



Neutral Citation Number: [2022] EWHC 768 (Comm)

Case No: CL-2020-000808

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

**IN THE MATTER OF AN ARBITRATION CLAIM**  
**IN THE MATTER OF ICC ARBITRATIONS**

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

Date: 01/04/2022

Before :

**SIR NIGEL TEARE**  
**Sitting as a Judge of the High Court**

Between :

- (1) AFRICA FINANCE CORPORATION  
(2) ECOBANK NIGERIA LIMITED  
(3) FIDELITY BANK PLC  
(4) FIRST BANK OF NIGERIA LIMITED  
(5) GUARANTY TRUST BANK PLC  
(6) SHELL WESTERN SUPPLY AND TRADING  
LIMITED  
(7) STERLING BANK PLC  
(8) UNION BANK OF NIGERIA PLC  
(9) ZENITH BANK PLC

**Claimants**

- and -

AITEO EASTERN E & P COMPANY LIMITED

**Defendant**

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**Ben Juratowitch QC and Belinda McRae** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimants**  
**Stephen Houseman QC and Tom Ford** (instructed by **Stewarts Law LLP**) for the **Defendant**

Hearing dates: 22-24 March 2022

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**Approved Judgment**

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand down is deemed to be 10:30 am on 01 April 2022.”

**Sir Nigel Teare :**

1. This case concerns an application for a final anti-suit injunction on the basis of an agreement to arbitrate. It is being heard at the same time as an application to set aside the interim anti-suit injunction which was granted *ex parte*. Both applications concern, in particular, the significance of delay in seeking anti-suit relief.
2. The Claimants are Lenders. The First Claimant is a multilateral development finance institution, headquartered in Nigeria, and the Sixth Claimant is a Shell entity registered under Bahamian law. The remaining Claimants are Nigerian banks. I shall refer to the Claimants collectively as the Lenders.
3. The Defendant is a Nigerian company. I shall refer to the Defendant as the Borrower.
4. By two Facility Agreements dated 2 September 2014, the Defendant borrowed some US\$2 billion from the Lenders in order to purchase an interest in Nigerian oil fields and facilities. About 75% of that funding came from the First to Fifth Claimants and Seventh to Ninth Claimants (“the Onshore Lenders”) via a Nigerian-law governed facility agreement (“the Onshore Facility Agreement”). The rest came from the Sixth Claimant in the form of vendor financing via an English-law governed agreement (“the Offshore Facility Agreement”).
5. Both Facility Agreements contained arbitration agreements in Clause 41.1 providing for London-seated arbitration under the ICC Rules.
6. Clause 41.1.1 of the Onshore Facility Agreement provided:

Subject to Clause 41.2 (Finance Parties' option), any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination or any non-contractual obligations arising out of or in connection with this Agreement (a “Dispute”) shall be referred to and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the “ICC”) in force at that time (the “ICC Rules”), which ICC Rules are deemed to be incorporated by reference into this Clause 41.1.
7. Clause 41.1.1 of the Offshore Agreement provided:

Subject to Clause 41.2 (Finance Parties' option), any Party to this Agreement (other than an Obligor) may elect to refer for final resolution any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination or any non-contractual obligations arising out of or in connection with this Agreement (a “Dispute”) by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the “ICC”) in force at that time (the “ICC Rules”), which ICC Rules are deemed to be incorporated by reference into this Clause 41.1.

8. The Offshore Facility Agreement was governed by English law. The Onshore Facility Agreement was governed by Nigerian law. There was no dispute that, following *Enka v Chubb* [2020] 1 WLR 4117, the applicable law of the arbitration agreement in the Offshore Facility Agreement was English law and that the applicable law of the arbitration agreement in the Onshore Facility Agreement was Nigerian law (though the Lenders submitted that in certain circumstances it would be governed by the law of the seat of the arbitration, England).
9. In about October 2018 the parties began to correspond in relation to sums which the Lenders said were due to them from the Borrower. On 19 August 2019 the Lenders alleged certain breaches of the Facility Agreements and asked the Borrower to remedy them. On 10 September 2019 the Borrower denied that any sums were due in a letter of some 81 pages. On 23 October 2019 the Lenders' Nigerian lawyers, Aluko & Oyebo (‘‘A&O’’), sent a Demand Letter demanding payment of the debt then due within seven days. Thus the Lenders claim that the Borrowers owes large sums to the Claimants, about US\$1.7 billion as at 31 December 2021.
10. On 31 October 2019 the Borrower commenced proceedings (‘‘the Nigerian FHC Proceedings’’) against the Lenders (and four other parties) in the Nigerian Federal High Court (the ‘‘FHC’’). The relief claimed in these proceedings was negative declaratory relief to the effect that the Borrower was not liable as alleged in the Demand Letter. The basis of the claim concerned allegations of force majeure which led to requests by the Borrower to restructure the Facility Agreements. It was said that the Lenders unreasonably refused to do so and that in consequence there had been no event of default.
11. On the same day, the Borrower sought and obtained an *ex parte* order for an injunction from Ekwo J (‘‘the Interim Injunction Order’’).
12. The Interim Injunction Order restrained the Lenders from:
  - (a) ‘‘...acting in any way or manner or taking any step to interfere with the *res* of this dispute by giving effect to the content of the [Demand Letter], or taking any step to enforce any right in respect of alleged indebtedness of the plaintiff (being contested and disputed in this suit)’’; and
  - (b) ‘‘...acting on or taking any step pursuant to or in furtherance of the [Demand Letter], from taking over, obstructing, or interfering in any way or manner howsoever with the running of the business of the Plaintiff...’’.
13. The Interim Injunction Order ended by saying, ‘‘case adjourned to 12th November 2019 for Motion on Notice.’’
14. On 12 November 2019, all Lenders save the First Claimant (‘‘the Appellant Lenders’’) filed a Notice of Appeal (‘‘NoA’’), in which they sought an order setting aside the decision of the High Court and an order dismissing/striking out the Borrower’s suit. Ground 1 alleged that the High Court had no jurisdiction because claims under the Facility Agreements were to be settled by arbitration in London. Ground 2 alleged that the High Court exceeded its jurisdiction when ordering the Lenders not to exercise their rights to recover sums due under the Facility Agreements. Ground 3

alleged that the High Court erred in law when it assumed jurisdiction notwithstanding the parties' choice of London as the seat of arbitration.

15. On the same day, the First Claimant filed a notice of preliminary objection before the Nigerian High Court on the grounds of its immunity from the jurisdiction of the Nigerian courts.
16. Also on the same day, the Lenders filed a motion before the High Court seeking a stay of execution of the injunction and a stay of further proceedings in the suit pending the hearing and determination of the appeal. The Court of Appeal has directed that the stay motion should remain on the court's file, but not be heard, until after the appeal has been determined.
17. 12 November 2019 was the return date of the *ex parte* Interim Injunction Order and a hearing took place before the judge who had granted the injunction. He was informed of the above notices and said:

“I have not even seen any of the processes. Now all parties are before me and all parties have filed their processes and these are processes that the Court will necessarily have to look into to take one decision or the other and I do not want a situation where any party takes the law into his hands till the Court takes decision on the processes filed. Parties should restrain themselves and submit themselves to the jurisdiction of the Court.”
18. The judge then made an order adjourning the matter until 25 November 2019.
19. On 19 November 2019 the record of the appeal was transmitted to the Court of Appeal by the High Court Registry. That had the effect of freezing the High Court proceedings pending the determination of the appeal filed by the lenders.
20. On 20 November 2019 the Appellant Lenders filed in the Court of Appeal equivalent motions to those before the High Court seeking a stay of execution of the injunction and a stay of further proceedings in the suit pending the hearing and determination of the appeal.
21. From early November 2019, the parties engaged in commercial negotiations on a without prejudice basis in respect of the Borrower's alleged debt under the Facility Agreements.
22. Mr. Johnson, a director of the First Claimant, has given written evidence that the loans, being in “extremely large amounts”, were “systemically important loans within the Nigerian banking system” and “represent significant credits on the books of the Onshore Lenders and a default under the loans would be a very serious matter for each Lender”.
23. Mr. Johnson has further said (without intending to waive privilege) that the negotiations were complex and difficult and that the Lenders were committed to exploring every avenue available to restructure the Facility Agreements. He added that, “any restructuring would need to include a settlement of the Nigerian

proceedings. Without that settlement, the restructuring would not have been commercially effective.” He said that the “Lenders saw the restructuring of the Facility Agreements as the best way to resolve the Nigerian Proceedings and the underlying defaults. The Lenders were concerned that initiating arbitration proceedings would kill any restructuring negotiations with [the Borrower] and they, therefore, made the withdrawal of the Nigerian Proceedings an essential part of the restructuring negotiations which continued from October 2019 to November 2020.”

24. Mr. Wort of Shell has given further evidence of the negotiations (again without intending to waive privilege). He has explained that certain of the matters discussed, a pre-export facility agreement and an alternative evacuation route for crude oil on the Nembe Creek Trunk Line, were intended to assist the Borrower in paying its debts.
25. No progress was made with the Notice of Appeal for a number of reasons. In early 2020 there were two adjournments. Between 24 March 2020 and 4 May 2020 court sittings were suspended on account of COVID 19 and the High Court and Court of Appeal only returned to full operation on 28 September 2020.
26. Mr. Johnson further said that by October 2020 it was becoming clear to all the Lenders that the negotiations were stalling and although some Lenders continued to hope that they would be successful, others began to doubt that there would be a successful restructuring. At the end of October 2020, Freshfields were retained by the Lenders to supplement A&O's role as Nigerian counsel and both Freshfields and A&O were asked to provide advice on the Lenders' rights under the Facility Agreements in case the restructuring negotiations failed.
27. On 23 November 2020 an attempt by the CEO of Sterling Bank, one of the Lenders, to break the impasse with Mr. Peters of the Borrower failed. On the same day Freshfields and A&O provided advice on the commencement of arbitration. The advice in its “final form” was provided on 27 November 2020.
28. On 1 December 2020 the Lenders instructed Freshfields to prepare arbitration proceedings and an arbitration claim in the English court seeking an anti-suit injunction.
29. On 11 December 2020 the Lenders commenced two arbitrations: the first commenced by the Sixth Claimant under the Offshore Facility Agreement (“the Offshore Arbitration”), and the second by the Onshore Lenders under the Onshore Facility Agreement (“the Onshore Arbitration”).
30. Later that same day, the Lenders commenced the present proceedings by way of an Arbitration Claim Form accompanied by a Part 23 application for urgent interim relief in the form of an anti-suit injunction.
31. On 14 December 2020 Cockerill J granted the interim relief sought by the Lenders. In summary, that order restrained the Defendant, its officers and agents from continuing the Nigerian FHC Proceedings and from bringing any claims arising out of the Facility Agreements in any forum other than in London-seated ICC arbitration.
32. The statements from Mr. Johnson and Mr. Wort to which I have referred were not before Cockerill J. (those statements were not made until 29 and 30 July 2021).

Instead there was a statement from a Mr. Pugh of Freshfields. Mr. Pugh informed the court that the parties had engaged in negotiations following the commencement of the Nigerian proceedings and that those negotiations were on a without prejudice basis. He said that the Lenders were prepared to waive privilege but could not do so without the consent of the Borrower. He was able to say that, “at all times, from the lenders' perspective, the withdrawal of the Nigerian Proceedings was a pre-condition to a restructuring of the Facility Agreements being effected.” He also explained that “once the lenders reached a view that the commercial negotiations were unlikely to lead to the withdrawal of the Nigerian Proceedings, they decided that they needed to appoint English counsel to advise on arbitration proceedings and any other options that the Lenders had to protect their rights. The Lenders proceeded to appoint Freshfields as English counsel to complement A&O's role as Nigerian counsel given the governing laws of the Facility Agreements.”

33. On 14 December 2020 the Borrower filed a further motion before the Nigerian High Court for injunctive relief. The court scheduled a hearing for 21 December 2020 and on that date the court remitted the motion to the Court of Appeal.
34. On 22 December 2020 the Borrower filed, but did not serve, a motion in the Court of Appeal seeking to dismiss the Lenders' appeal. Nothing has happened with regard to that motion.
35. On 5 January 2021 the Borrower issued an application before this court to set aside the anti-suit injunction granted on 14 December 2020.
36. On 14 January 2021 Tempo Energy Nigeria Limited (“Tempo”), a shareholder in the Borrower and a party to the Facility Agreements sought an injunction restraining the Lenders, the Borrowers and Dame Elizabeth Gloster (who had been nominated as an arbitrator by the Lenders) from participating in the English court proceedings and arbitrations. That injunction was granted on 22 January 2021 but is the subject of an appeal to the Nigerian Court of Appeal.
37. On 18 January 2021 the Borrower sought and obtained on 19 January 2021 a similar injunction from the Nigerian High Court. However, following correspondence between the parties it was withdrawn.
38. On 7 June 2021, the Borrower issued an application before this court for an order that the court had no jurisdiction to hear the Claimants' claim. This was not actively pursued at the present hearing.
39. On 4 November 2021, the Borrower filed an injunction motion before the Nigerian Court of Appeal, which sought to restrain the Lenders, their agents and representatives (including Freshfields and Counsel) from giving effect to the interim anti-suit injunction issued by this court, from participating in the arbitrations and from participating in the proceedings before this Court.
40. On 16 November 2021 the Notice of Appeal was amended. The Notice of Appeal had originally claimed that the Nigerian Court had no jurisdiction because of the arbitration clause. This was incorrect and so Ground 1 was amended to say that the court erred in law when it proceeded to exercise its jurisdiction in circumstances where there was an arbitration agreement. Two further grounds of appeal were added.

41. On 17 February 2022 the Nigerian Court of Appeal rejected the motion for an injunction and in its written reasons (issued on 3 March) the Court observed that if the relief sought were granted, “the Court would then be making different agreement terms for the parties”. The court expressly found that the Facility Agreements “contain Arbitration clauses”. On the same day that the ruling was published, the Borrower filed an appeal to the Nigerian Supreme Court.
42. On 15 March 2022 the arbitral tribunal in the arbitration, commenced pursuant to the Offshore Facility Agreement (Geoffrey Ma, Dame Elizabeth Gloster and Lord Neuberger), issued a Partial Award on the question of whether the tribunal had jurisdiction. The tribunal determined that it had. The Borrower submitted that, by issuing a notice of appeal in Nigeria, the Appellate Lenders had submitted to the jurisdiction of the Nigerian Court and had waived their right to arbitrate. By contrast the Sixth Claimant relied upon the notice of appeal as an exercise of its option to refer the dispute to arbitration. The Tribunal decided that the notice of an appeal was an unequivocal election to insist on arbitration (see paragraph 44) and that there had been no waiver of the right to arbitrate (see paragraphs 50-52).
43. The present hearing before this court is concerned with the Lenders’ application for a final anti-suit injunction and the application by the Borrower to set aside the anti-suit injunction granted *ex parte*.
44. As is apparent from the above narrative, written statements have been provided by officers of the Lenders. There has been no evidence about the negotiations from the Borrower and, shortly before the hearing, the Borrower said that it did not require Mr. Johnson and Mr. Wort to attend for cross-examination.
45. Written expert evidence of Nigerian law was also provided by two Nigerian lawyers on a number of matters. They were cross-examined on only some of those matters and in the event final submissions were made on only one of those matters though a few other points were touched upon.

#### The application for a final anti-suit injunction

46. I deal first with the agreement to arbitrate disputes arising under the Facility Agreements and with the breach of that agreement.
47. With regard to the Onshore Facility Agreement there is no dispute that the Lenders’ claim was one which the parties had agreed to be referred to arbitration. With regard to the Offshore Facility Agreement there is a dispute as to whether, as required by the arbitration agreement in that Facility Agreement, the Sixth Claimant had referred the dispute to arbitration. However, that question has now been determined by the arbitral tribunal appointed pursuant to the Offshore Facility Agreement in favour of the Sixth Claimant. It was held that by their Notice of Appeal on 12 November 2019 the Sixth Claimant had elected to refer the matter to arbitration. Unless and until that award is set aside pursuant to a challenge under section 67 of the Arbitration Act 1996 that award is final and binding upon the parties to the Offshore Facility Agreement.
48. The commencement of proceedings in the High Court of Nigeria by the Borrower seeking negative declarations of non-liability was a breach of the arbitration agreement in the Onshore Facility Agreement and, from 12 November 2019, the



continuation of those proceedings was a breach of the arbitration agreement in the Offshore Facility Agreement.

49. However, counsel for the Borrower submitted, in relation to the Onshore Facility Agreement, that as at the date of the application for interim injunctive relief from this court there was no breach of the arbitration agreement because the Lenders had waived such arbitration rights. This was based upon a submission that by pursuing an appeal to the Nigerian Court of Appeal rather than seeking a stay of the Nigerian High Court proceedings pursuant to section 5 of the Nigerian Arbitration and Conciliation Act the Lenders had taken a step in the proceedings and waived whatever arbitration rights they otherwise had; see paragraph 10 of the Defendant's Closing Note. It was said that the First Claimant, by taking its preliminary objection on the basis of immunity had also taken a step in the proceedings and so waived its right to arbitrate; see paragraph 11 of the Defendant's Closing Note.
50. In relation to the Offshore Facility Agreement the same argument was advanced. However, the arbitral tribunal appointed pursuant to the terms of the Offshore Facility Agreement has held that there was no waiver of the right to arbitrate. The reasoning of the Tribunal was challenged by counsel for the Borrower and the Court was asked not to make any finding of breach until expiration of the period for a s.67 challenge or final determination of any such challenge if made; see paragraph 13 of the Defendant's Closing Note.
51. I shall deal first with the Onshore Facility Agreement. The arbitration agreement in that agreement is governed by Nigerian law. There was a dispute between two experienced Nigerian lawyers as to whether a failure to apply for a stay pursuant to section 5 of the Arbitration and Conciliation Act meant that the party in question had waived the right to arbitrate.
52. Professor Mbadugha gave evidence that if a party to an arbitration agreement when faced with court proceedings against it in Nigeria fails to apply for a stay under section 5 and takes any step in the proceedings (in this case the issue of the notice of appeal or, in the case of the First Claimant, the issue of a notice of objection) he will be deemed to have waived his right to arbitrate and to have submitted to the jurisdiction of the court. Professor Mbadugha derived support for that opinion from two cases in particular, *KSUDB v Fanz Construction Co. Ltd (1990) 4 NWLR 1 and Obi Obembe v Wemabod (1977) 5SC 70*; see paragraphs 140-148 of his first report.
53. Mr. Ayorinde gave evidence that a party will only take a step in the proceedings for the purposes of section 5 if (i) it demonstrates an intention not to go to arbitration and (ii) it is an act done in furtherance of a defence. He said that neither an appeal against an *ex parte* injunction nor a preliminary objection challenging the jurisdiction of the court is such a step. Mr. Ayorinde derived support for his opinion from several cases but in particular *Onward Enterprises v MV Matrix (2008) LPELR 4789* and *Sacoil 281 Nigeria Ltd v Transnational Corporation of Nigeria Plc (2020) LPELR 49761*; see paragraphs 9.8-9.21 of his first report.
54. Both Mr. Ayorinde and Professor Mbadugha displayed in their evidence considerable knowledge of Nigerian statute law and case law. It was clear that each had given considerable thought to the issue in dispute. I was also impressed that each of them, despite the many issues on which each had been asked for his opinion, was able

during the course of his evidence to recall the facts of the relevant cases and what each case had, in his view, decided.

55. When this court is faced with a conflict of expert evidence on foreign law, but one which has a common law foundation, this court can readily understand the basis for each expert's view and the reasons for their disagreement. When deciding which view to prefer the court may properly have regard to its own understanding of the respective views, rather than simply saying that it prefers one witness to the other. Having had the benefit of listening to the views of the experts when cross-examined and considering their respective arguments I reached the conclusion that Mr. Ayorinde's view as to what constituted a "step" for the purposes of section 5 was to be preferred. I did so for several reasons.
56. Section 5 provides that where a party to an arbitration agreement commences an action in court with regard to a matter which is the subject of the arbitration agreement any party to the arbitration agreement "may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings." This court is familiar with this form of stay; see section 9 of the Arbitration Act 1996. Both the Nigerian provision and the English provision are based on the New York Convention, though the wording is different and I am concerned with the Nigerian wording, not the English wording.
57. Where a party takes a step which furthers a defence to a claim brought in court the party evinces an intention not to have the merits of the claim determined by arbitration but in court. It therefore makes sense in such a case for the party to have lost his right to arbitrate and be unable to seek a stay. In the present case the Lenders, apart from the First Claimant, issued a notice of appeal seeking to have the injunction granted at first instance set aside and for the proceedings at first instance to be dismissed or struck out. The basis of that appeal, in Grounds 1 and 3, was the arbitration agreement. Rather than evincing an intention to have the merits of the claim determined in court the Lenders were insisting upon the merits of the claim being determined in arbitration. It is therefore difficult to understand why it makes sense in such a case for the Lenders to have lost their right to arbitrate and to be unable to seek a stay.
58. The modern cases to which Mr. Ayorinde refers, *Onward Enterprises Ltd v MV Matrix* (2008) LPELR 4789 and *Sacoil 281 Nigeria v Transnational Corporation* (2020) LPELR 49761, state that a step in section 5 must be one "in furtherance of the prosecution of the defence". That reflects the sense which one would expect to underlie the loss of the right to arbitrate brought about by the taking of a step in the proceedings.
59. The older cases on which Professor Mbadugha principally relies, *KSUDB v Fanz Construction* (1990) 4 NWLR 1 and *Obi Obembe v Wemabod* (1977) 5SC 70, do indeed refer to "any step whatsoever". This is what counsel for the Borrower described in their skeleton argument as the "expansive meaning" of "any other step" in Nigerian law. But neither case concerned a step which insisted upon arbitration which is what the Lenders did when they issued their notice of appeal. Further, as carefully explained by Mr. Ayorinde at paragraphs 9.12 -9.17 of his first report, the facts of those cases were very different from the present case. It is therefore doubtful that the dicta in those cases were intended to apply to the facts of the present case.

60. Professor Mbadugha said that the decision in *Onward Enterprises v MV Matrix* (2008) LPELR 4789 is “not good law and inapplicable”. That comment is based upon the proposition that it is inconsistent with the decision of the Supreme Court in *KSUDB v Fanz Construction* (1990) 4 NWLR 1. However, it is to be noted that in Professor Mbadugha’s textbook on the subject he states that the Nigerian courts have consistently held that a step in proceedings is a step that indicates an intention on the part of the party to the proceedings that the action should proceed rather than be referred to arbitration. Reliance was then placed on *Onward Enterprises v MV Matrix*. No suggestion was made in the textbook that that was not good law, notwithstanding that reference was also made to *KSUDB v Fanz Construction*.
61. Professor Mbadugha did not comment in his report on the latest case of *Sacoil 281 Nigeria v Transnational Corporation* (2020) LPELR 49761 which is to the same effect as *Onward Enterprises v MV Matrix*. In his evidence he said that he had not read it.
62. Finally, it is to be noted that the Nigerian Court of Appeal has recently dismissed the Borrower’s application for injunctive relief restraining the Lenders from proceeding with the London arbitrations. That dismissal sits unhappily with the suggestion that the Lender’s Notice of Appeal had caused the Lenders to have lost their right to arbitrate.
63. For these reasons I prefer the opinion expressed by Mr. Ayorinde and find that in Nigerian law the Lenders, by failing to apply for a stay pursuant to section 5 and filing a notice of appeal, have not taken a step in the action such as would cause them to have lost their right to arbitrate. It follows that when the application for an injunction was made before Cockerill J. in December 2020 the Borrower remained in breach of the arbitration agreement in the Onshore Facility Agreement.
64. For the same reasons I find that the notice of objection filed by the First Claimant which objected to the jurisdiction of the Nigerian Courts was not, in Nigerian law, a step in the action. It was manifestly not a step that indicated an intention on the part of the First Claimant that the proceedings should proceed rather than be referred to arbitration, to adopt Professor Mbadugha’s statement of Nigerian law in his textbook.
65. With regard to the Offshore Facility Agreement the arbitral tribunal has found that there has been no waiver of the right to arbitrate and that decision binds the Borrower and the Sixth Claimant. It follows that the Borrower remained in breach of the arbitration agreement in the Offshore Facility Agreement in December 2020.

Strong reasons

66. Thus there is in the present case a clear case of a breach of the agreements to arbitrate. The court will in such a case grant an anti-suit injunction unless there are strong reasons for not doing so.
67. In the present case the Lenders’ delay in seeking an anti-suit injunction from November 2019 until December 2020 is the suggested strong reason for not granting the requested injunction. It is incontestable that there was a very substantial delay in seeking relief from this court. However, it has been submitted by counsel for the Lenders that promptness is not an end in and of itself, that it is necessary to examine

to what extent the delay is justifiable or excusable, that the delay should be weighed against the importance of upholding the arbitration agreement, and that it is necessary to consider to what extent the delay has led to a waste of the resources of the foreign court. When all that is done, it was submitted that there was no strong reason for refusing to grant the requested anti-suit injunction. By contrast counsel for the Borrower submitted that the suggested justification for the Lenders' delay was inadequate and, in particular, (without prejudice to the burden of proof) that it was not reasonable to appeal rather than make the appropriate challenge on the return date at first instance, that it was not reasonable to fail to seek legal advice as to the Lenders' jurisdictional rights or substantive position under English law or Nigerian law for a year, that it was not reasonable for the Lenders to defer seeking an anti-suit injunction from this court in order to optimise their prospects of securing a favourable restructuring deal and that it was not reasonable for the Lenders to defer pursuit of that injunction until they were ready to commence parallel arbitrations (seeking the same jurisdictional relief).

68. I have been referred to a number of cases which discuss the relevance of delay in the context of seeking anti-suit injunctions. There was a time when one only needed to refer to *The Angelic Grace* [1995] 1 Lloyd's Reports 87. Now it is only necessary to refer to the discussion of the subject by Christopher Clarke LJ in the Court of Appeal (with whom Patten LJ and Sir Terence Etherton C. agreed) in *Ecobank Transnational Inc v Tanoh* [2016] 1 WLR 2231.
69. Christopher Clarke LJ referred to *The Angelic Grace* and to cases which had followed it at paragraphs 84-88 which established and applied the principle that an applicant for anti-suit relief must apply promptly and before the foreign proceedings were too far advanced. He then discussed and applied those principles at paragraphs 122-143.
70. At paragraph 122 Christopher Clarke LJ said that before granting the equitable remedy of an injunction all relevant considerations must be taken into account including the extent to which the respondent has incurred expense prior to any application being made, the interests of third parties, including, in particular the foreign court, and the effect of making such an order in relation to what has happened before it was made. At paragraph 123 he said that one relevant consideration is whether the applicant has acted with appropriate speed. The longer a respondent continues doing that which the applicant seeks to prevent him from doing, the greater the amount of labour and cost that he will have expended which could have been avoided. Where foreign proceedings are allowed to continue that prejudice or detriment may extend to third parties, including in particular the foreign court which may have conducted hearings and produced judgments; see paragraph 126. "[T]he need to avoid [delay] arises for a variety of reasons including the avoidance of prejudice, detriment, and waste of resources, the need for finality; and considerations of comity;" see paragraph 127. But the tenor of modern authorities was that an applicant should act promptly and claim relief at an early stage; see paragraphs 129. Also, it is not the case that delay is immaterial in the absence of prejudice.
71. Christopher Clarke LJ had earlier noted that delay and comity are related; see paragraph 120. He then explained that comity between courts, and indeed considerations of public policy, require, where possible, the avoidance of the waste of time and effort which is caused "by late attempts to change course or to terminate the voyage"; see paragraph 132. "The longer an action continues without any attempt to

restrain it the less likely a court is to grant an injunction and considerations of comity have greater force”; see paragraph 133. “A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that gone before, may be granted however late an application is made .....Such an objection is not based on the need to avoid offence to individual judges.....but on the sound basis that to allow such an approach is not a sensible method of conducting curial business”; see paragraph 134.

72. Christopher Clarke LJ concluded as follows: “In short, both general discretionary considerations and the need for comity mean that an applicant for anti-suit relief needs to act with appropriate despatch. In *Transfield Shipping case* at para 78 I observed that “comity, which involves respect for the operation of different legal systems, calls for challenges ...to be made promptly in whatever is the appropriate court”. Whilst recognising that delay is not necessarily a bar to relief, and the importance of upholding the rights of those who are the beneficiaries of exclusive jurisdiction agreements, I do not regard the cases subsequently decided by this court as rendering that statement inaccurate;” see paragraph 137.
73. With that authoritative guidance in mind I can now consider the facts of the present case and the evidence before the court. I was referred to several first instance authorities which applied the principles described and explained by the Court of Appeal in *Ecobank*. However, each case must turn on its own facts and on the evidence before the court.
74. The Lenders knew of the breach of the arbitration agreements in November 2019 and did not seek anti-suit relief until December 2020. It is therefore undoubtedly the case that the Lenders did not proceed promptly to seek such relief.
75. In such a case it is obviously necessary to understand why such delay occurred, in order to see whether there was what Christopher Clarke LJ described as “good reason” for the delay; see paragraph 123 of his judgment. I accept the submission of counsel for the Borrower that such a reason must be established objectively. In the present case the reason for the substantial delay of 13 months was that the Lenders were engaged with the Borrower in seeking to negotiate a restructuring of the Facility Agreements. It appears from the Borrower’s Statement of Claim in the Nigerian proceedings that this is what the Borrower wanted the parties to do. For their part, and bearing in mind that, as stated by Mr. Johnson in his evidence, a default on these substantial loans would be a very serious matter for each Lender, the Lenders were keen to explore every avenue available. They also intended that the restructuring would bring an end to the Nigerian proceedings. They did not wish to initiate arbitration proceedings because they feared that that would kill off the restructuring negotiations.
76. There was a debate before me as to whether this was a reasonable explanation. In my judgment, on the basis of the evidence before the court, this was a reasonable explanation. A restructuring of the Facility Agreements was what both parties wanted. Had the negotiations been successful there would have been no need for litigation in Nigeria or arbitration in London. That is surely something which the Court should encourage rather than condemn. Of course, by negotiating rather than applying to this court promptly for an anti-suit injunction, the Lenders ran the risk that by the time they did seek such relief the circumstances would be such that relief would be

refused. But that does not make the desire to resolve matters by negotiation and agreement unreasonable.

77. It was submitted by counsel for the Borrower that the negotiations were “all a matter of commercial self-interest”. No doubt the Lenders were motivated by what was perceived to be in their own commercial interests but on the evidence before the court the negotiations were also in the Borrower’s interests and requested by it. As explained by Mr. Wort, the negotiations concerning the pre-export facility agreement and the alternative evacuation route were intended to assist the Borrower to pay its debts. I have noted the submission made by counsel for the Borrower at paragraphs 44-47 of the Trial Skeleton that the delay was caused by “self-interested conduct of speculative financial business” but do not consider that such a description is justified by the evidence.
78. It was also submitted by counsel for the Borrower that the Lenders’ actions did not lead to “curial good sense or efficiency”. There would be force in this submission if the proceedings in Nigeria had involved the expenditure of time and costs in resolving or preparing to resolve the dispute between the parties in the Nigerian court. But that has not happened. The proceedings before the Nigerian Court have been “frozen” since 19 November 2019. Thus this is not a case where a late application for an anti-suit injunction would mean that efforts made in the foreign court to determine the dispute between the parties would be frustrated. I have noted the submission made by counsel for the Borrower at paragraph 62 of their Trial Skeleton that the appeal process in Nigeria costs money and consumes scarce judicial resources. It does; but the grant of anti-suit relief by this court will not waste that money and judicial resource. There will still be a need for the Nigerian Court of Appeal to hear the application to set aside the injunction granted at first instance.
79. At the same time as conducting the negotiations the Lenders had issued a notice of appeal. It was submitted by counsel for the Borrower that this was unreasonable. It was said that the Lenders ought on the return date, 12 November 2019, to have applied for a stay of the proceedings pursuant to section 5 of the Arbitration and Conciliation Act and sought the setting aside of the injunction which had been granted *ex parte* on 31 October 2019. Had this been done it was likely, according to the evidence of Professor Mbadugha when being re-examined, that matters would have been dealt with within one or two months.
80. Counsel for the Lenders said that since in November 2019 the Lenders did not wish to commence arbitration proceedings (for the reasons to which I have already referred) they would not have been able, as required by section 5, to show that they were “ready and willing to do all things necessary for the proper conduct of the arbitration.”
81. Why the “appeal route” was chosen rather than the “return date” route is not covered in the evidence of Mr. Pugh, Mr. Johnson or Mr. Wort.
82. The matter was however discussed with the experts in cross-examination. Under Nigerian law the Lenders had a choice of seeking the discharge of the injunction either on the return date or before the Court of Appeal. In Mr. Ayorinde’s experience the appeal route was “unique” but then it was also “unique” in the experience of the experts for a borrower to have obtained an *ex parte* injunction first. It appears that

there was also an issue of Nigerian law as to whether the Court of Appeal had jurisdiction to hear an appeal from an *ex parte* order. On this the experts disagreed but even if the court had jurisdiction the appeal route could be said to invite difficulty. It was also the opinion of Mr. Ayorinde that to seek discharge of the injunction on the return date might give rise to an argument that the Lenders had taken a step in the action. However, as the arguments developed in this case have proved, that was also a risk with the appeal route. Finally, it can be said in circumstances where the matter was likely to go to the Court of Appeal in any event the choice of the appeal route meant that the matter got to the Court of Appeal sooner than it would otherwise have done.

83. On the evidence before me it is not, I think, possible to say that the Lenders took the right (or reasonable) route or the wrong (or unreasonable) route. Both appear to have been available; on that point I preferred Mr. Ayorinde's evidence (for the reasons he gives at paragraphs 5.1-5.8 of his supplementary report). But even if the Lenders' choice of route can be criticised, I accept the submission made by counsel for the Lenders that what matters is that there has been no progress on the merits of the dispute and so this is not a case where a late application for anti-suit relief, if granted, would waste time and money expended in Nigeria.
84. I have noted the submission at paragraph 64 of the Trial Skeleton of counsel for the Borrower that delay in making the application for relief will lead to greater expense and complication in resolving the application. Delay can have that effect but it is not apparent that it would do so in the present case. Very little has happened in Nigeria during the period of delay and the arguments based upon the failure to seek a stay pursuant to section 5 and the issue of the notice of appeal (and notice of objection) would still have to be decided even if the application for relief had been made in late 2019 rather than late 2020.
85. The decision of the Court of Appeal in February 2022 to dismiss the motion for an injunction restraining the Lenders from proceeding with the arbitration is, as it seems to me, a cogent indication that this is not a case where the Nigerian Court considered that proceeding by way of arbitration in London in February 2022 was not a sensible method of conducting curial business.
86. The final area of criticism was the delay from the end of October 2020, when Freshfields and A&O were asked to provide advice on the lenders' rights under the Facility Agreements, until 11 December 2020 when the application for an anti-suit injunction was issued. It was said that this delay was unreasonable given the resources available to the Lenders. It was said that the application for the injunction could have been prepared within a week of any decision in late October to seek such relief and that there was no need to have commenced arbitration before seeking such relief. In so far as advice had not been sought on these matters before October 2020 that was unreasonable and the Lenders cannot rely on their own unreasonable conduct to justify the time taken.
87. Although the Claimants' Closing Outline at paragraph 10(f) states that it does not follow from the fact that advice was sought from Freshfields in November 2020 that advice on the Lenders' rights under the Facility Agreements was not obtained before then from A&O, there is no evidence that such advice was obtained and in any event English legal advice was required as to the prospects of enforcing the arbitration

agreement by an anti-suit injunction issued by this court. Such advice was only sought at the end of October 2020.

88. Nevertheless, I was not impressed by the criticisms made of the Lenders.
89. First, in circumstances where the Lenders did not wish to commence arbitration, I do not consider that it was unreasonable of them only to seek legal advice on their “jurisdictional rights” (which I assume refers to the possibility of seeking anti-suit relief from this court) until they had formed the view that the negotiations might fail. Freshfields and A&O were asked to provide advice at the end of October 2020 and it was not until 23 November 2020 that a final attempt to resolve the impasse failed. On the very same day the advice was provided though it was finalised on 27 November 2020. Thus by the time that the final attempt to resolve matters by negotiation had failed the Lenders had obtained the relevant advice.
90. Instructions to commence arbitration and to seek anti-suit relief were given on 1 December 2020. I do not consider that the passage of one week for 9 Lenders to consider the advice and decide to seek anti-suit relief was unreasonable.
91. Second, a period of 10 days elapsed from 1 December when instructions were given until 11 December when the application was prepared and issued. The supporting witness statement of Mr. Pugh was 31 pages in length. It is possible that the application could have been prepared and issued in less than 10 days but in the context of a major case I do not consider that 10 days can be said to be unreasonable.
92. Third, whilst anti-suit relief can be sought before arbitration is commenced this was a case where the Borrower had obtained injunctive relief from the Nigerian High Court. It is clear from Mr. Pugh’s evidence that much thought was given as to the nature of the relief which could be sought in arbitration without breaching that order and so acting in contempt of the Nigerian court; see paragraph 48 of his witness statement. For this reason declaratory relief was sought rather than an order for payment of money. I do not consider it unreasonable in such a case for the Lenders to have commenced the arbitration by the time they issued the application so that it was clear what relief was being sought in the arbitration.
93. I therefore consider that the time which elapsed from the end of the negotiations on 23 November 2020 until the issue of the application on 11 December 2020 was not unreasonable.
94. Having considered the question of delay my conclusions are as follows. There was a clear failure to seek anti-suit relief promptly after the Borrower’s breach of the arbitration agreement in October/November 2019. There was indeed a substantial delay of 13 months before relief was sought in December 2020. However, there was a reasonable explanation for that delay, namely, the existence of negotiations between the Lenders and the Borrower to restructure the Facility Agreements, assist the Borrower to pay its debts, and to bring the Nigerian proceedings to an end. By delaying to seek relief pending the negotiations the Lenders ran the risk that the Nigerian proceedings might develop to such an extent that when relief was sought it was too late to grant it because that would mean that legal costs of the parties incurred in Nigeria and the labours of the Nigerian court in seeking to resolve the merits of the dispute between the parties would have been wasted. But fortunately for the Lenders



there were no such costs or labours because no steps were taken in Nigeria to resolve the merits of the dispute. This was therefore a case where there has been substantial delay but in circumstances where the Nigerian proceedings have not been advanced at all during the period of the delay. Substantial delay on its own can result in equitable relief being denied, though it does not necessarily do so. In the present case there was a reasonable explanation for that delay. Moreover, it is important that the court should recognise the desirability of upholding the rights of those who are the beneficiaries of arbitration agreements. In the present case the conduct of the Borrower in commencing proceedings on the merits in Nigeria in breach of the arbitration clause and in seeking injunctive relief both at first instance and, later, before the Court of Appeal in Nigeria demonstrates a clear need for injunctive relief from this court to enforce the arbitration agreement. There is no risk of either offending the Nigerian courts or of failing to conduct curial business in a sensible manner because the Nigerian Court of Appeal has very recently recognised the arbitration agreement by refusing to grant injunctive relief restraining the Lenders from enforcing the arbitration agreement. Once the negotiations had come to an end on 23 November 2020 the time taken to issue the application for anti-suit relief on 11 December 2020 was not unreasonable. But even if the time taken at this stage was unreasonable I do not think that the delay was such as to make it unjust to grant the relief necessary to enforce the right to arbitrate.

95. In addition to delay two other matters were relied upon; see paragraph 24 of the Defendant's Closing Note.
96. The first of those was the question of the Lenders possibly acting in breach of the Nigerian court order of 31 October 2019 and therefore of being in contempt of court. The experts on Nigerian law have expressed differing opinions on this matter. The issue is one of construction of that order; does it apply to the arbitrations which have been commenced and to the application before this court? I did not understand that it was necessary for me to decide this issue. It would obviously be a matter for the Nigerian court to decide should a contempt motion be brought before it. The way in which the matter was put by counsel for the Borrowers in its Trial Skeleton at paragraph 67 was that it was relevant for the court to take into account that the Lenders were "(at least arguably) in contempt of the Nigerian court". I agree that it must be relevant to take into account such a possibility. However, that must be balanced against the fact that no contempt application has been brought by the Borrower who in fact made an application in November 2021 for an order restraining the Lenders from pursuing the arbitrations, which does not suggest that the Borrower already had an order which restrained the commencement of arbitration. Also, there is the circumstance that the Court of Appeal dismissed that application. Those factors suggest that the possibility of contempt is not of such weight in this case that it provides a strong reason (either on its own or in conjunction with the fact of delay) for refusing anti-suit relief. To this may be added the circumstance that the Nigerian order was obtained by the Borrower without informing the court of the existence of the arbitration agreement.
97. The second matter is what has been referred to as the November 2019 Sworn Assurances. In the affidavits supporting the Lenders' motions before the Court of Appeal in Nigeria it was stated that if the motions failed the Borrower "would not be prejudiced or precluded from proceeding with its suit at the Lower Court." This a

relatively new point raised by the Borrower. It was not one of the many matters on which the Nigerian law experts were asked to express an opinion. But what is said is that “these express words are enough to debar ASI relief on general equitable grounds.”

98. My understanding of this point is that the meaning of the statements was that in the event that the appeal failed the Lenders would not seek an anti-suit injunction from this court restraining the Borrower from proceeding with its action before the Nigerian court. However, the meaning of the statements could simply be that, in the event that the appeal failed, the fact that there had been a failed appeal would not prejudice the Borrower in proceeding with its action. In the context of statements made in the Nigerian proceedings the latter meaning seems to me the more likely. That is also suggested by the fact that the point now taken has not been taken by the Borrower before the Court of Appeal when seeking an injunction restraining the arbitrations. I was therefore not persuaded that the November 2019 Sworn Assurances constitute a strong (or any) reason (either on their own or in conjunction with the fact of delay and the possibility of a contempt) for refusing anti-suit relief.
99. It therefore follows that, subject to the application to set aside the *ex parte* order, I would be minded to grant the relief sought by the Lenders.

The application to set aside

100. In counsel to the Borrower’s Closing Note 7 grounds were relied upon for the submission that the application was unfairly presented to Cockerill J. on 14 December 2020. It was submitted orally that the first two were sufficient to vitiate the grant of anti-suit relief *ex parte* by the Court.
101. In the event of there being unfair presentation justifying the set aside of the *ex parte* order it was submitted that that was a matter which I should take into account when considering whether it was just and equitable to grant the order on a final basis
102. The first matter relied upon was described as a
- “Failure to identify s.5 ACA or explain the differences between it and the chosen modes of jurisdiction challenge; thereby eliding these very different concepts, concealing the existence or exercise of a choice, and avoiding any explanation for such choice by the Lenders.”
103. The second was described as
- “the implicit representation that the appeal route was believed at the relevant time (and for objective reasons) to be the most or more or even an ‘efficient’ and/or ‘effective’ means of challenging local jurisdiction ...There was no evidence for this.”
104. The Lenders provided in their evidence to Cockerill J. a letter from A&O explaining the attitude of the Nigerian Courts to arbitration agreements in the course of which section 5 was in fact mentioned. At paragraphs 8(a) and (b) reference was made to the

circumstances in which an application for a stay may be refused. The letter also gave a detailed account of the steps taken in Nigeria, in particular before the Court of Appeal. The effect of an appeal on any suggestion of contempt was also discussed. This letter was referred to in Mr. Pugh's first witness statement but I do not think that Cockerill J was taken to all its terms. It is however clear that, although reference was made in the letter to the remedy of a stay, there was no explanation of the difference between challenging the jurisdiction by means of a stay application pursuant to section 5 and the issue of a notice of appeal. The question is whether the section 5 route and the reason why it was not chosen were material matters of which Cockerill J. ought to have been informed.

105. A material fact is one "which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers"; see *General Dynamics v Libya* [2022] EWHC 501 Comm at paragraph 24 per Butcher J.
106. What was material for the Judge to know on the Lenders' application was the reason for the delay in making the application, whether the Lenders had at any stage asserted their right to arbitration and, in the case of the Offshore Facility Agreement, whether the Sixth Claimant had elected to arbitrate and what progress, if any, had been made in the Nigerian courts concerning the Borrower's claim in those courts and the Lenders' appeal to the Court of Appeal. Evidence on those points was fairly presented to the court.
107. I have asked myself whether it was necessary for the judge to know about section 5 and the reasons why the Lenders had chosen to appeal rather than seek a stay pursuant to section 5. Much of the debate in this court concerned the suggestion, supported by the evidence of Professor Mbadugha in re-examination, that such an application was likely to have been dealt with within a month or two. It was therefore suggested that the choice made by the Lenders to appeal rather than apply for a stay pursuant to section 5 was something which the judge was required to know. But what generated the delay in applying for an anti-suit injunction from this court was the decision to renegotiate the Facility Agreements in preference to commencing arbitration. The judge was informed of that. Being informed that the Lenders had chosen to appeal rather than seek a stay would not explain the delay in seeking an anti-suit injunction. Even if the appeal had been heard in, say, the first six months of 2020 the continued negotiations would still have caused the Lenders not to seek an anti-suit injunction from this court until such time as it was concluded that the negotiations would not be effective. I therefore do not consider that it was material for the judge to know of the reasons why the Lenders had chosen to appeal rather than to seek a stay of the proceedings pursuant to section 5. Of course, that could have been stated and would have given a fuller account of the Lenders' thinking but I am not persuaded that, on the facts of this case, it was material and it was necessary to know.
108. The suggested implicit representation that the appeal route was believed to have been an efficient or effective means of challenging the local jurisdiction was based upon the Lenders' skeleton argument before Cockerill J. at paragraph 36(a) where this was said:

"The delay is justifiable or excusable on the basis that the Lenders have sought to resolve matters by way of an appeal to

the Nigerian courts on the issue of jurisdiction, coupled with commercial negotiations that included the issue of discontinuance of the Nigerian proceedings ...In the end neither has proved efficient or effective, and now the Lenders seek the assistance of this Court.”

109. Earlier in the skeleton argument “the two-fold strategy” had been summarised; see paragraphs 18-21. I agree that there is an implicit representation that the appeal route was initially believed to be efficient or effective. The reason it ceased to be was explained by Mr. Pugh in his witness statement at paragraph 59(c), namely, the adjournments, the closure of the courts as a result of COVID-19 and the fact that no hearing had yet been listed, of which further details had been given in paragraph 40. The complaint made by the Borrower is that there was no evidence of the Lenders’ belief that the appeal route was initially believed to be efficient or effective. But in circumstances where the Lenders wished to have the injunction set aside and did not wish to commence arbitration it is also, I think, implicit in the evidence of Mr. Pugh that an appeal was lodged because the Lenders believed that the appeal route would be effective. On 19 November 2019 there was no COVID-19. I do not consider that it was material to state that expressly. The Lenders would hardly have commenced an appeal if they had thought it would be ineffective.
110. Counsel for the Borrower submitted that in other cases there had been express evidence of this nature. One example suggested was the evidence given to Hamblen J. in *Ecom Agroindustrial v Mosharaf Composite Textile Mill* [2013] 2 Lloyd’s Report 196 at paragraph 33. It is difficult to assess the nature of evidence given in other cases from the brief description given in a judgment. Hamblen J. referred to evidence given of “the good reasons for the claimant’s delay, namely that it thought it might be able to deal with the Bangladeshi proceedings more quickly and efficiently in the Bangladeshi courts themselves, by appealing the order for an interim injunction.” In the present case the reasons for the Lenders’ delay were also explained by Mr. Pugh, namely, the negotiations. I do not consider that Hamblen J.s’ account of the evidence in the case before him assists in evaluating the evidence in the case before me.
111. The third matter relied upon is described as follows:
- “The concealment of the Lenders’ own abusive conduct in maintaining inconsistent positions in the first and second seised forums, namely: (i) Ground 1.e. of the Notice of Appeal vs Pugh 1 paragraphs 60(a); and (ii) the November 2019 Sworn Assurances.”
112. An allegation that the Lenders concealed abusive conduct cannot, I think, fairly be maintained in circumstances where the Borrower chose not to cross-examine the Lenders’ witnesses and put that allegation to them. In any event I do not consider that the allegation of “abusive conduct” can be made out. As to the first, Mr. Pugh said in his witness statement that the Borrower had not drawn the attention of the Nigerian court to the arbitration agreements. It is true that in the Notice of Appeal at Ground 1(e) it is stated (and continues to be stated in the Amended Notice of Appeal) that the court was “well aware of...the existence of arbitration clauses in the agreements”. However, it is clear that that was a mistake. It is accepted that the court was not informed of the arbitration agreements. I do not regard that mistake as abusive

conduct. The Lenders do not gain from it. The true position would tend to strengthen the appeal. As to the second, reliance is placed on the November 2019 Assurances. I have already commented on these above. They do not, I think, say, impliedly, that the lenders will not seek anti-suit relief.

113. The fourth matter relied upon is expressed as follows:

“The suggestion that logistical difficulties slowed down the decision to seek ASI relief, when this was not so as a matter of fact.”

114. The point advanced here is that the suggestion made by counsel to Cockerill J. that time was spent obtaining the decision of the nine Lenders to the commencement of arbitration was “gainsaid” by the Lenders’ subsequent evidence. Counsel’s suggestion was based upon the evidence of Mr. Pugh; see paragraph 59(b) of his witness statement. The subsequent evidence of Mr. Johnson does not undermine what Mr. Pugh and counsel said. Mr. Johnson referred to the difference of view between the Lenders at the end of October 2020 and to the need to obtain the approval of those Lenders who made up 75% of the aggregate exposure of all the Lenders; see paragraphs 27 and 28 of his witness statement. Following the provision of legal advice on 23 November 2020 and a meeting of all the Lenders it was possible for instructions to be given on 1 December 2020; see paragraph 31. The speed with which the final decision was taken is commendable but does not undermine or gainsay what counsel and Mr. Pugh told the court.

115. The fifth matter relied upon is expressed as follows:

“The contention in A&O’s First Letter that an arbitration agreement ousts the jurisdiction of the Nigerian Court (as reflected in the Notice of Appeal, Grounds 1 & 3) which is both wrong (as since accepted) and underpinned the contempt analysis at the 14 December Hearing.”

116. It is true that A&O were mistaken. It is also true that in their first letter, when dealing with the issue of contempt following an appeal, A&O referred to lack of jurisdiction. However, in both letters the advice given was based upon the Group Danone case and that has not changed, though further authorities confirming the principle of the Group Danone case are mentioned in the second letter of advice. I am therefore unpersuaded that the mistaken suggestion that the jurisdiction of the court was ousted by the arbitration agreement “underpinned” the contempt analysis.

117. Nevertheless a mistake was made and, so far as I can see, no explanation has been offered as to how that mistake was made (see paragraph 17(b) of the lenders’ Skeleton Argument in response to the set aside application). It would have been appropriate, when the mistake was realised, to acknowledge the mistake, inform the court of it and explain why it had occurred. Unless I have missed some part of the evidence (I was not referred to all the witness statements or invited to read them all by either party) that was not done. But in circumstances where the mistake does not appear to have underpinned the advice on contempt I am not persuaded that there was a material misrepresentation in the application issued on 11 December 2020 or that the omission

to admit and explain the error is a good reason to set aside the anti-suit relief granted by this court.

118. The sixth matter relied upon is:

“The failure to analyse the scope of the IIO or real contempt risk in seeking ASI relief and suggestion that contempt would have no relevance to the Court’s exercise of discretion to grant ASI relief. As to Nigerian law, Mr. Ayorinde accepted that, despite a party appealing and seeking a stay of execution, it cannot do and may be punished for doing something that will destroy the *res* or render the appellate court’s decision “useless”.”

119. Counsel for the Lenders submitted (see paragraph 17(a) of the Skeleton Argument in response to the set aside application) that the allegation that there had been a failure to analyse the scope of the Nigerian injunction was “incorrect”. It is true that A&O, in their first letter, addressed the point and that Mr. Pugh referred to A&O’s opinion. What can be said is that the language of the order was not addressed in detail, or at least not in the detail that counsel for the Borrower would suggest was appropriate. However, the point was addressed and the limited nature of the relief sought in arbitration (declaratory relief rather than a money judgment) shows that further thought must have been given to the matter by Freshfields and A&O; see paragraph 48 of Mr. Pugh’s witness statement. On balance I do not consider that there had been an unfair presentation in this regard.

120. It is further said that there was an unfair presentation in that it was suggested that contempt was of no relevance. Mr. Pugh dealt with the question at paragraph 60(c) of his witness statement. He first said that the risk of contempt is not a proper basis to refuse relief. He does not explain why and I do not think he is right to say that. The risk must be a relevant factor though the weight to be given to the risk may well be reduced by the factors mentioned by Mr. Pugh at paragraph 60(a) and (b). Mr. Pugh next said that there was no risk of contempt having regard to the effect of an appeal in Nigerian law and the limited width of the terms of the Nigerian injunction. order’s terms. The first point may be putting the matter too high in the light of what Mr. Ayorinde accepted in cross-examination and the second point has been challenged by Professor Mbadugha.

121. When one examines what Mr. Pugh said in paragraph 60(c) in the light of the evidence of Nigerian law which has since been given it can be said that whilst he gave a clear statement of the Lenders’ position on the question of contempt a fuller account would have included the possible arguments to the contrary. However, in circumstances where Mr. Pugh had identified cogent reasons for giving little weight to the contempt risk (see paragraph 60(a) and (b)) and, with the assistance of A&O, had considered the question of Nigerian law and had informed the court in clear terms of what the Lenders said about that issue (paragraph 60(c)) I do not consider that the Lenders’ omission to advise the court of the possible arguments to the contrary as a matter of Nigerian law was sufficiently material or grave as to justify setting aside the order granted *ex parte*.

122. The seventh matter relied upon is:

“Service of foreign process in Nigeria”

123. This is, as I understand the point, a complaint that in obtaining permission for alternative service by email the lenders had given insufficient attention to the lawful methods of service in Nigeria and to the question whether service by email was lawful in Nigeria; see the Borrower’s Skeleton Argument in support of set aside at paragraph 40. As to whether there are mandatory requirements requiring service in a particular manner the experts disagreed. However, during COVID 19 service was permitted by email, as A&O advised Mr. Pugh, though Professor Mbadugha was of the view that that did not apply to the service of foreign proceedings and he was not challenged on that view when cross-examined. It may therefore be the case that service by email was not permitted in Nigeria and to that extent the correct position was not put before Cockerill J. But I am not persuaded that if a mistake has been made by A&O in advising that these proceedings could be served in Nigeria by email as a result of COVID 19 such mistake was sufficiently grave to justify setting aside the injunction which was granted *ex parte*.
124. Thus the only grounds established for seeking to set aside the grant of relief *ex parte* were the sixth and seventh grounds relating to the treatment of contempt and service. But both of those matters had been addressed (with the benefit of advice from A&O on Nigerian law) and to the extent that there was unfair presentation it was not, in my judgment, sufficiently grave to justify the setting aside of the relief granted *ex parte*.

Proceeding *ex parte*

125. The final point taken was that there was no proper basis for the Lenders proceeding *ex parte* before Cockerill J. That course was taken because, as explained by Mr. Pugh in his witness statement, it was feared that if notice of the application were given the Borrower would seek injunctive relief in Nigeria. In the circumstances of this case that appears to me to have been good reason for proceeding *ex parte*. This was challenged on the basis that the same reason had been advanced for not commencing arbitration and seeking anti-suit relief at the end of 2020. That is true but it does not follow that when the Lenders did decide to commence arbitration and seek anti-suit relief it cannot be a good reason for proceeding *ex parte*.

Conclusion

126. The Lenders have established their entitlement to a final anti-suit injunction and for the requested declaratory relief.