Neutral Citation Number: [2025] EWCA Civ 961

Case No: CA-2024-001254

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Stuart Isaacs KC sitting as a Deputy High Court Judge
[2024] EWHC 735 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2025

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE NUGEE
and
SIR LAUNCELOT HENDERSON

- -

Between :

AKINTUNDE GIWA	**Claimant / Respondent**
- and -	
(1) JNFX LTD	**Defendant/ Appellant**
(2) ASHAY MERVYN	
~~(3) JNFX NIGERIA LTD~~	
(4) FRONTIER FINANCIAL TECHNOLOGIES LTD	**Defendants**

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Catherine Addy KC and Joseph Wigley (instructed by **Cooke, Young & Keidan LLP**) for the **Appellant**

Matthew Bradley KC and Rumen Cholakov (instructed by **Peters & Peters LLP**) for the **Respondent**

Hearing dates: 20 and 21 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the High Court concerns the question whether summary judgment should have been given in favour of the Claimant, Mr Giwa, against the 1st Defendant, JNFX Ltd (**"JNFX"**) for damages for deceit in connection with a series of foreign exchange transactions, ten in all, under which large sums of Nigerian Naira (**"Naira"** or **"NGN"**) were to be exchanged for US dollars (**"dollars"** or **"$"**). I will refer to these as **"contract 1"**, **"contract 2"** etc.

2. In a judgment handed down on 2 April 2024 at [2024] EWHC 735 (Ch) Mr Stuart Isaacs KC, sitting as a Deputy Judge of the High Court, (**"the Judge"**) held that JNFX was liable for deceitful representations made by the 2nd Defendant, Mr Ashay Mervyn, on the basis that Mr Mervyn was acting with (at least) the ostensible authority of JNFX in the relevant transactions; and that Mr Giwa was entitled to summary judgment against JNFX for the sum of NGN 7,914,209,196.50 (the equivalent in 2020-21 of some $16m, but now worth some $5m) and interest thereon. That was given effect to by his Order dated 15 May 2024.

3. JNFX appeals with the permission of Falk LJ. It was represented by Ms Catherine Addy KC and Mr Joseph Wigley. Mr Giwa was represented by Mr Matthew Bradley KC and Mr Rumen Cholakov. None of the other Defendants took any part in the appeal: the claim against the 3rd Defendant had been discontinued before the hearing below; and neither the 2nd Defendant (Mr Mervyn) nor the 4th Defendant (a company of which he was a director) appeared, or were represented, at that hearing.

4. For the reasons given below I would uphold the Judge's decision that summary judgment be given in relation to the last in the series of contracts (contract 10) in the sum of NGN 4,921,000,000 plus interest, but allow the appeal in relation to the other contracts (contracts 1 to 9), and reduce the quantum of damages accordingly.

Facts

5. There has of course as yet been no trial and the facts have not yet been found. But the facts deposed to in the evidence before the Judge can be summarised as follows (I will have to look at some of the matters referred to below in more detail but this overview will suffice at this stage).

6. Mr Giwa is a Nigerian citizen resident in Lagos. His evidence is that the dollar is the Naira's primary foreign exchange currency pair, but that there has throughout his working life been a shortage of dollars in Nigeria due to currency controls operated by the Central Bank of Nigeria, with the result that the private sector increasingly relies on a parallel market for its currency needs. In 2014 he saw an opportunity to develop a new business line and set up as a broker/intermediary assisting clients with sourcing dollars.

7. One of his clients is MultiChoice Nigeria Ltd, a Nigerian company (**"MultiChoice Nigeria"**). It is part of the MultiChoice Group which is a multi-channel, multi-platform television service provider in Africa, providing premium video entertainment for subscribers in over 50 sub-Saharan African countries and is part of a pan-African group

of companies headquartered in South Africa.

8. Starting in September 2020 Mr Giwa placed a number of orders for the conversion of Naira into dollars for MultiChoice Nigeria. There were ten such orders over the period from September 2020 to September 2021. The individual with whom Mr Giwa dealt was Mr Mervyn, but Mr Giwa understood Mr Mervyn to be working on behalf of JNFX. Mr Giwa had been introduced to him in 2013 and first met him in Nigeria. Mr Mervyn, a British/Nigerian citizen resident in the UK, had told him that he was based in the UK and working for JNFX.

9. JNFX is an English company. It has two directors, Mr Nathan Eisenberg and Mr Jonathan Green. It is regulated by the UK Financial Conduct Authority as a payment services provider, and its website describes it as a currency solutions firm that executes and advises on all currency matters including cross border transactions and foreign exchange.

10. Mr Giwa began placing orders with Mr Mervyn in 2017 (for another client, unconnected with MultiChoice). The first order that he placed with Mr Mervyn for MultiChoice Nigeria was on 28/29 September 2020. It was for the exchange of NGN 936m for $2m (an exchange rate of $1 = NGN 468). This transaction was completed successfully.

11. It was followed by nine other transactions. The mechanics of each transaction were similar. They involved the following steps:

    (1) MultiChoice Nigeria transferred an amount of Naira to a bank account in Nigeria in the name of one of Mr Giwa's companies. The main one he used was called Christian Mayer Payment Solutions Ltd (**"CMP"**), but he also used two others, Christian Mayer Resources Ltd (**"CMR"**) and Gulf Island Petroleum Ltd (**"GIP"**). Each was a Nigerian company which Mr Giwa had set up and which he controlled.

    (2) The second step was that Mr Giwa procured the relevant company to transfer the requisite Naira into a bank account in Nigeria in the name of a company designated by Mr Mervyn. Initially this was a company called ChamsSwitch Ltd, but in February 2021 Mr Mervyn asked Mr Giwa to make the payments to the 4th Defendant, Frontier Financial Technologies Ltd (**"Frontier"**).

    (3) Dollars were subsequently transferred into an account in the name of MultiChoice Africa Holdings BV (a Dutch company) (**"MultiChoice Africa"**) at Standard Chartered Bank in London. These transfers were in some cases from accounts in the name of JNFX, or of JNFX International FZC, but in other cases from accounts in the name of other companies (called OEE Integrated Services, Yellow Card Financial LLC and ProTrade Group Ltd – these appear to be connected with cryptocurrency exchanges).

12. Contract 2, placed on 6 October 2020 for the exchange of NGN 2,320m for $5m, was also completed successfully. But thereafter things did not go so smoothly. In some cases some of the Naira that Mr Giwa had sent to the accounts designated by Mr Mervyn were returned. In contracts 3 and 4, taken together, that in fact led to an overpayment of dollars. In other cases there was a shortfall. Mr Giwa's case is that the

total sums involved were as follows:

(1) Between 28 September 2020 and 7 September 2021, MultiChoice Nigeria made 15 transfers of Naira totalling (in round figures) some NGN 40,000m to accounts in the names of Mr Giwa's companies.

(2) Between 29 September 2020 and 22 September 2021 Mr Giwa caused some NGN 36,700m to be transferred from his companies' accounts to accounts designated by Mr Mervyn. Over NGN 6,000m was returned, with the result that the net sum transferred was some NGN 30,000m.

(3) Between 4 October 2020 and 29 June 2021 33 dollar transfers were made into MultiChoice Africa's account at Standard Chartered Bank in London, totalling some $44m (of which over $18m came from JNFX itself).

(4) The amount of dollars that should have been transferred however (taking into account the Naira returned) was some $60m, meaning that there was a shortfall of some $16m.

13. The shortfall is pleaded in detail in a table in Mr Giwa's Amended Particulars of Claim, which (slightly adapted) I reproduce below:

Contract No	Contract date	Over or (under)payment	
		$	NGN
3 and 4	15.10.20 / 23.10.20	877,630	407,220,320
5	17.12.20	(708,000)	(334,530,000)
6	28.1.21	1	483.50
7	16.2.21	(4,500,000)	(2,155,500,000)
8	9.3.21	(900,000)	(428,400,000)
9	1.6.21	(1,000,000)	(482,000,000)
10	8.9.21	(10,000,000)	(4,921,000,000)
		(16,230,369)	(7,914,209,196.50)

14. As can be seen from the table, the underpayment on contract 10 was $10m. This was the entire contract sum. On 8 September 2021 Mr Mervyn confirmed by e-mail that $10m would be delivered, and between 8 and 22 September 2021 GIP transferred a total of NGN 4,921m to Frontier for this purpose. No monies however were ever received.

Mr Giwa's claims

15. In these circumstances Mr Giwa found himself in the embarrassing position that his client MultiChoice Nigeria had paid for some $16m which it had not received. He initially presented a winding up petition against JNFX on the grounds of an alleged petition debt but the petition was dismissed in February 2022. On 19 October 2022 he took an assignment of MultiChoice Nigeria's claims, and on 20 October 2022 he applied for a freezing injunction against Mr Mervyn and Frontier, which was granted by Miles J, and later continued by HHJ Gerald (sitting as a Judge of the High Court) until trial or further order. Mr Mervyn however has not engaged with the litigation; the

evidence is that the last communication received by Mr Giwa's solicitors from him was on 7 November 2022.

16. The claim form was issued on 8 November 2022. Various claims were advanced against the other defendants, but as against JNFX they were effectively two-fold. One was for breach of contract on the basis that Mr Mervyn had entered into each of the contracts as agent for JNFX, with its actual and/or apparent or ostensible authority, and hence that the contracts were between JNFX and either MultiChoice Nigeria (acting through Mr Giwa) or Mr Giwa in his own right. It is not necessary to give the details of the claims as in the event Mr Giwa did not pursue an application for summary judgment for them.

17. The other was for damages for deceit, on the basis that Mr Mervyn had committed the tort of deceit, and that JNFX was liable for the same because Mr Mervyn had acted pursuant to JNFX's actual and/or apparent or ostensible authority.

18. Two representations were relied on as having been made by Mr Mervyn to MultiChoice Nigeria (through Mr Giwa as its agent), namely that:

    (1) he intended that the Naira sums deposited into the Frontier account would be used only so as to exchange the same for dollars, in performance of the contracts (**"the Use Representation"**); and

    (2) he intended to procure the payment by JNFX to the MultiChoice Africa account of all dollars due under the contracts (**"the Payment Representation"**).

    These representations were said to have been expressly or impliedly made by Mr Mervyn by his conduct, or in his oral and written communications, at all times, including on or about the dates of formation of each of the contracts.

19. Each representation was said to have been false when made and known by Mr Mervyn to be false. MultiChoice Nigeria was said to have been induced by each of them to enter into the contracts, or to have done so in reliance on them. The loss claimed was NGN 7,914,209,196.50 (the total shown in the table above) on the basis that that sum represented the aggregate amount paid by MultiChoice Nigeria under the contracts for which no reciprocal dollar payments had been received.

20. JNFX's Defence was served in February 2023. It largely put Mr Giwa to proof. But it denied that Mr Mervyn had been acting with its actual or ostensible authority. It also pleaded a defence to the contract claims that any such transactions between JNFX and MultiChoice Nigeria would have been illegal under Nigerian law and hence unenforceable.

21. In June 2023 Mr Giwa discontinued the claim against the 3rd Defendant. In September 2023 he issued an application for judgment against each of the other Defendants, that is for summary judgment under CPR Part 24 against JNFX, and for summary judgment or judgment in default against Mr Mervyn and Frontier.

22. The application as issued sought judgment against JNFX on both the contract claims and the deceit claims but in February 2024 JNFX served a proposed draft Amended Defence which particularised its case on the contracts being illegal as a matter of

Nigerian law, and in Mr Giwa's skeleton (served on 13 March 2024 shortly before the hearing of the application) he dropped the application in respect of the contract claims, saying that he recognised that the questions of Nigerian law raised triable issues. As against JNFX he therefore only pursued the deceit claims.

The judgment

23. The application was heard by the Judge on 18 to 20 March 2024, and on 2 April 2024 he handed down judgment granting summary judgment against JNFX for the entirety of the deceit claims.

24. I will have to look at some of the detail of the judgment in due course, but for present purposes can summarise it quite briefly. At [1]-[9] he gave an introduction, in the course of which he identified the issues as being (i) whether Mr Mervyn was guilty of deceit; (ii) whether Mr Mervyn had ostensible authority to act for JNFX; (iii) whether JNFX's standard terms and conditions applied to the contracts; and (iv) a question of quantum ([7]-[8]). At [9] he identified that it was not necessary to consider either the question of Mr Mervyn's actual authority (Mr Giwa did maintain that Mr Mervyn had actual authority but did not seek to rely on that for the purposes of the application), or the question of illegality under Nigerian law (it being accepted by Mr Wigley for JNFX that that issue only impacted on the contractual claims).

25. At [10]-[11] he summarised the applicable legal principles in terms that Ms Addy did not criticise, her submission being that although he had directed himself correctly, he had not in fact applied the principles correctly.

26. At [12]-[16] he considered the representations and rejected the submission for JNFX that with further disclosure and cross-examination there was a realistic prospect of showing that the representations were not made. At [17]-[26] he dealt with the falsity of the representations, and at [27] with a suggestion that Mr Giwa did not rely on the representations, concluding at [28] that JNFX had no realistic prospect of defending the deceit claim against Mr Mervyn.

27. At [29]-[38] he considered the question of Mr Mervyn's ostensible authority. At [24] he said he agreed with Mr Giwa that the evidence that he did have ostensible authority was overwhelming, and he concluded at [38] that he was not persuaded that JNFX had a realistic prospect of showing the contrary.

28. At [39]-[42] he considered and rejected the suggestion that there was a prospect of showing that JNFX's standard terms and conditions were incorporated into the contracts.

29. At [43]-[48] he dealt with quantum, holding that the sums claimed (in the total of NGN 7,914,209,196.50) were justified.

30. By his Order dated 15 May 2024 he therefore gave summary judgment in favour of Mr Giwa on his claims in deceit against JNFX and ordered JNFX to pay Mr Giwa NGN 7,914,209,196.50 with compound interest at 8%. He also gave summary judgment for damages for deceit against Mr Mervyn and Frontier and judgment in default for Mr Giwa's other claims against them, with which we are not concerned.

Grounds of appeal

31. JNFX appeal, with the permission of Falk LJ, on 6 Grounds, namely that the Judge erred in finding that JNFX had no realistic prospect of success on the following points:

    (1) whether Mr Mervyn made the Use Representation;

    (2) whether the Use Representation (if made) and the Payment Representation were false, or alternatively were false in relation to any contracts prior to contract 10;

    (3) whether the representations were relied on by Mr Giwa and/or MultiChoice;

    (4) whether Mr Mervyn had ostensible authority to act on behalf of JNFX in entering into contracts;

    (5) whether JNFX's standard terms of business were incorporated into any contracts;

    (6) the quantum of Mr Giwa's claim.

Legal principles

32. There was no dispute between the parties as to the legal principles applicable to an application for summary judgment under CPR Part 24. Ms Addy referred us to the oft-cited summary by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and in particular to the points he made at sub-paragraphs v), vi) and vii), all of which caution the Court against giving summary judgment simply on the evidence before it without also considering whether the evidence that might reasonably be expected at trial might give a fuller or different picture. She also referred us to *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, [2006] ETMR 65 at [4]-[18] per Mummery LJ (summary judgment is designed for straightforward cases; the Court should exercise caution and avoid a mini-trial on the facts; and should hesitate about making a final decision without a trial where 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 to *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 WLR 1294. The latter was not a summary judgment application but a decision on jurisdiction, but Lord Hamblen JSC repeatedly warned against the Court conducting a mini-trial, invoking the same principles as are applicable on an application for summary judgment: see at [21], [103], [110], [120] and [126].

33. These principles are very familiar, and as I said were not disputed, nor is it suggested that the Judge was unaware of them, only that he did not in fact apply them correctly. I add a few words on the requirement to avoid a mini-trial. It is sometimes deployed as if the Court errs if it embarks on any detailed examination of the evidence before it. That I think overstates matters. The exhortation to avoid a mini-trial (which dates back at least to the judgment of Lord Woolf MR in *Swain v Hillman*, reported at [2001] 1 All ER 91 but in fact given in October 1999 not long after the introduction of the CPR) is directed at the situation where there is a conflict of evidence on some factual issue: see the way in which it is put by Potter LJ in *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [10] ("where there are significant differences between the

parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial"). In such a case the authorities make it clear that the Court should not seek to resolve, without the usual safeguards of disclosure and cross-examination, which of two versions of the facts is more likely to be true. But this does not mean that the Court is prevented from examining and assessing the evidence before it. On this I agree with the statement by Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [21] that the authorities "make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence". Indeed the Court is not only entitled but obliged to do this, not with a view to resolving disputed versions of events, but with a view to assessing whether there is any real substance in the suggested defence (or claim, as the case may be), or whether on the other hand it is fanciful. For this purpose it is well established that the Court is not obliged to take all factual assertions at face value, as it may be clear, particularly from contemporaneous documents, that there is no real substance in them: *Easyair v Opal* at [15 iv)], *ED & F Man v Patel* at [10]. The question is always whether it has been shown by the applicant that there is no real prospect of success in the defence (or claim), and for this purpose the Court necessarily needs to examine the evidence to see if there is, or may be, any substance in it.

Ground 1 – the Use Representation

34. As set out above, Mr Giwa's deceit claim relied on Mr Mervyn having made two false representations, the Use Representation and the Payment Representation (see paragraph 18 above). By Ground 1 of the appeal JNFX contends that the Judge erred in holding that JNFX had no realistic prospect of showing that the Use Representation was not made. It is to be noted that no challenge is made in respect of his conclusion that the Payment Representation was made, and hence, as accepted by Ms Addy, success on Ground 1 would not be sufficient by itself to succeed in the appeal. Mr Bradley was for that reason inclined to dismiss this Ground as academic but I think it should be considered on its merits.

35. The Judge dealt with the making of the two representations together at [12] to [16] of his judgment. At [12] he summarised Mr Giwa's case on the two representations as set out in his pleading. At [13] he gave an overview of JNFX's defence, noting that it advanced no affirmative case on the question of Mr Mervyn's deceit and that the thrust of its case was that even if Mr Mervyn's liability in deceit was established, there was no realistic prospect of fixing JNFX with liability for his conduct. At [14]-[15] he considered and rejected a submission that the representations, being statements of intention, were not capable of founding a claim in deceit. That is not challenged on appeal – unsurprisingly, as it is well established that if a person says that they intend to do something and at the time have no such intention, that is deceitful: the state of a person's mind is famously as much a fact as the state of their digestion, and to lie about your intentions is just as capable of founding an action in deceit as any other lie.

36. At [16] the Judge says:

> "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."

That is rather odd, and I cannot help thinking that something has gone wrong with the sentence as the Judge is not here dealing with the falsity of the representations but

whether they were made, and in any event the whole of Mr Giwa's case depends on Mr Mervyn *not* having had the intention alleged. It may be that what the Judge meant is that there was no evidence that Mr Mervyn did not claim to have the intention alleged. Be that as it may, the Judge continues (after noting that even if Mr Mervyn participated in the proceedings, which was itself unrealistic, he would be hard pressed to dispute Mr Giwa's 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."

That concludes his consideration of the question whether the representations were made, and he then went on to consider the question of the falsity of the representations.

37. I think it is fair to say that this analysis does not really explain why he concluded that the Use Representation was made, and it is necessary to consider what the relevant evidence before him was.

38. I start with whether there was any evidence of an express representation in writing that the Naira sums transferred by Mr Giwa would only be used to acquire dollars in performance of the contracts. There was scant evidence of this. Mr Bradley referred us to one e-mail in 2017 at the outset of Mr Giwa's dealings with Mr Mervyn (for another client, not for MultiChoice) in which Mr Mervyn asked Mr Giwa to confirm "the following trades with [CMR]". The trades were set out in a table showing CMR as buying $1.2m and selling NGN 441,600m. It is perhaps arguable that that amounted to an express representation that the Naira would be used by Mr Mervyn to acquire the dollars, although I do not regard that as at all obvious; in any event it is not suggested that any similar e-mails exist for the MultiChoice contracts. Mr Bradley also pointed to an e-mail right at the end of the relationship on 16 September 2021 in which Mr Mervyn said (in relation to contract 10):

> "With regards to the updated settlement date for the Multichoice 10,000,000.00 USD settlement, this payment will be paid out with MT103 on or before Thursday 30th Sept 2021. This date reasonably factors in time to trade the funds…
>
> This is a forward payment against past funds received today 16th Sept 2021"

That I accept is rather better evidence of an express representation that the Naira received that day would be traded to produce the $10m to be paid on 30 September 2021. But by itself it does not establish that similar representations were made for contracts 1 to 9; and we were not shown anything similar for those contracts.

39. In the absence of any express written representations, Mr Giwa's case must depend either on oral representations, or representations made impliedly or by conduct. Taking next the question of implied representations, Ms Addy said that there was nothing necessarily implicit in the contracts which required the very Naira transferred to be used

to acquire the dollars promised in return. If all that is agreed between A and B is that A will transfer a certain amount of Naira to B, and B will transfer a certain amount of dollars to A, that does not require B to use the Naira to acquire the dollars: the contract can be fulfilled by B using dollars that he happens to have available to him, or by using dollars that he acquires using other funds. Ms Addy referred to such a transaction as a transaction on a contractual debt basis rather than a proprietary basis.

40. As a matter of principle I think there is quite a lot to be said for this submission. Take for example contract 3. Mr Giwa's evidence on the making of this contract (given in his first affidavit, sworn in support of the application for the freezing injunction, but also relied on before the Judge) is as follows:

> "In around 14 October 2020, MultiChoice placed its third order for US$5,000,000 with me, transferring NGN 2,375,000,000 to [CMP]. On 15 October 2020, Mr Mervyn and I agreed I would transfer NGN 2,320,000,000 for the delivery of US$5,000,000 by 30 October 2020. I believe the rate for this order was NGN 464. On the same day, [CMP] transferred the agreed sum to the ChamsSwitch [First Capital Monument Bank] Account."

That is effectively all that he says about the terms of this contract (although he elsewhere explains that the arrangement was that the dollars to be paid in return for the Naira would be credited to MultiChoice Africa's account in London). A simple agreement that Mr Giwa would arrange for NGN 2,320m to be transferred to ChamsSwitch's account in return for the delivery of $5m to MultiChoice Africa's account is not on the face of it what Ms Addy calls a proprietary contract. It does not expressly oblige Mr Mervyn to use the Naira to acquire the $5m; and I think it is doubtful that it imposes any implicit obligation to do so. So long as he duly procured payment of the requisite amount of dollars, one would have thought it irrelevant how he did so. If that is right, it must also be doubtful whether entering into such a contract involves any implied representation by Mr Mervyn that he intended to use the Naira only for this purpose. I readily accept, given the sums involved, that it is perhaps unlikely that Mr Mervyn would have $5m lying around and in practice Mr Giwa no doubt assumed that Mr Mervyn would only be able to fulfil the contract by trading the Naira. But that seems to me a different point. To say that Mr Giwa assumed (and reasonably assumed) that Mr Mervyn would use the Naira to acquire the dollars to fulfil the contract is not the same as saying that Mr Mervyn impliedly represented that he intended to do so.

41. So I think there is at least room for argument whether there was any implied representation. Much the same goes for representation by conduct, as no particular conduct by Mr Mervyn is identified other than his conduct in holding himself out as willing and able to contract on the terms that he did.

42. That leaves oral representations. Mr Giwa's evidence does assert oral representations, as follows:

> "Mr Mervyn always represented to me that, for each company to which funds were sent and in each case, such Naira sums would be used only for the purposes of being converted by JNFX into U.S. dollars and deposited by JNFX once converted into the relevant nominated account

> for MultiChoice Africa. Without this assurance, which was given to me by phone and was the basis of all trades with Mr Mervyn even prior to the MultiChoice transactions, I would never have transferred any Naira sums to JNFX or any other entity nominated by Mr Mervyn."

43. So the question becomes whether JNFX would have any real prospect of challenging or undermining that evidence if there were a trial. JNFX is unlikely to be able to call any evidence of its own on this question, and there is no reasonable likelihood that Mr Mervyn would be available to give evidence at trial. And it is perhaps doubtful if further disclosure would add anything relevant. But JNFX would be able to cross-examine Mr Giwa on this statement. And here I think that it is not fanciful to suppose that they might get somewhere. Without rehearsing all the points that might be made in cross-examination, Mr Giwa's own evidence is that deals in the parallel market were made very informally by "phone, text messages or e-mail", and in this context his statement as to the assurance given him by Mr Mervyn, which is very general and does not give details, might perhaps be open to challenge in cross-examination.

44. Moreover there is evidence, from Mr Giwa himself, which suggests that the transactions between him and Mr Mervyn were far more complex than a straightforward swap of Naira for dollars with the particular Naira transferred always being used to acquire the dollars in question. He explains in his affidavit that the exercise of reconciling all payments between MultiChoice and JNFX had been extremely difficult, intricate and time consuming; it took him four months with the assistance of his solicitors to produce a reconciliation, and even this was incomplete as he was unable to trace the origin of certain dollar payments. The results are collected in a "Reconciliation Narrative" annexed to his affidavit. He there explains that he was processing transactions with Mr Mervyn not just on behalf of MultiChoice but also of other clients, and that he had approximately 15 such other clients during 2021. Moreover it appears that the dealings between Mr Giwa and Mr Mervyn did not keep the affairs of each of his clients rigorously separate. Thus he says that he and Mr Mervyn "employed the deliberate strategy of attempting to overfund MultiChoice when possible"; and he refers several times to what he calls a process of "netting off". He variously describes this as: "netting off of the entitlements/obligations between me and the FX dealer at that point in time across all our transactions"; "netting off between me and JNFX to account for debts accumulated on transactions for different clients"; "the continuous process of netting off between us"; and "the netting off process I described … i.e. by JNFX making commensurate payments to my other clients in lieu of the funds owed to me for overpaying MultiChoice."

45. I do not find these accounts of the netting off process as clear as they might be, but they do suggest that Mr Giwa and Mr Mervyn acted on the basis of some sort of global account across different clients such that Mr Giwa did not always consider it necessary to transfer the precise amount of Naira to Mr Mervyn specified in any particular contract. Thus for example Mr Giwa's evidence in relation to contract 9 is that he agreed with Mr Mervyn that he would transfer NGN 4,274m in the expectation of receiving $10m, and that he believed the rate agreed was likely to have been NGN 482 = $1. At that rate, as he explains, NGN 4,274m would only equate to $8,867,219; but Mr Mervyn agreed that JNFX would deliver $10m. Mr Giwa's explanation is that "this had been due in part to the outstanding sums owed to MultiChoice that had begun to build, but also due to the netting off process". Mr Giwa's evidence is that in the event

JNFX delivered $9m on 29 June 2021. By that date the full amount of NGN 4,274m had not been transferred but only NGN 3,374m (the equivalent, at a rate of NGN 482 = $1, of some $6.9m). The balance of NGN 900m was not transferred until 1 July 2021. On these facts it would seem that Mr Giwa was not expecting the full $10m to be wholly funded by the Naira he had agreed to transfer, nor was the $9m in fact received all derived from the Naira he had transferred.

46. All of that might be thought to cast doubt on Mr Giwa's statement that throughout the relationship he only dealt with Mr Mervyn because of the latter's assurance that the Naira he transferred would be used only to procure the dollars required. I think the position is not as clear as the Judge thought. In those circumstances I accept Ms Addy's submission that the fuller investigation of these matters that would be possible at trial, and the cross-examination of Mr Giwa on them, might add to or alter the evidence available to the trial judge on this issue.

47. I would therefore accept that the Judge should not have found that JNFX had no real prospect of success on this issue, and that this Ground is well founded. As already explained, however, this is not by itself enough to mean that the appeal should be allowed.

Ground 2 – falsity of the Payment Representation

48. Ground 2 is that the Judge erred in holding that JNFX had no realistic prospect of showing that the Use and/or Payment Representations (if made) were not false, alternatively were not false in relation to contracts 1 to 9.

49. In the light of my conclusions on Ground 1, I propose to concentrate on the Payment Representation. It is not disputed that it was made, and the question is whether it was false. I have set out the terms in which the Payment Representation is pleaded at paragraph 18(2) above and repeat that here for convenience, namely that Mr Mervyn represented that he intended to procure the payment by JNFX to the MultiChoice Africa account of all dollars due under the contracts.

50. I propose to consider contract 10 first as this stands rather apart from the other contracts (as recognised by the alternative ways in which Ground 2 is framed). In the case of the other contracts, there were some overpayments and rather more underpayments, but there was in each case at least substantial performance; in the case of contract 10 however no payment was made at all.

51. I will start by setting out the evidence relevant to contract 10 before the Judge. Mr Giwa says that on or around 7 September 2021 MultiChoice placed an order for $10m, transferring NGN 5,330m to GIP's account. On 8 September Mr Giwa agreed with Mr Mervyn that he would transfer NGN 4,822m to Frontier's account, and procured GIP to make an initial transfer of NGN 200m.

52. There were a series of e-mails between the parties on 8 September. These are also relevant to Ground 4 (the ostensible authority issue) so it is convenient to set them out here, as follows:

    (1) At 10.04 Mr Mervyn e-mailed Mr Giwa as follows:

> "This e-mail is to confirm the following:
>
> We will deliver the trade of 10million USD to Multichoice on the 17th Sept. 2021 against payment credited today 8th Sept 2021."

Mr Mervyn copied in both Mr Eisenberg at JNFX and a Mr Jon Batten, another employee of JNFX.

(2) At 11.06 Mr Giwa replied to the effect that delays in the previous 2 months had caused monumental damage to his business and that he could not afford one day of delay with this payment, adding:

> "Can you kindly get your partners buy in to this transaction and their commitment to ensuring that there are no delays with the payment."

(3) At 11.46 a reply came from Mr Eisenberg as follows:

> "I can confirm that as soon as the USD arrives we will send it out as per Ashay's [ie Mr Mervyn's] e-mail below."

(4) At 11.52 Mr Giwa replied to Mr Eisenberg:

> "Dear Nathan
>
> Thanks for your response but it does not really answer the issues raised below.
>
> The main concern is for JNFX to keep to the agreed timing of the delivery of the Dollars to MultiChoice. Which means that the funds must be in their nominated account by September 17th 2021 without any delay.
>
> This is what I need the company to be committed to. What has gone on in the last 60 days has been really really bad."

(5) Finally at 12.01 Mr Eisenberg replied to Mr Giwa:

> "Hi Tunde
>
> We are committed to meeting the date below and we apologise for the delays and appreciate the continued business.
>
> Nathan"

53. The evidence for Mr Giwa is that following the initial transfer of NGN 200m on 8 September 2021, GIP transferred NGN 3,500m to Frontier on 16 September, and a further NGN 1,221m on 22 September, making a total of NGN 4,921m.

54. Despite this, and despite Mr Mervyn's e-mail of 16 September promising Mr Giwa that the $10m would be paid out on 30 September (set out at paragraph 38 above), no

moneys were paid by then or at all.

55. On these facts (none of which were, or realistically were likely to be able to be, disputed) the question is whether the Payment Representation was false. As Ms Addy pointed out, a claim in deceit requires the representation to be false at the latest when acted upon. Here the transfers by GIP to Frontier took place over a period from 8 to 22 September 2021, so the full claim depends on whether the representation was false on 8 September. To put it another way, did Mr Mervyn on that date have a *bona fide* intention that the $10m would be paid? Or, to be more precise, has Mr Giwa shown that JNFX has no realistic prospect of disputing that he did not have that intention?

56. There is of course no direct evidence of Mr Mervyn's intention. Nor is there likely to be at trial as it is not suggested that there is any realistic prospect of his giving evidence. Mr Giwa's case therefore depends on inference. But if Mr Mervyn promises to pay Mr Giwa $10m, and despite receiving the necessary Naira to enable him to do it, completely fails to do so, it does not seem very difficult to infer that he had no intention of doing so. If he did intend to pay, why did he not do so?

57. Ms Addy concentrated her submissions on the inferences to be drawn in relation to the first 9 contracts, where although there were shortfalls, attempts were made to fulfil the contracts and substantial payments were in each case made. I will come back to the position in relation to those contracts below. But in relation to contract 10, her submission was that the Judge should not have rejected, as he did, the possibility that Mr Mervyn's intentions were honest when the transaction was agreed, but that he subsequently got into difficulties related to the depreciation of the Naira. What the Judge said (in his judgment at [18]) was that he was unable to accept that this alternative explanation was the more plausible one, "or that it is an explanation which has any real prospect of being upheld at trial."

58. I think this was a conclusion that he was justified in coming to. It is not as if there was a long period between the date when the representation was made and the dollars were due to be paid. Nor does it make sense to suggest that the reason that the dollars were not paid was due to some depreciation of the Naira. This might explain a shortfall, but not a complete failure to pay anything; in any event there was, and is, no evidence of a collapse or marked depreciation of the Naira (or of some cryptocurrency such as used by Mr Mervyn for his trading) in the relevant period.

59. Nor of course did Mr Mervyn ever proffer any such explanation (or any real explanation at all): on the contrary, he continued to promise payment in full. He sent Mr Giwa two International Wire Confirmations purporting to show payments from JNFX to MultiChoice Africa of $10,870,000 and $630,000 (ie totalling $11.5m) being in progress at 24 September, but Mr Giwa later ascertained that these were fake. On 6 October Mr Giwa e-mailed Mr Eisenberg complaining that these confirmations were fake. On 8 October he asked his lawyer to demand $14m (of which $11.5m was for MultiChoice) from JNFX, copying in Mr Mervyn; he explained in his evidence that the $11.5m was made up of the $10m for contract 10 and $1.5m towards earlier shortfalls, and was what Mr Mervyn had assured him could be delivered straightaway. On 13 October Mr Mervyn e-mailed him (copying in both Mr Green and Mr Eisenberg) as follows:

> "On the mentioned payment, I was unable to meet up with this payment

> as agreed yesterday due to some funding issues.
>
> I have discussed this internally and we will meet this payment of 11,500,00.00 USD on or before this coming Monday.
>
> We also have a call at 10.30am or whenever it is convenient to go over this and put this on record, as well as put this commitment in a formal legal letter.
>
> Once again, I apologise for these delays and misleading timescales and will ensure that this payment is met."

("This coming Monday" was 18 October.) This was followed on 19 October by an e-mail from Mr Green to Mr Giwa saying that "we are expecting funds in today".

60. It seems clear from this that Mr Mervyn was still telling Mr Green and Mr Eisenberg that although there had been delays the payment would be made. The fake confirmations and repeated broken promises have all the hallmarks of a debtor who cannot pay, and was never in a position to do so, rather than someone who genuinely thought he would be able to pay but subsequently ran into unforeseen difficulties. Mr Bradley submitted that in the absence of any evidence of a market collapse, the inference that Mr Mervyn was dishonest when he represented that he intended the dollars to be paid was realistically not possible to rebut; the fact that nothing at all was paid strongly suggests that Mr Mervyn had overcommitted himself and was never intending to pay. I think this submission is well founded.

61. Moreover Mr Bradley pointed to other matters supporting this inference. First, there was evidence that at the same time as MultiChoice's monies disappeared, other clients' monies went missing too. It is admitted in JNFX's Defence that in a video meeting in January 2022 between Mr Giwa, Mr Eisenberg and Mr Green (among others) JNFX explained that their understanding was that other companies had been caught in the same situation as MultiChoice Nigeria and had monies which had yet to be returned to them as a result of Mr Mervyn's actions. There was evidence that another client of Mr Giwa's called Delphinus was owed $2.5m in September 2021; and that a company called Greenov8 Global Platforms Ltd was owed $1m for Naira which it had transferred at the end of August 2021.

62. Second, there is the evidence that I have already referred to that Mr Mervyn sent Mr Giwa fake confirmations of transfers. As Mr Bradley submitted, if you are sending fake (and dishonest) confirmations of payment, it is a pretty sound inference that your conduct at the time is generally dishonest.

63. Third, Mr Bradley relied on the fact that JNFX itself had reached the conclusion that Mr Mervyn was dishonest. In the proceedings on the winding up petition that Mr Giwa presented against JNFX, JNFX's position was that it had become embroiled in a fraud perpetrated by Mr Mervyn (as admitted in JNFX's defence in this action).

64. Fourth, in a WhatsApp exchange between Mr Giwa and Mr Mervyn, Mr Mervyn admitted telling lies. This was on 2 October 2021 when Mr Mervyn wrote "I've just messed everything up with these lies". It seems probable from the context that he is referring to the fake confirmations and promises that the funds were in, but it is not

necessary to consider this in detail as on any view he is admitting to telling lies, and that is clear evidence of his dishonesty very shortly after entering into the transactions.

65. In those circumstances I agree that the Judge was justified in concluding that the evidence of Mr Mervyn's dishonesty in relation to contract 10 was overwhelming. JNFX was not in a position to advance any positive case to the contrary, and the suggestion that Mr Mervyn might have honestly intended the contract to be fulfilled and run into unexpected difficulties does seem to me to be fanciful.

66. In this connection Ms Addy applied to adduce further evidence. This was opposed by Mr Bradley on the basis that the normal criteria for the admission of fresh evidence on appeal, even adopting the less exacting requirements on an appeal from an application for summary judgment (see *Price v Flitcraft Ltd* [2020] EWCA Civ 850 at [44]-[47] per Floyd LJ), were not met. We looked at the evidence on a provisional basis.

67. What it shows is that Mr Giwa agreed a transaction with Mr Mervyn for another client of his, Technocrat XP Ltd (**"Technocrat"**), shortly before contract 10, and this was duly fulfilled. The evidence is that the agreement was made some time prior to 23 August 2021 and was for the payment of Naira in return for $2.4m to be paid to Technocrat. After some delays $2.37m was credited to Technocrat's account on 21 September 2021.

68. JNFX's case is that this significantly undermines Mr Giwa's case on the question whether Mr Mervyn was dishonest in relation to MultiChoice contract 10. But I do not think this is so. The fact that Mr Mervyn was able to procure payment of $2.37m to Technocrat on 21 September does not seem to me to show that he was also able to procure payment to MultiChoice – indeed the very fact that he did (nearly) fulfil the Technocrat contract but nothing was paid in respect of contract 10 for MultiChoice suggests that he was in no position to do both, as otherwise one would expect him to have done so. And if he could not fulfil both, it is not difficult to infer that he must have known that he was unable to do so; and to have gone ahead with MultiChoice contract 10 when he knew he could not fulfil it seems to me a clear case of a false and dishonest representation that he intended payment to be made. This is quite apart from the fact that the payment to Technocrat took place after Mr Giwa had sent him NGN 3,500m (the equivalent of over $7m) for MultiChoice contract 10 on 16 September, so it is entirely possible that it was only because of the payment under the MultiChoice contract that he was able to fulfil the Technocrat contract. There was also clear evidence that Mr Giwa told Mr Mervyn on 16 September that he would only send the balance of the Naira for MultiChoice contract 10 (a further NGN 1,221m, the equivalent of some $2.5m) if the Technocrat payment was made. In effect therefore by procuring payment of $2.37m to Technocrat, Mr Mervyn secured the payment in of an equivalent amount. None of this suggests that he had, or honestly thought he had, the funds to fulfil contract 10 for MultiChoice.

69. Even if admitted therefore I do not consider that the fresh evidence would cast any real doubt on the inference of dishonesty that the Judge rightly drew from the other material which I have referred to. It is in those circumstances unnecessary to consider whether JNFX satisfied the requirement of reasonable diligence so as to justify the admission of fresh evidence on appeal.

70. I would therefore dismiss Ground 2 of the appeal so far as it affects contract 10.

71. So far as concerns contracts 1 to 9, the position is not necessarily the same. Standing back from the detail, the story is of Mr Mervyn promising over the course of about a year that the contracts would be fulfilled. At the outset they were, and there is no reason to think his intentions were anything other than honest, but by the end, for the reasons I have given, he cannot have honestly intended that contract 10 would be fulfilled. At some point in the year therefore what had started as honest trading became dishonest. It is self-evidently a question of some difficulty to pinpoint the precise point at which this happened – that is where Mr Mervyn crossed the line from promises that he had every intention of keeping to promises that he must have known he could not honestly make.

72. If one examines the individual contracts the position can be seen to be as follows (see the table set out at paragraph 13 above):

    (1) Contracts 1 and 2 were fulfilled.

    (2) In the case of contracts 3 and 4, once account is taken of Naira that were returned, there was no shortfall but in fact an overpayment of $877,630.

    (3) In contract 5 there was a shortfall. This is pleaded as $708,000 which is less than the overpayment on contracts 3 and 4, so there was no loss overall by the end of contract 5.

    (4) Contract 6 was fulfilled (with an immaterial overpayment of $1).

    (5) There were shortfalls on contracts 7 and 8 of $4.5m and $900,000 respectively.

    (6) On contract 9 there was a shortfall of $1m. But see below.

73. For contract 9, I do not think there is a claim in deceit, whatever the position in contract. This is because Mr Giwa's own evidence is that the contract was placed on 1 June 2021 for the payment of $10m at a rate of NGN 482 = $1 (and so would equate to NGN 4,820m), but that he agreed with Mr Mervyn that he would only transfer NGN 4,274m, the equivalent at that rate of $8,867,219, due to previous shortfalls and the netting off process: see paragraph 45 above. That was what was transferred, with $9m being received in return. The shortfall in payment of $1m would, if the contract claim is otherwise good, no doubt entitle Mr Giwa to claim the $1m in contract. But it seems to me fallacious to assume that the same is true in tort. It is trite law that a claim in contract entitles the innocent party to be put in the same financial position as if the performance promised had been received; but a claim in tort only entitles the innocent party to be put in the same financial position as if the tort had not been committed. Here the claim in deceit takes as its premise that Mr Mervyn was deceitful when he promised payment of $10m (and thereby represented that he intended the full $10m to be paid), and Mr Giwa's case is that in reliance on that representation, Naira worth some $8.8m was transferred, in return for which $9m was received. In other words, although the full $10m was not received, by relying on the representation MultiChoice still received more than it paid. I do not see how in those circumstances it could have any claim in tort as it would have been no better off – in fact slightly worse off – if the representation had not been made, the contract had not been entered into, and nothing had been paid.

74. So what this claim comes down to is that Mr Mervyn was deceitful in relation to

contracts 7 and 8. Here I think Mr Giwa's own evidence is very pertinent. He says that generally shortfalls in deliveries were not considered a particularly concerning problem because everyone appreciated the difficulties of sourcing dollars with Naira and there was an expectation that the shortfalls would be made up for with overpayments on subsequent orders; even when substantial underpayments began to appear with contract 7 and the gap was approaching the $5m mark with contract 8 "it was not perceived to be of particular concern by MultiChoice especially given the economic environment of the constantly devaluing Naira (where the same or worse losses can be caused by simply holding onto Naira)." And of course Mr Giwa went on to place contracts 9 and 10 which he would scarcely have done if he had already concluded that Mr Mervyn was dishonestly deceiving him.

75. His contemporary perception of the shortfalls on contracts 7 and 8 therefore appears to have been to assume that Mr Mervyn was honestly intending to fulfil the contracts. I think it difficult in those circumstances to conclude that the case that he was in fact already making dishonest representations is so clear-cut that summary judgment should be given; at trial JNFX will be able to explore with Mr Giwa the whole question why the scale of the shortfalls on these contracts did not concern him at the time, and his answers may well add to the available evidence on the inferences to be drawn.

76. The Judge does not in his analysis distinguish between the various contracts, but simply treats the falsity of the Payment Representation as a single issue. Nor did Mr Bradley address us at any length on the earlier contracts. What he said was that the size of the shortfalls on contracts 7 and 8 could not be explained by difficulties in trading or depreciation of the Naira, but they evidence the intention of Mr Mervyn to start chipping away at what he could take before he went out with a bang in September 2021. That may be right; but for the reasons I have given I do not think it should be determined to be right before JNFX has had an opportunity to cross-examine Mr Giwa on the question.

77. I would therefore allow the appeal on Ground 2 in relation to the contracts other than contract 10.

Ground 3 – reliance on the Representations

78. Ground 3 is that the Judge erred in holding that JNFX had no realistic prospect of showing that the Use and Payment Representations (if made and if false) were not relied upon.

79. In the light of my conclusions on Grounds 1 and 2, it is only necessary to consider whether Mr Giwa or MultiChoice relied on the Payment Representation in relation to contract 10.

80. Here I think the position is very straightforward. It is an obvious inference that Mr Giwa only transferred the Naira to Frontier because of Mr Mervyn's representation that the dollars would be paid: see the exchange of e-mails on 8 September 2021 (paragraph 52 above), in which Mr Giwa presses for a commitment that the dollars will be paid on time. The Judge said (in his judgment at [27]) that it "defies common sense to suggest that Mr Giwa entered into the MultiChoice contracts otherwise than on the basis of the Representations". Whatever might be the case with the Use Representation, I agree that this is so in the case of the Payment Representation. One only has to posit

a situation in which Mr Mervyn had made it clear that he was not giving any assurance whether the dollars would be transferred in return for the Naira to see that Mr Giwa would never have gone ahead on that basis.

81. Ms Addy made three short submissions in support of this ground. The first only concerns the Use Representation and need not be considered. The second relied on the same matters as she relied on in relation to the falsity of the representations. So far as contract 10 is concerned, I have already given reasons why there is no real substance in such points. The third submission was that there were on Mr Giwa's own evidence instances when Mr Mervyn was unable to source the requisite amount of dollars and returned some of the Naira to Mr Giwa. That does not seem to me to affect the fact that the representation was that at the time of entering into each contract he intended that the contract be fulfilled, and that Mr Giwa would not have transferred the Naira in the first place without that representation.

82. I would dismiss Ground 3 so far as concerns reliance on the Payment Representation in relation to contract 10.

Ground 4 – ostensible authority.

83. Ground 4 is that the Judge erred in holding that JNFX had no realistic prospect of disputing that Mr Mervyn had ostensible authority to enter into the contracts on behalf of JNFX.

84. Again it is only necessary to consider contract 10, but it is helpful to set this in context. As Mr Giwa explains in his evidence, he was told by Mr Mervyn when he first met him that he was based in the UK and working for JNFX. E-mails in evidence from 2017 when Mr Giwa first entered into transactions with him (for another client) show that Mr Mervyn wrote from a JNFX e-mail address and signed off his e-mails as "Ashay Mervyn, Head of Emerging Markets, JNFX" with contact details including an address in the City of London and reference to JNFX's website. In an e-mail of 21 September 2017 Mr Mervyn writes to Mr Giwa asking for confirmation as to the source of his client's funds and adds "Thank you very much for trading with JNFX Ltd". In an e-mail of 25 September 2017 Mr Giwa thanks Mr Mervyn for his services and says "I intend buying at least $1m weekly from your company…".

85. So there is no real doubt that Mr Mervyn was holding himself out as representing JNFX and able to commit the company to trades, and that Mr Giwa understood him to be able to do so. By the time Mr Giwa was placing MultiChoice contracts with Mr Mervyn in September 2020, Mr Mervyn, still writing from a JNFX e-mail address, was signing himself off as "Head of Global Markets". On 14 October 2020 he signed a letter addressed to MultiChoice Africa in relation to contract 2 confirming that JNFX would complete the settlement of $5m by 22 October 2020. This letter was on JNFX headed notepaper and again signed by him as Head of Global Markets and included this:

> "On the behalf of JNFX, thank you very much for your business and I look forward to a continued business relationship."

86. In November 2020 Mr Mervyn asked Mr Giwa to obtain various confirmations from MultiChoice including:

> "please may we also have an email or letter stating the following people to issue trade instructions"

That e-mail, and Mr Giwa's response, were copied to Mr Eisenberg, to JNFX's compliance department, and to another individual at JNFX. There is no evidence of any objection from them.

87. By the end of February 2021 (at the time of contract 7) Mr Giwa was sufficiently concerned at various delays in payment that he messaged Mr Mervyn to the effect that "going forward I will need your partners to also agree to the transaction before we proceed". He explains that by "your partners" he meant the directors of JNFX, Mr Eisenberg and Mr Green. In May 2021 Mr Giwa e-mailed Mr Mervyn in relation to contract 9 to the effect that it was extremely important for the client that there were absolutely no delays, and asked:

> "Please be 100% sure that the funds will get to them on the day stated."

This e-mail, and Mr Mervyn's response that "This is understood and agreed" were copied to Mr Green. Again there is no evidence of any objection by him.

88. In August 2021 Mr Giwa e-mailed Mr Mervyn in relation to a trade for another client, saying:

> "I am extremely concerned about going ahead with the order without getting 100% assurances from your firm on when the payment will be received."

This was copied to Mr Eisenberg. Mr Mervyn replied that "we will settle" this trade on 23 August 2021. Mr Giwa's response, copied to Mr Eisenberg, was:

> "I need your partners to be committed to this date. A penalty of N10 per dollar will kick in from the 24th of August 2021 if the payment has not been received in the customer's account.
>
> Kindly confirm this and let one of your other partners second this confirmation."

This was also copied to Mr Eisenberg. He replied "That's confirmed".

89. It is against that background that the e-mail exchanges of 8 September 2021 in relation to MultiChoice contract 10 took place. I have set them out above (see paragraph 52). As there appears, Mr Giwa was not happy with Mr Eisenberg's first response which was to the effect that they would send out dollars when they arrived, and pressed Mr Eisenberg directly ("Dear Nathan") for the company to commit to payment of the funds by 17 September. He duly received Mr Eisenberg's agreement that "We are committed to meeting the date below … and appreciate the continued business".

90. Subsequently, when payment was not made, Mr Giwa e-mailed Mr Green on 15 October asking for an update on the MultiChoice and Delphinus payments. On 19 October he e-mailed again saying that "We really need to ensure the payments go out today". The response from Mr Green was:

> "I completely understand. It is very important for me to complete our co[m]mitment so we can start to repair our business relationship."

91. The Judge said (in his judgment at [34]) that the evidence that Mr Mervyn acted with the ostensible (if not actual) authority of JNFX in respect of the MultiChoice contracts was overwhelming, adding:

> "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 … 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."

At [35] he referred in relation specifically to contract 10 to the e-mail exchanges I have set out above; and at [38] he concluded that he was not persuaded that JNFX had a realistic prospect of establishing that Mr Mervyn lacked the ostensible authority to conclude the MultiChoice contracts.

92. Confining myself to contract 10, which is all that I need consider, I entirely agree. As I have said there is really no doubt on the documentary evidence both that Mr Mervyn represented himself as able to act for JNFX, and that Mr Giwa went into the transactions in the belief that he was so able. It is of course true that ostensible authority requires a representation not just by the putative agent (you cannot confer authority on yourself) but by the putative principal, but, as explained by Diplock LJ in his classic exposition of the principle in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] QB 480 at 503, the commonest form of representation by the principal is by conduct, that is:

> "by permitting the agent to act in some way in the conduct of the principal's business with other persons"

(see also at 505 to like effect). Here the directors of JNFX plainly did permit Mr Mervyn to hold himself out as able to conduct business with clients such as MultiChoice.

93. Moreover, as the e-mails show, in the present case Mr Eisenberg and Mr Green went well beyond just allowing Mr Mervyn to transact business ostensibly on behalf of JNFX. For contract 9, Mr Giwa copied in Mr Green, who did not object that Mr Mervyn was acting without authority; by the time of contract 10, Mr Giwa had twice (once in relation to another client, and once for contract 10 itself) received confirmation directly from Mr Eisenberg; and then in October received an e-mail from Mr Green confirming "our co[m]mitment" and referring to "our business relationship". This last e-mail of course comes after the representation in question but is confirmation of what is apparent from the earlier e-mails, namely that the directors of JNFX were themselves accepting that they were committed to the transaction.

94. Against this, Ms Addy had in effect two points. First, she referred to the principle that the third party cannot rely on ostensible authority if he knows that the agent's authority is limited. See *Armagas Ltd v Mundogas SA* [1986] AC 717 at 777B-C per Lord Keith:

> "Ostensible general authority may also arise where an agent has had a

> course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it. Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question…"

The first sentence of this seems to fit the present situation precisely – the earlier contracts were honoured.

95. But Ms Addy relied on an e-mail footer which appears at the foot of at least some of Mr Mervyn's e-mails. This contains a number of statements of the familiar type including the following:

> "JNFX Ltd makes no warranty or representation as to the accuracy or completeness of any information and does not assume whatever commitment hereby. This material is by a representative of JNFX Ltd and is for information purposes only for market counterparties or intermediate customers and should not be construed as a solicitation or offer to buy or sell any financial related products. Legally binding obligation can only arise for, or be entered into on behalf of, JNFX Ltd by means of a written instrument signed by a duly authorised representative."

96. This footer is in grey text and a small font and not easy to read, and I do not think it can be assumed that Mr Giwa ever in fact read it, or could be said to have known that Mr Mervyn had no authority to enter into transactions. If one does work through it, however, one finds both that Mr Mervyn is being held out as a representative of JNFX, and that a legally binding obligation can only be entered into by means of a written instrument signed by a duly authorised representative. Ms Addy submitted that an e-mail was not a written instrument, that the requirement for such an instrument to be signed was not satisfied by an e-mail signature, and that Mr Mervyn was not a duly authorised representative.

97. I think there is room for argument on all three points. But I do not propose to consider them further as there is to my mind a much simpler answer to the footer. This is that at best it leaves it unclear whether Mr Mervyn could commit JNFX or not to contracts such as MultiChoice contract 10. But Mr Giwa was not content to rest on the assumption that Mr Mervyn himself could commit the company. That was precisely why he required – and got – explicit confirmation from one of JNFX's directors. As directors of JNFX, Mr Eisenberg and Mr Green had undoubted authority – almost certainly actual, but at any rate ostensible – to commit the company and indeed to waive any formalities in doing so.

98. Ms Addy submitted that all they were doing by their e-mail confirmations was to commit the company to make onward payment of dollars if and when received from Mr Mervyn. That seems to me an impossible reading of the e-mails, which have to be read as a reasonable objective reader would read them. In particular Mr Giwa's e-mail of 11.46 on 8 September (see paragraph 52(4) above) made it clear that a confirmation that JNFX would send out the dollars as soon as they received them was not sufficient, following which Mr Eisenberg gave an unqualified commitment at 12.01. And the suggestion that Mr Giwa was not (on behalf of MultiChoice) doing business with

JNFX, but only with Mr Mervyn, cannot stand with the acceptance both by Mr Eisenberg (in his e-mail of 12.01 on 8 September) and by Mr Green (in his e-mail of 19 October) that Mr Giwa was doing business with, and had a business relationship with, JNFX itself.

99. Ms Addy's other point relied on the principle that the third party cannot rely on the apparent authority of a putative agent if he failed to make the inquiries that a reasonable person would have made in all the circumstances to verify that the agent had that authority: *Philipp v Barclays Bank UK plc* [2023] UKSC 25, [2024] AC 346 at [89] per Lord Leggatt JSC.

100. This principle I think only applies if the third party has reason to believe that the agent is acting without authority: see at [86]. I am rather doubtful that Mr Giwa had any reason to believe that Mr Mervyn was acting without authority, and the fact that the earlier contracts were honoured by JNFX would naturally have tended to reinforce his belief that he did have authority. But even if that is wrong, and he should have made reasonable inquiries, I do not see what else he needed to do than approach the directors and ask them to confirm their commitment. That is precisely what he did. In other words the answer to this contention is the same as the answer to the footer contention.

101. In those circumstances I think the Judge was entirely right to conclude that there was no reasonable prospect of the claim in relation to contract 10 failing for lack of ostensible authority, and I would dismiss this Ground.

Ground 5 – standard terms and conditions

102. Ground 5 is that the Judge erred in holding that JNFX had no realistic prospect of succeeding in its allegation that its published standard terms and conditions were incorporated into any contracts between Mr Giwa / MultiChoice and JNFX.

103. This seems to me a hopeless contention. Unlike the other points relied on, where JNFX put Mr Giwa to proof, the allegation that JNFX's standard terms and conditions were incorporated into any contracts is one where the onus rests squarely on JNFX. The entirety of the evidence relied on in support of this allegation is a print out of a page from JNFX's website which contains what are described as "Application terms and conditions", together with the fact that JNFX's website address is given as one of the contact details on Mr Mervyn's e-mails.

104. As Arnold LJ pointed out in argument, that does not tell one anything about how one navigates from the landing page of JNFX's website to the page containing the terms and conditions. No doubt it is the case that a contract made through a website may, by requiring clients to tick appropriate boxes and the like, incorporate a business's terms and conditions, but the mere fact that they are to be found somewhere on the website does not do this.

105. Moreover there seems to me to be a more fundamental objection to this contention. It is not suggested that the contracts here were made through the website. The evidence is that they were made with the minimum of formality by e-mail, text message, WhatsApp or orally on the phone. In order for a term to be incorporated into a contract, there needs to be something in the contract which incorporates it (or else a course of dealing on particular terms). JNFX is wholly unable to point to anything which might

incorporate the relevant terms, save for the reference to the website on the e-mails. That seems to me plainly insufficient. Even if Mr Giwa was prompted by curiosity to look at the website, and even if he found the terms, that would still not, so far as I can see, have the effect of incorporating them. Nor is there any relevant course of dealing which would incorporate them, as JNFX has no evidence that he ever dealt on those terms.

106. In these circumstances I would dismiss this Ground.

Ground 6 – quantum

107. Ground 6 is that the Judge erred by accepting Mr Giwa's case on quantum.

108. I can deal with this Ground very shortly as well. Ms Addy submitted that the lengthy reconciliation exercise undertaken by Mr Giwa, the various assumptions he made in the course of that, and the complexity of the accounting between the parties made it inappropriate to accept Mr Giwa's calculation of quantum without a full investigation. She pointed to the fact that the Judge himself said (in his judgment at [19]) that he accepted that Mr Giwa's reconciliation was "not perfect" and that there might be "room for argument about the precise amount of the shortfall" but in the end gave judgment for the precise amounts claimed.

109. Had it been necessary to investigate the position in relation to contracts 1 to 9, I think there may have been force in this submission. But the same difficulties do not beset contract 10. Here there is no doubt that Mr Giwa transferred the exact sum of NGN 4,921m in reliance (as I have accepted) on Mr Mervyn's false representation, and received nothing in return. That seems to me to make the quantum of loss in relation to contract 10 very easy: it is NGN 4,921m. I did not understand Ms Addy to argue to the contrary.

110. I would therefore dismiss this Ground insofar as it relates to contract 10.

Conclusion

111. I would therefore:

(i) allow the appeal on Grounds 1 and 2 in respect of contracts 1 to 9;

(ii) dismiss JNFX's application to adduce fresh evidence;

(iii) dismiss the appeal on Ground 5 (in respect of all contracts);

(iv) dismiss the appeal in respect of contract 10;

(v) vary the judgment by entering judgment for the sum of NGN 4,921m (in respect of contract 10) plus interest.

112. There has been no appeal against the rate of interest which the Judge took at 8% compound. I will leave it to the parties to calculate and agree the appropriate sum for interest down to the date of handing down our judgments, and a daily rate thereafter.

113. There will also need to be variations to paragraphs 3 to 6 of the Judge's Order which struck out, or refused permission to amend, various paragraphs of JNFX's Defence.

Again I would leave that to the parties to agree.

114. I add for the sake of completeness that Mr Giwa served a Respondent's notice. It is not necessary to go into the details. So far as contract 10 is concerned, Mr Giwa does not need to rely on it; and so far as contracts 1 to 9 are concerned, it does not affect the points on which I would allow the appeal.

Sir Launcelot Henderson:

115. I agree.

Lord Justice Arnold:

116. I also agree.