Neutral Citation Number: [2024] EWHC 901 (Comm)

Case No: CL-2023-000372

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 22/04/2024

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

NEDERLANDSE FINANCIERINGS-MAATSCHAPPIJ VOOR ONTWIKKELINGSLANDEN N.V.	**Claimant**
- and -	
(1) SOCIÉTÉ BENGAZ S.A. (a société anonyme incorporated and existing under the laws of the Republic of Benin)	
(2) WEST AFRICAN GAS PIPELINE COMPANY LIMITED (a company incorporated and existing under the laws of Bermuda)	**Defendants**

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Thomas Munby KC and Maxim Cardew (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Edgar Yves Monnou (Chairman of the First Defendant) for the **First Defendant**
Abdul Jinadu (instructed by **AO Law Ltd**) for the **Second Defendant**

Hearing date: 8 March 2024
Draft judgment circulated on: 15 April 2024

Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. On 8 March 2024, I heard an application by the Claimant ("***FMO***") for permission to apply for summary judgment against the First Defendant ("***Bengaz***"), in the absence of any Acknowledgement of Service or Defence; and for summary judgment. At the end of the hearing, I granted both applications and indicated that written reasons would follow. This judgment sets out my reasons for granting both applications.

2. The applications were supported by the 5th and 6th affidavits of Mr Ardil Jabbar Salem, a partner in FMO's solicitors, Hogan Lovells International LLP. Bengaz did not file any evidence in response. The Second Defendant ("***WAGPCO***") served, in response to

the applications, the 2nd affidavit of Mr Odey Simon Adamade, WAGPCO's General Counsel.

3. FMO's claims arise from a Credit Agreement, under which as at the date of the hearing Bengaz owed approximately US$56 million to FMO (including interest), and associated security documentation. As explained below, Bengaz is a shareholder in WAGPCO, and in that capacity has received and continues to receive substantial sums from WAGPCO over which FMO claims proprietary and other rights.

4. For the reasons set out below, I concluded that FMO's claims succeeded in full, and gave summary judgment accordingly together with ancillary relief.

(B) FACTS

(1) The parties

5. FMO is a company incorporated in the Netherlands and majority-owned by the government of the Netherlands. It operates as a bank and lends funds with a view to promoting economic development in emerging markets.

6. Bengaz is a company incorporated in Benin which operates as a special purpose vehicle for the purpose of holding investments in WAGPCO.

7. WAGPCO is a company incorporated in Bermuda. It owns and operates the West African Gas Pipeline which supplies gas from Nigeria to certain other West African countries pursuant *inter alia* to a West African Gas Pipeline Project Agreement dated 22 May 2003 between WAGPCO and the governments of Benin, Ghana, Nigeria and Togo.

(2) WAGPCO shareholders' agreements

8. The rights of WAGPCO's shareholders are (so far as material) regulated by:

   i) a Shareholders Agreement dated 19 May 2003 between WAGPCO and its shareholders, governed by English law, subsequently amended by seven amendment agreements dated 16 December 2004 (two agreements), 27 July 2005, 11 August 2005, 18 May 2007, 10 February 2022 and 23 June 2022 (together "***the Shareholders Agreement***"); and

   ii) an Escrow Agreement dated 19 May 2003 between WAGPCO, its shareholders and Standard Chartered Bank, governed by English law, supplemented by a further agreement dated 19 May 2003 and amended by an agreement dated 11 August 2005 (together "***the Escrow Agreement***").

9. Since 2005, pursuant to a transaction reflected in the fourth amendment to the Shareholders Agreement and the first amendment to the Escrow Agreement, Bengaz has been a 2% shareholder in WAGPCO and a creditor of WAGPCO in respect of substantial shareholder loans.

10. Bengaz's acquisition of its shareholding and other rights in respect of WAGPCO was financed by lending from FMO, as I explain below.

11. The shareholders of WAGPCO, including Bengaz, have from time to time become entitled, and continue to become entitled, to payments from WAGPCO pursuant to their various rights as shareholders, as creditors in respect of shareholder loans, and as parties to the Shareholders Agreement and the Escrow Agreement (together "***Shareholder Payments***", further defined at § 83.ii) below). Clause 9.1 of Amendment No. 1 to the Shareholders Agreement obliges WAGPCO to make payments due to its shareholders into such bank accounts as they shall from time to time specify in writing. As set out in § 56 below, FMO has, by its Particulars of Claim, exercised that right on Bengaz's behalf, acting as Bengaz's receiver pursuant to powers set out in the Security Agreements referred to below.

(3) The Credit Agreement between FMO and Bengaz

12. FMO and Bengaz entered into a Term Facility Agreement originally dated 11 August 2005 to govern the lending provided by FMO to Bengaz, subsequently amended and restated on four occasions by Supplemental Agreements dated 11 August 2006, 22 January 2007, 26 November 2007 and 2 April 2009 (together "***the Credit Agreement***").

13. Clause 2(a) of the Credit Agreement provides that:

> "Subject to the terms of this Agreement, FMO makes available to the Borrower [Bengaz]: (a) a term facility in an amount of $24,459,710..."

This term facility is defined as "*Facility A*" in clause 1.1, which sets out the definitions used in the Credit Agreement.

14. By clause 2(b), FMO made available to Bengaz a further term facility, defined as "*Facility B*". That facility is not the subject of the present claim, though FMO reserves the right to pursue further claims in respect of Facility B (by way of amendment or in separate proceedings).

15. The Availability Period of Facility A is defined as "*the period from and including the date of this Agreement to and including: (a) in the case of Facility A, October 15, 2010...*".

16. Footnote 1 to clause 2(a) adds that, for the avoidance of doubt, on the last day of the Availability Period, the aggregate of all Capitalised Interest Amounts (defined as "*the amount of accrued interest determined at the Fixed Rate and capitalised pursuant to Subclause 8.3 (Payment of Interest)*") shall not exceed US$6,777,085, making the total Facility A provided equal to an amount not exceeding US$31,236,795.

17. Clause 3(a)(i) requires the Borrower to apply all amounts borrowed under Facility A for the purpose of financing the Borrower's investment in WAGPCO.

18. Clause 6.1 requires that "*The Borrower shall repay the Facility A Loans in full on the Termination Date*", defined as "*in respect of Facility A, 15 April, 2020*".

19. Clause 8 includes the following provisions as to interest:

    i) Clause 8.1(a): "*The rate of interest on: (i) each Facility A Loan is the Fixed Rate*", defined as "*6 per cent. per annum*".

ii) Clause 8.3(a): "*Subject to paragraphs (b) and (c) below, the Borrower shall pay accrued interest: (i) on each Facility A Loan on each Interest Payment Date...",* defined as 15th April and 15th October in any year.

iii) Clause 8.3(b):

> "From the first Utilisation Date up to (and including) the last day of the Availability Period any accrued interest on each Facility A Loan will be capitalised on each Interest Payment Date and the Capitalised Interest Amount in respect of that Facility A Loan shall not be paid by the Borrower but instead shall be capitalised so as to form part of that Facility A Loan and each amount of accrued interest shall bear interest together with the rest of that Facility A Loan in accordance with Subclause 8.1 (Calculation of interest) and as set out in Schedule 8 (Calculation of Interest)."

"*Utilisation Date*" is defined as "*the date of a Utilisation, being the date on which a Loan is to be made*", and "*Utilisation*" is defined as "*the utilisation of a Facility*".

iv) Clause 8.3(d):

> "All amounts of accrued interest (including, for the avoidance of doubt, any deferred interest pursuant to paragraph (c) above) shall be repaid in full no later than on the Termination Date."

20. Clause 12.2 ("*Other indemnities*") states:

> "The Borrower shall, within 5 Business Days of demand, indemnify FMO against any cost, loss or liability incurred by FMO as a result of: (a) the occurrence of any Event of Default; [or] (b) a failure by the Borrower to pay any amount due under any Finance Document on its due date..."

21. Under clause 14.3 ("*Enforcement costs*"):

> "The Borrower shall, within 5 Business Days of demand, pay to FMO the amount of all costs and expenses (including legal fees and any travel expenses) incurred by FMO in connection with the enforcement of, or the preservation of any rights under, any Finance Document."

"*Finance Document*" is defined as "*this Agreement, the Supplemental Agreement, the Accounts Agreement, any Security Document, an Option Agreement, or any other document designated as such by FMO and the Borrower*".

22. The Events of Default provided for in clause 19 include:

i) Clause 19.1 ("*Non-payment*"):

> "An Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place at and in the currency in which it is expressed to be payable, unless the non-payment:
>
> (a) is in respect of any amount other than principal and interest payable under this Agreement;
>
> (b) is caused by technical or administrative error; and
>
> (c) is remedied within three Business days of the due date."

"*Obligor*" is defined as "*the Borrower or an SPV*", with "*SPV*" meaning "*any company in which the Borrower owns, legally or beneficially, directly or indirectly (or otherwise has any interest) in any share (or equivalent equity participation) in that company*".

ii) Clause 19.3 ("*Other obligations*"):

> "(a) The Borrower does not comply with any provision of the Finance Documents (other than those referred to in Subclause 19.1 (Non-payment) and Subclause 19.2 (Major covenants)).
>
> (b) No Event of Default under paragraph (a) above will occur if the failure to comply, is capable of remedy and is remedied within the earlier of 30 days of FMO giving notice to the Borrower and any Obligor becoming aware of the failure to comply."

23. Clause 23.5 ("*No set-off by the Borrower*") provides that "*All payments to be made by the Borrower under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim*".

24. Pursuant to clause 26.2 ("*Certificates and Determinations*"):

> "Any certification or determination by FMO of a rate or amount under any Finance Document is, in the absence of manifest error, conclusive evidence of the matters to which it relates."

and under clause 26.3 ("*Day count convention*"):

> "Any interest, commission or fee accruing under a Finance Document will accrue from day to day and is calculated on the basis of the actual number of days elapsed and a year of 360 days or otherwise, depending on what FMO determines is market practice."

25. Clause 30 provides that the Credit Agreement is governed by English law, and clauses 31 and 32 contain the following dispute resolution provisions:

> "**31. ARBITRATION**

31.1 Arbitration

Subject to Subclause 31.4 (Option), any Dispute shall be referred to and finally resolved by arbitration under the Arbitration Rules (the **Rules**) of the London Court of International Arbitration.

31.2 Procedure for arbitration

...

31.3 Recourse to courts

Save as provided in Subclause 31.4 (Option),the parties exclude the jurisdiction of the courts under Sections 45 and 69 of the Arbitration Act 1996.

31.4 Option

Before an arbitrator has been appointed to determine a Dispute, each of FMO and the Borrower may by notice in writing to all other parties to this Agreement require that all Disputes or a specific Dispute be heard by a court of law. If FMO or the Borrower gives such notice, the Dispute to which such notice refers shall be determined in accordance with Clause 32 (Enforcement).

32. ENFORCEMENT

32.1 Jurisdiction

(a) The courts of England have exclusive jurisdiction to settle any Dispute.

(b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(c) This Subclause is for the benefit of FMO only. As a result, FMO shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, FMO may take concurrent proceedings in any number of jurisdictions.

32.2 Service of process

Without prejudice to any other mode of service allowed under any relevant law, the Borrower:

(a) irrevocably appoints David Doble Solicitors of 6-7 Bedford Row, London WC1R 4BS as its agent for service of process in relation to any proceedings before the English courts in connection with any Finance Document; and

(b) agrees that failure by a process agent to notify the Borrower of the process will not invalidate the proceedings concerned.

32.3 Waiver of immunity

The Borrower irrevocably and unconditionally:

(a) agrees not to claim any immunity from proceedings brought by FMO against the Borrower in relation to a Finance Document and to ensure that no such claim is made on its behalf;

(b) consents generally to the giving of any relief or the issue of any process in connection with those proceedings; and

(c) waives all rights of immunity in respect of it or its assets."

(4) Security arrangements

26. Bengaz provided various forms of security to FMO in respect of its borrowing under the Credit Agreement. These include two consecutive security agreements in substantially similar terms dated 11 August 2005 and 2 April 2009 (together "***the Security Agreements***"). Under these agreements, Bengaz charged in favour of FMO all of its rights in respect of the Shareholders Agreement and the Escrow Agreement, and undertook to get in and realise various forms of assets and income (including income from WAGPCO) in the ordinary course of its business; and to hold the proceeds on trust for FMO, subject to payment into a "*Receipts Account*" (subsequently varied, in relation to payments from WAGPCO, to payment into a separate Proceeds Account: see below).

27. The Security Agreements include these provisions:

i) Under clause 2 ("*CREATION OF SECURITY*"), clause 2.1(a) ("*General*") states:

"All the security created under this Deed:

(i) is created in favour of the Lender [FMO];

(ii) is created over present and future assets of the Chargor [i.e. the First Defendant];

(iii) is security for payment of all the Secured Liabilities; and

(iv) is made with full title guarantee...".

The 2 April 2009 Security Agreement adds, at (v), that the security created under that Deed "*is in addition and without prejudice to the security created under the Original Security Agreement*."

ii) The "*Secured Liabilities*" are defined as:

> "all present and future obligations and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) of the Chargor to the Lender under each Finance Document, except for any obligation which, if it were so included, would result in this Deed contravening Section 151 of the Companies Act 1985"

and "*Finance Document*" is (via § 1.2(a)) defined as having the same meaning as in the Credit Agreement.

iii) Clause 2.2 ("*Credit balances*") states:

> "The Chargor charges by way of a first fixed charge all of its rights in respect of any amount standing to the credit of any account contemplated by this Deed and the debt represented by it."

iv) Clause 2.3 ("*Other Contracts*") states:

> "The Chargor charges by way of a first fixed charge, all of its rights in respect of the Company Shareholders Agreement [i.e. the Shareholders Agreement] and the Escrow Agreement."

v) In Clause 5 ("*ACCOUNTS"*), clause 5.1 ("*General*") defines "*Receipts Account*" as "*the income account no. 01 01 2549859 50 with the Account Bank*." The "*Account Bank*" is Standard Chartered Bank. Clause 5.5 includes the following provisions:

> Clause 5.5(a): "The Chargor must get in and realise its:
>
> (i) securities to the extent held by way of temporary investment;
>
> (ii) book and other debts and other moneys due and owing to it; and
>
> (iii) royalties, fees and income of any nature owed to it,
>
> in the ordinary course of its business and in accordance with the terms of the Escrow Agreement to the extent applicable, and hold the proceeds of the getting in and realisation (until payment into the Receipts Account if required in accordance with paragraph (b) below) on trust for the Lender."
>
> Clause 5.5(b): "The Chargor must, except to the extent that the Lender otherwise agrees, pay all the proceeds of the getting in and realisation into the Receipts Account and in accordance with the Escrow Agreement to the extent applicable."

As noted above and below, this clause was subsequently varied, in respect of payments from WAGPCO, to provide for payment into the Proceeds Account.

vi) Clause 7 ("*WHEN SECURITY BECOMES ENFORCEABLE*") includes these provisions:

> Clause 7.1 ("*Event of Default*"): "This Security will become immediately enforceable if an Event of Default occurs."
>
> Clause 7.2 ("*Discretion*"): "After this Security has become enforceable, the Lender may in its absolute discretion enforce all or any part of this Security in any manner it sees fit."

vii) Clause 9 ("*RECEIVER*") empowers FMO to appoint one or more persons to be a Receiver of all or any part of the Security Assets if the Security has become enforceable. However, by clause 9.5 ("*Relationship with Lender*"):

> "To the fullest extent allowed by law, any right, power or discretion conferred by this Deed (either expressly or impliedly) or by law on a Receiver may after this Security becomes enforceable be exercised by the Lender in relation to any Security Asset without first appointing a Receiver and notwithstanding the appointment of a Receiver."

"*Security Assets*" are defined as "*all assets of the Chargor the subject of any security created by this Deed*".

viii) Clause 10 ("*POWERS OF RECEIVER*") sets out the powers exercisable by any Receiver (which are, by reason of clause 9.5, also exercisable by FMO itself) after the Security becomes enforceable. The powers include the following:

> 10.1(a) ("*General*"): "A Receiver has all the rights powers and discretions set out below in this Clause in addition to those conferred on it by law; including all the rights, powers and discretions conferred on a receiver under the Act [i.e. the Law of Property Act 1925] and a receiver or an administrative receiver under the Insolvency Act, 1986."
>
> 10.2 ("*Possession*"): "A Receiver may take immediate possession of, get in and collect any Security Asset."
>
> 10.8 ("*Legal Actions*"): "A Receiver may bring, prosecute, enforce, defend and abandon any action, suit or proceedings in relation to any Security Asset which he thinks fit."
>
> 10.9 ("*Receipts*"): "A Receiver may give a valid receipt for any moneys and execute any assurance or thing which may be proper or desirable for realising any Security Asset."
>
> 10.14 ("*Other powers*"): "A Receiver may:
>
> > (a) do all other acts and things which he may consider desirable or necessary for realising any Security Asset or incidental or conducive to any of the rights, powers or

> discretions conferred on a Receiver under or by virtue of this Deed or law;
>
> (b) exercise in relation to any Security Asset all powers, authorities and things which he would be capable of exercising if he were the absolute beneficial owner of that Security Asset; and
>
> (c) use the name of the Chargor for any of the above purposes."

ix) Clause 12 ("*EXPENSES AND INDEMNITY*") states:

> "The Chargor must:
>
> (a) immediately and on demand pay all costs and expenses (including legal fees) incurred in connection with this Deed by the Lender, any Receiver, attorney, manager, agent or other person appointed by the Lender under this Deed...;
>
> and (b) keep each of them indemnified against any failure or delay in paying those costs or expenses ..."

x) Clause 15 ("*POWER OF ATTORNEY"*) provides:

> "The Chargor, by way of security, irrevocably and severally appoints the Lender, each Receiver and any of its delegates or sub-delegates to be its attorney to take any action which the Chargor is obliged to take under this Deed. The Chargor ratifies and confirms whatever any attorney does or purports to do under its appointment under this Clause."

xi) Clause 18 ("*GOVERNING LAW"*): states (in the first security agreement) "*This Deed is governed by English law*", or (in the second security agreement) *"This Deed, and any non-contractual obligations arising out or of in connection with it shall be governed and construed in accordance with English law."*

xii) Clause 19 ("*JURISDICTION*") provides: *"Each Party agrees that any claim or dispute under this Deed shall, mutatis mutandis, be resolved in accordance with clauses 31 and 32 of the Credit Agreement, except that the term "Parties" shall mean the parties to this Deed."*

28. The security package also included documents relating to the Proceeds Account. By a Bank Account Charge and an Accounts Agreement, both dated 19 June 2009, Bengaz entered into obligations to ensure that all income received from WAGPCO was paid into a separate bank account with Standard Chartered Bank with Account Number 01 02 2555336 50 ("***the Proceeds Account***") over which it gave security; and the obligation within clause 5.5(b) of the Security Agreements to procure payment into the "*Receipts Account*" was thereby varied insofar as it related to payments from WAGPCO. The Proceeds Account was opened on 28 May 2009.

29. Under the Bank Account Charge dated 19 June 2009 ("***the Bank Account Charge***") Bengaz (as "*Chargor*") granted FMO (as "*Lender*") a first fixed charge over all of its rights in the credit balance from time to time on the Proceeds Account, including all interest accrued on that balance. It includes these provisions:

i) In clause 2 ("*CREATION OF SECURITY*"), clause 2.1 ("*General*") provides that:

"All the security created under this Deed:

(i) is created in favour of the Lender;

(ii) is security for the payment, discharge and performance of all the Secured Liabilities; and

(iii) is made with full title guarantee...".

"*Secured Liabilities*" are defined as "*all present and future obligations and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) of the Chargor to the Lender under each Finance Document, except for any obligation which, if it were so included, would result in this Deed contravening any law (including Section 151 of the Companies Act 1985).*"

ii) Under clause 2.2 ("*Charged Debt*"), the Chargor charges by way of a first fixed charge all of its rights in respect of the Charged Debt. The "*Charged Debt*" is defined as "*the debt owed by the Account Bank to the Chargor represented by the Credit Balance*." The "*Credit Balance*" is defined as "*the credit balance from time to time on the Account, including all interest accrued on that balance*."

iii) Clause 12 ("*EXPENSES AND INDEMNITY*") states:

"The Chargor must:

(a) immediately and on demand pay all costs and expenses (including legal fees) incurred in connection with this Deed by the Lender; and

(b) keep the Lender indemnified against any loss or liability incurred by it in connection with any litigation, arbitration or administrative proceedings concerning this Security."

iv) Clause 16 ("*GOVERNING LAW*") provides: "*This Deed and any non-contractual obligations arising out of or in connection with it are governed by English law.*"

30. By an agreement dated 19 June 2009 between FMO (as "*Lender*"), Bengaz (as "*Borrower*"), and Standard Chartered Bank (defined as the "*Account Bank*") ("***the Accounts Agreement***"), Bengaz agreed *inter alia* to ensure that all income received by it from WAGPCO was paid into the Proceeds Account. The Accounts Agreement includes these provisions:

i) Clause 2.6(a) (under "*Security*"):

> "This Agreement constitutes notice to the Account Bank that under the Security Agreement the Borrower has charged (by way of a first fixed charge) in favour of the Lender all its rights in respect of any amount standing to the credit of the Proceeds Account and the debt represented by it."
>
> "*Security Agreement*" is defined for the purposes of this agreement as the Bank Account Charge.

ii) Clause 3.1 ("*Payments in*"):

> "The Borrower must ensure that all income received by the Borrower from the Company is paid directly into the Proceeds Account."

iii) Clause 3.2 ("*Withdrawals*"):

> "The Borrower may only withdraw amounts from the Proceeds Account if they are applied for the following purposes in the following order:
>
> (a) immediately following the end of the half of any financial year of the Borrower, in or towards satisfaction of the costs and expenses (including any operating expenditure) forecast to be incurred by the Borrower for the then next following half financial year as may be approved by FMO;
>
> (b) in or towards satisfaction of any deferred interest payment obligations under the Supplemental Agreement [i.e. the Credit Agreement];
>
> (c) in or towards satisfaction of any other interest payment obligations under the Supplemental Agreement;
>
> (d) in or towards satisfaction of any mandatory prepayment obligations under the Supplemental Agreement; and
>
> (e) in or towards any other amounts outstanding under the Finance Documents."

iv) Clause 4.2 ("*Default*"):

> "(a) Except as set out below, the Borrower may only make a withdrawal from the Proceeds Account if no Default is outstanding or will occur as a result of the withdrawal.
>
> (b) If a Default (other than an Event of Default) is outstanding, the Borrower may withdraw amounts standing to the credit of the Proceeds account for any purpose permitted by the Agreement.

> (c) Notwithstanding the above, if a Default is outstanding, the Lender may, and is irrevocably authorised to operate the Proceeds Account in accordance with this Agreement.
>
> (d) If an Event of Default is outstanding, the Lender: (i) will, on notice by it to the Account Bank, have sole signing rights in relation to the Proceeds Account; and (ii) may apply any amounts in the Proceeds Account in or towards amounts outstanding under any Finance Document in such order and from the Proceeds Account as the Lender thinks fit.
>
> (e) The Lender must notify the Account Bank if a Default occurs and the Account Bank must treat that notification as conclusive evidence that a Default has occurred and (until notified to the contrary by the Lender) is continuing."

v) Clause 8 ("*GOVERNING LAW*"): "*This Agreement and any non-contractual obligations arising out of or in connection with it, shall be is* [sic] *governed by and construed in accordance with English law*."

(5) Transactions undertaken

31. Bengaz drew down a total of US$25,210,694.18 under Facility A. Interest accrued on the sums withdrawn, and interest was capitalised up to the end of the Availability Period (15 October 2010) pursuant to § 8.3(b) of the Credit Agreement.

32. The details of the drawdowns, interest, interest capitalisations and repayments are set out in Schedule A to Mr Salem's 5th affidavit. The position in outline is as follows. The first drawdown was on 27 October 2006 in the sum of US$16,421,238.70. Further drawdowns were made in 2007 and 2009, and on 19 February 2007 the sum of US$1,015,772.72 was credited to the account, having been transferred to a different facility provided by FMO. By 15 October 2010, the total debt due to FMO was US$31,058,023.46, comprising US$25,210,694.18 total drawdowns (net of the February 2007 credit mentioned above) and US$5,847,329.28 of capitalised interest.

33. Over the ensuing 13½ years, interest has continued to accrue on the debt of US$31,058,023.46, at the contractual rate of 6% per annum. The only payments Bengaz has ever made were US$127,826.62 paid on 25 August 2011 and US$297,212.40 paid on 17 September 2012. FMO applied those payments against interest (as it was entitled to do pursuant to § 23.4 of the Credit Agreement).

34. By 13 December 2023, the day before FMO's application notice was issued, the total interest accrued since 15 October 2010, net of the two payments mentioned above, was US$24,457,614.12. The total debt owed by Bengaz to FMO under Facility A was therefore the US$31,058,023.46 debt (principal and capitalised interest) as at 15 October 2010 plus US$24,457,614.12 interest accrued since that date up to 13 December 2023, making a total of US$55,515,637.58. By the date of the hearing before me on 8 March 2024, that figure had risen to US$55,960,802.58, comprising US$31,058,023.46 principal and capitalised interest as at 15 October 2010 plus US$24,902,779.12 interest accrued from 15 October 2010 to 8 March 2024. The figure of US$55,960,802.58 was certified by FMO on 1 March 2024 pursuant to § 26.2 of the

Credit Agreement, and also verified in Mr Salem's 6th affidavit. I gave summary judgment in that amount on 8 March 2024.

35. Under §§ 12.2 and 14.3 of the Credit Agreement, FMO is also entitled to payment (within 5 Business Days of demand) of other costs, liabilities, and/or expenses incurred by FMO in connection with any Event of Default (§ 12.2) or enforcement or preservation of its rights under any Finance Document (including the Credit Agreement) (§ 14.3). The non-repayment of Facility A was an Event of Default (§ 19.1). FMO on 6 September 2023, 6 December 2023 and 16 February 2024 made demands under §§ 12.2 and 14.3 amounting in total to US$1,649,750.85. FMO is entitled, subject to assessment, to recover those sums in addition to the principal and interest referred to above.

36. Mr Salem states in his evidence, which I accept, that Bengaz has recognised and acknowledged that it is in default of its obligations on many occasions, including in specific exchanges to which he refers. Mr Salem explains that these exchanges occurred at a time when FMO had indicated its willingness to restructure Bengaz's indebtedness on mutually agreeable terms, but no restructuring was ultimately finalised. The exchanges he cites (attaching copies) are as follows.

    i) In an email on 11 October 2013, Mr Andrew Naylor, Managing Director of an entity called Development Capital Partners Limited, who it appears was advising the First Defendant in its negotiations with the Claimant at this time, states that the First Defendant does "*take seriously*" its obligations under the Credit Agreement and apologises for "*having let these slip*".

    ii) On 4 December 2013, Mr Sommissou (who, Mr Salem understands, took over from Mr Monnou in the negotiations with the Claimant at this time as Mr Monnou was injured) conveyed an email from Mr Monnou, in which Mr Monnou stated that "*there is only one question to solve between F.M.O and Bengaz SA: How do we get organised to allow F.M.O. to do anything ... We clearly know that as a creditor you will use all means at your disposal to recover the money owed to you, including enforcing your securities*".

    iii) Following a meeting between Mr Monnou and Ms Diana Arteaga (the Claimant's representative with responsibility for the First Defendant at this time) in September 2014 or early October 2014, Mr Monnou set out a number of proposals by email on 8 October 2014, to which Ms Arteaga responded in red text on 18 October 2014. Mr Monnou's email of 8 October states: "*We owe you money and we have to find a way to pay you back as quickly as possible, and doing our best by the same time to keep BENGAZ SA alive for new business*."

    iv) After the Proceedings were commenced, Mr Monnou on 17 July 2023, in an email to Mr Salem's firm, stated that after the "*dispute within BENGAZ SA"* was "*finished*", "*the next step will be to succeed the challenge of coming to a friendly agreement with FMO for the payment of our debt, save the future and get the company run*".

    v) At the return date hearing on 21 July 2023 Mr Monnou stated "*FMO has not been paid for more than 30 years now*".

(6) Diversion of funds

37. In the meantime, funds received by or due to Bengaz from WAGPCO have not been paid into the Proceeds Account, as should have occurred pursuant to the Security Agreements, the Bank Account Charge and the Accounts Agreement.

38. First, between 2012 and 2016, seven payments totalling US$4,169,756.55 ("***the Missing Payments***") were paid by WAGPCO into bank accounts in Benin, acting on instructions of Bengaz, and despite being notified during that period of the Accounts Agreement. Bengaz has not disclosed where these payments went. These sums were as follows:

    i) Payment of US$300,000.00 made on 20 April 2012 to account number 031897420101 held at Societe Generale De Banques AU Benin, account name BenGaz SA

    ii) Payment of US$440,000.00 made on 25 May 2012 to account number 031897420101 held at Societe Generale De Banques AU Benin, account name BenGaz SA

    iii) Payment of US$555,043.21 made on 8 January 2014 to account number 121123315501 held at Ecobank Benin, account name BenGaz SA

    iv) Payment of US$557,987.50 made on 8 July 2014 to account number 121123315501 held at Ecobank Benin, account name BenGaz SA

    v) Payment of US$565,027.89 made on 7 October 2014 to account number 121123315501 held at Ecobank Benin, account name BenGaz SA

    vi) Payment of US$565,027.89 made on 8 January 2015 to account number 121123315501 held at Ecobank Benin, account name BenGaz SA

    vii) Payment of US$1,186,670.06 made on 8 August 2016 to account number IBAN BJ66BJ115010010301199500013 held at Banque Atlantique Du Benin, account name Societe Bengaz.

39. Secondly, in the context of a shareholder dispute within Bengaz being litigated in the courts of Benin, WAGPCO has segregated sums due to Bengaz ("***the Segregated Funds***") in an account in London, held (like the Proceeds Account) at Standard Chartered Bank ("***the Segregated Account***"). The total sum held in that account was around US$26 million, a figure which increases as further sums fall due from WAGPCO to Bengaz.

(7) Procedural history

40. On 4 July 2023, FMO issued a without notice application for interim contractual and proprietary injunctions against the Defendants, along with a worldwide freezing order against Bengaz.

41. This application was heard on 5 July 2023 by Bright J, who made the orders sought ("***the 5 July Order***"), including an order that Bengaz provide by 11 July 2023 information about payments it had received from WAGPCO and disclosure of its assets.

42. On 6 July 2023, FMO issued the present proceedings.

43. Also on 6 July 2023, FMO sent the 5 July Order to Bengaz and connected individuals, and to WAGPCO. The Bengaz recipients included both: (i) Mr Monnou who is currently recognised by the Benin courts and by WAGPCO as Chairman of the Board of Bengaz, and whose company, Coryve Investments, asserts a 70% shareholding in Bengaz, and (ii) representatives of other shareholders who oppose him ("***the Foundation Shareholders***").

44. By a letter dated 7 July 2023, FMO gave Bengaz notice under § 31.4 of the Credit Agreement, exercising its right to rely on § 32 of the Credit Agreement, conferring exclusive jurisdiction on this court. The letter was sent to Bengaz by registered post to the four addresses of Bengaz referred to in Mr Salem's 5th affidavit (quoted, in relevant part, in § 48 below), at each of which it was signed for as having been received on 11 July 2023, as well as by email to various addresses associated with Bengaz.

45. On 6 and 18 July 2023, Mr Sossa of CDI, one of the Foundation Shareholders, wrote to confirm CDI's agreement with the 5 July Order. On 20 July 2023, Mr Sossa wrote to FMO's solicitors on behalf of (and copying) representatives of the Foundation Shareholders, attaching a joint statement on their behalf, stating that "*FMO's claim against Bengaz is certain, liquid and payable, and it must be the priority of the directors of the company Bengaz*" and "*all the actions initiated by our clients… are aimed at making Bengaz repay its debt to FMO*".

46. FMO served the proceedings on the Defendants. In § 32.2 of the Credit Agreement (quoted earlier), without prejudice to any other mode of service allowed under any relevant law, Bengaz irrevocably appointed David Doble Solicitors of 6-7 Bedford Row, London WC1R 4BS as its agent for service of process in relation to any proceedings before the English courts in connection with any Finance Document, and agreed that failure by a process agent to notify Bengaz of the process would not invalidate the proceedings concerned. In addition (though this point is not necessary in order to validate the service effected), David Doble Solicitors wrote to Bengaz on 31 March 2009 on the subject of fees, referring to its appointment as agent and to its understanding that that appointment would last for 20 years (apparently reflecting the anticipated long duration of the credit arrangements).

47. On 12 July 2023, FMO's solicitors sent the claim form, by way of service, by first class post to David Doble Solicitors at that address, and at three other addresses which information in the public domain indicated were practising addresses of the firm (Berkeley Square House, Berkeley Square, London W1J 6BD; 25 Southampton Buildings, London WC2A 1AL; and Floor 6, International House, 4 Maddox Street, London W1S 1QP). The packages sent to the Berkeley Square and Southampton Buildings addresses were subsequently returned undelivered. FMO's solicitors' courier team was told, when attempting to serve hard copy bundles for the 21 July 2023 hearing referred to below at the Berkeley Square address, that the firm was now operating at the Maddox Street address. Mr Doble emailed FMO's solicitors on 17 July 2023, giving the Maddox Street address in his email signature, stating that his firm's appointment as agent for service of process expired some years ago. However, the firm's appointment in the Credit Agreement was irrevocable. FMO's service of the proceedings on David Doble Solicitors, at the address stated in the Credit Agreement

and at the Maddox Street address, constituted valid service of the proceedings on Bengaz.

48. In addition, out of an abundance of caution, FMO took steps (without prejudice to the validity of the service already effected) to serve the proceedings on Bengaz in Benin. Mr Salem in his 5th affidavit gives the following details:

> "[59](a) On 17 July 2023, a copy of the Claim Form (including accompanying documents and a response pack) was couriered to the four addresses of the First Defendant in Benin known by this firm. The addresses are set out in full in Schedule C hereto and below.
>
> (i) Cotonou, Avlékété district Lot No. 136-137, Rue du Dahomey 01 BP: 4690-RP. I was first informed of this address by the Claimant. I note that during the 21 July Hearing, Mr Monnou expressly confirmed the address of the First Defendant to be "136 –137 Rue de Dahomey". The full address was also stated by Mr Monnou in an email to Hogan Lovells on 17 July 2023 to be "lot 136 - 137 Avlékété, rue du Dahomey, in Cotonou (Bénin)".
>
> (ii) Place Ganhi 01 BP 1519 Cotonou, Republic of Benin. After swearing Salem 1, this address was given to me as an alternate address by Ms Smolenska-Green.
>
> (iii) Ilot 451 Ganhi, Cotonou, Benin. My firm identified this address from a document relating to Court proceedings in Benin I note that on 27 July 2023, Mr Sossa confirmed by email to Hogan Lovells that "the claim form was served to the BenGaz (a) by DHL (b) by a Bailiff at address below; BenGaz SA Ilot 451 Place Ganhi 01 BP 1519 Cotonou Republic".
>
> (iv) Place Ghani 01 BP 5136 Cotonou, Republic of Benin. My firm also identified this address from a document relating to Court proceedings in Benin.
>
> (b) On 19 July 2023, the Claim Form (including accompanying documents and a response pack) was served via Bailiff in Benin at the addresses set out in Schedule C hereto.
>
> 60. Strictly without waiving privilege, I understand from the Claimant's Benin Counsel that service in Benin can take two forms: service by bailiff and a notification (being a simple letter sent to the First Defendant) and that as such, the precautionary service of the Claim Form (by both methods specified above) on the First Defendant in Benin amounts to valid service. This derives from Article 92 of the Code of Civil, Commercial, Social, Administrative and Accounting Procedure (the "Benin Code") which translates into English as "Legal documents from a foreign State whose notification is requested by the authorities

> of that State shall be notified by means of simple delivery or service through bailiff"."
>
> (exhibit references omitted)

I accept that evidence.

49. On 11 July 2023, Candey solicitors wrote to FMO's solicitors to state that they were in the process of being instructed by Bengaz.

50. On 20 July 2023, WAGPCO filed and served its Acknowledgment of Service, accepting jurisdiction.

51. The return date hearing took place on 21 July 2023. Sean O'Sullivan KC (sitting as a Deputy Judge of the High Court) continued the freezing order, proprietary injunctions, and other relief (with some variations) ("***the 21 July Order***"). Mr Monnou attended the hearing on behalf of Bengaz. He sought an adjournment, which was refused, and additional time to seek English legal advice and apply to set aside or vary the injunctions, and was given until 1 September 2023 to do so. The Deputy Judge nonetheless warned and directed Mr Monnou to comply with the information requirements of the 21 July Order forthwith. WAGPCO was represented by counsel and solicitors at the hearing, and took a neutral position apart from requesting fortification of FMO's undertaking in damages. Mr Sossa also attended the 21 July 2023 hearing but did not make representations.

52. On the same day as the 21 July 2023 hearing, in which he participated, Mr Monnou issued proceedings in Benin on behalf of (or purportedly on behalf of) Bengaz ("***the Opposition***") claiming *inter alia* that the 5 July Order had not been properly served in Benin and that WAGPCO should make payment to Bengaz instead.

53. Bengaz did not file an Acknowledgment of Service by the deadline on 28 July 2023, or at all, despite being reminded by FMO of the deadline by a letter dated 26 July 2023.

54. On 1 September 2023, Candey (although not yet on the record for Bengaz) emailed the Deputy Judge's clerk at chambers direct requesting an extension of time to set aside or vary the 21 July Order. This was rejected on the basis of its procedural irregularity, but Bengaz did not make any formal application for an extension of time.

55. Candey came on the record for Bengaz on 7 September 2023.

56. On 13 September 2023, FMO served its Particulars of Claim on WAGPCO, and on 3 October 2023 served them on Bengaz. Service on Bengaz was effected by hand-delivery to Candey, and (out of an abundance of caution) by hand-delivery to David Doble Solicitors at their Maddox Street address, and on Bengaz in Benin by registered courier to the four addresses referred to above. By § 30 of the Particulars of Claim, FMO exercised certain rights, as follows:

> "In all the circumstances, the Claimant has (and exercises) each of the following contractual rights, which it is just and appropriate for the Court to (a) confirm by way of declaration, (b) enforce by way of specific performance, (c) enforce, insofar

> as necessary, by way of injunction and (d) enforce, insofar as necessary, by further or consequential orders:
>
> (1) The right, pursuant to clause 3.1 of the Accounts Agreement, to require the First Defendant to ensure that the contents of the Segregated Account and all future Shareholder Payments be paid by the Second Defendant into the Proceeds Account;
>
> (2) The right, pursuant to clause 9.5 of the Security Agreements, to exercise the powers which would be exercisable by a Receiver appointed over the First Defendant's entitlement to Shareholder Payments under the Shareholder Agreement (which form part of the "Security Assets" within the terms of the Security Agreements as set out above) and thereby require the Second Defendant to pay the contents of the Segregated Account and all future Shareholder Payments into the Proceeds Account; and
>
> (3) The right, pursuant to clause 15 of the Security Agreements, to act as the First Defendant's attorney and thereby require the Second Defendant to pay the contents of the Segregated Account and all future Shareholder Payments into the Proceeds Account."

57. Between 6 October 2023 and 10 November 2023, FMO and WAGPCO agreed extensions of time for WAGPCO's Defence, to allow time for without prejudice discussions and (ultimately) the present summary judgment application to be prepared and issued, which suspended the deadline under CPR 24.4(4).

58. On 14 December 2023 FMO issued the present application. The application notice and papers (including the 5th affidavit of Mr Salem, dated 14 December 2023) were served on Candey by hand, on David Doble Solicitors by hand at the Maddox Street address, and by registered courier to Bengaz at the four addresses in Benin referred to above. In addition, electronic copies were sent, for information, to email addresses associated with Bengaz.

59. On 6 January 2024, Mr Sossa on behalf of all the Foundation Shareholders wrote to FMO's solicitors confirming their support for FMO's actions.

60. On 5 February 2024, FMO wrote to AO Law (instructed on behalf of WAGPCO) and to Candey noting that the deadline for responsive evidence had passed.

61. On around 9 February 2024, a Desiré Monnou appears to have sent a letter to the court requesting an adjournment of this hearing. Desiré Monnou signed the letter as Bengaz's "*Managing Director*", and is described in the Opposition as Bengaz's "*CEO in office*". The letter was not copied to FMO's solicitors, but was later sent by email from Bengaz to FMO's solicitors on 16 February 2024. Desiré Monnou stated that Bengaz lacked funds to seek legal advice, wished to use the Segregated Account funds protected by the 21 July Order, and would "*firmly oppose*" summary judgment.

62. FMO's solicitors replied, to Candey, on 21 February 2024 noting that:

i) Candey had been on the record since 7 September 2023, and been approached by Bengaz as long ago as 11 July 2023, so Bengaz had had the benefit of English legal representation since then;

ii) the 21 July Order made express provision for Bengaz to spend a reasonable sum on legal advice and representation, which Bengaz had indeed relied on (albeit improperly without explaining the source of funds); and there was no basis to seek to use funds subject to proprietary claims;

iii) Bengaz's position was not credible where it was pursuing the Opposition proceedings in Benin;

iv) Bengaz had still failed to comply, or even attempted to comply, with its asset disclosure obligations under the 21 July Order; and

v) in any event, the relief being sought by Bengaz was far too late.

63. On 21 February 2024, FMO's solicitors received a notice of change (signed by Mr Monnou) stating that Candey had ceased to act for Bengaz. This appears to have been filed under the wrong claim number. A further notice of change (also signed and dated 21 February 2024) was sent to FMO's solicitors by Candey on 6 March 2024. The notice gave the address to which documents about the claim should be sent as Lot N136-137, Rue du Dahomey, Quatier Aviekete, Cotonou, Benin (i.e. the same premises as the first of the four addresses for Bengaz referred to earlier) along with Mr Monnou's email address.

64. Also on 21 February 2024, WAGPCO served the 2nd affidavit of Mr Adamade, dated 16 February 2024, along with an application for relief from sanctions. Following correspondence, FMO consented to the application subject to the court's approval, and an order granting relief to WAGPCO was made on 4 March 2024. FMO and WAGPCO also agreed an extension of time for FMO's evidence in reply to WAGPCO, i.e. the 6th affidavit of Mr Salem, which was served on 4 March 2024.

65. At the hearing on 8 March 2024, FMO and WAGPCO were represented by counsel. Mr Monnou participated on behalf of Bengaz, and Mr Sossa was present as an observer. Mr Monnou stated that he was appearing under protest because Bengaz had never been in a position to be properly represented by an English lawyer, and sought an adjournment. He stated that FMO and WAGPCO had been withholding all Bengaz's funds, and that Bengaz had had no funds since 2016. Asked about the fact that Candey had been acting for Bengaz for a significant period of time, Mr Monnou said it had been a 'nightmare' finding funds to pay them. As to Bengaz's funding of proceedings in Benin, Mr Monnou said he was a lawyer himself with chambers in Benin.

66. After giving Mr Monnou and counsel for the other parties an opportunity to make submissions, I refused to adjourn the hearing, giving oral reasons which have been separately transcribed. In summary, I concluded that an adjournment was not appropriate in circumstances where:

i) Bengaz had had representation by English solicitors (Candey), who were involved at least to some degree from 11 July 2023, and then formally on the

record from 7 September 2023 until 21 February 2024, i.e. shortly before the hearing.

ii) During that time, no Acknowledgement of Service was filed and no Defence was filed.

iii) No application was made (during that period or at all) for any variation to the worldwide freezing order in order to allow money to be spent on legal representation.

iv) The worldwide freezing order, insofar as it dealt with non-proprietary assets, included the usual exception for money to be spent on legal expenditure. It did not contain such an exception in relation to assets to which a proprietary claim was made. However, the evidence before me indicated that a substantial sum of money, of the order of US$4 million (i.e. the Missing Payments), had been paid to Bengaz rather than to the account specified in the Credit Agreement.

v) Importantly, in spite of orders made by the court, there had been no asset disclosure by Bengaz (in relation to the Missing Payments or anything else).

vi) I was therefore not persuaded that Bengaz had shown that it was unable to instruct lawyers due to a lack of funds; and I was in any event not persuaded that it would be appropriate to adjourn the applications.

(C) PERMISSION TO APPLY FOR SUMMARY JUDGMENT

67. FMO seeks permission to apply for summary judgment against Bengaz, permission being required because Bengaz has filed no Acknowledgement of Service.

68. I summarised the relevant principles in *DVB Bank SE v Vega Marine Ltd* [2020] EWHC 1494 (Comm):

> "56. CPR 24.4(1) provides:
>
> > "A claimant may not apply for summary judgment until the defendant against whom the application is made has filed – (a) an acknowledgement of service; or (b) a defence, unless – (i) the court gives permission; or (ii) a practice direction provides otherwise."
>
> 57. There is no requirement for a party to obtain permission under CPR 24.4(1) before issuing a summary judgment application: both applications can be made in the same application notice: *F BN Bank (UK) Ltd v Leaf Tobacco A Michailides SA* [2017] EWHC 3017 (Comm) § 17 (Andrew Baker QC); *European Union v Syria* [2018] EWHC 1712 (Comm) § 62 (Bryan J); and *Punjab National Bank (International) Ltd v Boris Shipping Ltd* [2019] EWHC 1280 (QB) § 30-32 (Christopher Hancock QC).

> 58. Bryan J summarised the principles relevant to the exercise of the court's discretion under CPR 24.4(1) in *European Union v Syria*:
>
> '(1) The purpose of the rule are to ensure that no application for summary judgment is made before a defendant has had an opportunity to participate in the proceedings and to protect a defendant who wishes to challenge the Court's jurisdiction from having to engage on the merits pending such application.
>
> (2) Generally, permission should be granted only where the Court is satisfied that the claim has been validly served and that the Court has jurisdiction to hear it. Once those conditions are met there is generally no reason why the Court should prevent a claimant with a legitimate claim from seeking summary judgment.
>
> (3) The fact that a summary judgment may be more readily enforced in other jurisdictions than a default judgment is a proper reason for seeking permission under CPR 24.4(1).' (§ 61)
>
> I would add, in relation to (3), that it would in my view be sufficient that the claimant has a reasonable belief that a summary judgment may be more readily enforced than a default judgment. There is no justification for the court subjecting any such belief to minute examination, when the permission the claimant is seeking is in reality no more than the opportunity to obtain a reasoned judgment on the merits of its claim."

69. Mr Salem states in his 5th affidavit:

> "66. Strictly without waiving privilege, the Claimant has given careful thought as to whether it would be most appropriate to seek default judgment or summary judgment in the circumstances. The Claimant seeks an order for summary judgment (rather than default judgment) in the following circumstances.
>
> (a) The nature of the relief sought in the Summary Judgment Application includes declaratory and injunctive relief. It also necessitates the Second Defendant to be a respondent to the Applications in circumstances where it is the holder of the Segregated Account and has control over the Shareholder Payments. The Second Defendant has filed an Acknowledgment of Service in these proceedings and its defence deadline has been extended by agreement. Default judgment is therefore not an appropriate or adequate remedy.
>
> (b) As set out above, the First Defendant is a company incorporated in Benin the Second Defendant is a company incorporated in Bermuda. It may therefore be necessary to

> enforce any judgment obtained overseas (including in Benin or Bermuda), given that the Defendants are incorporated in other jurisdictions, the cross-border nature of the claims, and the fact that there have been and/or are proceedings before the courts of Benin and Togo ...
>
> (c) As already noted, the First Defendant has failed to give any asset disclosure, and therefore it is important for the Claimant (having little knowledge of where assets of the First Defendant it may wish to enforce against are located) to ensure it has the best possible chance of enforcing a judgment of the English Court in other jurisdictions."

70. In these circumstances it was appropriate to grant permission, and I did so at the hearing on 8 March 2024.

(D) SUMMARY JUDGMENT

(1) Principles

71. Under CPR 24.3, the court may give summary judgment "*against a claimant or defendant on the whole of the claim or on an issue if — (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial*".

72. In The LCD Appeals (*Iiyama (UK) Ltd and others v Samsung Electronics Co Ltd and others*) [2018] EWCA Civ 220, the Court of Appeal approved the following considerations applicable to summary judgment applications, taken from passages in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *Swain v Hillman* [2001] 1 All ER 91 at 94. I state them below in a form applicable equally to applications by claimants and applications by defendants:

i) the court must consider whether the respondent has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) a "*realistic*" claim or defence is one that carries some degree of conviction. This means a claim or defence that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 § 8;

iii) in reaching its conclusion the court must not conduct a "*mini-trial*": *Swain v Hillman*;

iv) this does not mean that the court must take at face value and without analysis everything that a respondent says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* § 10;

v) however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:

Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;

vii) on the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725; and

viii) a judge in appropriate cases should make use of the powers contained in Part 24. In doing so, he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose; and it is in the interests of justice. If the respondent has a case which is bound to fail, then it is in their interests to know as soon as possible that that is the position: *Swain v Hillman* [2001] 1 All ER 91 § 94.

73. If an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success or other reason for having a trial: *Sainsbury's v Condek* [2014] EWHC 2016 (TCC) § 13.

74. A respondent to a summary judgment application who claims that further evidence will be available at trial must serve evidence substantiating that claim: *Korea National Insurance Corp v Allianz* [2007] 2 CLC 748 (CA):

> "It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The

> court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here. …" (§ 14 per Moore-Bick LJ)

(2) FMO's debt claim against Bengaz

75. I have set out in section (B) above the facts and evidence on which FMO bases its application for summary judgment for the sum of US$55,960,802.58.

76. Although, as noted above, Bengaz has engaged to a degree with these proceedings, and has given general expressions of opposition to FMO's claim, it has neither filed a Defence, nor set out substantive grounds of defence, nor filed any evidence in opposition to FMO's claims and summary judgment application.

77. WAGPCO has stated that it does not oppose the summary judgment application and takes a neutral stance. However, it submitted that if the application were granted, then the court should order FMO to indemnify it in respect of any losses that may be caused to it by the court's order. I consider that point in section (C)(6) below.

78. I am satisfied, on the evidence provided, that FMO is entitled to the sum sought, that there is no real prospect of Bengaz succeeding in any defence to the claim, and that there is no other compelling reason why the case should be disposed of at a trial. FMO is therefore entitled to summary judgment for US$55,960,802.58 against Bengaz.

(3) Declaration claims

79. The power to grant declarations is part of the general jurisdiction of the High Court, and is now derived from section 19 of the Senior Courts Act 1981.

80. CPR 40.20 provides that:

> "The court may make binding declarations whether or not any other remedy is claimed."

81. In deciding whether to exercise its discretion, a court invited to make a declaration must consider whether in all the circumstances it is appropriate, taking into account justice to the parties, whether the declaration would serve a useful purpose, and whether there are any other special reasons why the court should or should not grant the declaration (*Financial Services Authority v Rourke* [2002] CP Rep 14 (Neuberger J, 19.10.01)).

(a) Proceeds Account

82. FMO seeks summary judgment on its claim for a declaration that all payments from WAGPCO to Bengaz must be made into the Proceeds Account, based on § 3.1 of the Accounts Agreement: "*The Borrower must ensure that all income received by the Borrower from the Company is paid directly into the Proceeds Account*", which, as noted earlier, is defined as account no. 01 02 2555336 50 at Standard Chartered Bank, London.

(b) Segregated Funds

83. FMO also seeks summary judgment on its claim for declarations that the following funds ("***the Segregated Funds***") are held on trust for FMO:

i) the contents of the Segregated Account, being amounts ringfenced by WAGPCO in respect of Bengaz's payment entitlements; and

ii) any further payments from WAGPCO in respect of Bengaz's entitlements pursuant to its various rights as shareholder in WAGPCO, as creditor in respect of shareholder loans to WAGPCO, and as party to (i) the Shareholders Agreement and (ii) the Escrow Agreement (together, "***the Shareholder Payments***"), in respect of which funds have been or may in future be segregated by WAGPCO.

84. I agree with FMO that the Segregated Funds are held on a primary trust by WAGPCO for Bengaz, under the principles set out in *Re Kayford* [1975] 1 WLR 279, 282, *Bath and North East Somerset Council v HM Attorney General* [2002] EWHC Civ 1623 (Ch), *Snell's Equity* (34th ed) § 22-013 and *Lewin on Trusts* (20th ed.), vol 1, § 8-004. The evidence shows that:

i) these funds comprise Bengaz's Shareholder Payments pursuant to the Shareholders Agreement and Amendment No. 4 to it;

ii) they have been segregated from WAGPCO's own monies;

iii) the Segregated Account has the account name *"W/A GPCo Limited BenGaz Holding Account*";

iv) interest is treated by WAGPCO as part of the total, rather than being withdrawn for the benefit of WAGPCO;

v) in management reports for May 2022 and January 2023, WAGPCO describes these funds as being held "*on behalf of*" Bengaz;

vi) Mr Adamade in his 1st affidavit describes the Segregated Funds as being held both "*for the benefit of*" and "*on behalf of*" Bengaz.

85. Bengaz's beneficial interest is, in turn, held on trust for FMO as a result of § 5.5(a) of the Security Agreements, quoted in § 27.v) above. Further, WAGPCO is on notice of FMO's proprietary rights in the Segregated Funds, by reason of FMO's letter dated 27 June 2023 and the documents it has served in the course of the proceedings.

(c) Rights exercisable by FMO as Receiver

86. FMO seeks a declaration that, by § 9.5 of the Security Agreements, quoted in § 27.vii) above, it is entitled to exercise on behalf of Bengaz the rights, powers and discretions that would be exercisable by a Receiver under the Security Agreements in respect of (i) Bengaz's rights against WAGPCO to Shareholder Payments and (ii) the Segregated Funds; and, accordingly, that FMO is entitled to require WAGPCO (and WAGPCO is obliged) to pay Segregated Funds and future Shareholder Payments to FMO's order into the Proceeds Account.

87. Clause 9.5 applies after the security provided for in the Security Agreements has become enforceable. Under § 7.1, that occurs if there is an Event of Default. Events of Default have clearly occurred, including, most simply, by reason of non-payment (§ 19.1 of the Credit Agreement).

88. The power conferred by § 9.5 of the Security Agreements applies to any Security Asset, defined as "*all assets of the Chargor the subject of any security created by this Deed.*" Clause 2 of the Security Agreements states that the security created by the Security Agreements "*is created over present and future assets of the Chargor* [Bengaz]" (§ 2.1(a)(ii)) and includes "*all of its [Bengaz's] rights in respect of [the Shareholders Agreement*" (§ 2.3). Both Bengaz's rights to the balance of the Segregated Funds and its rights against WAGPCO to future Shareholder Payments fall within the definition of "*Security Asset*".

89. FMO has, through its Particulars of Claim, exercised these rights by requiring WAGPCO to pay the Segregated Funds and any future Shareholder Payments into the Proceeds Account.

(d) FMO as Bengaz's attorney

90. FMO seeks an equivalent declaration pursuant to its rights as Bengaz's attorney under § 15 of the Security Agreements, quoted in § 27.x) above. As FMO points out, by requiring payment into the Proceeds Account, FMO is merely enforcing its rights under the Security Agreements and Bengaz's obligations under the Accounts Agreement.

(e) Missing Payments

91. As explained earlier, the Missing Payments were paid by WAGPCO into bank accounts in Benin acting on the instruction of Bengaz, but should have been paid into the Proceeds Account. FMO seeks summary judgment on its claim that the Missing Payments, or their traceable proceeds/exchange product, are held on trust for FMO by Bengaz as a result of § 5.5(a) of the Security Agreements.

(f) Conclusion on declaration claims

92. I consider that each of the declarations sought, as summarised, would be just as between the parties, and would serve a useful purpose, not least given the ongoing situation in which payments from WAGPCO to Bengaz are held and will continue to fall due. The apparent contention about control over Bengaz in my view makes it all the more important for the court to provide clarity about FMO's rights vis-à-vis both Bengaz and WAGPCO.

(4) Specific performance and injunctive relief

93. FMO also seeks orders for mandatory relief against both Defendants.

(a) Specific performance against Bengaz

94. FMO seeks summary judgment on its claim for specific performance of Bengaz's obligation under the Accounts Agreement, to ensure that all Shareholder Payments are paid into the Proceeds Account, by ordering Bengaz (i) to instruct WAGPCO to pay all Segregated Funds and future Shareholder Payments into the Proceeds Account, and (ii)

insofar as the Missing Payments (or their proceeds) remain in the hands of Bengaz, to pay these into the Proceeds Account.

95. A basic criterion when considering on order for specific performance is whether damages would be an adequate remedy (*Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] AC 1172 § 30). The question has also been framed as whether "*it is just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?*" (*Evans Marshall & Co Limited v Bertola SA* [1973] 1 WLR 349, 379H).

96. FMO seeks specific performance on the basis that, whenever Shareholder Payments are not paid into the Proceeds Account (and *a fortiori* when paid away elsewhere), FMO is deprived of the benefit of its position as a secured creditor under the Security Agreements and Accounts Agreement, under which it should have immediate recourse to them via the Proceeds Account (a secured account in London). Given that the Shareholder Payments represent Bengaz's only (or principal) revenue stream and the principal means of repayment of the outstanding debts, it is clear that a mere claim against Bengaz for damages would be an inadequate remedy. An order for specific performance is clearly appropriate.

(b) Injunctive relief against WAGPCO

97. FMO seeks injunctive relief against WAGPCO to ensure that Shareholder Payments (both the Segregated Funds and future payments) are paid into the Proceeds Account. FMO relies in this regard on the following rights, the basis of which I have already set out:

    i) its right, under the Accounts Agreement, that all income received by Bengaz from WAGPCO be paid into the Proceeds Account;

    ii) its right, as both Bengaz's attorney and its quasi-receiver, to direct that all payments from WAGPCO are paid into the Proceeds Account; and

    iii) its proprietary rights in respect of the funds segregated by WAGPCO in respect of Shareholder Payments, i.e. the Segregated Funds.

98. There is a real risk that, absent injunctive relief, Shareholder Payments (including the Segregated Funds) will not be paid into the Proceeds Account, in circumstances where:

    i) the Missing Payments were paid away at Bengaz's direction;

    ii) the Segregated Funds have not to date been paid into the Proceeds Account but instead held in the Segregated Account;

    iii) there are ongoing disputes about the management and control of Bengaz;

    iv) Mr Monnou appears at present to be recognised as being entitled to act on Bengaz's behalf, and has (according to FMO's evidence) been alleged, by a temporary interim administrator of Bengaz and by other shareholders in Bengaz, to have been involved in the misappropriation of the Missing Payments;

    v) shortly before proceedings were commenced, Bengaz asked WAGPCO to pay all funds held for its benefit into bank accounts in Benin;

vi) Bengaz has failed to comply with orders to disclose what has happened to the Missing Payments;

vii) at least the last of the Missing Payments was made after WAGPCO was put on notice of Bengaz's obligations under the Accounts Agreement; and

viii) WAGPCO has failed to recognise FMO's rights over the monies flowing (*prima facie*) from WAGPCO to Bengaz, in letters/memos dated 7 September 2015, 24 April 2022 and 29 June 2023, and in evidence filed on 14 July 2023 stating that *"[b]ut for the uncertainty surrounding the authorised legal representatives of Bengaz and the myriad of court orders, the Company would not have been constrained to make payments into the Bengaz-FMO Proceeds Account, especially if clear instruction are received from appropriate representatives of Bengaz to do so*".

99. As with FMO's claims for specific performance, damages would be an inadequate remedy because FMO would be left unsecured in circumstances where it is entitled to be secured. I consider injunctive relief to be appropriate.

100. FMO also seeks an ancillary order that WAGPCO notify FMO of each entitlement to a Shareholder Payment falling due for the benefit of Bengaz, which continues the order at § 12(1) of the 21 July Order (with which WAGPCO has complied). It is appropriate to make that order too.

(5) Disclosure relating to Missing Payments

101. FMO seeks an order that Bengaz give details of all Shareholder Payments it has received since April 2009, i.e. the Missing Payments. This reflects § 11(1)(a) of the 21 July Order, with which Bengaz has not complied; and is based on Bengaz's obligation to ensure that all income received by it from WAGPCO is paid into the Proceeds Account, and FMO's proprietary interest in those Missing Payments. I consider this relief to be appropriate.

(6) Indemnity sought by WAGPCO

102. Mr Adamade indicates in his 2nd affidavit that WAGPCO does not oppose FMO's application for summary judgment, and "*stands ready to pay the sums held in the Segregated Account into the Proceeds Account or any other account pursuant to the order of a competent Court*".

103. However, Mr Adamade requests an order "*directing the Claimant to indemnify and keep the Second Defendant indemnified in full and on demand from and against all or any claims (whether or not successfully compromised or settled), actions, liabilities, demands, cost, expenses or proceedings brought or established against or suffered or incurred by the Second Defendant, as a result of or in connection with the orders sought and/or granted in the Claimant's application dated 14 December 2023.*"

104. Mr Adamade states that that the funds sequestered in the Segregated Account have been the subject of a plethora of legal proceedings pending in multiple jurisdictions, which has restricted WAGPCO's ability to do other than to sequester the funds. He refers to the following matters.

i) Mr Adamade describes a "*complex series of internal disputes*" between shareholders of Bengaz as to its ownership and management structure, commencing around 2014, which resulted in Bengaz being unable effectively to engage with WAGPCO as a shareholder. This necessitated WAGPCO procuring a Scheme of Arrangement in Bermuda and England to allow for a capital restructuring to progress in the absence of Bengaz.

ii) WAGPCO relies on § 9.1 of Amendment No. l to the Shareholders Agreement whereby, as I note earlier, WAGPCO is obliged to make payments due to its shareholders pursuant to instructions received from its shareholders.

iii) From April 2012 to date, Bengaz has been due shareholder loan repayments. In the absence of a duly authorised representative for Bengaz to instruct WAGPCO and/or WAGPCO's inability to determine who from Bengaz it should rightfully deal with, WAGPCO in January 2018 commenced sequestering funds due to Bengaz.

iv) In broadly the same period, WAGPCO's decision-making processes were further disrupted by the attendance at its general meetings of certain uninvited individual shareholders of Bengaz. To stop these disruptions, the Benin Tribunal de Premiere Instance de Premiere Classe de Cotonou, on WAGPCO's application, declared in a judgment of 27 December 2017 (No 082/17 1ere Ch. COM) that, without prejudice to Bengaz's rights of participation in WAGPCO, Bengaz's individual shareholders were not entitled to be its representatives at WAGPCO's meetings, and restrained them from doing so by way of injunction pending appointment by the courts or other legally recognised administrative body of legal representatives for Bengaz. The Benin court made a further declaration in the same judgment that Bengaz did not, at that time, have a duly authorised person to represent it on WAGPCO's board of directors.

v) An appeal by Bengaz against the 27 December 2017 decision of the Benin Tribunal de Premiere Instance de Premiere Classe de Cotonou was upheld by the Benin Court of Appeal on 13 April 2022. The Benin Court of Appeal, *inter alia*, declared Mr Monnou as chairman of the board of directors of Bengaz and further ordered that he be allowed to participate in WAGPCO's meetings. The court ordered that failure to comply will attract a daily penalty of CFA 25 million. The court also ordered WAGPCO to pay damages of CFA 200 million to Bengaz. Pursuant to the court's order, and upon Bengaz's confirmation of Mr Monnou's appointment as its director to WAGPCO's board of directors, WAGPCO has since June 2022 recognized Mr Monnou as the director representing Bengaz on WAGPCO's board of directors.

105. Mr Adamade states that WAGPCO is at risk of suffering significant injury in the event that an order is granted in respect of the sequestered funds held on behalf of Bengaz, without a complete consideration of the subsisting proceedings pending in multiple jurisdictions and/or complete indemnification of WAGPCO by FMO. He refers in particular to:

i) Proceedings due for hearing on 1 March 2024 before the Commercial Court of Cotonou, Benin in Suit No. BJ/e-TCC/2023/0632 '*Opposition a Paiement*' (Objection to Payment), arising from a summons dated 21 June 2023, served on

WAGPCO by minority shareholders of Bengaz (the Foundation Shareholders), notifying parties of FMO's objection to any payment and any return of funds, effects or assets belonging to Bengaz by WAGPCO.

ii) Proceedings pending before the Common Court of Justice and Arbitration, Abidjan, Cote D'Ivoire in Appeal No.029/2022, being an appeal from the Court of Appeal's orders referred to in § 104.v) above. The parties were awaiting a hearing in respect of this appeal.

iii) Proceedings pending before the Court of Appeal, Benin in Appeal No. 059/2023 in respect of a "*consignment order*" dated 17 June 2022 granted by the President of the Cotonou Commercial Court for payment of the CFA 200 million awarded by the Court of Appeal into court pending the outcome of WAGPCO's appeal pending before the Common Court of Justice and Arbitration. This appeal was scheduled for judgment on 15 March 2024.

iv) Proceedings pending before the Commercial Court of Cotonou, Benin in Suit No. BJ/e-TCC/2023/0738 commenced on 21 July 2023 in respect of Bengaz's objection to service by FMO in the present proceedings of "*a foreign judgment and documents in a foreign language with writ of summons …*". The application was scheduled for judgment on 1 March 2024.

106. Mr Adamade adds that he is aware Bengaz currently has no access to its funds in the Segregated Account. He believes that whilst there is no risk of WAGPCO contravening the 21 July Order, WAGPCO is concerned that an order to release the funds to any party or transfer the funds to any other account is likely to entangle WAGPCO in continuous litigation costs, if the court proceeds to grant FMO's application without the full indemnification of WAGPCO.

107. WAGPCO in its skeleton argument suggests that the proceedings referred to in § 105.iv) above have the most direct relevance to FMO's present applications. It says there is a clear and obvious danger that the Beninoise court could find in Bengaz's favour and decide that proper service was not effected. Whichever way the court decides, it says, an appeal is likely. WAGPCO will be at risk that its compliance with any order this court makes (in particular, an order to pay funds into the Proceeds Account) will place it in breach of an order made in a different jurisdiction; and will also inevitably result in WAGPCO incurring additional legal costs.

108. WAGPCO refers to two authorities. In *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport* [1981] 1 WLR 126, the court granted an injunction restraining the defendant from removing a cargo from a port, on condition that the plaintiff undertook to reimburse the port authority for the loss of income and other costs incurred as a result. Robert Goff J stated that the Commercial Court was anxious that the jurisdiction to grant Mareva (now freezing) orders *"should be implemented in a manner which takes account of the interests of innocent third parties"* (p.1263H). In *Cartier v British Telecommunications* [2018] UKSC 28, the Supreme Court referred at §§ 12-13 to the ordinary rule that the respondent to a *Norwich Pharmacal* order is entitled to its costs of compliance, and the similar practice applied to expenses incurred by banks in complying with *Bankers Trust v Shapira* orders (disclosure of information to trace the proceeds of fraud), and the costs of complying with freezing orders; adding that

"[o]ther innocent third parties, such as port authorities required by a freezing order to detain a vessel in port, are entitled to the same indemnity" (citing *Clipper Maritime*).

109. In response, FMO points out, in its evidence and submissions, that:

i) In the proceedings referred to in § 105.i) above, the Foundation Shareholders object "*to any payment and any return of funds, effects or assets belonging to BENGAZ Company and owned by the WEST AFRICAN GAS PIPELINE COMPANY LIMITED ...on the basis of a supposed meeting of the board of directors and of alleged null and illegitimate deliberations of the general assemblies of May 24 2023 at the Benin royal hotel*"; and express concern that *"[g]iven that the plaintiffs are particularly concerned that BENGAZ company assets, owned by WAGPCo company and intended for repaying FMO company, which is the lending bank for financing BENGAZ Company's participation in WAGPCO capital, disappear [sic], as was the case in August 2016, if they fall into the hands of a director stripped of any capacity this time*". The Foundation Shareholders also ask the Benin court to order Bengaz and WAGPCO to pay them a sum equivalent to about US$22 million (CFA 13 billion converted at the 3 March 2024 rate 1 XAF = 0.0017 USD). However, any payment made pursuant to summary judgment granted by this court would not occur pursuant to any disputed board meeting of the kind to which the Foundation Shareholders object.

ii) The proceedings referred to in § 105.ii) above essentially relate to a dispute about WAGPCO having declined to recognise or invite Bengaz officers to its statutory shareholders' meetings for more than four years. In the course of these proceedings, the Cotonou Court of Appeal on 13 April 2022 ordered WAGPCO to pay CFA 200 million in damages to Bengaz, and WAGPCO seeks to overturn that order in cassation proceedings before the Common Court of Justice and Arbitration. The Commercial Court of Cotonou on 17 June 2022, by Consignment Order 0253, authorised WAGPCO to deposit that sum at the Caisse des Depots et Consignations in Benin pending the end of the proceedings for appeal in cassation. The proceedings have no apparent relevance to FMO's present applications.

iii) The proceedings mentioned in § 105.iii) are an appeal by Bengaz from the Consignment Order 0253 referred to above, and again have no relevance to FMO's present applications.

iv) The proceedings referred to in § 105.iv) above were brought by Bengaz on 21 July 2023, in breach of the jurisdiction clause in the Credit Agreement. The orders sought against WAGPCO derive from its English law obligations to make payments to Bengaz under Amendment No. 1 to the Shareholders' Agreement, in circumstances where FMO is entitled to act on Bengaz's behalf as set out above. There could be no proper basis for Bengaz or its shareholders to dispute FMO's entitlement to any order made by this court on its application, nor is it clear how any overseas court could properly entertain any attempt by them to do so.

110. I accept FMO's submissions on these matters. The question of whether the present proceedings were properly served is a matter for this court to determine, applying

English rules of procedure and (to the extent relevant) any relevant foreign law. The rights and duties of Bengaz and WAGPCO are governed by English law, and both parties are subject to this court's jurisdiction in relation to the present action. The indemnity sought by WAGPCO from FMO would in substance transfer to the Benin court the power to determine the outcome of these applications, despite the jurisdiction clauses in the contracts between FMO and Bengaz, because it would require FMO to indemnify WAGPCO in the event that the Benin court took a different view from this court as to the ultimate entitlement to the funds paid/payable from WAGPCO to Bengaz. Any doubt about who is entitled to control Bengaz is beside the point in circumstances where, whoever controls it, Bengaz and WAGPCO owe duties to FMO which FMO is entitled to ask the court to enforce. The cases cited by WAGPCO are distinguishable because:

i) they relate to interlocutory relief, whereas in the present case the court has made a final decision on the merits, holding that monies are due from Bengaz to FMO, that WAGPCO is obliged to make future payments into the Proceeds Account, and that Bengaz holds its interest in the Segregated Funds on trust for FMO, a trust of which WAGPCO is on notice; and

ii) WAGPCO is not an 'innocent third party' in the sense contemplated by the authorities it cites. Unlike the third parties in those cases, WAGPCO has pre-existing obligations to make payments to Bengaz, and under the contractual arrangements summarised earlier, FMO is entitled to act as Bengaz's receiver and attorney in that regard. WAGPCO is, to that extent, under obligations to make payments at FMO's direction, and the effect of this court's orders is to hold WAGPCO to those obligations. It is not entitled to an indemnity from any consequences that may arise from complying with those obligations.

111. For similar reasons, I do not consider WAGPCO to be entitled to an indemnity from FMO in respect of legal costs. FMO is entitled to enforce Bengaz's and WAGPCO's obligations without having to incur the risks and costs involved in providing an indemnity. I did, however, make orders for Bengaz to pay both FMO's and WAGPCO's costs of the present proceedings. Those orders were the subject of a short ruling (separately transcribed).

(7) Other relief

112. At the hearing on 8 March 2024, I also continued the worldwide freezing order against Bengaz, for reasons and on terms which were the subject of a further short ruling (separately transcribed). I also made certain orders dispensing with personal service provided that specified other steps were taken to bring my orders to the attention of the Defendants.

(E) CONCLUSIONS

113. For the reasons set out above, I concluded that FMO should be granted permission to apply for summary judgment, and was entitled to summary judgment on its claims in debt, for mandatory relief and for disclosure.