Neutral Citation Number: [2024] EWHC 735 (Ch) Claim No: BL-2022-001918

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 2 April 2024

Before:

STUART ISAACS KC (sitting as a Deputy Judge of the High Court)

- -

Between:

Akintunde Giwa

Claimant

- and –

(1) JNFX Limited
(2) Ashay Mervyn
~~(3) JNFX Nigeria Limited~~
(4) Frontier Financial Technologies Limited

Defendants

- -
- -

Mr Matthew Bradley KC and Mr Rumen Cholakov (instructed by Peters & Peters Solicitors LLP) appeared on behalf of the Claimant

Mr Joseph Wigley (instructed by Cooke, Young & Keidan LLP) appeared on behalf of the First Defendant

Hearing dates: 18-20 March 2024

Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to The National Archives. The date and time deemed for hand down is deemed to be 10.30am on 2 April 2024.

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

Stuart Isaacs KC:

Introduction

1. By an application notice dated 18 September 2023, the claimant, Mr Akintunde Giwa ("Mr Giwa"), applies (1) against the 1st defendant, JNFX Limited ("JNFX"), for summary judgment and the striking out of its defence; and (2) against the 2nd defendant, Mr Ashay Mervyn ("Mr Mervyn"), and 4th defendant, Frontier Financial Technologies Limited ("Frontier"), for summary judgment and the entry of a default judgment for failure to file acknowledgments of service and defences. The application is supported by witness statements of Jonathan Tickner dated 18 September 2023 and Vladimir Joseph Meerovich dated 22 December 2023, partners in Mr Giwa's solicitors. It is opposed by witness statements dated 17 November 2023 of Stephen David Elam, a partner in JNFX's solicitors, and Jonathan Ian Green, JNFX's managing director.

2. The claim against the 3rd defendant, JNFX Nigeria Limited, was discontinued and a worldwide freezing order ("WFO") granted against it on 10 November 2022 was discharged pursuant to an order of Zacaroli J dated 14 June 2023. References in this judgment to the defendants therefore exclude JNFX Nigeria Limited.

3. Mr Mervyn and Frontier, a Nigerian company of which Mr Mervyn is a director, have not responded to the claims against them and have taken no part in the proceedings. Mr Mervyn is in contempt of this court's orders. He is currently wanted by the Nigerian Economic and Financial Crimes Commission in an alleged case of obtaining money under false pretence and fraudulent conversion of funds. His whereabouts are unknown. WFOs granted against him and Frontier on 10 November 2022 were continued by Zacaroli J on 14 June 2023. Mr Giwa also applies by an application notice dated 14 March 2024, supported by a second witness statement dated 13 March 2024 of Mr Meerovich, for those WFOs to be converted into post-judgment WFOs and for Mr Giwa's fortification of them to be released. At the hearing, Mr Giwa's counsel, Mr Matthew Bradley KC, stated that the determination of that application should only be made after this judgment had been handed down.

4. Mr Giwa is a currency exchange broker who earns commission by assisting those looking to buy US dollars with Nigerian Naira. JNFX is a private limited company incorporated in England which is engaged in foreign exchange and international money transfer business.

5. The present dispute concerns foreign exchange transactions required by MultiChoice Nigeria Limited ("MultiChoice Nigeria"), a Nigerian company engaged in the provision of satellite television services across the African continent. Mr Giwa or his companies had been engaged by MultiChoice Nigeria for a number of years to arrange the exchange of Naira to dollars in connection with MultiChoice Nigeria's business. According to Mr Giwa, he acted on Multichoice Nigeria's behalf or else for himself in arranging with JNFX, under the 10 contracts described in paragraphs 23 to 31 of the amended particulars of claim (the "MultiChoice Contracts"), for the exchange of Naira

into dollars. MultiChoice Nigeria paid the Naira into the bank accounts of companies controlled by Mr Giwa and were then sent to bank accounts nominated by JNFX in return for dollars to be paid into an account held at Standard Chartered Bank in London in the name of MultiChoice Africa (the "MultiChoice Account"). From about early 2021, Mr Mervyn increasingly instructed Mr Giwa to send the Naira to a bank account held at First City Monument Bank in Nigeria in the name of Frontier (the "Frontier Account"). MultiChoice Africa, as its name implies, is another company within the MultiChoice group of companies. Mr Giwa alleges that JNFX failed to pay into the MultiChoice Account the full equivalent dollar sums or to reimburse MultiChoice Nigeria its Naira. A total of Naira 7,914,209.196.50 was paid to JNFX under the MultiChoice Contracts for which no dollar payments (amounting to $16,230,369) were received in return. The tenth and last contract (the "Tenth Contract"), concluded on 8 September 2021, provided for the conversion of Naira 4,921,000,000 into $10 million but no dollar sum was paid in return for the Naira amount paid over the JNFX. MultiChoice Nigeria has assigned its claims to Mr Giwa. According to Mr Giwa, his primary dealings with JNFX were conducted with Mr Mervyn, who had ostensible if not actual authority from JNFX to enter into the MultiChoice Contracts.

6. In the circumstances pleaded in detail in the amended particulars of claim, Mr Giwa claims the principal sum of Naira 7,914,209.196.50 against all the defendants; or else he claims that sum against Mr Mervyn and Frontier and Naira 4,921,000,000 against JNFX. His claims against Mr Mervyn and Frontier are for money had and received or else are proprietary claims and for unlawful means conspiracy; he also claims against Mr Mervyn in deceit; and against Frontier for dishonest assistance. In the amended defence, JNFX denies that it is under any liability to Mr Giwa. In particular, it alleges that the MultiChoice Contracts are illegal under Nigerian law. Mr Giwa accepts that the issue of illegality under Nigerian law raises triable issues and therefore bases its present application on what he says are those aspects of his claims which are unaffected by the issue of illegality under Nigerian law. As against JNFX, for the purposes of the present application, his claim is founded on JNFX's alleged liability for Mr Mervyn's deceit. Mr Giwa maintains other contractual claims against JNFX in respect of the MultiChoice Contracts but those claims are not the subject of the present application because of Mr Giwa's acceptance that they raise triable issues.

7. Mr Giwa, on whom the burden of proof lies, submits that JNFX has no realistic prospect of showing, as alleged by JNFX, that:

    (1) Mr Mervyn is not guilty of deceit;

    (2) Mr Mervyn lacked ostensible authority to act as its agent in entering into the MultiChoice Contracts and that it is not therefore liable for Mr Mervyn's deceit;

    (3) JNFX would not in any event have been obliged to fulfil any of its obligations under the MultiChoice Contracts due to the requirement in its standard terms of business which would have governed them that all payments to it must be made to a bank account in the name of JNFX.

8. JNFX also submits that the quantum of Mr Giwa's claim should be reduced to $8,429,369 in light of dollar payments made by it for which no credit has been given. It further submits that the application raises complex issues of fact which need to be the subject of disclosure and evidence at a trial.

9. In light of the position taken by Mr Giwa on this application, it is unnecessary to consider JNFX's submissions first, on Mr Mervyn's alleged lack of actual authority, although Mr Giwa maintains that Mr Mervyn's authority was indeed actual and not just ostensible; and, second, on the issue of illegality under Nigerian law since, as JNFX's counsel, Mr Joseph Wigley, accepted at the hearing, that issue impacts only on Mr Giwa's contractual claims. Mr Wigley also did not pursue the faint suggestion made for the first time in his oral submissions that the deceit claim might itself be a matter to be determined in accordance with Nigerian or possibly Dubai law.

Applicable legal principles

10. The legal principles applicable to the application are clear and were not substantially in dispute. Mr Giwa submits that the defendants have no real prospect of defending the claim and that there is no other compelling reason for a trial. He submits that, in application of the principles laid down by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] - which have been approved by the Court of Appeal in *AC Ward & Sons v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24] and followed and applied in many later cases - he is entitled to summary judgment; and that the amended defence discloses no reasonable grounds for defending the claim. JNFX submits, also in application of those principles, that its defence has a real prospect of success, and that summary judgment should therefore be refused. It also submits, in the context of the strike-out application, that it cannot be said that the amended defence discloses no reasonable grounds for defending the claim. It is important to bear in mind that a "real" or "realistic" defence is one that carries some degree of conviction, see *EasyAir* at [15(ii)], which means a defence that is more than merely arguable.

11. In *Foglia v The Family Officer Ltd and Others* [2021] EWHC 650 (Comm) at [13] to [18] and *King and Others v Stiefel and Others* [2021] EWHC 1045 (Comm), Cockerill J laid down the approach to be applied in relation to an application for summary judgment where the cause of action is founded on fraud. The judge stated that there is no bar to granting such an application if the test in CPR 24.2 is met but that very considerable caution is required. In *Foglia*, she drew attention at [15] to Mummery LJ's judgment in *Doncaster Pharmaceutical Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661 at [18] where it was also said that the court should hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(1) Mr Mervyn's deceit

12. The claim against Mr Mervyn in deceit is pleaded in paragraphs 38 to 46 of the amended particulars of claim. In particular, it is alleged that he falsely represented that he intended (1) that the Naira sums deposited into the Frontier Account would only be used to be exchanged into dollars in performance of the MultiChoice Contracts (the

"Use Representation"); and (2) to procure the payment by JNFX to the MultiChoice Account of all dollar sums due under the MultiChoice Contracts (the "Payment Representation"). The Payment Representation was a continuing representation which he repeated on multiple occasions even after the dates for full payment of the dollar sums under the MultiChoice Contracts had passed. The Use Representation and the Payment Representation are referred to together below as "the Representations".

13. Mr Giwa submits that there can be no real doubt about the liability of Mr Mervyn in deceit. JNFX does not accept that Mr Mervyn is liable in deceit: it says that it is not in possession of the information to know whether that is the case and that it is for Mr Giwa to prove his case against Mr Mervyn. However, it advances no affirmative case denying Mr Mervyn's liability in deceit. The thrust of JNFX's submissions is that even if Mr Mervyn's liability in deceit is established, there is no realistic prospect of fixing it with liability for Mr Mervyn's conduct. Mr Giwa contrasted that position of JNFX in the amended defence and on this application with its previous position. For example, in JNFX's skeleton argument dated 10 February 2022 in support of its application for an injunction to restrain Mr Giwa from presenting a winding up petition against it and to strike out the petition, it was stated that its "*current and incomplete understanding is that Mr Mervyn seems to have perpetrated a fraud of some kind, using the Company's name and brand to gain credibility. This fraud is the factual background to the Petition Debt, which unsurprisingly is disputed by the Company in the circumstances*".

14. JNFX first puts Mr Giwa to proof that the Representations constitute statements of fact capable of founding a claim in deceit. I have no doubt that they are. I reject the submission in paragraph 72 of JNFX's skeleton argument that Mr Mervyn's statements of intention "*are not capable of constituting a representation founding a claim in deceit*". That submission is not borne out by the passage from *Clerk & Lindsell* on Torts (24th edition) at 17-12 cited by JNFX in support.

15. As stated in *Civil Fraud* (1st edition) at 1-044:

> "*So, if a person represents to another that, in the event of receipt of a sum of money from the representee, he will use that money for a particular purpose, this constitutes a representation of present intention and so a statement of fact. Hence if the representor does not actually harbour that intention at the time of making the representation, or if he knows that he will not be able to put the stated intention into effect, then the representor may be liable in deceit because he has made a false representation as to his present state of mind. (Moreover, such a misrepresentation will almost always be fraudulent, since it is the representor's own true intentions or knowledge that falsifies the representation).*"

16. There is no evidence in the present case to suggest that Mr Mervyn did not, at the time he made the Representations, have the intention alleged and no real prospect of any such evidence being obtained. Mr Mervyn has not sought to dispute Mr Giwa's case in any respect and takes no part in the proceedings. Contrary to JNFX's submission, there is no question of Mr Mervyn having been deprived of any opportunity to participate in the proceedings and rebut the allegations made against him, as suggested in paragraph 74 of its skeleton argument. Even if he were to participate, which itself is unrealistic, on the documentary evidence before the court alone, he would be hard pressed to dispute Mr Giwa's case in any event. It is also incorrect for JNFX to say, as it does in

paragraph 73 of its skeleton argument, that Mr Giwa is relying in support of the falsity of the representations made on "*the mere fact*" that the stated intentions were not eventually carried into effect. It is clear from paragraph 41 of the amended particulars of claim that this is not the case. JNFX asserts that with the benefit of further disclosure and cross-examination of Mr Giwa, there has to be a realistic prospect of showing that the Representations were not made but I am not persuaded that there is any substance in that assertion, in relation both to what further disclosure and what cross-examination suggested by JNFX might realistically lead to that conclusion.

17. The grounds on which Mr Giwa alleges that it is to be inferred that the Use and Payment Representations were false are set out in nine sub-paragraphs of paragraph 41 of the amended particulars of claim.

18. JNFX submits that the matters in paragraph 41.1 and 41.2 (going to the fact that the intentions of Mr Mervyn were not fulfilled) are not evidence of the falsity of those intentions when made. Based in particular on the evidence of Mr Elam, a partner in JNFX's solicitors, it was perfectly possible that Mr Mervyn only subsequently got into difficulties related to the depreciation of the Naira against the dollar which resulted in his original intentions not being able to be fulfilled. I agree that those matters are not themselves evidence of the falsity of Mr Mervyn's intentions on which the Representations are founded but, taken together with all the other matters relied on, I am unable to accept that Mr Elam's alternative explanation is the more plausible explanation, or that it is an explanation which has any real prospect of being upheld at a trial.

19. JNFX also submits that it would be unsafe to conclude that the matters in paragraph 41.3, namely the multiple substantial shortfalls across the MultiChoice Contracts which cumulatively ran to about $16 million, made it inherently unlikely that Mr Mervyn can have held the intentions he represented at the time of the Representations. JNFX argues that the analysis performed by Mr Giwa is not a sufficiently robust basis for the allegation. As explained below, I accept that Mr Giwa's reconciliation is not perfect and that there may be room for argument about the precise amount of the shortfall but, in my judgment, it cannot realistically be demonstrated that there were not substantial shortfalls or that the existence of those shortfalls does not support the inference of the falsity of the Representations which Mr Giwa seeks to draw.

20. Paragraph 41.4 concerns the video-conference meeting on 17 January 2022 between inter alios Mr Giwa, Mr Green and Mr Eisenberg, JNFX's other director. JNFX submits that the meeting occurred only after the Tenth Contract and that what is alleged to have been said by JNFX added nothing and fits equally well with the possibility that Mr Mervyn was trying to trade out of the difficulties which he had got into with his long-term trading strategy – a possibility not pleaded by JNFX. I have already expressed the view that I do not consider the alternative explanation to have any real prospect of success at trial.

21. In relation to paragraph 41.5, JNFX took issue with the suggestion that in the winding-up proceedings brought by Mr Giwa against it, it was making any admission of fraud by Mr Mervyn and certainly not any admission that the requisite elements for the tort of deceit were made out. I agree that this matter is not in any way determinative but there

is no hint at that time of the alternative explanation for Mr Mervyn's conduct now put forward by JNFX.

22. Paragraph 41.6 distinguishes between the Naira/dollar transactions referred to in paragraph 20 of the amended particulars of claim, which were fulfilled without incident, and those referred to in paragraph 41.4(a) of the amended particulars of claim, which were problematical. I agree with JNFX that these matters do not advance Mr Giwa's case on the falsity of the Representations.

23. Paragraph 41.7 refers to Mr Mervyn's repeated representations after the due dates for payment of the full dollar sums had passed that he nonetheless intended to procure payment to the MultiChoice Account but failed to do so. In isolation, these matters could be viewed as consistent with Mr Mervyn's intentions when the Representations were made not being false but in light of the totality of the evidence relied on by Mr Giwa, that is not in my judgment a realistic alternative explanation. The failure to procure payment after further repeated representations that payment would be made strongly supports the inference sought to be drawn by Mr Giwa. As stated in the passage from Civil Fraud quoted above, it is the representor's own true intentions or knowledge that falsifies the representation.

24. Paragraph 41.8 alleges that:

> "*Mr Mervyn has on numerous occasions, including on 24 and 25 November 2020, 12 January, 19 and 22 February 2021 and 7 January 2022 provided Mr Giwa/Multichoice with purported confirmations in the form of MT103 Swift messages that the dollar sums due under the dishonoured MultiChoice Contracts had been paid or were due to be paid to the MultiChoice … Account, all of which confirmations have subsequently proven to be false, from which it is to be inferred that the confirmations so provided were inauthentic and/or forged by Mr Mervyn.*"

25. JNFX submits that this matter, to the extent that it is being suggested that the confirmations were in fact false, is "obviously" something that should be proved at trial by reference to the relevant documents. There is in my judgment ample evidence to show that the confirmations which Mr Giwa provided did not reflect the true position. More importantly in the present context, I am not satisfied that further disclosure, even if it could be obtained, or any cross-examination of Mr Giwa would realistically give rise to a different outcome.

26. Paragraph 41.9 relies on a WhatsApp message sent on 2 October 2021 in which Mr Mervyn admitted having lied in relation to the MultiChoice Contracts transactions, stating that he knew he had "*messed everything up with these lies*". JNFX's suggested alternative explanation (that Mr Mervyn was saying that "*I will make payment after contracts have been entered into and that payment not being forthcoming*" (quoting from the hearing transcript at 122:3-5)) is in context difficult to reconcile with Mr Mervyn's acceptance that he had been lying and is without any actual foundation or based on any evidence or disclosure which might realistically be able to be obtained in order to found that alternative explanation.

27. Finally on the issue of deceit, JNFX submits that it has a realistic prospect of showing that Mr Giwa was not induced by and did not rely on the Representations in entering into the MultiChoice Contracts. It points to various documents which, it submits, suggest that Mr Giwa was well aware that Mr Mervyn may have been using the Naira for other purposes and that the Swift confirmations might be fake. In paragraph 76 of Mr Giwa's affidavit referred to above, Mr Giwa says that he challenged Mr Mervyn and certainly did not suspect him of misappropriating the funds. I am not persuaded that there is any substance in that assertion, both in relation to what further disclosure and what cross-examination suggested by JNFX might realistically lead to that conclusion. It also defies common sense to suggest that Mr Giwa entered into the MultiChoice Contracts otherwise than on the basis of the Representations.

28. In the result, approaching the matter with the caution it requires, I am not persuaded that JNFX (or Mr Mervyn) has a realistic prospect of defending the deceit claim made against Mr Mervyn. In my judgment, there is no obvious conflict of fact which exists between the case advanced by Mr Giwa and the defences put forward by JNFX to the deceit claim against Mr Mervyn and no reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available to a trial judge and so affect the outcome of the case. It is fanciful to suggest otherwise. JNFX has referred in support of its submission to particular documents or parts of them but they were often taken out of context. They not only provide a scant basis for its defence but, in context, support Mr Giwa's position. JNFX also relied inter alia on what documents it might obtain by way of third-party disclosure from the Nigerian banks with which Mr Mervyn dealt. However, actually obtaining such documents would be fraught with difficulty and there has been no attempt to do so. It appears that JNFX took a statement from Mr Mervyn at some time prior to November 2021 in consequence of which it informed Mr Giwa at the 17 January 2022 meeting that it was starting legal proceedings through the English courts against Mr Mervyn. The likelihood that JNFX would have done so in respect of Mr Mervyn trading out of any difficulties as opposed to fraudulent conduct on his part is remote.

(2) Mr Mervyn's ostensible authority

29. The second main issue is whether there is a realistic defence that Mr Mervyn lacked ostensible authority to act as JNFX's agent in entering into the MultiChoice Contracts and is therefore not liable for Mr Mervyn's deceit. At the hearing, there was initially a debate between the parties as to whether JNFX was vicariously liable (in the employment law sense) for Mr Mervyn's deceit, on the assumption that, as I have held, there is no realistic defence to the deceit claim. In the end, however, it was accepted by the parties that the issue of JNFX's liability for Mr Mervyn's deceit falls to be determined by reference to whether Mr Mervyn had ostensible authority. As stated in *Civil Fraud* at 1-139:

> *"… the general principles of vicarious liability … are not directly applicable to claims in deceit. Because the tort of deceit is a tort involving reliance by the claimant upon the truth of a representation made by a person, the employer is not liable for his employee's representation unless made within his actual or ostensible authority. … Thus, at least in the (usual) case where the deceit is practised in connection with the entry into a contract or other transaction, the usual test applicable to vicarious liability for torts – that is whether the tort was*

> *committed by the employee in the 'course of employment' – is displaced in favour of an authority test that would be more commonly seen in a contract case.*"

30. The classic statement of when apparent or ostensible authority arises is contained in Diplock LJ's judgment in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503-504. It is:

> -"*a legal relationship created by a representation, made by the principal to the contractor, intended to be and in fact relied upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. …*
>
> *The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is by permitting the agent to act in some way in the conduct of the principal's business with other persons. By doing so, the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into.*"

31. In *Aramco Trading Fujairah FZE v Gulf Petrochem FZC* [2022] EWHC 288 (Comm) at [25] – [26], HH Judge Pelling KC determined, in the context of whether declaratory relief should be granted following the striking out of the defence and the entry of default judgment against it, that the defendant's case that the signatory of a letter of indemnity relied on by the claimant lacked ostensible authority to execute it on the defendant's behalf was fanciful. In reaching that conclusion, the judge had regard to the fact that the letter of indemnity was on the defendant's letterhead and bore its stamp. Such conduct clearly constituted permitting the agent to act in the management or conduct of the principal's business, as did permitting the agent access to the defendant's email system. Mr Giwa draws attention to the similarities between the facts in *Aramco* and those relied on in the present case to establish Mr Mervyn's ostensible authority. JNFX submits that *Aramco* is distinguishable: the ratio of the judgment was that the claimant had paid over $4 million for a cargo in reliance on the letter of indemnity, without which there would have been no payment. It is correct that the payment was regarded by the judge at [26] as "*the key point*" but it was not the only point relied on by him and I respectfully agree with the judge that the other matters referred to by him are properly supportive of the existence of ostensible authority.

32. For its part, JNFX draws attention to the statements in *Bowstead & Reynolds on Agency* (23rd edition) at 8-017 on what facts may be relied on to establish a representation of authority. In particular, it refers to the statement that "*The ubiquity of letterhead (paper or electronic) within most businesses means that it would not normally be safe to rely on letterhead alone as representing that the writer has authority to bind the principal whose letterhead it is*".

33. It is JFNX's pleaded case inter alia that Mr Mervyn lacked any authority on its behalf and, even if he did, his alleged deceit was in furtherance of his own interests and insufficiently connected with any authority which he did have, and hence outside any such authority.

34. However, I agree with Mr Giwa that the evidence that Mr Mervyn acted with the ostensible (if not actual) authority of JNFX in respect of the MultiChoice Contracts is overwhelming. This aspect is addressed in detail in paragraphs 19 to 69 of Mr Giwa's skeleton argument, which are not repeated here. In summary and not exhaustively, reliance is there placed on a wealth of matters, including the facts that Mr Mervyn corresponded from a JNFX email address; is described in the emails' signature block as JNFX's "*Head of Global Markets*" with the contact and website details of JNFX given; and also described himself as "*Head of Emerging Markets*". Importantly, it is also clear that Mr Green and Mr Eisenberg were aware from having been copied into or forwarded communications from Mr Mervyn to Mr Giwa and third parties such as MultiChoice and Dubai Islamic Bank of the role being claimed by Mr Mervyn and at no time disclaimed that role or indicated that he lacked the authority to transact the business which he was transacting.

35. In relation specifically to the Tenth Contract, that was concluded by email exchanges on 8 September 2021 by an email from Mr Mervyn to Mr Giwa copied to Mr Eisenberg and Mr Batten of JNFX, Mr Giwa's email in reply which led to an email from Mr Eisenberg himself confirming that "*as soon as the USD arrives we will send it out as per Ashay's email below*", Mr Giwa's response to that email and finally Mr Eisenberg's email stating that "*We are committed to meeting the date below* [to which Mr Giwa's email had referred, namely 17 September 2021] *and we apologise for the* [previous] *delays and appreciate the continued business*". After that date had in fact passed without the dollar funds having been delivered, Mr Mervyn's authority was confirmed by Mr Green and Mr Eisenberg as set out in paragraph 30 of Mr Giwa's skeleton argument.

36. JNFX's pleaded denial that the admitted titles ascribed to himself by Mr Mervyn constituted senior positions within JNFX is, in my judgment, nothing to the point. The pleaded allegation that JNFX is unaware of the way in which Mr Mervyn introduced himself is, in the light of the documentary evidence adduced by Mr Giwa, untenable. JNFX's efforts to rely on the matters summarised in paragraph 31 of Mr Giwa's skeleton argument have no substance. The present case is far removed from one where sole reliance is placed on a letterhead. Mr Wigley sought to argue that references in some of the communications to Mr Mervyn's *"partners*" indicated that the relationship between Mr Mervyn and JNFX was not one of agent and principal but I reject that argument: it is perfectly plain in context that Mr Giwa was referring to JFNX as Mr Mervyn's principal with which Mr Giwa was contracting and that reference to Mr Mervyn's "*partners*" was to others within JNFX. Elsewhere, Mr Giwa refers to Mr Mervyn by saying "*You and your company JNFX*", for example in his email dated 3 November 2021 sent at 14:25. It is also insufficient for JNFX to point to the fact that in *Hockley Mint Ltd v Ramsden* [2019] 1 WLR 1617, the Court of Appeal, in the unusual circumstances of that case, decided that it was necessary to remit the case to the High Court to determine whether the alleged agent had ostensible authority as a basis for contending that the present case should go to trial. It is further insufficient and also unsatisfactory for JNFX to seek to rely on matters of which the court was only

informed by Mr Wigley towards the end of his oral submissions on instructions. In short, I consider that JNFX has at best only a fanciful prospect in my judgment of establishing that Mr Mervyn did not have ostensible authority to engage on its behalf in the transactions complained of in these proceedings, in particular insofar as concerns the Tenth Contract.

37. JNFX also argues that it has a realistic prospect of showing that Mr Giwa did not reasonably believe that Mr Mervyn has ostensible authority. He submits that Mr Giwa failed to make appropriate inquiries which he ought to have made of JNFX and its directors as to Mr Mervyn's authority to enter into foreign exchange contracts on its behlf. He seeks to rely on the footers in the emails sent by Mr Mervyn which state inter alia that JNFX does not assume any commitment by the emails and that legally binding obligations can only arise for, or be entered into on JNFX's behalf, by means of a written instrument signed by a duly authorised representative; the fact that JFNX was not authorised to transact foreign exchange business in Nigeria; and the other matters relied on in paragraph 55 of its skeleton argument.

38. Having regard to all the circumstances, I am not persuaded that JNFX has a realistic prospect of establishing that Mr Mervyn lacked the ostensible authority to conclude the MultiChoice Contracts. The evidence all points the other way and I do not consider, in the face of the documentary evidence, that there are reasons for concluding that reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available to a trial judge and so affect the outcome of the case. It is fanciful to suggest otherwise.

(3) JNFX's standard terms of business

39. Third, JNFX submits that it would not in any event have been obliged to fulfil any of its obligations under the MultiChoice Contracts due to the requirement in its standard terms of business which would have governed them that all payments to it must be made to a bank account in the name of JNFX. Mr Wigley, at the conclusion of his oral submissions, went so far as to say for the first time that this might be a matter for expert evidence at trial.

40. JNFX submits, in reliance on a passage in *Chitty* at 16-011 and *BDW Trading Ltd v Lantoom Ltd* [2023] EWHC 183 (TCC) at [97] to [102] that reference to standard terms on a website may be sufficient to incorporate those terms into a contract and that the terms may also be incorporated by a course of dealing. It argues that disclosure and cross-examination is likely to shed light on what, if anything, may have been said about the incorporation of terms, including disclosure and evidence about Mr Giwa's dealings with other currency exchange providers.

41. For his part, Mr Giwa submits that the JNFX's terms were never mentioned to Mr Giwa at any material time and that the terms were in fact contrary to any custom of the parties. By way of illustration, whereas clause 11 of the terms requires all monies to be paid into an account in JNFX's name, JNFX accepts that the Naira it received were not so paid.

42. I agree with JNFX that reference to standard terms on a website may suffice to incorporate them into a contract. The passage in Chitty states that this may be the case "*by ticking a box on a screen or by clicking on a hyperlink*" but not simply by a reference to them on the website. The circumstances in *BDW Trading Ltd* and the other cases cited in footnote 57 to the passage in *Chitty* relied on by JNFX are also very different. They support the contrary proposition to that for which JNFX is contending since they show that more is required than a mere reference on a website. I can also see no basis for concluding, Micawber-like, that something may turn up on disclosure or in cross-examination which realistically would alter the position. I regard any course of dealing between Mr Giwa and other currency exchange providers as immaterial to the position as between Mr Giwa and JNFX.

(4) Quantum

43. Mr Giwa's position on quantum is that he seeks an order that JNFX should pay a total of Naira 7,914,209,196.50 made up of Naira 4,921,000,000 in respect of the Tenth Contract and Naira 2,993,209,196.50 in respect of the nine earlier MultiChoice Contracts.

44. In paragraphs 42 and 43 of the amended defence, JNFX claims credit for various payments made to the MultiChoice Account in the total sum of $23,401,000. JNFX says that this is the amount of the credit to be given "[a]*ccording to its analysis so far*", which is continuing, and that in consequence the amount capable of being claimed by Mr Giwa should be reduced to $8,429,369. It submits that there are inconsistencies in the reconciliation of figures and that Mr Giwa's attempt, explained in paragraph 73 of his affidavit dated 20 October 2022 in support of his application for WFOs against Mr Mervyn, JNFX Nigeria Ltd and Frontier, to reconstruct, with as much detail as possible, how each order for currency exchange was placed by MultiChoice is unreliable.

45. In respect of the Tenth Contract, the FCMB bank statements of Mr Giwa's company, Gulf Island Petroleum Ltd, establish the transfer of Naira 4,921,000,000 to Frontier. The correspondence in the latter part of 2021 shows that JNFX was accepting liability to pay the full amount due and it is not in dispute that no part of the $10 million due in return has ever been paid. The credit claimed by JNFX relates to transactions made prior to the conclusion of the Tenth Contract on 8 September 2021. Therefore, in my judgment, JNFX has no defence to judgment being entered against it for the full sum of Naira 4,921,000,000.

46. In respect of the previous nine contracts, Mr Giwa submitted that JNFX's claim for the additional credit of $7,801,000 for which he has not already given credit as alleged in paragraph 42 of the amended defence is fanciful, for the two reasons elaborated in paragraphs 91 and 92 of his skeleton argument. First, it is said, based on the evidence in Mr Tickner's first witness statement, that such payments can only affect JNFX's liability, if at all, under the first five of the MultiChoice Contracts since the sixth and subsequent contracts were not concluded until after the last of the sums sought to be credits was paid. A total sum of Naira 3,065,800,516.50 is therefore due in respect of the sixth to ninth contracts, as set out in the amended particulars of claim. Second, it is said that there is no real prospect of JNFX establishing that credit is due in relation to the Naira 334,530,000 shortfall in respect of the fifth contract, for the reasons given in paragraph 92 of Mr Giwa's skeleton argument.

47. After some initial hesitation, I have reached the conclusion that there is also no realistic prospect of JNFX showing that credit of Naira 334,530,000 must be given in respect of the fifth contract. Although Mr Giwa explains in paragraph 92.6 of his skeleton argument why his quantification of his claim is accurate, the process of reconciliation of what, if any, credits must be given is not straightforward and Mr Wigley spent some time in his oral submissions seeking to demonstrate that. However, what in my judgment is key is that it is clear from Mr Bradley's oral submissions and the documents to which he drew attention in the course of those submissions that the credits claimed by JNFX derive not from contracts with MultiChoice with which Mr Giwa had anything to do but with contracts entered into by a Ms Adeosun: see the hearing transcript for 19 March 2024 at 66:19 to 70:17. I accept those submissions.

48. In the result:

    (1) Mr Giwa is entitled to summary judgment pursuant to CPR 24.2 in respect of his claim in deceit against JNFX and Mr Mervyn in the sum of Naira 7,914,209.196.50, together with interest thereon.

    (2) JNFX's Defence is struck out in so far as it pleads a defence to the claim in deceit and reliance on its standard terms of business.

    (3) Permission to amend JNFX's Defence is refused in so far as the amendments relate to a defence to the claim in deceit.

    (4) The application for summary judgment or to strike out JNFX's Defence so far as concerns the contractual claim against JNFX is dismissed and that claim shall proceed to trial.

49. This leaves the position of Mr Mervyn in respect of the other claims alleged against him and the position of Frontier to be determined. Mr Giwa additionally claims damages against Mr Mervyn for dishonest assistance in a breach of trust; damages against Frontier for deceit; and, against both Mr Mervyn and Frontier, damages for unlawful means conspiracy. In each case, interest and costs and other ancillary relief is claimed.

50. In view of the conclusions which I have reached above, I am prepared to give summary judgment against Frontier in respect of the deceit claim. No distinction can sensibly be drawn between Mr Mervyn and Frontier in this respect.

51. However, in respect of the other claims against Mr Mervyn and Frontier, I am uneasy about giving summary judgment in circumstances where Mr Giwa made no real submissions in relation to them. I do not think it is sufficient simply to say that it necessarily follows from Mr Mervyn's liability in deceit that he is also liable for dishonest assistance or that Frontier is wholly a creature of Mr Mervyn and a core component of how he squirreled away the Naira or that both Mr Mervyn and Frontier are guilty of unlawful means conspiracy. It is more appropriate that default judgment be entered against Mr Mervyn and Frontier in respect of those matters pursuant to CPR 12 for failure to file an acknowledgment of service and a defence.

52. Apart from the matters addressed above, there are outstanding issues relating to interest and costs and ancillary relief and also the disposal of Mr Giwa's application dated 14 March 2024. I request counsel to seek to agree an order which reflects the decisions made in this judgment. If the order is agreed and can be submitted to me in draft (in Word format) by email or if any matters not agreed can be determined by me on paper, then there will be no need for a further hearing to deal with those matters. If there is a need for a hearing to deal with those matters and the outstanding matters, then I leave it to counsel to fix one (with a time estimate of, say, half a day).