385,000 (plus interest) on account of costs should be paid to Zumax from the funds in Court.
15. On 6 March 2018 David Richards LJ granted a stay of execution pending the Bank's application for permission to appeal. On 27 April 2018 Kitchin LJ granted permission to appeal and continued the stay of execution.
16. On 5 October 2018 Obadina J gave judgment for Zumax in the 1668 proceedings following a trial of issues regarding the enforceability of the settlement and consent order of 2005. She held that the settlement and consent order were unenforceable for fraud and ordered the Bank to pay Zumax Naira 602.3m (at that time c.\$2m). The Bank filed an appeal and sought a stay of execution.
17. On 16 October 2018 Zumax's then solicitors, Mordi & Co, sent a letter contending that the stay of execution ordered by Kitchin LJ should be lifted. They said that, when applying for a stay of Obadina J's order, the Bank had said on affidavit that paying the judgment debt (of Naira 602.3m) would adversely affect its ability to meet its obligations to its depositors. Mordi & Co's letter contended that this imperilled the protection given by the payment into Court and that, with interest, the judgment sum and payments on account of costs (now amounting to about £3.25m.) should be released to it. They went

on to say that Zumax needed the funds to enable it to recover and repair two vessels which had been abandoned at Chevron flow-stations in Nigeria some 15 years earlier. Chevron was said to have issued an ultimatum in August 2018 for Zumax to remove the vessels, failing which they would be scrapped. They said that unless Zumax could recover, repair, and use the vessels it might not be able to continue the proceedings. They said that the order of Obadina J requiring the payment of Naira 602.3m meant that the Bank could no longer contend that Zumax was impecunious. They invited the Bank to agree that the stay should be lifted.

18. The Bank did not agree and Zumax made an application on 31 October 2018 for the stay to be lifted, supported by the eleventh witness statement of Mr Mordi (“Mordi 11”). He set out Zumax’s arguments for lifting the stay, based on the decision of Obadina J, and what the Bank had said on affidavit in Nigeria about its own financial position. He said that, on the Bank’s own evidence, there were now serious concerns about its solvency. He said that, in light of the judgment debt of Naira 602.3m, the Bank could no longer say that Zumax was impecunious. He also said that any earlier impecuniosity (which he did not admit) was the result of the Bank’s own wrongful actions in appointing receivers in 2002 and fraudulently procuring the consent order in 2005 (among other things). He advanced various arguments for saying that the appeal to the Court of Appeal from Barling J’s order had limited prospects of success.
19. Mr Mordi then gave further details about Zumax’s “pressing need” to use some of the monies sought to enable it to recover the two vessels from Chevron, repair them and put them to profitable use. He said that Zumax had already been able to recover another of its barges from Chevron and repair it. He put the cost of recovery and repair of the two remaining vessels at \$1.96m and their surveyed value after repair at \$3.4m. Zumax had received an indicative bid of \$14,000 a day for one of its operational barges, M.V. Zumax-1, and Zumax estimated that it could hire the two remaining vessels (which were larger) for c.\$15-18,000 each per day. Mr Mordi said that Zumax was “plainly in a good position to make good and profitable use of the judgment monies and ... the value of [Zumax] would plainly be enhanced by the use of the judgment monies.” He said that one of the two vessels could alone earn \$5.4m a year. Zumax was prepared to give undertakings to the Court as to the use of the judgment debt monies if the stay were lifted. Mordi 11 said nothing about the means by which Zumax had funded the litigation or about any other intended uses of the monies if the stay was lifted. There was no evidence of Zumax having any significant outstanding liabilities to any third parties.
20. After further correspondence the parties agreed the terms of a consent order on 14 November 2018 lifting the stay of execution. The order included undertakings by Zumax that (a) it would use the monies received pursuant to the order (other than in respect of its legal costs as ordered by Barling J) only for the purposes of Zumax, “including for the purposes and assets set out in paragraphs 33-40 of [Mordi 11] (and not for the purpose of funding these proceedings), until the determination of the [appeal to the Court of Appeal]”; (b) Zumax would not take any steps to divest itself of the two vessels pending

the appeal; and (c) if and to the extent that the appeal were determined in favour of the Bank such that any of the monies were required to be repaid to the Bank, Zumax consented to any enforcement action against the assets identified in those paragraphs of Mordi 11.

21. The Bank wrote an open offer to Zumax on 8 November 2018 saying that if (a) the Bank succeeded in appealing Barling J's decision that it was a trustee, but (b) the Bank failed in its payment defence (i.e. that it had in fact paid equivalent sums to Zumax in Nigeria), and (c) Zumax accepted that it had no other claims, the Bank would pay the equivalent of the transfers (other than the third) plus interest at Libor + 2.5% from the date of Zumax's demand for repayment in 2013.
22. On 9 November 2018 Barling J dismissed Zumax's further application for judgment on the alternative basis of a claim in debt.
23. Pursuant to the consent order of 14 November 2018 the sum of £3.28m odd was released to Zumax from the funds in Court on 10 December 2018.

Post-judgment submissions to the Court of Appeal

24. The argument before the Court of Appeal took place on 13-14 February 2019. On 14 February 2019 the Court of Appeal indicated that the appeal would be allowed on the trust point. Judgment was given on 1 March 2019.
25. The parties made post-judgment submissions about the form of the Court of Appeal's order. The Bank sought the repayment of the monies released to Zumax in December 2018 and payments on account of its costs. Zumax argued (among other things) that (a) it should not be required to repay the judgment sum, on the footing that this would equate to conditional leave to defend the claims (which it said was the just outcome); alternatively (b) any repayment should be paid into Court as a condition of defending; (c) there should be a set-off of the sums claimed by the Bank from Zumax against the liabilities of the Bank under the order of Obadina J in the 1668 proceedings; and (d) there should be a stay of execution pending an application for permission to appeal to the Supreme Court.
26. Zumax did not submit to the Court of Appeal that it could not repay the sums or pay amounts on account of costs.
27. Zumax also invited the Court of Appeal to consider bank statements it had recently obtained for the Naira accounts held by it with three other banks at Warri (as referred to by Newey LJ at [4]). There had been some discussion during the hearing of the appeal about what these might show and their relevance to the issues. The Bank submitted that the statements for the Warri accounts might show receipts of Naira corresponding to the transfers into the Commerzbank accounts. Newey LJ summarised the rival arguments at [60]-[62] and said at [63]:

“There is undoubtedly force in the points that [counsel for Zumax] made. Should statements for Zumax's Warri accounts for the

relevant period become available and prove to lend no support to FCMB's case, it may need to re-evaluate its position. As matters stand, however, I have concluded, on balance, that FCMB does have a real prospect of defeating the claim as regards the first, second, fourth, fifth, seventh, eighth and ninth transfers on the strength of the payment defence.”

28. In its post-judgment submissions, Zumax sent the Warri bank statements to the Court and submitted that they did not show any relevant receipts by Zumax of Naira into its Warri accounts. It was partly on this basis that it sought to persuade the Court of Appeal that no repayment of the judgment sum should be ordered.
29. Zumax also served draft Amended Particulars of Claim on 11 March 2019.
30. On 13 March 2019 the Court of Appeal ordered the repayment of the judgment sum (and interest) to the Bank, required Zumax to make certain payments on account of costs, refused to make an order setting off these sums against the order of Obadina J, and refused permission to appeal.

Events after the Court of Appeal's order

31. On 19 March 2019 Zumax replaced its existing solicitor and barrister team with a new one (consisting of Quinn Emanuel and leading and junior counsel from a leading commercial set of chambers).
32. On 27 March 2019 the deadline for payment of the costs order made by the Court of Appeal passed without any payment. Zumax did not apply for an extension of time. The Bank pressed for payment.
33. On 29 March 2019 Zumax provided a fresh draft Amended Particulars of Claim settled by their new leading and junior counsel and supported by a long draft witness statement from Mr Bunting of Quinn Emanuel. It sought to introduce claims based on debt, restitution, breach of contract, tort, and breach of fiduciary duty.
34. On 10 April 2019 the deadline set out in the order of 13 March 2019 for repayment of the judgment sum passed without payment or an application for further time. The Bank again pressed for payment.
35. On 10 April 2019 Zumax issued a second set of proceedings, said to be a protective claim (to cover potential limitation issues), seeking materially the same relief as the draft amended Particulars of Claim provided in the present proceedings on 29 March 2019.
36. On the same day, 10 April 2019, Zumax served an application to appeal to the Supreme Court from the order of the Court of Appeal.
37. On 11 April 2019 Quinn Emanuel stated in correspondence that “Zumax does not have the funds to meet the orders made against it by the Court of Appeal and is not able to raise those funds from third parties associated with it”.

Nothing was said in that letter about what had happened to the £3.28m odd that had been paid to Zumax in December 2018 from the Court funds office.

38. Zumax then made a series of proposals to the Bank about payment, which the Bank did not accept.
39. The Bank made an application to the Supreme Court on 26 April 2019 for an order that any permission to appeal should be conditional on the payment of the outstanding amounts under the Court of Appeal's order of 13 March 2019. On 2 May 2019 the Supreme Court ordered Zumax to file a full response to the Bank's application.
40. In response, on 13 May 2019 Zumax served the eighth witness statement of Mr Nduka-Eze ("Nduka-Eze 8"). This disclosed that no part of the judgment sum received by Zumax in December 2018 had been used to recover and repair the two vessels identified in Mordi 11, but instead the monies had been paid to Cosmopolitan Alliance Limited ("Cosmopolitan") and Kasa Partners ("Kasa"), which (it was said) had funded Zumax's operations and litigation for many years.
41. On 31 May 2019 the Bank served evidence in rebuttal from Mr Preston (Preston 10).
42. On 29 June 2019 Zumax offered to pay £196,105 by 11 July 2019 in respect of the amounts ordered by the Court of Appeal. On 8 July 2019 it said that it would not meet its own 11 July 2019 deadline but anticipated paying the first sum by 23 July 2019. It did not do so, but, after further correspondence and demands, on 15 August 2019 Zumax paid £100,000 on account of the amounts ordered by the Court of Appeal.
43. On 7 November 2019 an order was made by consent staying the second action with the Bank expressly not having submitted to the jurisdiction.
44. On 19 November 2019 the Supreme Court refused Zumax's application for permission to appeal.
45. On 19 March 2020 Zumax issued its application for permission to amend the Particulars of Claim, supported by a final version of Mr Bunting's first statement. These documents contained some differences from the drafts served in March 2019.
46. On 30 March 2020 the Bank issued the sanctions application and on 20 April 2020 issued its contingent application for security for costs. The evidence for the sanctions application is a witness statement of Mr Preston of 30 March 2020 ("Preston 11"); a witness statement of Mr Nduka-Eze of 15 June 2020 ("Nduka-Eze 11"); and Mr Preston's response of 22 June 2020 ("Preston 15"). The electronic bundle for the hearing ran to about 2,000 pages.

What happened to the monies released to Zumax from the sums in Court

47. As already stated, pursuant to the consent order of 14 November 2018 the sum of £3.28m odd was released to Zumax from the funds in Court on 10 December 2018. None of the monies were used by Zumax in recovering or repairing the two vessels identified in Mordi 11. Instead the funds were paid, on dates which are not disclosed in the evidence, to Cosmopolitan and Kasa.
48. These payments were first disclosed in Nduka-Eze 8, filed in May 2019 in response to the Bank's application to the Supreme Court for conditions. Mr Nduka-Eze explained that Zumax had paid Naira 1.425bn to Cosmopolitan and Kasa. He did not give an exchange rate for that sum, but elsewhere in the statement he referred to the conversion (into dollars) of other amounts and, using the same rate, Naira 1.425bn came to more than £3.58m (using dollar/sterling rates applicable in May 2019). Mr Preston has said in evidence that the payments to Cosmopolitan and Kasa must have amounted to all or nearly all of the monies paid over to Zumax in December 2018 and Zumax has not taken issue.
49. The evidence provided by Zumax about Cosmopolitan and Kasa is far from comprehensive. The Bank has also carried out corporate searches. What the evidence shows is that Cosmopolitan is a company incorporated in Nigeria. It was set up by Mr Nduka-Eze in 2001. It has four director/shareholders including Mr Nduka-Eze who holds about 85% of the issued shares. Mr Nduka-Eze says, from time to time since 2003 Cosmopolitan advanced amounts totalling £3.5m to Zumax on informal terms. Nothing has been said about the timing of the advances (e.g. how much of it was paid in respect of the funding of the current proceedings), or their terms (e.g. as to interest, or shares in the proceeds of any litigation).
50. Kasa is described in the evidence as "an investment and private equity vehicle of which Mr Coleman is a partner, holding a 40% interest". It has two other unnamed partners. Mr Nduka-Eze says that it has advanced monies informally and was owed around £1.56m by July 2013.
51. The advances made by Cosmopolitan and Kasa are said by Mr Nduka-Eze to have been for Zumax's operational expenses and "its litigation costs," which "includes Zumax's own costs of the present proceedings."
52. Though Zumax says in its evidence that the informal advances date from 2003, they were not referred to or reflected in the accounts of Zumax in respect of any period before 2015, or any accounts approved before 15 February 2019. On that date (which was after the Court of Appeal hearing) annual accounts were signed for the years 2015 to 2018 and management accounts filed for the 3 months to March 2019, which reflected, for the first time, the long-term liabilities to Cosmopolitan and Kasa.
53. The Bank agreed at a procedural hearing before Zacaroli J on 5 June 2020 not to contend that the payments to Cosmopolitan and Kasa were not in respect of genuine liabilities. It remains the case however that there is no documentary evidence about the nature or terms of the arrangements between Zumax and these backers.

54. The Bank complains that the payments to Cosmopolitan and Kasa breached the undertakings given by Zumax in the order of 14 November 2018.
55. The Bank says, first, that it was implicit in those undertakings that at least some of the monies would be used by Zumax for recovering and repairing the two vessels identified in Mordi 11, which did not happen, and, secondly, that the payments to Cosmopolitan and Kasa were made for the purpose of funding the proceedings.
56. As to the first point, Zumax says that the undertaking required only that the payments be used for its business. It was always understood that at least a large part of the money (the balance over c.\$1.96m) would be used for purposes other than recovering and repairing the vessels and, in any case, the undertaking said only that Zumax's purposes and assets included those set out in Mordi 11. Zumax also points out that the application to lift the stay was based in large part on what the Bank had told the Court in Nigeria about its own financial wellbeing and the effect of the order of Obadina J.
57. I agree with Zumax that, strictly speaking, it was not required to use any specific part or proportion of the monies for the purposes or assets set out in paragraphs 33-40 of Mordi 11 and it cannot be said to have breached the undertaking merely by using the monies for other purposes of Zumax. I do though consider that the Bank expected, and reasonably expected, that around \$2m would be used for the purpose of those assets. I also think that, given what is now known about Cosmopolitan and Kasa, it is probable that Mordi 11 failed to give a fair impression about Zumax's intentions about the use of the monies. It is reasonable to infer that Zumax already intended at the time the stay was lifted to pay a large portion of the monies to Cosmopolitan and Kasa. The witness statement said nothing about Cosmopolitan or Kasa or Zumax having any liabilities to them. Zumax's latest accounts at that time (which were for the period up to 2014) did not disclose these liabilities either. I consider that in applying for the lifting of the stay Zumax did not provide the Court with a full and fair picture.
58. There is also real force in the Bank's contention that Zumax used at least part of the monies for the purpose of funding the proceedings. Zumax's own evidence is that some of the advances given by Cosmopolitan and Kasa were to fund its litigation against the Bank. The undertaking was not restricted to future funding and using the money to discharge existing liabilities to funders on its face is a use of the money for the purpose of funding the proceedings.
59. It is not however necessary to reach a final conclusion about whether there was a breach. What is material is that Zumax received and paid out £3.28m odd shortly before the hearing of the appeal knowing that there was a real risk that the appeal would succeed and that it would have to return the money. I shall return to this point below.

Legal principles

60. In Michael Wilson & Partners v Sinclair [2017] EWHC 2424 (Comm), Sir Richard Field (sitting as a deputy judge of the High Court) reviewed the

authorities concerning the imposition of debarring orders in respect of unpaid costs orders and summarised the principles as follows:

“[29] In my judgment, the following principles are applicable when dealing with an application that a party to on-going litigation should be debarred from continuing to participate in the litigation by reason of having failed to pay an order for costs made in the course of the proceedings:

- (1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the Court's inherent jurisdiction.
- (2) The Court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
- (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
- (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
- (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
- (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order.”

61. The judge in that case was dealing with an order for costs against the defendant but the same must apply to an order against a claimant.
62. The same approach has been taken in the case of an order for payment of the principal judgment debt as a condition of defending: Hangar 8 Management v Talaveras Group [2019] EWHC 2483 (Comm).
63. Logically the same approach should apply where the order for the repayment of an overturned judgment sum. I shall follow the principles set out in the Michael Wilson & Partners case.
64. On an application for sanctions, which is a case management decision, the underlying merits of the case are normally irrelevant. It is only where a party would be entitled to summary judgment, and where this can be shown quickly, that the Court will take the merits into account: Global Torch v Apex Global Management [2014] UKSC 64, [2014] 1 WLR 4495 at [30]-[31].
65. Zumax argues that the imposition of sanctions will stifle its claim. On this point I draw the following guidance from Goldtrail Travel Limited v Onur Air [2017] UKSC 57, [2017] 1 WLR 3014:
- (a) It is wrong to impose a condition which would have the effect of preventing a party (R) bringing, continuing, or defending a claim.
 - (b) Where R argues that it will not be able to comply with a sanction and will therefore be deprived of access to justice the burden is on it to establish this on the balance of probabilities.
 - (c) Even where R appears to have no realisable assets of its own with which to satisfy the proposed condition, that condition will not stifle the claim if R can raise the required sum.
 - (d) Where R is a company, the Court must keep at the forefront of the analysis that it is a distinct legal personality from its shareholders. The question is whether R can establish on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition.
66. At [24] Lord Wilson said this:
- “The criterion is simple. Its application is likely to be far from simple. The considerable forensic disadvantage suffered by an appellant which is required, as a condition of the appeal, to pay the judgment sum (or even just part of it) into court is likely to lead the company to dispute its imposition tooth and nail. The company may even have resolved that, were the condition to be imposed, it would, even if able to satisfy it, prefer to breach it and to suffer the dismissal of the appeal than to satisfy it and to continue the appeal. In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court

can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms."

Zumax's opposition to the imposition of sanctions

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

The merits of the claims

68. As I explained in the introduction, the Bank invited me (for the purposes only of the sanctions application) to assume that Zumax will be permitted to amend its claim, and I will adopt this approach.
69. Zumax says it would be wrong to impose a condition which might prevent it taking the case to trial where it can already be seen (without the need for a trial) that the Bank is liable to it. As Global Torch shows the merits will only be relevant if Zumax can show that it would succeed to the summary judgment standard.
70. The Bank accepts (on the working assumption of this application, that permission to amend will be given) that it would have come under a duty as banker to pay Zumax amounts corresponding to the transfers into the Commerzbank accounts, and that it has not paid or credited Zumax in respect of the tenth transfer. The Bank also accepts (on the same assumption) that it would have been obliged to pay Zumax on demand and that, for this purpose, a valid demand was made on 17 April 2013.
71. Zumax argues that the Bank conceded in the Court of Appeal that, as a receiving bank, it acted as agent for Zumax and that the Bank is therefore obliged (on its own admissions) to account as a fiduciary. It says that it will be entitled to interest on a generous basis, dating back to the moment of receipt, rather than from the date of its demand for repayment. This would greatly enlarge its claim. It says this claim passes the summary judgment test.

72. I reject this submission, which seems to me to be driven by a misunderstanding of terminology. To say that a receiving bank is the agent of its customer does not entail that the bank is a fiduciary. The receiving bank is only an agent in the special and limited sense that payment to the bank operates to discharge the underlying debt of the payer against the customer. But (absent special agreement) a bank is authorised to receive funds credited to it as its own property, free of any duty to segregate them, or use them for the purposes of the customer. It does not receive them as a trustee or fiduciary for the customer (see Foley v Hill). A bank is no doubt required to account in the sense of providing the customer with timely and accurate information about credits and debits and the overall state of the customer's account. It usually does this by providing a bank statement (which is a kind of account) recording the debits and credits. But that has nothing to do with an obligation on a fiduciary to account to its principal, which engages special rules about profits, compounding, accounting on the footing of wilful default, and so forth: see Millett LJ's illuminating analysis in Paragon Finance v DB Thakerar [1991] 1 All ER 400.
73. Zumax also seeks to rely on a wider agency argument. It submits that the unusual facts of this case take it outside the usual banker-customer relationship. The Bank, it says, received the transfers with no intention of paying their equivalent or accounting for them to Zumax and therefore it was not entitled (as banker) to borrow them on receipt and treat them as its own. It relies on the fact that in inter-solicitor correspondence as late as 2013 the Bank denied even receiving the transfers. It says that, as the Bank received the transfers without any intention of paying an equivalent sum to Zumax, it must have received them not as a debtor but as an agent for Zumax.
74. Zumax submits that it would succeed on this argument to the summary judgment standard. I cannot accept this. A Court would have to consider all the evidence about the nature and basis of the arrangement between the parties (which was not before me on this application). Moreover, the Bank contends that (apart from the tenth transfer) it paid equivalent sums to Zumax. This defence would (if established) undermine the factual premise of the wider argument. As I explain below Zumax has failed to persuade me that the Bank's case in that regard is not realistically arguable. I also consider that the legal underpinning of Zumax's wider submission is far from self-evident and is unsuitable for a sanctions application of this kind.
75. Zumax says (as a fall back) that at least as regards the tenth transfer (where the Bank accepts it has no payment defence) this wider "agency" argument applies. I cannot accept this submission. If the Bank has a real prospect of showing that the usual banker-customer principles apply to the earlier transfers, it also has a realistic prospect of showing that it was entitled to borrow the tenth amount and pay an equivalent sum to Zumax; and that, having failed to do so, any liability to Zumax would be in debt.
76. I was also taken to a passage in the judgment of Obadina J where she said that a banker is under a fiduciary duty to account transparently. If that means a banker is required to tell the customer what it has received for its account, the substance of the duty is unsurprising (though the fiduciary tag is potentially

misleading). If it means more than this, I do not accept that it is correct. There is no evidence before the Court that Nigerian law differs from English law in relation to the imposition of fiduciary duties. At any rate I do not think that this brief comment would lead the Court to conclude that the Bank is liable to comply with the panoply of accounting obligations imposed on a fiduciary in equity.

77. For these reasons, I am unable to accept Zumax's attempts to suggest that the Bank has conceded that it is under a wide-ranging, fiduciary, obligation to account dating back to the time of receipt of the transfers. I do not accept that Zumax is able to establish the existence of such a duty to the summary judgment standard.
78. Zumax also contends that even if the Bank as agent was not a fiduciary it is nonetheless obliged to account as an "ordinary agent". I do not consider that this adds anything of substance to the claim in debt or for breach of contract.
79. As to the claim in debt, the Bank accepts that (subject to its arguments about permission to amend) it has no defence in respect of the tenth transfer. That was \$410,000 but Zumax agrees that it has to give credit for an amount of \$39,550 recovered in earlier proceedings (Commerzbank AG v IMB Morgan [2004] EWHC 2771 (Ch)), leaving a balance of \$370,450. It appears to me that (whatever conclusions I reach on other points) it would be wrong to impose a sanction requiring the payment of this sum (plus interest). I shall return below to address interest on this amount.
80. As for the other transfers, as Barling J held there is a dispute about whether the third transfer was even received into the Commerzbank accounts and there is no reason to question that conclusion. As to the remaining eight transfers, the Court of Appeal recorded in its order that apart from the tenth transfer, the Bank had a real prospect of establishing its defence that it had paid Zumax.
81. Zumax submits, nonetheless, that the Bank lacks a credible defence for these eight transfers. It relies on the discussion in the Court of Appeal about the potential relevance of the Warri bank statements and the Bank's acceptance that it would have to reassess its defence once the statements were disclosed. Zumax says that the Warri statements show that there were no Naira payments to Zumax corresponding to the transfers into the Commerzbank accounts. It submits that since there is no other direct evidence of payment there is no prospect of the Bank succeeding in this defence.
82. The Bank says that it has considered the Warri bank statements but contends that it continues to have a real prospect of establishing its defence. It argues that in the Court of Appeal it did not rely exclusively on the absence of the Warri bank statements (see Newey LJ's summary at [60]-[62]). It repeats its submission that the payments may have been made direct to suppliers of Zumax, and it relies on the evidence of Mr Owolabi (cited by Newey LJ at [7]). It observes that Zumax knew contemporaneously about the receipts into the Commerzbank accounts and for many years did not complain about non-payment. It also refers to a document known as the "Warri schedule" which (on at least one interpretation) lists amounts received by Zumax from the Bank

in 2001 and 2002. The Bank relies on a manuscript annotation on the schedule which (on one reading) suggests that sums totalling Naira 84m were received by Zumax from the Bank on a series of dates in 2002. As these were not matched by receipts into the Warri bank accounts the Bank invites the inference that they (or their value) must have been paid to Zumax in some other way. The Bank says that the Warri schedule was referred to in the minutes of a board meeting of Zumax held on 19 August 2002 attended by various directors including Mr Dowds (the CEO).

83. This interpretation of the Warri schedule is disputed by Zumax. It says that the Warri schedule is not a Zumax document and argues that it does not bear the manuscript of Mr Dowds (the CEO). It says that the document was prepared by Mr Chinye (the CFO of Zumax, who has been shown to be dishonest) and that there is no evidence about who annotated it, or when.
84. This factual dispute cannot be resolved on this application. I consider that it is realistically arguable on the available evidence that the annotation was written by someone at Zumax in about August 2002 and that the Warri schedule was discussed in some detail at the board meeting in August 2002. This provides some support for the Bank's case that amounts were paid by the Bank to Zumax by a means other than transfers to its Warri bank accounts. I also note that these points were made by Mr Preston in his 14th witness statement and they were not answered by Zumax's evidence.
85. The Bank also points out that the Warri bank statements were sent to the Court of Appeal before it finalised its order. The Court of Appeal did not accede to Zumax's argument that repayment of the judgment sum should be refused on the basis that the bank statements showed the payment defence to be unsustainable. I agree with the Bank that it is material (though not conclusive) that the Court of Appeal considered these arguments before finalising its order.
86. Zumax also relies on the open offer sent by the Bank before the Court of Appeal hearing. Zumax says that this shows that it can expect to recover (at least) the principal amount of the transfers (save the third) and interest at Libor plus 2.5% since 17 April 2013. The offer was however made on the assumed basis that the Bank had won on the trust argument, but lost on its payment defence, and that Zumax had agreed to abandon its claims other than the debt claim. The second and third contingencies have not occurred. The Bank has been given permission to run the payment defence and Zumax has not agreed to abandon its other claims: in its draft Amended Particulars of Claim it seeks c.\$548m of interest on the principal sum of c.\$3.5m. I also note that the Court of Appeal made its order after the date of the open letter. I do not think that the open offer assists Zumax on this application.
87. I conclude that Zumax is unable to show (even on the working assumption of this hearing that it will be permitted to amend) that it would be entitled to summary judgment in respect of the transfers other than the tenth.
88. That leaves the question of interest on the tenth transfer. The Bank accepts that a demand for repayment was made by letter on 17 April 2013.

89. As to the period before that, in its draft Amended Particulars of Claim Zumax claims contractual interest from the date of receipt but pleads that it is not presently possible to specify the rate of interest payable under the contract. As to the period since the demand it claims interest at various alternative rates. The question of interest was of course left over by Barling J's order and the parties have not served evidence which would enable me to determine it.
90. The Bank has provided a calculation of interest at 13% compounded quarterly from 17 April 2013 to the end of December 2018 (when Zumax received the monies from the Court office). Using the dollar/sterling exchange rate for 31 December 2018 the total of principal and interest comes to some £603,022. While there is no specific basis for the selection of the 13% rate, the Bank argues that it is generous and Zumax did not contest the rate for the purposes of the application and I shall use the same rate. The Bank's calculation also assumes (in favour of Zumax) that no adjustment has to be made for depreciations in the Naira against the US dollar after April 2013.
91. Zumax contends that the same interest rate should apply to the period from receipt of the tenth transfer down to April 2013. Zumax has not been able to provide any contractual terms providing for the payment of interest on credit balances or other evidence showing that contractual interest was payable. It relies instead on some historic bank statements for its Naira account with the Bank and says that these show that the Bank credited it with interest from time to time. One of the remarkable features of this dispute is that the Bank has produced more than one set of bank statements for Zumax's account and, as Barling J commented in his judgment, the various sets of statements are not consistent with one another. Zumax says nonetheless that some of the statements show interest being credited to its account, including in some cases in periods when Zumax was shown to be in debit. It says that, in the absence of other evidence, the Court should apply a 13% interest rate as a proxy for the contractual rate of interest to the entire period since the date of the transfers into the Commerzbank accounts.
92. I do not accept this submission. It is not clear (to the summary judgment standard) whether there was a contractual obligation to pay interest or (if so) at what rate. This is not a point that has been addressed in the evidence and it was not resolved by Barling J. The Bank contends that there was no contractual interest payable in the period before the demand was made and says that it will be entitled to plead a defence in this regard if and when permission to amend the Particulars of Claim is given. It says that even if it could be shown that interest was payable on credit balances, there is no reason to suppose that it was at 19% (or any other rate), that there are potential limitation arguments, and that it would also be necessary to consider the impact of devaluations in the Naira against the dollar since 2002. I am unable on this application to resolve these points against the Bank to the summary judgment standard. I conclude that there is no reason to make any allowance for interest for the period before the demand in April 2013.
93. For the reasons set out above I consider (whatever my conclusions on the other points) that it would not be right to impose a sanction requiring the

repayment of £603,022 of the judgment sum as a condition of Zumax being allowed to continue with the proceedings.

The Bank's conduct

94. Zumax says that the Bank is seeking to use the proposed unless order as an instrument of oppression. It makes wide-ranging allegations about the Bank's conduct. In summary, it says that in the early 2000s Zumax was a highly profitable business, with large international oil companies as clients, and a multi-million dollar annual turnover. The Bank then dishonestly claimed that Zumax owed it large amounts of money and, in December 2002, appointed receivers under a debenture. It became clear that the receivership was damaging the business and the parties entered into negotiations to seek to find a way of lifting the receivership. According to Zumax, the Bank continued to mispresent the state of account between them, claiming that Zumax was a debtor when, on the true state of account, it was a substantial creditor of the Bank. The receivership was lifted in April 2005 and in May 2005 the parties entered into a settlement agreement, embodied in a consent order of the Nigerian Court, under which Zumax agreed to pay sums to the Bank and not to challenge the agreed state of account between them.
95. Zumax says that it has never recovered from the damage to its business caused by the Bank's false demands and the wrongful imposition of the receivership.
96. In January 2006 Zumax started proceedings in Nigeria alleging that the consent order and settlement agreement had been procured by fraud.
97. The Bank placed Zumax back into receivership in June 2007 ("the second receivership").
98. Since then the parties have complained about one another to various Nigerian authorities, including the Nigerian Economic and Financial Crimes Commission, the Central Bank of Nigeria, and the police. In particular, in 2011 the Bank sought to persuade the Nigerian police to investigate Zumax and Mr Nduka-Eze.
99. In October 2009 Zumax commenced the 1668 proceedings in Nigeria seeking to set aside the consent order for fraud. The Bank for its part obtained freezing orders and garnishee orders in Nigeria against Zumax and its assets. These were only released in 2012.
100. Zumax also complains that the Bank was instrumental in undermining its credit status and ratings by making false reports to regulators, including the Central Bank of Nigeria. It says that the Bank made unjustified allegations of professional misconduct against Mr Nduka-Eze (who is a lawyer with his own practice in Nigeria) and baseless complaints to the police. It also says that the Bank brought a series of libel actions against Mr Nduka-Eze and Zumax which were dismissed and did so despite having been told by its own lawyer that at least one such case could not succeed.

101. Zumax also relies on the finding of Barling J that as late as October 2016 the Bank was making demands for repayment of sums it knew were not due, and that this was done for tactical reasons.
102. Obadina J gave judgment in the 1668 proceedings in October 2018, holding that the consent order and settlement agreement were unenforceable for fraud, and ordered the Bank to pay Zumax Naira 602.3m.
103. Zumax says, in summary, that the Bank's conduct, which has continued over the best part of two decades, has severely damaged its business. Before 2002 the business was flourishing but the appointment of the receivers in 2002 wrecked Zumax's ability to trade. Customers did not wish to deal with a company in receivership and other Banks would not lend to it. Zumax says that this led to a severe depletion of its assets, including to its inability to recover the two valuable vessels from Chevron. Since 2005 it has been tied up by the Bank in expensive litigation, including the 1668 proceedings, which was finally resolved in its favour in 2018 when the Court concluded that the Bank had been guilty of fraud. It says that the lifting of the first receivership did not allow it to trade, because the Bank was continuing to assert its false claims and, indeed, imposed the second receivership, and then obtained freezing orders and garnishee orders on the same false basis that Zumax owed it money when the opposite was the case.
104. Zumax says that the Bank should be disabled by this conduct from seeking to impose sanctions. Zumax says that it cannot pay the amounts ordered by the Court of Appeal and that this is the fault of the Bank. To require the payment of those amounts as a condition of continuing the action would, it says, to turn the order of the Court of Appeal into an instrument of oppression. It draws an analogy with cases on security for costs such as Aquila Design v Cornhill Insurance [1998] BCLC 134.
105. I cannot accept Zumax's submission that (on the current facts) it would be oppressive or unfair to impose the conditions or that the Bank's past conduct is a ground for refusing to impose sanctions. While there appears to be force in at least some of Zumax's complaints about the Bank's conduct over many years there is a short answer. In December 2018 Zumax had the £3.28m odd released from the Court funds office. It knew that the appeal was imminent and that it might succeed. It knew too that it would have to repay the judgment sum if the appeal succeeded. Mordi 11 indeed addressed this possibility and explained that Zumax would provide undertakings in relation to the use of the money to guard against the case where it was necessary to repay. The undertakings were given on the assumption that Zumax might lose the appeal and be required to repay. But rather than retaining the funds pending the appeal or using them to recover and repair the barges, Zumax chose instead to disburse them to Cosmopolitan and Kasa.
106. On Zumax's own case the informal loans from Cosmopolitan and Kasa had been outstanding for many years. There is no evidence that they were pressing for repayment. Mr Nduka-Eze does not suggest that there was any pressure (and indeed the evidence suggests that, as the 85% owner of Cosmopolitan, he was in a position to influence its decisions concerning the advances to

Zumax). All he says is that the directors of Zumax (including of course himself) considered there was a “moral obligation” to pay, whatever that might mean. Zumax gambled on the outcome of the appeal and lost. This is a not to my mind a case where the imposition of a sanction would be oppressive or unfair by reason for the past conduct of the Bank. This does not of course mean that the evidence about Zumax’s current financial position is irrelevant (far from it). However, in my judgment its relevance is to the stifling argument, to which I now turn.

The stifling argument

107. Zumax says that it cannot pay the amounts due under the Court of Appeal’s order of 13 March 2019 and that to impose the order would deprive it of access to justice. As explained above, Zumax bears the burden of showing this on the balance of probabilities, and it has to show not only that it has insufficient resources of its own but also that it cannot raise the money from third party backers. Michael Wilson & Partners and Goldtrail (*supra*) show that the onus is on Zumax to supply detailed, cogent, and proper evidence which gives full and frank disclosure of its financial position and its prospects of raising the necessary funds. The Court may also draw adverse inferences from gaps in the evidence.
108. Zumax argues that it remains in financial straits. It says that the second receivership is still in place and that this has prevented it from carrying on its business profitably. It also says that the Bank’s claims to be a creditor of Zumax (which it says are false) have stymied its prospects of raising conventional bank loans.
109. I consider there is some substance in Zumax’s argument that the Bank’s claims that Zumax owes it substantial sums secured by a debenture have prevented Zumax from raising conventional bank loans. On the other hand, I think that Zumax has greatly overstated the impact of the second receivership. There is no evidence that the second receiver has become involved in the assets or business of Zumax and, indeed in the course of its submissions, Zumax accepted that it was not saying that receivership had prevented it from earning monies. Both Mordi 11 (filed in October 2018) and Nduka-Eze 8 (filed in May 2019) said that Zumax expected to generate profits from the use of its vessels, and neither suggested that it would be hindered by the second receivership.
110. There is little hard evidence about Zumax’s financial position. There are accounts (including some management accounts) up to March 2019 which show that it did not at that time have sufficient assets of its own to meet the Court of Appeal order. The accounts also show it to be loss making.
111. But there are several areas where Zumax’s evidence about its own resources is incomplete and unsatisfactory.
112. First, there are no accounts at all for the period after March 2019, so the Court does not have current information.

113. Secondly, Zumax is said to employ 10 staff. In September 2018, according to Zumax's own evidence, there was an offer from a third party to hire one of its operational barges (Zumax-1) for 9 months, extendable, at \$14,000 per day. There is evidence that another barge (Sewop Sunflower) was to be hired in May 2019 for a daily rate of \$4,000. Taken together the gross revenue of these two vessels would have been over \$5m a year. There would no doubt be associated overheads and operational costs, but no evidence has been provided about whether the barges have been hired out or the associated costs.
114. Thirdly, Zumax has not explained how it has been funding its own legal costs since the decision of the Court of Appeal. Zumax instructed a new team of Quinn Emanuel and leading and junior counsel in March 2019. The new team must have read into the case and, since April 2019, they have been engaged in producing draft Amended Particulars of Claim and supporting evidence, applying to the Supreme Court for permission to appeal, addressing the Bank's application to the Supreme Court for the imposition of conditions, preparing and issuing the second set of proceedings and obtaining permission to serve them out of the jurisdiction, and making the application for permission to amend. There is no evidence at all about their fees (which must have been substantial) or about the source of funding. The question has been raised in correspondence but has not been answered. It is reasonable to infer that Zumax has access to funds (from its own resources or third parties) to meet these fees which it has not disclosed, and that it has not presented a full and frank account of its finances to the Court.
115. I next consider whether Zumax has shown that it cannot raise the required money from others.
116. It appears that there are three equal shareholder/directors of Zumax including Mr Nduka-Eze. There is no evidence about the means of the other two shareholders, Chief Okafar and Mrs Atim Uzor, or their willingness to fund Zumax through advances.
117. Mr Nduka-Eze does not say in his statements that he is unwilling to back Zumax, or that Cosmopolitan and Kasa were not willing to advance monies. Indeed, the evidence points the other way. In Nduka-Eze 8 (served in May 2019 in the course of the Bank's application to the Supreme Court for the imposition of conditions) he said that Zumax proposed to pay £196,015 within 30 days and further sums later. He said it would be raised from Zumax's own income from barge contracts and from Cosmopolitan and Kasa. It was implicit in this that Cosmopolitan and Kasa were willing to provide the money, subject to having sufficient resources to do so. It must be noted that in that same passage he referred to the sums under the 1668 proceedings being set off and also said that the balance would be paid over 12 months. However, the passage gave no evidence of the means of Cosmopolitan and Kasa (something I return to below). The present significance of the passage is that there was no suggestion that Cosmopolitan and Kasa were not willing to back the company (subject to having sufficient means).
118. Zumax indeed submitted at the present hearing that it makes commercial sense for Zumax to invest the money required by the Court of Appeal's order and

pursue its case for tens of millions of dollars. The directors of Zumax and other backers therefore have strong financial incentives to continue to back Zumax in the proceedings, subject to having the means to do this.

119. The evidence about Mr Nduka-Eze's own ability to provide funding is far from full or detailed. He is a practising lawyer in Nigeria. He is a member of various clubs including the Lansdowne Club and Annabel's, both Mayfair Clubs which have substantial annual fees. He also has an 85% interest in Cosmopolitan (which is addressed further below). He has recently revealed that he personally owns the freehold of a 30-hectare site in Nigeria which he says is conservatively valued at Naira 2 bn (c. \$5.5 m). While this is not supported by a formal valuation it suggests that he is a man of some substance. Mr Nduka-Eze has offered the land as security, but the Bank has given evidence that it does not have capacity to accept security save in support of a loan. There is no detailed evidence to explain why Mr Nduka-Eze is not able to raise money against this property. He says in general terms that it is difficult in light of the Bank's conduct (including complaints to the Nigerian authorities and police) but there is no detailed evidence about him making attempts to raise a mortgage on the property or of being rebuffed.
120. As for Cosmopolitan, despite Mr Nduka-Eze being the 85% owner and it having until recently advanced over £3.5m to Zumax, there is no primary evidence (in the form of accounts, bank statements, or otherwise) about its means or ability to raise money from other sources.
121. Mr Nduka-Eze has very recently identified an "asset belonging to Cosmopolitan," being some land underlying a property development project in Lagos. The project is said to have a value of Naira 825m (about \$2.3m). This too has been disclosed as part of an offer of security (which the Bank says it has no legal power to accept). There is no cogent or detailed evidence explaining why Cosmopolitan cannot raise money against the project or of any actual efforts to do so. There is again little more than a general assertion that raising money is very difficult in light of the Bank's past conduct. I find this unpersuasive. There is no evidence that the Bank has complained about Cosmopolitan or interfered with its relations with its own borrowers. The Bank did not know even about the role of Cosmopolitan (or Kasa) until the service of Nduka-Eze 8 in May 2019 and there is no evidence of any complaints by the Bank against either of them since then.
122. Mr Nduka-Eze has also given evidence about a development in Nigeria which appears to involve Cosmopolitan having previously owned eight townhouses and two penthouses, of which only two remain unsold. No details have been provided about this or what became of the proceeds. But it bolsters the overall impression that Cosmopolitan is a substantial and profitable business. It was willing and able to provide large advances to Zumax until December 2018 and there is no evidence that its circumstances or fortunes have changed since then such that it can no longer provide funds to Zumax.
123. I turn to Kasa. It is said to be an unlimited liability partnership registered in Ghana. The two partners other than Mr Coleman are not named. No accounts or bank statements have been provided (though Mr Coleman, a long-standing

acquaintance and colleague of Mr Nduka-Eze addressed me at the hearing). There is almost no evidence about its assets or ability to raise funds. Kasa was able to provide substantial funds to Zumax, which were apparently unpaid until December 2018 and there is no evidence to show that its circumstances have changed so that it would not be able to provide similar levels of funding now.

124. It is also important to be bear in mind the history of the relationship between Zumax and Cosmopolitan and Kasa. The two companies have apparently been willing to advance funds to Zumax on informal terms without pressing for repayment. No details have been given of the commercial terms of the lending (including as to interest or any right to share of the proceeds of the litigation conducted by Zumax) but Cosmopolitan and Kasa have both chosen to advance funds to Zumax knowing of its historical trading difficulties and its troubled relationship with the Bank.
125. As I have already noted, there is no suggestion that Cosmopolitan or Kasa are unwilling to lend further funds to Zumax to pursue the litigation. Zumax says instead (in very general terms) that the money was passed to underlying investors or creditors and that they are unwilling to reinvest the money. This evidence is strikingly short on detail. There is nothing about any efforts made to obtain further funding from the recipients. The evidence is so cursory that the Court cannot objectively assess its cogency.
126. Zumax has not given any details of what became of the money when it was returned to Cosmopolitan and Kasa, and it is not possible fairly to test or scrutinise the assertion that the necessary funds could not be raised again. No details are given as to the identity of the investors or creditors or how much they each received. It is not clear for instance how much if anything Mr Nduka-Eze himself received. Given his 85% ownership interest in Cosmopolitan, in the absence of other evidence, it is reasonable to assume that he received a large proportion of it. But his evidence does not provide details or say what he has done with any money he received.
127. While Zumax says in general terms that the (unidentified) underlying investors or creditors are unwilling to re-invest the money, this is explained (in very general terms) by reference to the Bank's complaints about Mr Nduka-Eze to the Nigerian criminal authorities. It appears to be suggested that the other underlying investors want to avoid the same thing happening to them. This is not convincing. The complaints to the police are now historical (dating from about 2011) and on the available evidence is it is possible that some of the lending via Cosmopolitan and Kasa has happened since then. In any case, if the monies are advanced to Zumax to enable it to meet the Court of Appeal's order there is no reason why the Bank should know who ultimately provided the funding.
128. In summary, Zumax has not provided a full and transparent account of its ability to meet the order for payment. There are many gaps in the evidence about its own means and those of Mr Nduka-Eze, the other shareholders, and its historical backers, Cosmopolitan and Kasa. There is no suggestion that they are unwilling to do so (subject to having the means). There are no details

about what became of the monies released to Zumax in December 2018 or what efforts have been made to recover them since the order of the Court of Appeal. There is no evidence about Zumax's trading since March 2019 or whether it has generated revenues on its vessels. Zumax has not disclosed how it has paid its own lawyers since March 2019. There is, on the other hand, evidence suggesting that Cosmopolitan is a substantial business and that Mr Nduka-Eze is a reasonably wealthy man but the evidence about his assets is exiguous. Cosmopolitan and Kasa were able and willing to provide Zumax with funding until 2018 and there is no reason, given the evidence, to conclude that they would not be able to provide similar funding now.

129. The burden of showing that it will be denied justice if the Court of Appeal's order is enforced by a sanction is on Zumax. The Court is entitled, indeed required, to scrutinise the evidence with a careful eye and to draw adverse inferences from obvious gaps (of which there are many). Zumax has failed to persuade me on the balance of probabilities that it will be unable to pay the amount owing under the Court of Appeal order if a debaring sanction is imposed.

The sums owed to Zumax under the judgment of Obadina J

130. Zumax contends that it would be wrong to impose a sanction for its failure to pay the sums owing under the Court of Appeal's appeal when the Bank has failed to pay the Naira 602.3m due under the order of Obadina J. (Zumax says that there are in fact further substantial sums owing to it by the Bank, but the only one established by an order of a Court is that contained in the order of Obadina J.)
131. The Bank has appealed that order and has sought a stay from the Court of Appeal.
132. Zumax's argument based on Obadina J's order point is closely related to the set off argument advanced to the Court of Appeal in the post-judgment submissions. The Court of Appeal decided to impose the requirement to repay the full amount of the judgment sum despite the order of Obadina J. In my judgment the order of the Court of Appeal is to be regarded as an unconditional and independent obligation, without linkage to any sums payable by the Bank to Zumax. I consider that any issues there may be about the enforcement the Nigerian judgment debt are properly to be addressed in Nigeria. I do not consider that the existence of Obadina J's order is a reason for refusing to enforce the Court of Appeal's unconditional order by imposing a sanction.

Other factors

133. There is no other convenient way for the Bank to enforce the 13 March 2019 order. Zumax is a Nigerian company. It has not produced recent accounts, and Zumax itself contends that it does not have sufficient resources of its own to meet the order. There are no assets within the jurisdiction and the evidence suggests that the Bank would have difficulties seeking to execute the order against Zumax in Nigeria.

134. Zumax complains that the Bank still has the title deeds its barges including those referred to in Mordi 11. The Bank says that it has searched for the deeds and cannot find them. It has explained to Zumax how to obtain new deeds. This is an application which only Zumax can make and it is relatively inexpensive. There is nothing in this point to dissuade the Court from making an order imposing sanctions on Zumax.

Conclusions

135. The Court of Appeal made its order on 13 March 2019 and so far only £100,000 has been paid. Orders of the Court should be generally complied with and, if necessary, enforced by appropriate sanctions. The Court of Appeal considered a number of the points now relied on by Zumax (such as the set off argument and Zumax's arguments about the Warri bank statements). Zumax had £3.286 million in its hands in December 2018 but, with the hearing of the Court of Appeal imminent, rather than holding the monies pending the outcome or investing the funds in valuable assets, it chose to pay off advances to funders. Though it complains about two decades of conduct by the Bank, Zumax itself chose to pay out the judgment sum without making reserves. Zumax has failed to discharge the burden of establishing that its claim will be stifled by the sanction sought. Nor is there any obvious alternative way of enforcing the order. I consider that it is appropriate to impose the sanctions sought in the application save in respect of the amount of £603,022 (see [93] above); on the working assumption of this application (that Zumax will be permitted to amend) that is a sum to which the Bank has no arguable defence. The parties should seek if possible to agree an order giving effect to this judgment.
136. The Bank seeks an order that if it fails to comply with the proposed sanction Zumax shall be prevented from taking or continuing with any other claim based on the same causes of action as in the present action. The Bank refers specifically to the second proceedings. It contends that it would be abusive for Zumax to continue that action where it is continuing breach of the order of the Court of Appeal in the present case. While I see considerable force in the Bank's submission, I was not taken to any of the authorities about a second action being abusive and heard no argument about it, and I am not prepared to make this order. Naturally by taking this course I am not to be taken to suggest that Zumax may properly continue the second proceedings without first complying with the Court of Appeal's order of 13 March 2018.