Neutral Citation Number: 2014 EWHC 2075 (Ch)

Case No: HC13E04381

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2014

Before :

MR CHARLES HOLLANDER QC (SITTING AS A DEPUTY JUDGE)

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Between :

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

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- -

Phillip Bliss Aliker (instructed by FCMB legal department) for the Defendant
Francis Collaco Moraes (instructed by Mordi & Co) for the Claimant

Hearing date: 8-9 May 2014

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JUDGMENT

MR CHARLES HOLLANDER QC (SITTING AS A DEPUTY JUDGE):

The Applications

1. There are applications by the Defendant before the court as follows :

   (a) An application dated 6 December 2013 for an extension of time to apply to challenge the jurisdiction of the court

   (b) An application dated 11 December 2013 to challenge the jurisdiction of the court on the basis that (i) the court does not have jurisdiction to hear the matter (ii) forum non conveniens, alternatively an application for a stay of proceedings

   The alternative application for a stay of proceedings is based on a number of grounds (i) inherent jurisdiction (ii) summary judgment (iii) strike out of the claim as an abuse of process (iv) security for costs.

2. The application was surprisingly estimated for only one day but it was in the event difficult to complete within two days. Thus I permitted both parties to serve further written submissions after the hearing and I have taken into account the post-hearing written submissions of both parties.

3. The Claimant ("Zumax") is a Nigerian company previously engaged in the oil services business in Nigeria dealing primarily with Shell and Chevron. A nominee of Zumax, Redsear Limited (an Isle of Man incorporated company), received U.S. dollar payments made in respect of services provided by Zumax in a U.S. dollar account at the London branch of Chase Manhattan International Limited (which subsequently became J.P. Morgan Bank)("Chase") ("the Redsear account"). Zumax says that if the offshore funds were needed to meet Nigerian costs they would be remitted to the correspondent bank accounts with Commerzbank AG (detailed below) ("Commerzbank") to be forwarded to Zumax.

4. First City Monument Bank plc ("FCMB") is a Nigerian registered bank. It is the product of a series of Nigerian bank mergers. By such mergers it assumed all the liabilities and obligations of amongst other banks, IMB International Bank plc (formerly known as International Merchant Bank plc) ("IMB") and Finbank.

5. IMB were Zumax's bankers. IMB Morgan plc ("IMB Morgan") (formerly known as IMB Securities plc) was a subsidiary of IMB.

6. IMB maintained a U.S. dollar denominated correspondent bank account at the London branch of Commerzbank A.G. with account no.160122964010/15 USD ("the IMB Commerzbank account"). IMB Morgan maintained at the same bank branch a second U.S. dollar denominated correspondent bank account no.160210002200 USD ("the IMB Morgan Commerzbank account").

7. Between May 2000 and April 2002 the sum of U.S.$3.547 million was, by authorised transfers, transferred from the Redsear account to the IMB and IMB Morgan Commerzbank accounts. There were nine transactions detailed in paragraph 8 of the Particulars of Claim. Those transfers were made by Mr Edwin Chinye as detailed in manuscript instructions given to Chase. The instructions make clear that the sums transferred are to be remitted to Zumax. This claim seeks the recovery of U.S.$3,507,450 of funds so remitted to the two Commerzbank accounts ("the Funds").

8. Zumax's case is that the effect of these instructions was that the monies were received by IMB and IMB Morgan subject to a *Quistclose* trust. Zumax say they never received these funds and they are entitled to make proprietary claims against FCMB as the successors in title of IMB. Although FCMB did not succeed to the liabilities of IMB Morgan, Zumax say that IMB Morgan were, for this purpose agents or nominees of IMB.

9. As I explain below, Zumax subsequently went into receivership as a result of its inability to pay a loan made by IMB. There have been a number of actions in Nigeria and England involving both parties which I deal with below and which formed part of the argument before me.

The application to serve out

10. On 19 September 2013 Deputy Master Nurse granted Zumax permission to serve the Claim Form in this action out of the jurisdiction. On 8 and 9 October 2013 service was effected in Nigeria. Service was acknowledged on 30 October.

11. On 7 November FCMB's solicitors sought and were given by Zumax's solicitors a 28 day extension of time to prepare its application and evidence in support of a

jurisdiction challenge and wrote to the court confirming that. That extension expired on 5 December. On 4 December FCMB sought in correspondence a further extension until 31 January 2014. A response on 6 December refused this further extension and pointed out that time had now expired. FCMB made an application to court for an extension of time purportedly dated 5 December but in fact sent to the court by fax at 1616 hrs on Friday 6 December which was, given the time on 6 December, only issued by the court on Monday 9 December. On 11 December FCMB made a substantive application to challenge jurisdiction. At this stage no evidence was served in support of either application.

12. On 16 December Zumax's solicitors sought disclosure and inspection of copies of Commerzbank accounts of FCMB, and made an application on 20 December. On 4 February 2014 Master Teverson granted Zumax's application for copies of Commerzbank account documents.

13. On 16 January 2014 Master Teverson gave directions on FCMB's applications, including requiring evidence to be served by 6 February. The master also set a timescale for any subsequent application for permission to rely on expert evidence. In the event a late application was made by FCMB in relation to expert evidence which was dismissed by Deputy Master Matthews on 18 February.

14. On 5 March Zumax made an application for summary judgment and then applied for it to be heard together with FCMB's application, which Master Teverson refused on 26 March. A security for costs application is also referred to in the papers, although it was not advanced before me.

15. FCMB then made its own application under the Bankers Books Evidence Act on 4 April against Commerzbank. This application is significant because it is argued by Zumax that it amounts to a submission to the jurisdiction.

16. On 7 May 2014, in the light of the position taken by Zumax as to the failure to make the jurisdiction application in time, FCMB made an application for relief against sanctions and served a witness statement explaining why it made the jurisdiction application out of time.

The arguments: summary

17. FCMB seek to set aside service out on grounds that:

(a) There was no sufficiently arguable case made out for service out

(b) The order for service out should be set aside for non-disclosure

(c) The appropriate forum is Nigeria.

18. In the alternative FCMB seek orders striking out the proceedings and for summary judgment, although, save to the extent they arise as part of the jurisdiction applications, they cannot be dealt with until the jurisdiction application has been resolved.

19. Zumax contend:

(a) No application challenging the jurisdiction was made in time; therefore FCMB are deemed to have submitted to the jurisdiction

(b) Although the court has power to grant relief against sanctions, in the circumstances no relief against sanctions should be granted

(c) In any event, by seeking relief in the action by their Bankers Books Evidence Act application dated 4 April 2014, without reserving their position FCMB submitted to the jurisdiction

(d) The order for service out was justified and there was no non-disclosure

(e) The appropriate forum is England.

Application made too late?

20. CPR Pt11 deals with the procedure for disputing the Court's jurisdiction. It provides as follows:

"(1) A defendant who wishes to—

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must—

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant—

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying the proceedings….

…

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file—

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence."

21. In *Texan Management Ltd v Pacific Electric Wire and Cable Company Ltd [2009]UKPC 46* the Privy Council, whilst considering the Eastern Caribbean equivalent of CPR Pt 11, looked at the effect of the new CPR provisions on stays of proceedings and service out. This decision impacts on several points relevant to this application.

22. At [66] Lord Collins pointed out that although it is inelegantly and inconsistently drafted, CPR Pt 11 should be interpreted as being intended to apply to applications for stays of proceedings as well as challenges to the jurisdiction *stricto sensu.* He pointed out at [69] that:

> "The tight time limits in the English CPR Part 11 and EC CPR r.9.7 make complete sense in the case of applications to set aside service or discharge an order for service out of the jurisdiction."

23. He continued :

> "73. The overall effect is this. A defendant served within the jurisdiction who has reasons for applying for a stay on *forum conveniens* grounds at that time should normally make the application under EC CPR r.9.7/English CPR Part

> 11. It is doubtful whether failure to make such an application in time means that the defendant has conclusively accepted that the court should exercise its jurisdiction, but that will not normally matter because the court has a power to extend the time for compliance with any rule, even if the application for extension of time is made after the time for compliance has passed: EC CPR r.26.1(2)(k). It has been held that even though English CPR r. 11(5) (EC CPR r.9.7(5)) contains a provision deeming the defendant to have accepted the jurisdiction of the court, the court has power to extend the period in EC CPR r.9.7(3) retrospectively after the period for defence has expired: *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch), [2006] ILPr 129, at [46] (a case of service outside the jurisdiction).
>
> 74. In addition, except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right: EC CPR r.26.9.
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> 75. Together these powers are sufficient to give effect to the overriding purpose of the jurisdiction to stay proceedings on *forum non conveniens* grounds, which is to ensure that the claim is tried in the forum which is more suitable "for the interests of the parties and for the ends of justice": *Sim v Robinow* (1892) 19 R (Ct. of Sess) 665, 668, *per* Lord Kinnear.
>
> 76. Where the circumstances which give rise to an application for a stay arise after the service of proceedings and outside the time limits in EC CPR r.9.7/English CPR Part 11, then the application may be made either under the inherent jurisdiction or under the court's powers of management in EC CPR r.26.2(q)/English CPR r.3.1(2)(f).
>
> 77. To summarise, the overall position is this: (1) if at the time the proceedings are first served, there are circumstances which would justify a stay, the application should be made promptly under EC CPR r.9.7/English CPR Part 11; (2) any failure to comply strictly with time-limits may be dealt with by an extension of the time-limits, and any formal defect in the application may be cured by the court; (3) if circumstances arise subsequently which would justify an application for a stay, the application would be made under the inherent jurisdiction or EC CPR r. 26.2(q)/English CPR r.3.1(2)(f)."

24. He then went on to consider the position as to relief from sanctions because the application was out of time.

> " 80. It is only necessary to deal with PEWC's point that the judge ought to have applied the check list for relief from sanctions in EC CPR r 26.8. No question of a sanction arises. Even if PEWC were right in saying that there was no proper application under r.9.7 and therefore Texan and Dragon were to be treated as having accepted that the court had jurisdiction to try the claim, that is not a sanction, since it applies to any defendant who files an acknowledgment of service and is not in a position to contest the jurisdiction."

25. Lord Collins thus recognised that there will be cases where it was not appropriate, or possible, to apply for a stay of proceedings at the same time as making an application

to set aside service out of the jurisdiction. But in any normal case, the court would expect the application for a stay to be made within the same time limits as applicable where an application was made to set aside service.

26. In the present case, an application for a stay is made as well. However, the only significance of such an application is that (1) such an application might be relevant in the event that I decide that FCMB voluntarily submitted to the jurisdiction by making an application inconsistent with the jurisdiction challenge (2) in the event that I refuse to extend time for a jurisdiction challenge, it is possible that FCMB might be able to rely on the application for a stay rather than the jurisdiction challenge.

27. The further question arises as to as to how the court should approach applications out of time, both for a stay and jurisdiction challenge. It was accepted by Zumax that even though the deeming provision had already had effect, the court had power to grant an extension of time retrospectively in appropriate circumstances. The decision of Lawrence Collins J in *Chris Sawyer v Atari Interactive Inc [2005] EWHC 2351 (Ch)* to that effect at [46] was approved by Lord Collins in the passage cited above from *Texan Management.* The *Mitchell* jurisdiction in relation to relief from sanctions, considered below, is well known and might be expected to apply to applications to set aside service. Yet Lord Collins said that because of the deeming provisions of CPR Pt 11, no question of relief from sanctions arises.

28. Lord Collins refers expressly at [69] to the "tight time limits" applicable to applications to set aside service out. If they are not complied with, the deeming provision automatically provides that the defendant is treated as having accepted the jurisdiction of the court. Thus relief against sanctions is not an appropriate expression here, as the deeming provision is not a sanction.

29. I was not shown any case which considered applications for an extension of time in relation to jurisdiction applications in the post-*Mitchell* era. It is relevant to cite what Lawrence Collins J said in *Chris Sawyer at [45]-[47]:*

> "45. The power under CPR, r.3.1(2)(a) to extend time may be exercised "Except where these Rules provide otherwise…". Although CPR r.11(5) contains a deeming provision providing for the consequences of non-compliance, there is nothing in the rule which displaces the court's general discretion to extend time.
>
> 46. It had been held in several decisions at first instance under the previous version of CPR, r.11(4) (when the time-limit was linked to the period for service of defence) that the court had power retrospectively to extend the time

for service of defence so as to allow the defendant to contest the jurisdiction : *USF Ltd v. Aqua Technology Hanson NV/SA,* January 30, 2001; *Midland Resources Ltd v. Gonvarri Industrial SA* [2002] LL.Pr. 74 and *Monrose Investments Ltd v. Orion Nominees Frichmond Corporate Service Ltd* [2002] LL.Pr 267; *SSQ Europe SA v. Johann & Backes OHG* [2002] 1 Lloyd's Rep. 465. In *Burns-Anderson Independent Network Plc v. Francis Henry Wheeler* [2005] 1 Lloyd's Rep 580 at paras 30-34 (HH Judge Havelock-Allen QC, Bristol Mercantile Court) the power to extend the 14 day period in CPR r.11(4) was assumed to exist.

47. I am satisfied that I have power to extend that period. It would be absurd if a simple error by solicitors as to the time limit had the potentially far-reaching effect of causing a submission to the jurisdiction, which could not be rectified by an application for an extension of time, and which would lead to a further application by the defendant for a stay of proceedings (in which the burden would be reversed), and perhaps (if damage could be shown) to an action for negligence against the solicitors."

30. *Chris Sawyer* was followed by Beatson J in *Polymer Vision R&D Ltd v Sebastiaan Maarten Marie Van Dooren [2011] EWHC 2951 (Comm)* at [74].

31. In this regard I conclude that the position is as follows:

(a) Where an application is made to set aside service out, there is power to extend time after the time limit has expired.

(b) In cases where a stay is applied for, the court will consider whether the stay application is merely the other side of the coin to the setting aside application, or whether it is an application of a different nature, and in particular whether it could readily have been made at the outset of proceedings. In the former case, as here, the principles on extending time should be no different from those set out above. However, in the latter types of case (not applicable in the present case), the court may take a different attitude to an application made outside the time limits.

32. Zumax contends:

(a) FNCB had until 13 November 2013 to make an application to challenge jurisdiction (CPR 11.1(4)).

(b) The parties were not permitted to extend the time specified in CPR11.1(4) (see CPR3.8(3)). That parties are prohibited from agreeing to extend periods prescribed by the CPR as recently confirmed by Turner J in; *Ma Lloyd & Sons Ltd (t/a KPM Marine) v*

PPC International Ltd (t/a Professional Powercraft) [2014] EWHC 41 (QB) [2014] 2 Costs L.R. 256 at [27]

(c) The court did not approve any extension. In any event that agreement was only to 5 December 2013.

(d) FNCB in breach of CPR 11.1(9) did not file or serve any evidence with the application to challenge jurisdiction of the court.

(e) Consequently pursuant to CPR 11.1(5) D has accepted that the court has jurisdiction to try the claim see: *Hoddinott v Persimmon Homes (Wessex) Limited* [2008] 1 WLR 806 at [27-28].

33. Zumax accepted that the court had jurisdiction to grant an extension of time retrospectively. Zumax pointed out that no application for relief was made until just before the commencement of the hearing of the application (7 May) and was thus made too late and the grounds inadequate. They contended that no extension should be given.

34. FCMB accepted that they were out of time and also accepted that it was necessary for them to make an application for relief from sanctions, but pointed out:

(a) that, apart from the failure to seek the sanction of the court on an extension agreed by Zumax, the effective delay was a single day

(b) The documents required to be served with the Claim Form had not all been served on them

(c) There was, they contended, good reason for the delay

35. Although, as I have said, Lord Collins indicated that the *Mitchell* jurisdiction does not apply, it is relevant to cite the relevant *Mitchell* jurisdiction to understand the approach of the court to failures to comply with time limits. In *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537* the Court of Appeal said;

> "40. We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle 'de minimis non curat lex' (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance;

> or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.
>
> 41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event …
>
> 46. The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously.
> …
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> 48. … In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial."

See further [34],[38], and [49-50] of the judgment.

Application to extend time: discussion

36. My initial reaction, when told that Zumax was contending that FCMB should not be granted an extension of time when the application was (1) made one day late and (2) also based on a failure to obtain the court's sanction for an agreed extension of time

was that it would be disproportionate to refuse an extension. However, it seems to me on consideration that there is much more to the point than meets the eye.

37. CPR r11(1)(5) provides that a defendant who fails to make a jurisdiction application in time is to be treated as having accepted that the court has jurisdiction to try the claim. So on 5 December FCMB were deemed to have accepted the jurisdiction of the English court and lost its right to challenge jurisdiction. No claim can proceed until jurisdiction is established and time for any challenge has passed or been waived. The wording of the rule reflects the importance given by the rules to observance of this particular time limit.

38. I would regard the failure to seek the approval of the court for the extension agreed in correspondence between solicitors as "trivial."

39. However, the failure to make an application by 5 December 2013 may be seen in a different category. At that date a 28 day extension of the specified period in which a challenge must be made had already been given. By 5 December, FCMB were obliged not only to make the application but also serve their evidence in support. It appears they were not in any position to do so. The application made on 6 December was only for a further extension of time and when the substantive application was ultimately made on the 11th no evidence was served, nor does it appear it was anywhere near ready.

40. Mrs Nkontchou seeks to explain the position in her fifth witness statement. This witness statement was itself not made until 7 May, (erroneously stated as 7 March) the day before first day of the hearing before me.

41. She says FCMB instructed lawyers on 27 October 2013, and he refers to telephone conferences on 30 and 31 October . He made a trip to Nigeria on 2 November. But thereafter what happened remains somewhat obscure:

> "16. I am told by Tony Ibekwe of the Bank that during the month of November 2013 the Bank was still evaluating the issues. There had been a number of corporate mergers which made it very difficult to get to the bottom of the issues. When he left Nigeria for London on 8 December 2013, there were still a great many questions which remained unanswered. There were documents which the Bank had yet to get a hold of. However, it was decided that Mr Ibekwe should travel to London and do the best that he could on the documents and with the information then available. "

42. Mrs Nkontchou's witness statement does little to assist the court as to why FCMB did not make the application (either for an extension or the substantive application) in time. In the event, no evidence was served until 6 February 2014. It is right to recognise that Master Teverson at a hearing on 16 January (by which time no evidence had been served) required evidence to be served only by 6 February. However, in considering the application for an extension, it is relevant to note that all that was done on 6 December was to ask for more time, and on 11 December, the substantive application was made with no supporting evidence, notwithstanding the wording of r11(1)(4)(b).

43. FCMB point out that they had not been served with the documents required to be served when service was effected. They were missing the witness statement served in support of the application for leave to serve out which they say hampered their response. When they ultimately asked for the witness statement it was served without exhibits and the exhibits came much later.

44. In fact on 8 October 2013 Zumax effected service through an officer of the Lagos High Court then sought to serve copies on FCMB on the following day to ensure the correct paperwork was provided but was "aggressively rebuffed" by FCMB officers who maintained that FCMB had been served with all relevant paperwork (see Nduka-Eze 2/66). It is important to note that the request for a copy of the witness statement in support of service out was then not made until 10 December 2013. As it was impossible to do any detailed work on the jurisdiction challenge until this document was received, as it was the basis on which Zumax had obtained leave to serve out, the failure to ask for this document until 10 December speaks volumes about the work which had been done by that date. By 10 December 2013 a 28 day consensual extension had already expired five days previously.

45. In relation to the application to extend time for making this jurisdiction application out of time in my view (i) the delay in making the application came after a lengthy agreed extension of time (iii) no explanation or evidence in support of the application for an extension of time was made until the last-minute application on 7 May under pressure from Zumax (iv) the explanation for the delay was, and remains, wholly inadequate (v) when the application was made on 6 December, it was initially only an application for a further extension of time made without evidence (vi) a substantive application was made on 11 December but in breach of the rules no evidence was served; although the master subsequently extended time for service of evidence, this

indicates that the evidence in support of the application had not been prepared by 11 December (vii) the failure to seek a copy of the witness statement in support of the application until 10 December indicates the failure to carry out basic work to prepare the application; indeed, the fact that it was several days after the 28 day extension expired before even the most basic document, the witness statement in support of the application to serve out, was sought, speaks volumes about the work done by that stage (viii) I regard the delay as non trivial, the explanation for the delay late and entirely unsatisfactory

46. I consider that, as Lord Collins makes clear, and contrary to the submissions put before me, *Mitchell* does not apply because there is here no application for relief from sanctions. But *Mitchell* does have some relevance as it provides an indication of the present policy of the courts in treating time limits as more important than perhaps was previously seen to be the case. Moreover, where the CPR states that the effect of this particular time limit not being complied with is that the defendant is treated as accepting the jurisdiction of the court to try the case, this cannot be seen as an unimportant time limit.

47. I recognise that Zumax have not put evidence of specific prejudice caused by the failure to make the application on time. But it cannot be a precondition of refusing an extension of time that prejudice is shown. I do not consider any good reason has been shown for the failure to make an application in time to justify an extension of time . I refuse to extend time under the 5 December application or to extend time retrospectively or (if applicable) grant relief against sanctions.

Submission to the jurisdiction

48. In case I am wrong so far, I need to consider the other issues.

49. The next issue is whether FCMB submitted to the jurisdiction by making an application in the course of these proceedings dated 4 April 2014 under the Bankers Books Evidence Act against Commerzbank. The application sought an order requiring Commerzbank to release and provide copies of all account records held by them in relation to the accounts of FCMB's predecessor IMB International Bank plc and the commercial entities known as IMB Morgan plc and IMB Securities Ltd. The application was supported by the fourth witness statement from Mrs Nkontchou,

There is no reservation of position pending the jurisdiction application or other reference to that application. Indeed, the fact that jurisdiction is being challenged is not mentioned either in the application notice or in the witness. At para 15 Mrs Nkontchou says:

> "... the Claimant makes very serious allegations of fraud against the defendant. It is essential that the defendant is able to meet these allegations. The Defendant requires the information to assist it in narrowing the issues in contention and to ensure that all matters are before the court. Furthermore, access to the documents should assist the court to resolve the dispute justly and expeditiously. "

50. In *SMAY Investments Ltd v Sachdev 2003 1WLR 1973* Patten J said at [41]

"It seems to me that when a Defendant has complied with CPR Part 11 with a view to challenging the jurisdiction of the Court, and the time for making his application under CPR Part 11(4) has not yet expired, then any conduct on his part said to amount to a submission to jurisdiction, and therefore a waiver of that right of challenge, must be wholly unequivocal. That was also the view of Colman J in relation to the provisions of the old RSC. In *Spargos Mining v Atlantic Capital Corporation* (15th December 1995, unreported) he said this:

> "In approaching the question of submission, I have in mind the following authorities. In *Astro Exito Navagacion S A v W T Hsu,* otherwise known, more pronounceably, as *The 'Messiniaki Tolmi',* [1984] 1 Lloyds Reports, 266, Lord Justice Goff (as he then was) at page 270, said this: 'Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case.'
>
> In *Sage v. Double A Hydraulics Ltd,* [1992] Times Law Reports, 165, Lord Justice Farquharson said (and this is a report of the judgment which is not reported in *oratio recta):*
>
> > 'A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.'

> In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.
>
> If the well−informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning."

51. In *The Burns-Anderson Independent Network plc v Wheeler 2005 ILPr 38 at 528* Judge Havelock-Allen QC rejected at [41] the argument that in this respect knowledge is required for waiver; here the law presumes waiver regardless of the subjective intention of the defendant. The waiver is of all arguments that the claim was not properly served.

52. I recognise that at the time when this application was made, FCMB had already launched their application to challenge the jurisdiction of the court, and to that extent it differs from other cases where the alleged submission occurred before such an application had been made. But applying the test set out by Patten J, it seems to me impossible to treat this application, and the wording of the witness statement as anything other than an equivocal submission to the jurisdiction of the English court and the disinterested bystander would surely have taken the same view. It says that there are fraud issues before the court and states that the documents are required "to assist the court to resolve this dispute justly and expeditiously." That is inconsistent with the defendant's position that the court had no jurisdiction to resolve the dispute at all. In my view this application, and the terms in which it is framed, are only consistent with an acceptance that the court is being asked to consider the merits of the dispute between the parties and involves a submission to the jurisdiction by FCMB.

Effect of a submission

53. Neuberger J said in *Ledra Fisheries Ltd v Turner [2003] EWHC 1049 (Ch)*at [18]:

"Where a person has a right to bring a claim in this country and there are no grounds for disputing jurisdiction, either because no grounds actually exist or because they have been waived, then while it would be wrong to conclude in light of the breadth of the court's powers that there is no jurisdiction to stay proceedings in light of other proceedings brought abroad, the court should be slow to invoke that power.

19. As Moore-Bick J is recorded as saying by Lord Bingham CJ [in *Reichold Norway ASA v Goldman Sachs International* [1999] 2 Lloyds Rep 567] at 577 to 578:

> "Since the court's jurisdiction to stay proceedings was discretionary in the circumstances in which an application for a stay might be made, almost infinitely variable, he [that is Moore-Bick J] found it difficult to accept [and I interpose the word 'the'] submission that it would never be proper for the court to grant a stay of an action pending the outcome of proceedings. But he did accept that such a step should only be taken if there were very strong reasons for doing so and the benefits which were likely to result from doing so clearly outweighed any disadvantage to the plaintiff."

Accordingly, I agree with Mr Smith that the claimants' application to stay the counterclaim has a very high hurdle to cross.

20. There was some argument as to whether the question of forum non conveniens should be taken into account. In my judgment, it is certainly a factor which can and should be taken into account when considering an application of this sort. However, unless it is very clear that another jurisdiction is the appropriate forum then, where the opportunity to raise the forum non conveniens argument has been lost, as here, because CPR 11(5) applies, the court should be very slow to grant a stay simply on grounds of forum non conveniens, because that would be to allow a defendant, in this case a counterclaiming claimant, getting in through the back door after the front door has been locked. I should add that the question of general discretion was considered in *Reichhold* in this context, when the front door of forum non conveniens under CPR 11 has been lost. "

54. I am not aware of any subsequent authority where this particular dictum has been considered. The decision is referred to in a footnote in *Dicey, Morris and Collins* without comment. I note at [47] of *Chris Sawyer* (cited above) , Lawrence Collins J said that if an extension of time were refused, this would lead to a further application by the defendant for a stay of proceedings in which the burden (as to forum) would be reversed. This does not sit at all well with the comments of Neuberger J: if his comments in *Ledra* are correct, any such application would be otiose.

55. If the dictum of Neuberger J is correct, then it would follow that if the right to apply to set aside service out has been lost or waived, then in any normal circumstances the court will not permit the defendant to achieve the same result by making an

application for a stay. I should also note what the Court of Appeal said in *Hoddinott v Persimmon Homes (Wessex) Ltd [2008] 1WLR 806, 815:*

> "28. In our view, a defendant is fixed with the consequences stated in paragraph (5) if the two stated conditions are satisfied. At first sight, there is an apparent difficulty with the application of this approach to a case (such as the present where the defendant wishes to argue that the court should not exercise its jurisdiction to try and claim, rather than to dispute the court's jurisdiction to try the claim. The distinction between the two categories of case seems to have been well understood by the draftsman. It is clearly drawn in paragraphs (1) and (6). But paragraph (3) provides that a defendant who files an acknowledgement of service does not, by doing so, lose any right he may have "to dispute the court's jurisdiction"; and paragraph (5) provides that if the two conditions in (a) and (b) are satisfied, the defendant is treated as having accepted that the court "has jurisdiction to try the claim". It may, therefore, be argued (although it was not argued before us) that paragraphs (3) and (5) refer to paragraph (1)(a) but not paragraph (1)(b). We would reject such an argument. CPR 11 must be read as a whole. It is clear that both paragraphs (2) and (4) are referring to applications made under paragraph (1)(a) and (1)(b). Further, paragraph (5) provides that if the defendant does not make "such an application" (i.e. an application under paragraph (1)(a) or (b)), then the consequences will be as stated. Paragraph (5) cannot mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court has jurisdiction to try the claim. It must mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court should exercise its jurisdiction to try the claim. In our judgment, the reference to disputing the court's jurisdiction in paragraph (3) and accepting that the court has jurisdiction in paragraph (5) encompasses both limbs of paragraph (1). The reference to the court's jurisdiction is shorthand for both the court's jurisdiction to try the claim and the court's exercise of its jurisdiction to try the claim."

56. In *Texan Management,* at [71] Lord Collins referred to *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3107 (Ch), [2007] 1 All ER (Comm) 1160. There a Part 20 defendant out of the jurisdiction failed to make an application to dispute the jurisdiction and took steps which amounted to a submission to the jurisdiction. Sir Andrew Morritt C went on to consider and dismiss an application for a stay on the ground that Saudi Arabia was a more appropriate forum. No point appears to have been taken that the defendant was debarred from pursuing the action for a stay by virtue of his failure to make an application disputing the jurisdiction.

57. It was contended by FCMB that even if as a result of the matters set out above they were precluded from challenging the jurisdiction of the English court, nevertheless

they were entitled to make a *forum non conveniens* challenge in the same manner as if they had been served within the jurisdiction, albeit that the *Spiliada* burden of proof would be different. If the dictum of Neuberger J is correct, then the court would normally refuse to accede to such a stay application where an application to apply to set aside serve out was available but that right has been lost or waived. The dicta referred to above from Lord Collins suggest strongly that what Neuberger J said is not correct, and I prefer, with some hesitation to take the Lord Collins approach.. However, for reasons set out below, ultimately the point is not material to determination of this application.

The issues

58. On 18 December 2002 IMB placed Zumax in receivership pursuant to a debenture dated 17 December 1998 over a debt of Naira 465 million. On 2 June 2003 Mr Chinye resigned from his office as director of Zumax. It appears that Mr Chinye was responsible for a series of frauds. Mr Chinye was both a director of Zumax and a director of IMB.

59. The insolvency of Zumax led to a variety of actions in Nigeria and also litigation in England. FCMB point to the various actions in Nigeria and contend that (1) the present action is barred by Settlement Agreements entered into in Nigeria (2) alternatively those Nigerian proceedings amount to a *lis alibi pendens* which justifies the stay (3) alternatively the present proceedings are barred by proceedings in this jurisdiction before Lawrence Collins J (4) in any event these matters are relevant considerations in favour of a trial in Nigeria.

60. On 10 April 2013 lawyers for Zumax wrote a letter of claim to FCMB asserting that the sums totalling U.S.$3.547 million had not been paid to Zumax but had arrived at the IMB Morgan Commerzbank account. Prior to commencement of the proceedings, by letter dated 24 June 2013 FCMB's lawyers responded stating:

> *"IMB/Finbank denies receiving the funds allegedly transferred from the Redsear account. At all relevant times, Zumax has full knowledge that the funds were never remitted to IMB/Finbank. Zumax has unequivocally admitted this fact on oath in previous judicial proceedings before Nigerian courts…*"

61. This positive case was somewhat at odds with FCMB's protestations that, because it was successor in title of IMB, it had very little information about IMB's affairs. However, when it became apparent that this positive case was entirely untenable, as a result of Zumax obtaining an order for disclosure from Commerzbank of the bank statements which showed that the funds were indeed received and paid into the two Commerzbank accounts, at a relatively late stage in the run-up to the hearing of this application, FNCB (Mrs Nkontchou 2 w/s dated 19 March 2014) changed its case asserting that the prior maintained denial of non-receipt of the funds was a 'mistake' and sought to advance a new case. Now, in addition to the points referred to above as to other proceedings, FCMB asserts that (1) the claim is not a proprietary claim (2) the claim relates to instructions given by Mr Chinye, and at the time he was acting for Zumax rather than IMB/IMB Morgan (3) there is no basis for the claim in relation to IMB Morgan (4) the claim is statute barred under Nigerian limitation law (5) the claim is barred by laches.

62. The October 2004 Settlement Agreement between the parties sought to settle an action pending in Nigeria. It provided in the proviso at the end:

> "(iii) 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 do hereby fully release and discharge each other, … from any and all damages, suits, claims, debts, demands, assessments, obligations, liabilities, attorney's fees, costs, expenses, rights or action 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 extend to any claim arising out of this Terms of Settlement."

63. Thus 'the release and discharge' only became effective upon the parties complying with all the terms of the October 2004 agreement. It was not fulfilled and consequently there was no 'release and discharge'. (see generally paragraph 48 of the 2nd w/s of Mrs Nkontchou dated 19 March 2014).

64. A new action in 2005 led to the 2005 Settlement Agreement (dated 23 May 2005) which provided at paragraph 17:

> "Upon [1] the final effectiveness of this Terms of Settlement and [2] the termination of the law suit as provided herein and [3] the fulfilment of all the obligations stipulated therein, the parties shall and do hereby fully release and discharge each other… henceforth from any and all damages, suits, claims, debts…of any kind or character whatsoever, accrued prior to the date of execution of these terms…"

65. Again the 'release and discharge' depended on fulfilment of all of the terms of the 2005 Settlement Agreement, which did not occur. A new action has been commenced concerned with setting aside the 2005 Settlement Agreement for misrepresentation.

66. None of these actions appear to relate to the specific payments the subject of this action and, so far as is presently apparent, there seems to be no effective bar to these proceedings as a result of those actions.

67. On 30 November 2004 Lawrence Collins J gave judgment in *Commerzbank AG v IMB Morgan plc and others* [1]. The judge considered various claims to monies in the Commerzbank account and whether a variety of claimants to such monies (most of whom were entirely separate from the present parties) had made good proprietary claims. This was an interpleader claim brought by Commerzbank against IMB Morgan (but not IMB). This action arose after the Commerzbank accounts were frozen by the English court where there was evidence of money laundering and advance fee fraud in relation to monies in the accounts. That judgment contains a valuable analysis of the detail as to how the accounts worked.

68. A claim is made in those proceedings by Zumax for U$441,000 (see judgment p25) and a claim for $409,985 was admitted. What Zumax says about this is that they had limited information about the accounts in 2004. On the information now available to them, there is nothing in the judgment of Lawrence Collins J which precludes this action. They are simply precluded from making a double recovery.

69. As to the merits of the case otherwise, Zumax says that although a customer's account normally involves a debtor/creditor relationship, when monies are paid to a banker for a defined purpose such as here a Q*uistclose* trust comes into existence. The *Quistclose* principle was summarised by Lord Millett in *Twinsectra Ltd v Yardley 2002 AC 164, 184 at [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

[1] 2004 EWHC 2771.

equity will 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. The trust arises, say Zumax, in London. Indeed, in the interpleader proceedings before Lawrence Collins J, Zumax say he accepted their analysis of the accounts. A failure to pay out to Zumax or a payment to someone other than Zumax (still in London) would also involve a breach of trust. The instructions were acted on, they say, in London.

71. As for the claim being in part against IMB Morgan rather than IMB, Zumax say that IMB Morgan was a subsidiary of IMB and IMB had control over the IMB Morgan Commerzbank account as shown by (1) a SWIFT message dated 30 April 2002 from Commerzbank A.G. to George Omunubi, at IMB, for IMB to grant Commerzbank authority to debit the IMB Morgan account in the sum of U.S.$146,801 (2) a facsimile message dated 2 July 2002 from IMB in which IMB refers to the IMB Morgan account as “our account” and requests that Commerzbank make payments on the account. In the light of this, it is said the account of IMB Morgan was, at least arguably, an account held as agent or nominee for IMB.

72. As for the argument that Mr Chinye was in giving instructions acting for Zumax, and that an important issue was whether he gave and acted on instructions wearing his hat as director of Zumax or as director of IMB, Zumax says that only IMB could operate the Commerzbank account and thus any intervention from Mr Chinye could only have been as agent for IMB as its managing director. .

73. One difficulty for FNCB was that to the extent Nigerian law was relevant, they were precluded by the master’s order from leading evidence of Nigerian law. However, as for the law of limitation, it was in the event common ground that Nigerian law of

limitation was in substance the same as English law, and that Nigerian law followed the (English) 1980 Limitation Act. .

74. In *Williams v National Bank of Nigeria 2014 2WLR 355* the Supreme Court construed s21 of the Limitation Act which provided

> "21. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use."

75. Lord Sumption, for the majority, referring to the applicability of this section to constructive trustees, drew a distinction between the two different kinds of constructive trustees:

> "9. It is clear that Lord Selborne regarded as a constructive trustee any person who was not an express trustee but might be made liable in equity to account for the trust assets as if he was. The problem is that in this all-embracing sense the phrase "constructive trust" refers to two different things to which very different legal considerations apply. The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees *de son tort*, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed. Others, such as company directors, are by virtue of their status fiduciaries with very similar obligations. In its second meaning, the phrase "constructive trustee" refers to something else. It comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not. These can conveniently be called cases of ancillary liability. The intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets. It is purely remedial. The distinction between these two categories is not just a matter of the chronology of events leading to liability. It is fundamental. In the words of Millett LJ in *Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, at 413, it is "the distinction between an institutional trust and a remedial formula – between a trust and a catch-phrase."

76. S21 provided for no limitation period where the trustee was of the first kind to which he refers. It was accepted before me that the Nigerian limitation provisions follow s21. It is apparent from what Lord Sumption says that a person who receives money under an express trust, as is alleged here, falls within the first category of trustee and no limitation period applies.

77. As for laches, in *Gwembe Valley Development Company Ltd v Koshy [2003] EWCA Civ 1048* at [140] the court held that where no limitation period is prescribed by the 1980 Limitation Act, the defence of laches was equally not available.

78. In any event Zumax contend that the relevant period of limitation was extended by the Nigerian equivalent of s32(1) which provides:

> "....where in the case of any action for which a period of limitation is provided by this Act, either −
>
> (a) the action is based on the fraud of the Defendant; or
> (b) any fact relevant to the Plaintiff's right of action has been deliberately concealed from him by the Defendant.... the period of limitation shall not begin to run until the Plaintiff has discovered the fraud, concealment....(as the case may be) or could with reasonable diligence have discovered it...."

See *Collins v Brebner 26.1.2000 unreported, Court of Appeal at [39]-[45]/.*

79. As to the merits, it is far from clear to me which, if any, of the numerous defences presently raised by FCMB would survive a summary judgment application. That is an issue for another day. It is to be remembered that until very recently FCMB were aggressively asserting that IMB/IMB Morgan had never received the money and that Zumax knew that to be the case. It was not clear to me how much thought had really been given to the various alleged defences, or which of the numerous defences raised were really arguable at all. In any event, in my view Zumax has much the better of the argument on the merits at present.

Leave to serve out

80. The application for leave to serve out was based on three grounds within CPR Practice Direction 6B. FCMB challenges each of these. Dealing with them individually:

(a) *(11) The whole subject matter of the claim relates to property located within the jurisdiction*

(b) *(15) A claim is made for a remedy against the defendant as constructive trustee where the defendant's alleged liability arises out of acts committed within the jurisdiction*

(c) *(16) A claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction*

81. The principles concerning applications for service out were summarised by Toulson J in *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [2004] 1 Lloyd's Rep. 731 at [9-11]

> "9. First, the applicant must show in respect of each claim that he has a "good arguable case" that it falls within a relevant sub-paragraph of rule 6.20: *Seaconsar.* This is a less stringent test than requiring proof on the balance of probabilities.
>
> 10. Secondly, the applicant must show that there is a serious issue to be tried in respect of each claim which he is seeking to make. The "merits threshold" under this test is the same as if the claimant were resisting an application by the defendant for summary judgment under rule 24.2: De Molestina v Ponton [2002] 1 Lloyd's Rep 271. This is reflected in the requirement, by rule 6.21(b), for the applicant to provide evidence that he believes that his claim has "a reasonable prospect of success" – the antithesis of a claim which has "no real prospect of succeeding" and is therefore liable to summary dismissal under rule 24.2. The underlying rationale is that the court should not subject a foreign litigant to proceedings which the defendant would be entitled to have summarily dismissed.
>
> 11. Thirdly, the applicant must persuade the court that England is clearly the appropriate forum."

82. Each of the three grounds relied upon for service out are in my view made out to the degree of arguability required. In *Nabb Brothers Ltd v Lloyds Bank International (Guernsey) Ltd 2005 ILPr 37* Lawrence Collins J (a judge who seems to feature at almost every stage of this judgment) expressed the tentative view at [74]-[77] that a proprietary equitable claim would fall within CPR 6.20(15). His comments are also consistent with the present claim falling within the restitutionary part of the rule.

Material non-disclosure.

83. FCMB argued that leave to serve out should be set aside as a result of a series of material non-disclosures or misstatements in the evidence in support of the application to serve out.

84. The principles concerning disclosure in applications for service out were set out by Toulson J in *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [2004] 1 Lloyd's Rep. 731 at [24-36].

85. In counsel's skeleton argument, a lengthy list of matters which should have been disclosed are catalogued. In summary the points were as follows (see para 35 of FCMB's skeleton argument which sets them out in full):

(a) Zumax exaggerated the significance of the judgment of Lawrence Collins J in previous English interpleader proceedings
(b) The impression was wrongly given that the claims were not the subject of previous Nigerian proceedings
(c) Zumax said nothing about the relationship between Zumax and Mr Chinye
(d) Zumax failed to inform the court that it had a potential liability to IMB as a constructive trustee
(e) Zumax said nothing to the court as to the possibility that some or all of the monies in question had already been paid
(f) No reference was made to Nigerian law of limitation
(g) Zumax failed to give the court a balanced view of the Nigerian claims
(h) Zumax failed to inform the court that certain actions in Nigeria had been struck out
(i) Zumax failed to point out that it had previously elected to sue others in relation to Mr Chinye's frauds
(j) Zumax failed to draw attention to the prejudice to FCMB in the claim being brought at this late stage.

86. In the Application Notice dated 11 December 2013, reference is made to material non-disclosure but no detail is given. A letter from FCMB's solicitors dated 11 December alleges material non-disclosure nut the only points taken there are (i) failure to refer to previous actions in Nigeria (ii) failure to refer to 2004 and 2005 Nigerian settlement agreements (see p2). The witness statement served on 6 February 2014 in support of applications sets out a case of non-disclosure at para 11 (Nkontchou 1) but in terms that are in many respects different from those advanced by counsel in his skeleton for the hearing and takes less points than he does.

87. FCMB had set out its case in detail in its solicitors' letter of 24 June 2013. It was, therefore, to be expected that the witness statement in support of the application to serve out would focus on responding to the points taken in FCMB's letter of 24 June. Whilst an applicant must draw the attention of the court to matters within its knowledge which potentially count against the application, where the defendant has already set out its case in a considered pre-action letter, it will not usually be necessary for the applicant to seek to anticipate defences not raised by the defendant, unless, of course, those relate to matters which could not fairly be known about by the defendant because they relate to matters solely within the knowledge of the applicant.

88. The letter of 24 June asserted the following matters by way of response to the letter of claim, having taken two and a half months to reply: (i) that the funds were never remitted to IMB/Finbank (ii) Zumax had so admitted in previous proceedings in Nigeria (iii) FCMB were being threatened with suit for the acts of their subsidiary IMB Morgan, and the doctrine of separate corporate personality precluded such suit (iv) the acts in question were acts of Mr Chinye, and at the time he was acting for Zumax not FCMB. There was no suggestion in the letter that any objection would be taken to the jurisdiction of the English court.

89. Ultimately, the case of Zumax is, and has always been, very simple. Monies were transferred to the accounts of IMB/IMB Morgan but were never subsequently received by Zumax. FCMB had asserted that the monies were never received in the accounts of IMB/IMB Morgan but that was plainly wrong. The transfers took place in this jurisdiction. The proceedings in Nigeria were an irrelevance.

90. In Mr Nduka-Eze's witness statement in support of leave to serve out the circumstances of the transfers were explained in detail in a manner which responded to the various points taken by FCMB. It is true that there is no express reference to Mr Chinye in the witness statement and a criticism can be made of the failure to deal fully with that point, but the transfer of funds is dealt with in sufficient detail, with the documents exhibited, and the 24 June letter is itself exhibited (and referred to expressly at paras 15 and 16 of the witness statement). It seems to me that taking the witness statement as a whole; it would be unfair to elevate the criticism in relation to Mr Chinye to a material non-disclosure. I do not consider any of the other matters raised contain justifiable non-disclosure criticisms.

91. The duty of disclosure on applications without notice is of fundamental importance and the court will always be vigilant to ensure that applicants comply with it. But the court also expects those defending applications to be circumspect in their allegations of material non-disclosure. If the defendant himself does not think a point of sufficient importance to mention it in pre-action correspondence, then there must be a good justification for a complaint that the claimant himself should have mentioned it in his application for leave to serve out. Material non-disclosure is a serious matter and not a game to be played by lawyers. If allegations of material non-disclosure are to be made, they should be identified with precision at the outset (in the application notice, or at the very least in the witness statement in opposition to the application) and not put forward in materially different terms in counsel's skeleton. I deprecate FCMB's attempts to rely on what seems to me to be any conceivable point they could think of, whatever its merit, in this regard and in my view it speaks volumes as to their attitude to this application.

Appropriate forum

92. FCMB then argued that, given the issues in the case, Zumax could not show, as was required on a service out application, that England was clearly the appropriate forum within the *Spiliada* test. On the stay application, the test was whether Nigeria was clearly the appropriate forum.

93. FCMB presented a superficially attractive case as to why Nigeria was the appropriate forum. In summary they submitted (1) the dispute concerns the bank-customer relationship in an account of a Nigerian company (2) the witnesses will all be Nigerian resident witnesses: it will be necessary to hear evidence from a number of employees, and auditors of FCMB plus Mr Chinye (3) the parties' documents are in Nigeria (4) there have been numerous proceedings in Nigeria on related matters which will need to be considered (5) the effect of the 2004 and 2005 Settlement Agreements made in Nigeria will need to be taken into account (6) the banking relationship between the parties is governed by Nigerian law and and in particular Nigerian limitation law will apply (7) Nigerian bank regulatory issues are best determined by the Nigerian courts (8) all the parties are Nigerian based.

94. The difficulty with these submissions, like so much else of FCMB's case, is that it is somewhat unreal. FCMB had initially vigorously asserted that Zumax had received the monies in question, and that Zumax knew this very well. That turned out to be

entirely wrong. A number of defences raised in the course of evidence or argument appeared equally misconceived. For example, Nigerian limitation law (and laches if relevant) is apparently the same as English limitation law and, given the nature of the case put forward by Zumax, looks unlikely to assist FCMB in any event. The 2004 and 2005 Settlement Agreements look unlikely to have anything to do with the claim, as FCMB appeared to have no answer to the point that they could only provide a bar to a claim by Zumax once payment was made and it never was.

95. I am afraid that I ended up having no confidence that the matters raised by FCMB would be ultimately relevant to determination of the proceedings and 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. This made it difficult to see what the issues would be in any trial. FCMB suggested that there would be a need for a number of Nigerian witnesses and provided a long list. But on examination it was far from clear why these witnesses would need to give evidence. The list of witnesses suggested by FCMB also bore an air of unreality: is it really likely, for example, that anyone will wish to call Mr Chinye, apparently a fraudster, to give evidence?

96. Zumax contended that, if one carries out the analysis properly, the appropriate forum is clearly England: (1) The trust is an English trust. All the fund transfers took place in England, through the London branches of Chase and Commerzbank (2) Zumax's proprietary rights to the funds arose in England, under English law, and are thus best adjudicated in England (3) The fund transfers between the London branches of the banks are also governed by English law. (4) All potential witnesses involved in the funds transfers at Chase and Commerzbank are likely to be based in this jurisdiction (5) all the primary documentary evidence relating to the account transfers (including account records) is located in England (including any remittances out of the accounts) (6) FCMB has a subsidiary in London and employed lawyers operating in London so FCMB will not be disadvantaged.

97. Zumax further contended that Nigeria is not a suitable forum because (1) Disclosure will be required from Commerzbank of statements of the accounts. It is unlikely that such disclosure could be obtained in Nigeria (2) It is unlikely that staff at the London banks will be released to travel to Nigeria for the reasons set out in paragraph 73 of the 2nd w/s of Mr Nduka-Eze dated 4 March 2014 (3) The pace of justice in Nigeria is interminably slow (see paragraphs 74 and 75 of the 2nd w/s of Mr Nduka-Eze dated 4

March 2014) (4) There is corruption in Nigeria which leads the state (not to mention ordinary private litigants) suffering extraordinary delay in obtaining justice against well-funded defendants (see paragraph 78 and 79 of the 2nd w/s of Mr Nduka-Eze dated 4 March 2014. There is consequently a real risk that C will not obtain justice is Nigeria: see Dicey, Morris & Collins The Conflict of Laws 15th Ed at 12-036 to 037 and *Altimo Holdings v. Kyrgyz Mobil Tel* [2011] UKPC 7, [2012] 1 WLR 1804 at [90, 95, 143 and 151] per Lord Collins.

98. I do not think the evidence before me as to the difficulties or alleged corruption in Nigeria provides of itself sufficient material to decline to send the case to Nigeria: in particular, both parties have in the past been apparently able and willing to sue in Nigeria in related actions.

99. In circumstances where it is very far from clear what the issues at trial will really be, it seems to me that what is apparent at this stage is that the action is concerned with accounts that are in London, the bank officials will be in London, and it is likely to be necessary to compel their evidence. I can see that there may be real difficulties in requiring independent bank witnesses who are domiciled in England to give evidence in Nigerian proceedings. Further, if additional Commerzbank or Chase disclosure, is required that will be easier to secure in England. These seem to me important advantages in a trial in England. And it is relevant to note that to the extent that it is alleged that part of the claim is precluded by the judgment of Lawrence Collins J, that is also better determined in this jurisdiction.

100. In these circumstances, in my view England is clearly the appropriate forum for determination of this dispute, whether one applies *Spiliada* on service out or a stay application. .

Disposition

101. I refuse the application for an extension of time for the application to set aside service. I also refuse the substantive application to set aside and the application for a stay. I dismiss the applications to set aside service out and for a stay.