Claim No: CL-2019-000752

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN AN ARBITRATION CLAIM
AND IN THE MATTER OF APPLICATIONS UNDER S.67 AND S.68 OF THE ARBITRATION ACT 1996
BETWEEN:

THE FEDERAL REPUBLIC OF NIGERIA

Claimant

- and -

PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED

Defendant

Claim No: CL-2018-000182

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN AN ARBITRATION CLAIM
AND IN THE MATTER OF AN APPLICATION UNDER S.66 OF THE ARBITRATION ACT 1996
BETWEEN

PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED

Claimant

- and -

THE FEDERAL REPUBLIC OF NIGERIA

Defendant

SKELETON ON BEHALF OF THE FEDERAL REPUBLIC OF NIGERIA ("FRN")

References to the Opus Bundle are given in the form {**Bundle/Tab/Page**} as appropriate.

Time estimate for hearing: 1 day (the parties have agreed a provisional timetable which was sent to Court on 15 November 2022).

Pre-reading estimate (if time allows): 1 day (the parties are providing a consolidated reading list for the Court).

A OVERVIEW AND BACKGROUND

1 The current hearing concerns three applications, ahead of the eight-week trial commencing on 16 January 2023: (a) Process & Industrial Developments Limited's ("**P&ID**") Application dated 30 September 2022 (time est. 2.5 hrs); (b) FRN's Application dated 18 October 2022 (time est. 2 hrs); (c) P&ID's Application dated 20 October 2022 (time est. 1.5 hrs). These applications are addressed in turn below.

2 The trial concerns P&ID's s.66 enforcement application, and FRN's s.67 and s.68(2)(g) challenges in relation to three arbitral awards (the "**Awards**") relating to a gas processing contract (the "**GSPA**") dated 11 January 2010. P&ID commenced the arbitration on 22 August 2012. The Final Award was made on 31 January 2017, ordering FRN to pay P&ID US$6.6 billion in damages plus interest at 7 percent, presently totalling c. US$11 bn.

3 FRN's case is that the GSPA, the arbitration clause and the Awards were procured by a massive fraud perpetrated by P&ID. In *The Federal Republic of Nigeria v. Process & Industrial Developments Ltd* [2021] 1 Lloyd's Rep. 121 (the "**Cranston Judgment**"), Sir Ross Cranston granted FRN extensions of time and relief from sanctions to bring its challenges, found that FRN had proceeded with reasonable diligence and that:

3.1 There is a strong *prima facie* case that the GSPA was procured by P&ID paying bribes to Nigerian officials, including to a Ms Grace Taiga[1] and Mr Taofiq Tijani[2] (Cranston Judgment §§196-199,{C/12/31-32}), which was concealed during the arbitration; and

3.2 There is a strong *prima facie* case that Mr Michael Quinn (P&ID's co-founder, alongside Mr Cahill) gave false evidence to the tribunal which gave the impression that P&ID was a legitimate business able and willing to perform the GSPA, when in fact it was not (Cranston Judgment §210,{C/12/34}); and

3.3 There is "at the least" a *prima facie* case that Mr Olasupo Shasore, FRN's advocate in the arbitration, was corrupted by and colluded with P&ID (Cranston Judgment §225{C/12/36}) (it being FRN's case that P&ID and its associated persons colluded with and/or entered into corrupt arrangements with various individuals, including

[1] The legal director of the Nigerian Ministry of Petroleum Resources ("**MPR**") at the time it entered the GSPA, which Ms Taiga witnessed.
[2] Chairman of the Technical Committee of the MPR which purported to assess the technical merits of the GSPA.

but not limited to Mr Shasore, involved in FRN's defence of the arbitration, with a view to seeking to secure a settlement and impede the conduct of FRN's defence).

4 Each of these matters, it will be submitted at trial, are individually (as well as collectively) sufficient to establish that the Awards were obtained by fraud and/or that they, or the way in which they were procured, were contrary to public policy for the purposes of s.68(2)(g) of the Arbitration Act 1996: see §§1-6 of the Re-Re-Amended Statement of Case {A1/1/2-4}.

5 Since the Cranston Judgment, extensive (and remarkable) further evidence of wrongdoing by P&ID in relation to the entry of the GSPA, arbitral process and these proceedings has emerged, with this coming predominantly as a result of FRN's pursuit of proper disclosure by P&ID both via correspondence and applications.[3] These matters have been reflected in amendments to FRN's pleadings, with FRN most recently having sent P&ID further re-amendments to its Statement of Case (the "**Re-Re-Re-Amended Statement of Case**") on 3 November 2022, which is the subject of an application for permission.[4] In particular:

5.1 On 29 October 2021 (the original disclosure date), Kobre & Kim (UK) LLP ("**Kobre & Kim**") (P&ID's then solicitors) wrote to Mishcon de Reya LLP ("**Mishcon**") identifying, for the first time, that P&ID were in possession of numerous documents which might be privileged and confidential to FRN, including privileged and confidential documents from the time of the entry into the GSPA and multiple privileged documents containing legal advice provided to FRN as to how to defend the arbitration and advising on settlement negotiations (the "**FRN Privileged Documents**"). P&ID had obtained such documents contemporaneously.

5.2 One email thread confirms that at least one of the suppliers of FRN Privileged Documents in 2014 was Ms Olufolakemi Adelore (then Legal Director of the MPR), using her email address flakeytee@yahoo.com to communicate with a Mr Adetunji Adebayo ("**Mr Adebayo**"), who promptly forwarded this (and many other FRN Privileged Documents) to others at and/or acting for P&ID (including Mr Seamus Andrew, Mr Brendan Cahill and Mr Trevor Burke KC). FRN contends that Mr

[3] FRN has had to issue eight applications in total to date.
[4] Having been sent to P&ID on 3 November for the purposes of requesting permission, P&ID has dragged out providing such permission, leaving FRN no option but to issue an application for consent on 16 November 2022 {N9/1}.

Adebayo acted as one of P&ID's agents and middlemen in paying bribes.[5] Full details of how P&ID came to obtain the FRN Privileged Documents remain obscured due to: (a) a lack of disclosure by P&ID revealing the identity of all the FRN individuals who improperly leaked and supplied such privileged documents to P&ID, including as a result of document destruction;[6] and (b) P&ID maintaining in its Response to FRN's RFI that it is unaware of the identity of any of the individuals who provided such privileged documents to it: see P&ID's Response to FRN's RFI dated 17 May 2022 (including Annex One to that document) at {A2/11}, {A2/12} and {A2/13}.

5.3 Second, it is apparent that such FRN Privileged Documents were contemporaneously shared with (among others) P&ID's representatives Mr Andrew and Mr Burke KC[7], but they did not disclose this to FRN or the tribunal at any time. Mr Burke KC and Mr Andrew assert in their witness statements for trial that during conversations with Mr Cahill and Mr Adebayo they warned them against providing such documents, but (a) P&ID previously confirmed that no notes of such alleged conversations exist;[8] and (b) the practice seems to have continued unabated. It transpires that Mr Burke KC is Mr Quinn's nephew; that he purportedly acted for P&ID without any written retainer in place; that he received payments totalling US$3.5 million that were not paid through his chambers, Three Raymond Buildings, and that he stands to receive approximately US$850 million in the event P&ID is successful in these proceedings. Mr Andrew is a solicitor who acted for P&ID during the arbitration; Mr Andrew is a current director of P&ID, and a director and owner of Lismore Capital Limited ("**Lismore**"). Lismore is the owner of 75% of the shares in P&ID

[5] Mr Adebayo was an old friend of Mr Michael Quinn. Under the terms of a "*Settlement Brokerage Agreement*" dated 2 July July 2014, Mr Adebayo was instructed to act as P&ID's representative during the arbitration, "*to facilitate negotiations between*… [FRN] *with a view to securing an amicable settlement of the claims in favour of P&ID*" {H6/349}. In return for his services, Mr Adebayo stood to receive up to 50% of any settlement figure totalling US$1 billion or more, plus an additional US$60 million payment for achieving a settlement of US$950 million or more. The disclosure shows that Mr Adebayo is now entitled to 10% of the anticipated proceeds arising out of the 75% stake in P&ID owned by Lismore Capital Limited ("**Lismore**"), and stands to receive over US $850 million if P&ID were to succeed in these proceedings.

[6] The documents show those acting for P&ID repeatedly referencing the need to delete the incoming messages providing FRN Privileged Documents. See, for example, {I/23}, {I/24}, {I/25}, {I/109}, {I/110}, {I/116}, {I/117}, {I/123}, {1/124}, {1/133}, {1/134}, {I/135}, {1/136}. Further P&ID contends that Mr Adebayo's documents are not within its control.

[7] See, for example, {I/44}, {I/45}, {I/46}, {I/47}, {I/52}, {I/53}, {I/54}, {I/55}, {1/56}, {1/57}, {1/58}, {I/59}, {1/60}, {I/74}, {I/75}, {I/81}, {I/82}, {I/83}, {I/84}, {I/84.1}, {I/85}, {1/96}, {1/97}, {1/98}, {I/102}, {1/103}, {I/104}.

[8] Kobre & Kim second letter dated 7 July 2022, paragraph 2 {N3/9.1}.

and stands to receive a sum in excess of US$8.25 billion in the event that P&ID is successful in these proceedings, and retain at least US$850 million.

5.4 Third, as set out in the current Re-Re-Amended Statement of Case {A1/1} and Re-Amended Reply {A1/3}, considerable further evidence of corruption of Nigerian officials has emerged, including (but by no means limited to): (a) further payments to Ms Taiga from companies associated with Messrs Quinn and Cahill dating back to around 2004 when she was a public official working for the Nigerian Ministry of Defence as a Legal Advisor; (b) a payment from Mr Adebayo to Ms Hafsat Belgore (the then-Assistant Legal Advisor in the MPR) in December 2014; and (c) additional high value cash deposits having been paid into the account of Ms Adelore.

5.5 Fourth, supplemental disclosure provided from P&ID as a result of the Foxton Order {C/22} has revealed that: (a) a Mr Bernard McNaughton, a former employee of companies associated with Messrs Quinn and Cahill, had offered in 2020 to act as a witness and provide documents in connection with these proceedings evidencing corruption, but (b) Mr Cahill and others procured Mr McNaughton's silence and non co-operation through entering a settlement agreement providing payment to Mr McNaughton contingent on P&ID succeeding in its claim against FRN.

6 In addition to strongly supporting FRN's existing case, FRN contends that P&ID's obtaining of the FRN Priviliged Documents in connection with the arbitration also establishes that the Awards were obtained by fraud or contrary to public policy within the meaning of s.68(2)(g), whilst the interference with a witness and other evidence of failure to provide disclosure and document destruction makes P&ID's defence to FRN's set-aside application an abuse of process.

B P&ID'S APPLICATION DATED 30 SEPTEMBER 2022

B1 P&ID's Privilege Application

7 By its Privilege Application, P&ID seeks the orders at paragraphs 1 and 2 of the draft Consolidated Order for its 30 September 2022 Application {X1/2}. By way of background, FRN's case is that P&ID colluded with a number of individuals involved in FRN's defence during the arbitration, including by paying them bribes, so that they would work against the

interests of FRN in the arbitration and in settlement discussions.[9] Due to P&ID's concealment of its fraud and destruction of documents revealing the identity of those involved, it has been a painstaking task for FRN to piece together the key wrongdoers, requiring multiple disclosure applications to force P&ID to provide the relevant documents. As detail is uncovered, so FRN has amended its pleadings to reflect the new information. At the time of the Cranston hearing in July 2020, a central colluding individual identified was Mr Shasore. FRN has identified other individuals involved in its defence of the arbitration who colluded, based on payments and disclosure,[10] namely Mr Ibrahim Dikko, Ms Adelore, Mr Ikechukwu Oguine, Ms Belgore, and Ms Oluremi Clara Aderemi (the "**Colluding Individuals**").[11]

8 In its Disclosure Certificate,[12] FRN set out a limited waiver of privilege ("**Waiver**") regarding: (i) documents relating to the contemporaneous conduct of and settlement during the course of the arbitration (Waiver, paragraphs 1.1 and 1.4); (ii) documents relating to the set-aside proceedings in Nigeria in 2016 (Waiver, paragraph 1.2); and (iii) documents relating to advice from and/or communications with Mr Shasore and/or Twenty Marina Solicitors in relation to the dispute with P&ID (Waiver, paragraph 1.3).

9 The Waiver was limited, however, so that it did not extend to:

9.1 in respect of the 2016 Nigerian set-aside proceedings documents and Mr Shasore/Twenty Marina Solicitors documents (i.e. Waiver paragraphs 1.2 and 1.3), documents containing and/or revealing privileged material from any person other than Mr Shasore or Twenty Marina Solicitors (Waiver, paragraph 2.1); or to

9.2 any documents covered by legal advice or litigation privilege in respect of the present proceedings or other actual or potential set-aside or enforcement proceedings in any jurisdiction (Waiver, paragraph 2.2). As to those set-aside or enforcement proceedings, the only such proceedings, aside from these proceedings, are the 2016 Nigerian

[9] Re-Re-Amended Statement of Case 4, 21, 59, 64, 71-75 {A1/1}.
[10] In fact, establishing corruption or collusion with any one of the individuals acting for FRN should be more than sufficient to set aside the Awards under s68(2)(g) of the Arbtiration Act 1996.
[11] In FRN's Re-Re-Re-Amended Particulars (the subject of the application for permission), FRN has now also identified that Mr Shasore's colleague, Mr Ukiri, was in communication with Mr Adebayo and shared a FRN Privileged document with Mr Adebayo shortly after receiving US $300,000 payment from Mr Shasore. FRN avers that it is to be inferred that Mr Ukiri was being paid to act, and/or was in any event acting, as one of the conduits for collusion between P&ID and Mr Shasore.
[12] {X1/7/16}.

set-aside proceedings, the 2016 English set-aside proceedings and the ongoing US enforcement proceedings.[13]

10 Since it served its Disclosure Certificate, FRN has extended the Waiver:

10.1 to include in Waiver paragraphs 1.3 and 2.1, as well as Mr Shasore and Twenty Marina Solicitors, all of the presently identified Colluding Individuals, plus Ajumogobia & Okeke and Africa Law Practice ("**ALP**") (both law firms at which Mr Shasore worked) (Twenty Marina Solicitors, Ajumogobia & Okeke and ALP are, for convenience, referred to as the "**Shasore law firms**"); and

10.2 to documents relating to the 2016 English set-aside proceedings, to the extent such documents relate to advice from and/or communications with the Colluding Individuals and the Shasore law firms, but subject to the same limit on the Waiver as set out in Waiver, paragraphs 2.1 and 2.2.[14]

11 Put simply, the result of the Waiver is that no privilege is asserted over any documents relating to the contemporaneous conduct of the arbitration or settlement during the arbitration at all.[15]

12 Further, save for (i) documents containing and/or revealing privileged material from anyone **other** than the Colluding Individuals and the Shasore law firms, and (ii) privileged documents in respect of these proceedings and the US proceedings, **no** privilege is asserted over:

12.1 any documents relating to the 2016 Nigerian set-aside proceedings or (insofar as they relate to to advice from and/or communications with the Colluding Individuals or the Shasore law firms) relating to the 2016 English set-aside proceedings; or

12.2 any documents containing or evidencing advice from or communications with the Colluding Individuals or the Shasore law firms in relation to the P&ID dispute.

13 That is an extensive waiver of privilege with only limited and justifiable carve outs. But P&ID is now trying to prise open even those limited retentions of privilege. It seeks at

[13] Akhtar 15, 19 {X1/5/8}.
[14] Letter from Mishcon to Kobre & Kim 7 September 2022 {X2/4}. P&ID was informed of the extension of this waiver to Mr Dikko and Ms Aderemi on 2 November 2022 {X1/5/1}.
[15] For the avoidance of doubt, this does not extend to any advice given by Stephenson Harwood and/or Roderick Cordara KC in respect of the 2016 English set-aside proceedings (which is distinct from the contemporaneous conduct of the arbitration itself, and clearly forms part of the limited carve-out to FRN's waiver of privilege as set out in paragraph 2.2 of its Disclosure Certificate), {X1/7/37}.

paragraph 1 of the draft Order all documents or parts of documents withheld by FRN on grounds of privilege which contain, reveal or evidence advice from and/or communications with the Colluding Individuals and the Shasore law firms in relation to the dispute with P&ID.

14 Given the documents over which privilege is **not** asserted (see above), P&ID's application is therefore directed **only** at documents or parts of documents which contain, reveal or evidence advice from and/or communications with the Colluding Individuals and Shasore law firms, where:

14.1 those documents or parts of documents contain and/or reveal privileged material from persons **other** than the Colluding Individuals and the Shasore law firms.

14.2 the advice or communications are subject to legal advice privilege or litigation privilege in respect of these proceedings and/or the current US proceedings.

15 Properly analysed in this way, P&ID's application is revealed for what it truly is: an unjustified and unmeritorious attempt to attack FRN's legitimate assertions of privilege.

16 P&ID tries to justify its attack on three bases:[16]

16.1 that FRN has impliedly waived privilege over the documents which it now seeks;

16.2 there has been a collateral waiver; and

16.3 that fairness requires that the disclosure sought be given.

17 As to the argument that there has been an implied waiver of privilege, this is hopeless. Implied waiver is a concept of very limited application, restricted to the situation where there is litgation between client and lawyer. For obvious reasons, where a client sues his lawyer and has thus put in issue the relationship between them, he cannot at the same time insist on the confidentiality being kept in the documents that passed between them. There were attempts to broaden the concept of implied waiver beyond the client-lawyer relationship, to third parties,[17] but that has now been firmly rejected, including by the Court of Appeal in

[16] Marsh 1, 30 {X1/3/13}; Marsh 7, 14.2 {X1/8/5}. See also Kobre & Kim's letter to Mishcon of 7 June 2022{X2/1/2}.
[17] e.g. in *Hayes and Rowson v Dowding* [1996] PNLR 578.

Paragon Finance v Freshfields [1999] 1 WLR 1183 per Lord Bingham CJ at p.1193. Ramsey J noted in *Farm Assist Ltd v SoS for Environment Food & Rural Affairs* [2009] PNLR 16 at [50]:

> "…as confirmed by the Court of Appeal decision in Paragon Finance, the implied waiver in Lillicrap v Nalder only arises in proceedings between a solicitor and client. …Whilst a person's state of mind and also that person's actions may well have been influenced by legal advice, there is no general implied waiver of privileged material merely because a state of mind or certain actions are in issue. This means that, in the absence of disclosure of the privileged legal advice, the other party is precluded from being able to put that legal advice to a person to show that the advice influenced the state of mind or actions of that person. In many cases it could be said that privileged legal advice might be relevant to establishing an issue and that, in this way, the privileged material could be said to be put in issue. That is not the approach taken in English law. Rather, the underlying policy considerations for creating privilege to protect communications between a client and solicitor are treated as paramount even if some potential unfairness might occur. The test in English law is therefore based neither on general principles of fairness nor on relevance."

18 Similarly, Morgan J in *Digicel (St. Lucia) Ltd v Cable & Wireless Plc* [2009] EWHC 1437 (Ch) made clear at [52]-[53] that in an action against a third party, the principle of implied waiver (and the associated test of fairness) does not apply:

> "The fact that the legal advice is relevant to an issue does not result in a waiver of privilege. Relevance is a necessary precondition for disclosure but it is not itself a sufficient condition for a finding of waiver. The position is the same even where the legal advice is 'highly' relevant, rather than relevant to a lesser extent, and even where an investigation of the issue may be hampered by the absence of the privileged material. The position is the same again even when the issue is as to a person's state of mind. Equally, in my judgment, it makes no difference that the alleged state of mind relates to a matter of law rather than to a matter of fact. There will of course be a a waiver of privilege if a party deploys the contents of the legal advice in the litigation. In the absence of such deployment, there is no rule of law which allows the court to override the claim to privilege just because the court thinks it would be fair to do so. The court will simply have to do the best that it can to come to what it hopes will be the right conclusion on all the evidence presented, even where evidence that would be relevant has been withheld by a party who is entitled in law to withhold that evidence."

19 It is also clear that even if there were an implied waiver, that would not extend to, or would be unlikely to extend to, materials attracting litigation privilege.[18]

20 As to the argument concerning collateral waiver, it is unclear precisely what is said to have constituted the collateral waiver beyond Mr Marsh's reference to the Waiver in the Disclo-

[18] Passmore on Privilege, 4th ed, at 7-494.

sure Certificate and the further Waiver since in respect of the 2016 English set-aside proceedings. Those waivers, on their own terms clearly set out the limits of the Waiver being offered. On no basis can it be said that the waiver has collaterally gone beyond that. P&ID rightly made no such suggestion for over 7 months after the Disclosure Certificate was filed.

21 As to the argument concerning fairness, the authorities cited above regarding implied waiver make clear that fairness is not the touchstone on the question of privilege (see the passages from *Farm Assist* and *Digicel* above, for example). In any event, there is no unfairness in the present case: the only retention of privilege is where it would reveal privileged material in relation to **other** persons (i.e. not the privileged material from Mr Shasore or other of the Colluding Individuals or from the Shasore law firms) or in relation to privileged material in relation to **ongoing** proceedings, namely the present proceedings and the US proceedings. Contrary to P&ID's case, its application would result in unfairness the other way.

22 It is worth also putting the matter in context. FRN confirms that there are in fact no withheld documents or redacted parts of documents which contain, reveal or evidence legal advice from and/or communications with the Colluding Individuals and Shasore law firms in respect of the dispute with P&ID as regards Ms Adelore, Mr Oguine, Ms Belgore, Mr Dikko, Ms Aderemi, and Ajumogobia & Okeke. The documents withheld or parts of documents redacted concern only Mr Shasore, Twenty Marina Solicitors and ALP. Further, those withheld or partly redacted documents comprise just 68 documents, inclusive of several duplicate versions of the same documents (meaning that, in reality, unique documents make up under half of the total figure). Moreover, many concern legal advice or litigation privilege in respect of these live proceedings and/or the current US proceedings.

23 There is therefore no justification for paragraph 1 of the draft Order.

24 There is considerable irony in P&ID seeking the Order at paragraph 2. This case concerns a massive fraud perpetrated by P&ID and outrageous attempts to cover up that fraud, including undeniable instructions to destroy documents and obfuscation and obstruction by P&ID in response to FRN's attempts to uncover the fraud and the identity of those involved. The simple solution to paragraph 2 would be for P&ID to provide a full and proper answer to FRN's RFI dated 8 April 2022 {A2/11} seeking detail as to the provenance of the FRN Privileged Documents. P&ID (including via Mr Adebayo) must know the identity of the individuals with whom it colluded. Akhtar 15, 22 {X1/5/10-13} sets out the true position.

25 In any event, as P&ID has slowly given disclosure (in a process akin to drawing teeth), FRN has amended its case to plead collusion by specific individuals where that becomes justifiable. It will continue to do so. Thus, it has already complied with paragraphs 2.a and 2.b to the extent it can at present. There is thus no need or basis for the Order.

B2 P&ID's RFI and additional information application

26 This application has now fallen away. P&ID has dropped its demand for paragraph 3 of the draft Order, perhaps recognising the absurdly wide-ranging nature of its request, which required information to be sought from many individuals in Nigeria in relation to events that took place around a decade ago, where those individuals may have moved to different employment or even died. The application for paragraph 3 should never have been made.

27 Paragraph 4 has also fallen away. This part of the application was also wholly unjustified and should not have been made. Despite the complete lack of relevance of these materials, FRN has, so as to avoid wasteful argument, provided disclosure pursuant to paragraph 4.[19]

B3 P&ID's Disclosure Application

28 P&ID has rightly dropped most of this application, including its unmeritorious attempt at a fishing expedition across the entirety of the documents of the President, Chief of Staff, Deputy Chief of Staff and Vice President for a more than 4-year period from June 2015 to July 2019. It would or should have been obvious to P&ID from the outset that there was no basis for this at all, FRN's disclosure having laid out clearly the lack of involvement of those individuals in the arbitration. P&ID nevertheless wasted considerable time and cost for both parties by pursuing its request, only to drop it at the eleventh hour. That is not a constructive way to conduct litigation and FRN will address this in its submissions on costs.

29 All that remains are four matters. Only paragraph 6 is addressed in further detail later below.

29.1 Paragraph 5b. P&ID appears to agree to FRN's proposal to write to the EFCC and thereby confirms that it will not allege improper collateral use of documents. If that confirmation is not being given, P&ID should inform FRN forthwith. FRN will write in the terms proposed and provide the update when any response is received.[20] There is no justification for P&ID reviewing the letter before it is sent.

[19] Akhtar 15, 50 {X1/5/22}.
[20] Akhtar 15, 59 {X1/5/25}.

29.2 Paragraph 5c. P&ID now demands that FRN carry out new searches (though the scope is not clear) as regards the provenance of FRN Privileged Documents.[21] This was not sought in the draft Order and the searches sought and basis are unclear. Mishcon will seek clarification in correspondence, but there should be no Order in this respect.

29.3 Paragraph 6, where P&ID seeks extensive disclosure of the electronic data (including WhatsApp, text message and email) of Mr Abdullahi Yola, the former Solicitor General, and Mr Malami, the Honourable Attorney General of the Federation, relating to the involvement of the Ministry of Justice ("**MOJ**") in the dispute with P&ID.

29.4 Paragraph 8. This has largely fallen away,[22] though P&ID now insists on a new, further order. FRN has already indicated that the issues concerning remaining confirmations can be addressed in correspondence in short order and P&ID's new request accepts that correspondence is the appropriate way to deal with the remaining points. In circumstances where there is agreement and FRN intends to write promptly, no order is necessary.

Paragraph 6

30 As to paragraph 6, P&ID seeks an extraordinarily broad collection of electronic data, including the personal data, of Mr Yola and Mr Malami, and disclosure of documents evidencing or relating to the involvement of the MOJ in the dispute with P&ID. The application starts from the false premise that FRN's disclosure in these respects has been lacking to date. In fact:[23]

30.1 FRN conducted a large document collection exercise across a number of government agencies and bodies, including the MOJ.

30.2 Within the MOJ, the exercise covered thousands of individual hard-copy documents and electronic data gathered from laptops, USB hard drives and emails. The exercise collected documents from, amongst other areas, the Solicitor General's Registry, the Attorney General's Registry and the Civil Litigation Department. The two Registries

[21] Marsh 7, 35 {X1/8/15}.
[22] Marsh 7, 59-60 {X1/8/23-24}.
[23] Akhtar 15, 64 {X1/5/26}.

are the official repositories for all hard copy documents sent or received by the Solicitor General's Office and the Attorney General's Office, and any other additional documents related to the dispute with P&ID would be held in the Civil Litigation Department files, which were also collected for the purposes of disclosure.

30.3 As noted in FRN's Disclosure Certificate, Appendix B, documents were also collected from 3 personal email accounts at the MOJ and a shared email account relating to the P&ID dispute.[24] This alone resulted in some 3,631 documents, including families, being collected.[25]

31 The full extent of FRN's document collection exercise in respect of the MOJ was set out in its Disclosure Certificate[26] and the extent of the exercise more generally was also set out therein. However, it was not until P&ID's letter of 25 July 2022, nearly 9 months later, that P&ID made any complaint about the extent of that exercise or sought any additional disclosure.

32 Despite this extensive collection and searches already conducted, P&ID now, very late in the day, seeks broad further disclosure of documents, including emails, text messages and/or any other types of communications (including but not limited to Whatsapp and/or Telegram messages) of Mr Yola and Mr Malami for the period 1 June 2015 to 31 July 2019.

33 Strikingly, the evidence in support of the request for this massive exercise comprised just two paragraphs of Mr Marsh's evidence – Marsh 1, 55 and 56 {X1/3/21-22}. These: (i) made no more than bare assertions as to the supposed involvement of Mr Malami in the dispute; (ii) did not suggest any involvement of Mr Yola at all; (iii) did not even mention mobile devices and thus did not even attempt to justify that element of the extensive request; and (iv) gave no explanation of why disclosure was needed in respect of personal emails and devices.

34 Mr Marsh's attempt to rescue the position in his reply evidence takes matters no further: for example, there is still no attempt to justify the request for disclosure of mobile device data. The remaining points in issue are addressed below, taking Mr Yola and Mr Malami in turn:

Mr Yola

[24] {X1/7/26-28} – and see Appendix to Mishcon letter of 7 September 2022 {X2/4/8}.
[25] Mishcon letter dated 5 August 2022, para 11 {X2/3/6}.
[26] Exhibited in SA15 {X1/7/20}.

35 P&ID inexplicably seeks a search for the period 1 June 2015 to 31 July 2019, but Mr Yola left office on 10 November 2015. P&ID relies on three documents which are all said to indicate that Mr Yola played a "key role" in settlement attempts during his tenure. However, this supposed "key role" is nowhere substantiated and, tellingly and in any event, P&ID does not suggest that Mr Yola's involvement extended any further than in relation to settlement. The position therefore remains as FRN said it was: Mr Yola's involvement was limited and will have been captured by the existing disclosure insofar as documents exist. That disclosure is the result of the extensive document-gathering exercise across the FRN government agencies and bodies, including the Solicitor-General's Registry.

36 In terms of searches of the MOJ email accounts of Mr Yola, confirmation has now been obtained that no MOJ email account exists or has ever existed for Mr Yola.[27] P&ID suggests that this is all the more reason why Mr Yola's personal email accounts and mobile devices should be searched, but this is to put the cart before the horse. It also ignores the issue of control. There is no indication that Mr Yola ever used personal email or mobile devices to communicate in relation to his limited involvement in the dispute. Mr Marsh suggests that this is because of inadequate searches of email accounts so far. However, that ignores the extensive email collection from the MOJ already, with 3,631 documents gathered from the three MOJ email accounts and one shared email account.[28] Had Mr Yola been involved in the dispute and used email in that regard to the extent that P&ID speculates, the likelihood is that relevant emails would have been collected already. That there are none is telling.

37 It is all the more plain, as a result, that the rest of P&ID's application in respect of Mr Yola (a former official) – seeking collection and searches in respect of his mobile and personal data – is a straightforward fishing expedition or is otherwise designed to inconvenience FRN and disrupt its preparations for trial. Mr Marsh's attempt (Marsh 7, 53) {X1/8/22} to justify this by reference to P&ID's WhatsApp disclosure does not help him. That was justified by good evidence in surrounding documents that various P&ID individuals used personal devices to communicate via WhatsApp (and as more recently discovered, despite P&ID's previous false statement to the contrary, Signal). There is nothing in the evidence at all to suggest that Mr Yola used personal email or his personal devices to communicate in respect of his limited involvement in relation to the arbitration.

[27] Mishcon letter dated 15 November 2022 {X2/14}.
[28] Mishcon letter dated 5 August 2022, para 11 {X2/3/6}.

38 The request for the Order in respect of Mr Yola should therefore be dismissed.

Mr Malami

39 As for Mr Malami, again, his involvement in the dispute was limited. He was not appointed Attorney General until 11 November 2015 and the MOJ did not formally take conduct of the arbitration from the MPR until June 2016.

40 Mr Marsh portrays FRN as going out of its way to hide certain matters regarding its document collection exercise. This is inaccurate and does not account for FRN's detailed and comprehensive Disclosure Certificate (complete with appendices providing further information), in stark contrast to P&ID's Disclosure Certificate (which, due to its inadequacies, had to be supplemented by a further Disclosure Certificate in January 2022), nor for extensive further clarifications provided in Mishcon's first letter of 7 September 2022 {X2/4}.

41 P&ID make much of the discovery of a @justice.gov.ng email account for Mr Malami. It is said by Mr Marsh that "FRN has now revealed that Mr Malami used [this account] during the period of the Arbitration". That is plain wrong. In fact, what was addressed was its existence, not whether it was used. What Ms Akhtar did say (Akhtar 15, 77) {X1/5/31-32} was that there was nothing in the parties' current disclosure to suggest that that account was used in relation to the MOJ's conduct of the arbitration, pointing out that not a single example existed of Mr Malami using that account between his assumption of office and the publication of the Final Award on 31 January 2017. To allay any concern, Mishcon (via its eDiscovery provider, MDR Discover LLP) collected the entire mailbox (including historic backups), reviewed all documents responsive to the full suite of disclosure keyword searches (across the period 11 November 2015 to 31 January 2017[29]) and identified no disclosable documents. Thus, the official email account element goes nowhere. Mr Marsh contends that the searches were conducted by FRN itself, but this is a misunderstanding. For the avoidance of doubt, the searches (and subsequent review) were in fact conducted by Mishcon.

42 As regards Mr Malami's personal email account, again, there was no justification for a search and FRN does not have control of this account. In an effort to save costs and time in arguing the point, Mr Malami arranged for FTI Consulting LLP (in the presence of Mishcon) to search his personal email account (ayaymalami@yahoo.co.uk), applying keyword searches

[29] 11 November 2015 being the date on which Mr Malami assumed office and 31 January 2017 being the date of the Final Award.

and a date range (as set out in Akhtar 15, 79) {X1/5/32-33} in his presence or of his representative. All responsive documents were provided with his permission to Mishcon who reviewed them and identified no disclosable documents. A targeted search was, with his permission, conducted for the meeting minutes alleged to be missing. No relevant documents were found.[30]

43 With the core elements of its application in respect of Mr Malami addressed, P&ID has no justification for anything further:

43.1 It complains that only limited search terms were applied to Mr Malami's personal account (Marsh 7, 50) {X1/8/20} , but the search terms applied (set out at Akhtar 15, 79) {X1/5/32-33} are the most obvious in the context of this dispute and most likely to produce responsive hits. In circumstances where the search was of Mr Malami's personal email, permitted by him, and where there is no evidence at all that he used his personal email to communicate in respect of the arbitration, the application of these search terms was a reasonable, proportionate and practical way to address P&ID's (unjustified) concerns. There is no basis for now repeating the exercise with a much more extended search, especially where applying even core search terms produced no disclosable documents. The suggestion that disclosable documents will be identified by applying **less** obviously relevant search terms stretches logic beyond breaking.

43.2 Mr Marsh also complains that Mishcon have not confirmed whether Mr Malami used any other personal email accounts. This was not a question previously asked but, in the interests of being constructive, FRN is informed that Mr Malami has two other personal email accounts, neither of which have ever been used in relation to his conduct of the arbitration or of these proceedings more generally.

43.3 P&ID again makes not even a barebones effort to justify the application in respect of Mr Malami's mobile devices. There is no indication at all that there are likely to be relevant documents on those devices (not least given the absence of any evidence in the existing disclosure to indicate he used them in relation to the arbitration). This is an obvious fishing expedition, designed to cause disruption.

44 In short, there is no justification at all for the Order sought at paragraph 6 of the draft Order.

[30] Akhtar 15, 79 {X1/5/32-33}.

C FRN'S APPLICATION DATED 18 OCTOBER 2022

45 The Order sought by FRN is at {Y1/2}. The outstanding matters are addressed below.

C2 Outstanding matters re. paragraph 1 of the Order {Y1/2/2-4}

46 Following the Order of Mr Justice Jacobs[31], Kobre & Kim provided disclosure of various WhatsApp threads on 31 August and 14 September 2022.[32] However, these threads are obscured by considerable redactions, some 3,484 allegedly on the basis of privilege and some further 985 under the generic description "irrelevant and confidential".[33] It is apparent that P&ID's redactions include ones without proper basis: FRN can (fortuitously) prove this because P&ID in fact purported to redact various messages in the threads that it had previously provided for inspection as standalone messages without redaction and where the content is plainly not in fact privileged. FRN wrote to P&ID on 30 September 2022 setting out examples: {Y1/4/6-44}. P&ID had redacted, for example, a message from Grace Taiga to Mr Cahill on 5 September 2019 in which she stated *inter alia*, "*PLEASE BE REMINDED THAT FAILURE TO COMPLY WITH THE AWARD AT THE SET TIME ATTRACTS INTEREST AT THE SAME TIME I WISH to counsel that* ***we stand on our grounds*** *not to set aside award and uphold the AWARD in its totality*…"[34] (emphasis added). Ms Taiga was the legal adviser to the MPR who awarded the GSPA to P&ID: she is not a member of P&ID's legal team.

47 Quinn Emanuel have now agreed to re-review the redactions on the Whatsapp threads, albeit worryingly appear to have pre-judged the position given their statement in their letter of 7 October 2022 that "*We do not accept your suggestion that the redactions applied to the WhatsApp Thread Disclosures to date have involved any 'cherry-picking' or 'inadequacies in […] approach*"[35].

48 Two matters remain potentially in dispute:

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[31] See paragraphs 4 and 5 of the Order dated 15 July 2022 {C/29}.
[32] Quinn Emanuel replaced Kobre & Kim on 30 September 2022. On the very day the notice of change was served, Quinn Emanuel served a lengthy disclosure application directed at FRN.
[33] As explained in *JSC Commercial Bank Privatbank v Kolomoisky and others* [2022] EWHC 868 (Ch) at [8], "…*while, for the purposes of carrying out the model D and model E search-based extended disclosure in accordance with para 8 of CPR PD 51U, the exercise is to be done by reference to the Issues for Disclosure, a para 16.1(1) redaction is only permissible if the redacted data is irrelevant to any issue in the proceedings. Once a document has been identified for disclosure by application of model D or model E, the question of whether parts of it can be excluded from inspection raises different issues…"* Redactions cannot be made on the grounds of confidentiality alone: *Hancock v Promontoria (Chestnut) Ltd* [2020] 4 WLR 100 at [87].
[34] {Y1/4/12}.
[35] {Y1/4/305}.

48.1 The timing of the completion of the review: Quinn Emanuel maintain that they need until 9 December 2022 to complete the review. They have yet to provide a single thread back to FRN (despite the suggestion of rolling disclosure). This is far too late. This is 10 weeks after the issue was raised with Quinn Emanuel, and relates to documents that should have been provided properly by way of dislcosure long ago. A date of 9 December 2022 is after the PTR and will impede any applications to challenge redactions that have been nonetheless left in place.

48.2 Whether FRN is entitled to answers to the questions set out at paragraph 1c(i)-(ix) of the Order: Answers to these questions (whether in correspondence or a witness statement) are each necessary for FRN to unpick what went wrong, to ensure this is remedied and/or to challenge any questionable redactions left in place following the re-review.[36] P&ID's willingness to provide such responses is still unclear, and its requirement to do so should be unambigiously reflected in the Order.

C3 Outstanding matters re. paragraph 2 of the Order {Y1/2/4}

49 Mr Adebayo is a significant individual: in July 2014, he entered into an agreement whereby he was authorised by P&ID to "facilitate negotiations" in return for up to 50% of any settlement sum.[37] He was an important conduit by which P&ID obtained FRN Privileged Documents and information during the arbitration,[38] and incontrovertibly made payments to (among others) members of the MPR legal team during the arbitration.[39] FRN's case is that Mr Adebayo paid bribes and obtained illicitly provided legally privileged content on behalf of P&ID. By contrast, P&ID denies that Mr Adebayo acted as its agent. Whilst Mr Adebayo stands to receive some US$850 million if P&ID succeeds in these proceedings,[40] his documents have not been obtained by P&ID for the purposes of these proceedings (with Mr Smyth emailing Mr Cahill on 14 September 2019 stating "*I assume Tunji has deleted all emails between us from his phone*"[41]), nor has he been called by P&ID as a witness.

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[36] Insofar as the redactions on the basis of privilege are concerned, the Court is entitled to scrutinise carefully how a claim to privilege is made out and a witness statement should be as specific as possible: see *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) at [11]. Insofar as the redactions on the basis of irrelevance are concerned, see *Privatbank at* [12]. More generally, the Court has broad powers, including under CPR PD57AD 17.1(5) to require a party to *"make a witness statement explaining any matter relating to disclosure"*.
[37] {Y1/8/11-22}.
[38] See, jut for example, {Y1/8/29-47}, {Y1/8/48-49}, {Y1/8/50-52}, {Y1/8/54-56}, {Y1/8/175-179}.
[39] {Y1/8/292},{Y1/8/381-383}.
[40] {Y1/8/23-28}.
[41] {Y1/8/384}.

50 Virtually no substantive communications between Mr Adebayo and the other individuals acting for P&ID have been provided for inspection. It transpires that 538 otherwise disclosable communications with Mr Adebayo have been withheld on the purported basis of privilege (the "**Adebayo Privilege Log**").[42] This does not appear sustainable,[43] including given any privilege has been waived given Re-Re-Amended Defence §70B.5 {A1/2/46} and Mr Andrew's Seventh Witness Statement at §10-12 {Y1/4/567-568}, both of which purport to rely on contentions as to the alleged content of communications with Mr Adebayo.[44]

51 Following the application being issued, Quinn Emanuel agreed to conduct a re-review of the documents within the Adebayo Privilege Log, with this meant to have been completed by 16 November 2022. However, on 16 November 2022, Quinn Emanuel identified that this re-review would not be completed until 21 November (thereby depriving FRN of the ability to address the outcome in its skeleton). For present purposes what remains disputed on the current application[45] is whether P&ID should be required to explain the basis on which privilege is claimed for all documents in the log which P&ID intends to continue to withhold. FRN contends it is necessary P&ID should be required to provide this information (whether in a witness statement or correspondence): (a) this information will allow FRN to determine whether, following the re-review, P&ID has a proper basis to continue withholding from inspection any communications with Mr Adebayo, and to frame any application to challenge this appropriately; and (b) the level of information previously provided in the Adebayo Log was woefully deficient.

C4 Outstanding matters re. paragraph 3 of the Order {Y1/2/4}

52 By letter dated 24 June 2022, Kobre & Kim gave express confirmation, on instructions, that, save for WhatsApp and SMS, Mr Cahill "has not used any other messaging platforms"[46].

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[42] {Y1/4/534-547}.

[43] The basis on which communications with Mr Adebayo could properly be the subject of a claim of privilege by P&ID has never been properly explained. Further, the communications that have been withheld can be seen from the privilege log to apparently include (i) communications concerning the negotiation of the agreements between P&ID and FRN, which do not seem capable of attracting a valid privilege claim; (ii) notes of alleged WP meetings, notwithstanding privilege has been waived by P&ID to WP during the arbitration; (iii) P&ID has also confirmed that it will not assert privilege in documents containing or evidencing the circumstances in which confidential or privileged FRN documents came to be obtained or provided to P&ID or contain or evidence the contemporaneous sharing or discussion of the same {Y1/4/548} & {Y1/4/549}.

[44] *PCP Capital Partners LLP v Barclays Bank Plc* [2020] EWHC 1393 (Comm), [2020] Lloyd's Rep. F.C. 460 at [48].

[45] For the avoidance of doubt, all FRN's rights are reserved to bring further applications in the future challenging any subsisting claims to privilege in relation to the Adebayo communications and/or the WhatsApp redactions.

[46] {Y1/4/217} at paragraph 5(a).

53 However, as a result of the WhatsApp disclosure pursuant to the Jacobs Order, this has been proven to be false. That disclosure, by chance, includes reference by Mr Cahill to using Signal.[47] Signal is an end-to-end encrypted messaging platform known for its secure and private messaging capabilities. By letter dated 2 November 2022, Quinn Emanuel made a bare assertion that "Mr Cahill sent a small number of experimental messages on Signal in 2019 and/or 2020, including to Mr Steve Oronsaye".[48] Further, information has now been provided by Quinn Emanuel's third letter of 17 November 2022 as to who else it is said Mr Cahill communicated with.

54 Quinn Emanuel identified that Mr Cahill's iPhoneX, on which Signal was downloaded, is held by the Irish Gardai following Mr Cahill's arrest in Ireland in December 2021.[49] Quinn Emanuel has further said in its third letter of 14 November 2022[50] that Mr Cahill refuses to request that the iPhoneX be made available by the Irish Gardai to be searched for these proceedings. In the circumstances, a witness statement should be provided, that sets out what steps P&ID has taken to obtain access to, or a copy of, Mr Cahill's iPhoneX, including in light of P&ID's power to require Mr Cahill to take all reasonable steps to further the prosecution of P&ID's claim and enforcement under clause 5.8 of the Shareholders' Deed.[51]

C5 Outstanding matters re. paragraph 4(a) of the Order {Y1/2/5}

55 One of the issues before Mr Justice Jacobs in July 2022 was that P&ID had, when providing disclosure, disclosed only standalone WhatsApp messages responsive to the keyword searches, rather than the full threads of which those responsive messages formed part.[52] Mr Justice Jacobs ordered the entirety of the threads to be provided for inspection, save for making a distinction in the case of the WhatsApp group chat thread between Mr Cahill, Mr Burke KC and Mr Andrew given its size. In relation to this specific thread, Mr Justice Jacobs determined at paragraph 5 of his Order:[53]

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[47] In a WhatsApp message sent from Mr Cahill to Mr Smyth on 22 September 2019, Mr Cahill wrote " *I received a pdf on Signal from Steve. Can 't figure how to circulate. Please find out how to do it."* {Y1/4/572}.
[48] {Y2/19/1}.
[49] {Y2/19/2} P&ID have refused to provide information or clarity as to the basis of Mr Cahill's arrest. Reports in the press indicate that Mr Cahill was detained on suspicion of conspiracy, contrary to section 71 of the Criminal Justice Act 2006, which allows the Irish Gardai to investigate offences committed outside the State.
[50] {Y2/23/1-3}.
[51] See in this context Mishcon's letter dated 16 November 2022 {Y2/25}.
[52] P&ID has confirmed since the hearing before Mr Justice Jacobs that the threads were in fact exported and obtained by its discovery platform as a single thread (i.e. a single document), and only split into individual messages prior to processing: see para 3 of Kobre & Kim's letter dated 9 August 2022 {Y1/8/433}.
[53] {C/29/3}.

"Insofar as the group chat between Trevor Burke QC (+447976722364), Seamus Andrew (+447717330708) and Brendan Cahill (+353 (87) 254 2886) is concerned, without prejudice to any subsequent applications in this regard:

(a) By 31 August 2022, P&ID is to provide inspection of the entire line of conversation of which each message previously provided for inspection formed part, subject only to redactions of that conversation in accordance with CPR PD51U paragraph 16.1.

(b) By 31 August 2022, P&ID is to search and manually review all messages in the 14 days either side of each conversation disclosed pursuant to paragraph (a), and provide disclosure of all disclosable messages identified as a result.

(c) Having been given an opportunity to review any further disclosure provided pursuant to (a) and (b) above, FRN is to be entitled to identify reasonable additional search terms to be applied to the messages within the group chat for the purposes of identifying further messages and/or conversations to be reviewed by P&ID for the purposes of identifying further disclosable documents to be provided for inspection."

56 Pursuant to paragraph 5(c) of the Jacobs Order, FRN has requested, and P&ID has agreed to apply, nine additional search terms to the thread.[54] However, insofar as those search terms identify further disclosable conversations, P&ID has resisted having to now look for further disclosable documents 14 days either side of each such disclosable conversation (i.e. the mechanism ordered at paragraph 5(b) of the Jacobs Order). P&ID is wrong to resist this:

56.1 Mr Marsh wrongly claims, "most of [the WhatsApp disclosure] has minimal or no relevance to the issues in dispute".[55] As set out in Akhtar 17 at §28,[56] the limited disclosure already provided from just this particular thread reveals that Messrs Cahill, Andrew, and Burke KC were all privy to *inter alia*: (i) the implementation of plans to make concealed payments to Grace Taiga;[57] (ii) concerns relating to Grace Taiga and her daughter Aisha Taiga that "We need to hold their hands all the time…Their thinking and attitude change when left to think alone";[58] (iii) plans to withhold information relating to the "benevolent payments" that P&ID had made since incorporation (with it stated that this information "could open new and unwelcome lines of enquiry").[59]

56.2 Requiring that P&ID search 14 days either side of any disclosable conversations found is consistent with the approach previously ordered by Mr Justice Jacobs and an appropriate mechanism towards ensuring that a reasonable search has now been

[54] "main man"; "chap"; "local man"; "Ojo"; "Kofo"; "$", "£", "€"; "Eur*", {C/29/3}.
[55] Marsh 5, 29 {Y1/5/11}.
[56] {Y1/7/10-11}.
[57] {Y1/8/441-446} and {Y1/8/453}.
[58] {Y1/8/455-458}.
[59] {Y1/8/459}.

done, in that the communications surrounding the particular disclosable conversations may also be disclosable, but might not themsleves have been captured by the keyword searches given the often short and bitty nature of messages sent using WhatsaApp.

E P&ID's Application dated 20 October 2022

57 By this application P&ID seeks an order:

57.1 compelling FRN to respond in full to P&ID's RFI dated 13 October 2022 concerning the instruction of Mr Shasore in separate arbitrations commenced by Sunrise Power & Transmission Co against FRN (the "**Sunrise Arbitrations**"); and

57.2 for disclosure and inspection of certain categories of documents in relation to the Sunrise Arbitrations and EFCC money laundering charges against Mr Shasore.

58 At the outset, it must be said that this application is entirely unnecessary and is premature. FRN was already in the process of responding to requests made in correspondence for the very information and documents now sought by the draft Order. Quinn Emanuel sent two letters – received on Friday 14 October 2022 (sent after hours the day before) – setting out: (i) for the first time the RFI and requesting confirmation by Monday 17 October 2022 (i.e. the very next working day) that FRN would provide a substantive response to the RFI by 28 October 2022;[60] and requesting for the first time the disclosure now sought by paragraph 2 of the draft Order and requesting a response also by the next working day, 17 October 2022, confirming that FRN would provide the disclosure sought by 7 November 2022.[61]

59 By any sensible standard, the requests for responses by the next working day were unreasonable. Mishcon plainly needed to take instructions and FRN needed adequate time to consider the requests before committing to providing the confirmations requested. That being so, Mishcon responded quite properly on 17 October 2022 confirming that they were taking instructions and would respond as soon as they were in a position to do so.[62]

60 Despite this response, and despite therefore knowing that FRN was considering the requests and planning to get back to P&ID as soon as it was in a position to do so, and most strikingly, despite the time that P&ID itself had proposed as the actual dates of response (namely

[60] {Z2/1}.
[61] {Z2/2}.
[62] {Z2/3}.

28 October and 7 November 2022) still being weeks hence, it impetuously lodged this application. It was wholly unnecessary; FRN had given no indication at all that it would not engage constructively with the requests. P&ID's approach has been unreasonable and its conduct has already resulted in significant costs and time being wasted in dealing with its application, rather than engaging with the very requests it supposedly wanted addressed.

61 In the intervening period, as would have happened in any event without this application, much of the subject matter of this application has been addressed and fallen away. What remains in issue is addressed further below.

The subject matter of the application

62 The Sunrise Arbitrations are wholly unrelated confidential arbitral proceedings between FRN and Sunrise Power & Transmission Co. [redacted]. In the ordinary way, they are confidential, though some basic information about them appears to be in the public domain. This confidentiality is important to bear in mind when considering the detailed information and disclosure P&ID now seeks. There is no good reason (and P&ID has given none) why P&ID should be able to pry into those ongoing confidential proceedings involving a third party.

63 The EFCC money laundering charges are brought against Mr Shasore as part of the EFCC's investigation into his conduct in relation to the fraud. The EFCC is an independent investigatory agency and the FRN cannot interfere in its processes. FRN is not aware, unless the EFCC tells it, of the detail of EFCC investigations and has no right to EFCC documents.

Points remaining on the RFI

64 FRN has provided its Response to P&ID's RFI of 13 October 2022 – see {Z2/6} addressing the substance of P&ID's requests. P&ID now pursues only a few points.

65 [redacted]

[63] Marsh 6, 11{Z1/6/5}.
[64] [redacted]

66 P&ID asks (in respect of Request 7) why Mr Shasore and ALP ceased to act for FRN. FRN has said that, aside from the lack of relevance, that is privileged information.[65] In response:[66]

66.1 Mr Marsh has referred to supposed waivers of privilege in relation to Mr Shasore. FRN has already set out the lack of merit to P&ID's arguments as to waiver of privilege, and the Court is referred to FRN's submissions in that respect above (see paras. B117B121 above). Further, the privilege would not only be as between Mr Shasore and FRN, but also litigation privilege in respect of the Sunrise Arbitrations.

66.2 Mr Marsh refers to any written communication from FRN to Sunrise, the tribunal or any other third party regarding the reasons for termination, noting that they would not ordinarily be privileged since they would not be confidential. As to this:

66.2.1 First, there is no indication that FRN wrote to any third party giving the **reason** for Mr Shasore and ALP ceasing to act for FRN; and

66.2.2 Second and in any event, any communications with Sunrise or the tribunal would in fact be confidential, being within the confines of the arbitration, so Mr Marsh is simply wrong in that respect.

66.3 Mr Marsh has referred to any publication in the media of the reasons for termination of the engagement not being privileged. FRN is unaware of there having been any such publication and the point appears to be pure speculation.

67 P&ID has asked (in respect of Request 8) for a "full response" to its request as to whether "any emanation of the Nigerian state" has "instructed Mr Shasore or his firm or received legal advice from him or his firm in any formal or informal capacity in relation to any other dispute, or in any advisory capacity, since 13 July 2016". In respect of the "formal" aspect of the request, P&ID has confirmed that the answer is: no.[67] The difficulty with the "informal" aspect of the request is its vagueness: it is not understood. Mr Marsh unhelpfully (and tendentiously) has said that this lack of understanding is an attempt to "dodge" the request. To the contrary, FRN in fact simply seeks precision in circumstances where it is being asked to give a blanket confirmation. P&ID has belatedly clarified, so far as FRN can tell, that advice provided in an "informal" capacity means unsolicited views and opinions such as

[65] Response to RFI – {Z2/6/3}.
[66] Marsh 6, 13 {Z1/6/6}.
[67] FRN Response to P&ID RFI dated 13 October 2022, Response 8 {Z2/6/3}.

those disclosed by FRN to P&ID. If that is what P&ID means, then FRN is not in a position to provide the response sought, because it understandably cannot make a firm statement as to whether Mr Shasore has or has not provided any such unsolicited views or opinions to "any emanation of the Nigerian state" (the wording of P&ID's RFI) over a more than 6 year period. There is no justifiable basis, therefore, to require FRN to answer this request.

Points remaining on the request for disclosure

68 FRN has provided extensive disclosure in respect of P&ID's requests at paras 2.a – d. of the draft Order, but on the basis that reference to them in these proceedings will be in camera. Mr Marsh challenges this, but simply says (i) that these documents are already "plainly in the public domain" and (ii) that this will be a matter for legal submission.[68]

68.1 As to (i), Mr Marsh gives no detail of the documents being allegedly "plainly in the public domain". Absent evidence, there can be no assumption that they are public.

68.2 As to (ii), in circumstances where these documents originated in relation to the Sunrise Arbitrations, they remain confidential to those arbitrations and it is therefore not suitable for them to be referred to in public.

68.3 [redacted]

69 Incidentally, P&ID appears, in Mr Marsh's evidence, to challenge the final determination of Sir Ross Cranston as to whether there was any trigger to put FRN on notice of the matters complained of in the periods he considered.[70] P&ID plainly has no ability to challenge that finding now, so far out of time, and without any basis to do so in any event.[71]

70 Marsh 6, 30 {Z1/6/10} now seeks to cast the net far wider as regards the Sunrise Arbitrations, seeking "*any documents from the Sunrise Arbitrations which are relevant to Issue for Disclosure 27*". As to this:

70.1 There is no provision in the draft Order in these terms. It appears that P&ID has tried to expand the disclosure sought on the hoof.

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[68] Marsh 6, 23 {Z1/6/8}.
[69] Akhtar 19, 15 {Z1/8/5}.
[70] Marsh 6, 27 {Z1/6/9}.
[71] Further, insofar as section 73 of the Arbitration Act 1997 is concerned, it only applies to the discovery of an irregularity before the award is published.

70.2 This would go far beyond the parties' Disclosure Certificates and Butcher J's Order, requiring an application for variation or additional Order (CPR PD51U, 18). There is none; it would also not be necessary, reasonable or proportionate at this late stage.

70.3 In any event, such an expansion of the disclosure request would constitute an impermissible intrusion into the rights of third parties (Sunrise and the tribunal), in particular their rights to the confidentiality in relation to the arbitration.

70.4 P&ID makes no effort at all to explain why there would be likely to be any relevant documents in the Sunrise Arbitration. The request is plain fishing.

71 As to the remainder of the disclosure request and Marsh 6, 32-34 {Z1/6/10-11}:

71.1 The request for disclosure at 2.e stands or falls with the Court's view on P&ID's Request 8 as to "informal" advice. See above.

71.2 As to the request at 2.f, the payment records and surrounding correspondence are not relevant. The relevant documents relate to **the fact** of the fees and to the terms agreed, in respect of which information has been given and disclosure provided. In addition, information has been given as to what has been paid. P&ID gives no basis for going beyond that.

71.3 As to the request at 2.g and 3, FRN wrote to the EFCC and the EFCC produced charge sheets and exhibits relating to the charges brought against Mr Shasore as Ms Akhtar set out at Akhtar 16, 20 {Z1/4/6}.

MARK HOWARD KC
PHILIP RICHES KC
TOM FORD
TOM PASCOE

18.07.2022