Neutral Citation Number: [2021] EWHC 2611 (Ch)

Case No: BR-2020-000483

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

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

Date: 29th September 2021

Before :

ICC JUDGE MULLEN

- -

Between :

Alpamys Tatishev	**Applicant**
- and –	
Zimmerz Management LP	**Respondent**

- -
- -

Mr Ted Loveday (instructed by **Macfarlanes LLP**) for the **Applicant**
Mr Sparsh Garg (instructed by **Signature Litigation LLP**) for the **Respondent**

Hearing date: 17th June 2021

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Approved Judgment

COVID 19 – This judgment has been handed down by circulation to the parties.
The deemed time of hand-down is 10.30am.

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

Introduction

1. By his application sealed on 25th September 2020, Mr Alpamys Tatishev seeks to set aside a statutory demand, dated 14th August 2020, which demand claims that the sum of $849,759.34 is due to the respondent, Zimmerz Management LP ("Zimmerz"), pursuant to a settlement agreement dated 28th June 2019 ("the Settlement Agreement"), under which Mr Tatishev agreed to pay the Debt in settlement of liabilities under a guarantee apparently executed by him on 26th September 2017 ("the Guarantee").

2. The Guarantee, on its face, provides that Mr Tatishev is jointly and severally liable for the payment of a loan made to Mr Aman Sarsengaliuly Kozhabayev, under a loan agreement, also dated 26th September 2017, ("the Loan Agreement") together with interest, penalties for delay and losses incurred by Zimmerz caused by "improper performance" of Mr Kozhabayev's obligations under the Loan Agreement. The loan was due to be repaid on 31st December 2018 and was not repaid, though there is a dispute as to whether two small payments were made towards it.

3. The statutory demand alleges that that Mr Tatishev acknowledged his liability under the Guarantee by entry into the Settlement Agreement, which set out a schedule of payments to discharge the principal debt of $570,428.91, $177,223.66 by way of interest for the period 7th October 2017 to 28th June 2019 and, finally, $102,106.77 by way of penalties for failure to comply with various loan repayment deadlines. In breach of the Settlement Agreement he failed to make payment. In fact, $150,000 was paid by Mr Tatishev in three instalments following the Settlement Agreement, with the last payment being made on 28th October 2019.

4. The application was accompanied by a short witness statement from Mr Tatishev, dated 24th September 2020. He says that he became aware of the statutory demand on 7th September 2020 when he received a copy of it by an email that stated that the demand had been served on his residential address in London. Mr Tatishev states that he is involved in a number of businesses but his interest is financial only and he relies upon advisors to arrange and manage his participation in them. He accepts that he was involved in a construction project that required funding in 2017 and he agreed to stand as guarantor for the $590,000 loan to a construction company. He knew that a personal guarantee was prepared for his signature but he did not think that the company had proceeded with the loan.

5. He contends, however, that he did not sign the Guarantee, which he now knows to have been signed by the finance director of the construction company, Mr Kozhabayev himself. He exhibits a very short, undated, letter from Mr Kozhabayev, written in Russian, together with a certified translation, that states that, unbeknownst to Mr Tatishev, he signed the Guarantee. No witness statement has been obtained from Mr Kozhabayev.

6. As to the Settlement Agreement, Mr Tatishev says that he was pursued by Zimmerz in 2019 and received a letter of claim from it dated 3rd April 2019 ("the First Letter of Claim"). As a result of the passage of time and the number of business projects and guarantee obligations in which he was involved, he believed he had signed the

Guarantee and so entered into the Settlement Agreement to avoid the consequences of non-payment. He realised later, although he does not say in what circumstances this came to light, that he had not signed the Guarantee and was not liable under it. He therefore stopped making payments under the Settlement Agreement. He also complains that the statutory demand does not take into account of the payments of $150,000 that he made under the Settlement Agreement. He therefore sought to set aside the statutory demand on the basis that Settlement Agreement was entered into under a mistake and that the Debt is overstated.

7. Mr Anton Knyazev, the ultimate beneficial owner of Zimmerz, made a witness statement in answer, dated 23rd November 2020. He highlighted that Mr Tatishev does not dispute agreeing to act as guarantor of a loan. He exhibits an email dated 27th February 2017 from Mr Tatishev to Mr Aleksei Smolianov, a representative of Zimmerz, which, he says evidences Mr Tatishev's involvement in the negotiation of the loan. He also exhibits a series of WhatsApp messages between Mr Tatishev and Mr Smolianov between 7th September 2017 and 19th September 2017, in which Mr Tatishev agrees on 12th September 2017 to act as guarantor for Mr Kozhabayev. These documents are also in Russian. Although the translations are not certified, they are accepted to be accurate.

8. He says that further draft versions of the loan agreement and Guarantee were sent to Ms Aelita Tolegenova, whom he believed to be assistant to both Mr Kozhabayev and Mr Tatishev, by email on 26th September 2017. Default having been made in payment, the First Letter of Claim was sent to both Mr Tatishev and Mr Kozhabayev.

9. In response to the First Letter of Claim Mr Tatishev instructed lawyers in Moscow, Yakovlev & Partners Law Group, to propose settlement terms. The Settlement Agreement was entered into and three payments of $50,000 were made. A further letter of claim was sent, dated 20th March 2020, ("the Second Letter of Claim") and, in a WhatsApp message dated 10th April 2020 sent in response to an enquiry from Zimmerz' lawyer, Mr Tatishev stated that he planned to fulfil his obligations. No reply was received to subsequent messages sent to him and so the statutory demand was served. He accepts that the statutory demand overstates the debt, having not taken into account the $150,000 already paid. He recalculates the debt at a rather higher figure than set out in the statutory demand on the basis of the accrual of penalty interest.

10. That was the state of the evidence when the application came before ICC Judge Barber for its first hearing on 24th November 2020. She gave directions for evidence in reply and rejoinder. She listed the application to be heard with a time estimate of one day.

11. Mr Tatishev's second witness statement, dated 18th January 2021, expands on his business dealings with Mr Kozhabayev and Mr Smolianov. He explains that, in May 2017, Mr Smolianov had provided "financial support" to Mr Kozhabayev in the sum of $143,000. This was not documented at the time. Mr Kozhabayev required a further loan of $490,000 later in the same year. As part of the proposals for this, it was agreed that the earlier financial support would also be documented in the form of a loan agreement. Mr Tatishev says that he agreed in principle to act as guarantor of these loans. He did not recall ever agreeing to stand as guarantor for the larger sum of $590,000. He contends that the draft loan agreement referred to in the email dated 27th

February 2017 exhibited to Mr Knyazev's first witness statement is unrelated to the loan agreement entered into by Mr Kozhabayev, it being for a sum of 230,000 Kazakhstani Tenge, equivalent to around $736,000, expressed to be made to a firm called Stroy.com Progress LLP and its structure and terms are entirely different to the Loan Agreement. In relation to the WhatsApp messages expressing a willingness to act as guarantor, he explains that, although he cannot be sure given the passage of time to what loans he was referring, he thought that it was probably the proposed loan of $143,000 and the loan of $490,000.

12. He denies that Ms Tolegenova was acting for him and says that she was acting on behalf of Mr Kozhabayev alone in the emails sent in September 2017 and points out that the emails to her refer to two separate loans in the sums of $143,000 and $490,000. They do not relate to the Loan Agreement or the Guarantee. He also states that payments of some $26,622 had in fact been paid by Mr Kozhabayev on 5th December 2018 to Zimmerz' bank account with ABLV Bank AS and he exhibits a document from Halyk Bank, which is not translated, but seems to show an order for the payment of $26,622. Certain parts of the document have been completed in English. however, and one part of the document bears the words

> "PARTIAL LOAN REPAYMENT LOAN AGREEME NT DD 26092017 REPAYMENT AMOUNT 266 22 US DOLLARS."

The figures after the letters "DD" appear to represent the date of the Loan Agreement. Mr Tatishev says this payment has not been taken into account by Zimmerz. He says that the failure to take account of these payments in the First Letter of Claim and the Settlement Agreement amounts to misrepresentation and forms a separate ground for setting the Settlement Agreement aside. He reiterates that he had signed a "very large number" of commercial agreements over the previous five years and had a diverse range of business interests so that he relied heavily on his advisors and partners to manage his participation. He says that he misremembered what took place and he placed faith in Mr Smolianov, who is his business partner in another venture, and was simply too trusting when he was told he had signed the Guarantee.

13. I can deal with Mr Knyazev's statement in rejoinder, dated 19th February 2021, shortly. It deals with the alleged payment of $26,622. He exhibits a translation of the Halyk Bank document, which seems to confirm that it represents confirmation of a payment instruction. Mr Knyazev states that the payment could not have been received as a result of ABLV Bank having gone into liquidation on 23rd February 2018. It was therefore unable to receive deposits and these were not in fact received. He exhibits a document from the (Latvian) Financial and Capital Market Commission stating that it had prohibited ABLV from receiving incoming payments.

14. More substantive is the statement of Mr Smolianov, also dated 19th February 2021. He alleges that the differences between the draft agreement attached to the February 2017 email and the Loan Agreement itself is explained by the fact that the former was merely a draft and that the reference to a different recipient of the loan was because Mr Tatishev had asked for the loan to be made to that entity. The document evolved between that point and September 2017. Mr Smolianov accepts that a payment of $143,000 was made on 15th May 2017 to Mr Kozhabayev, at the request of Mr Tatishev. In relation to the change in the amount of the loan from $490,000 to

$590,000, Mr Smolianov says that this alteration was made as a result of a telephone call from Mr Tatishev to him after receipt of the drafts. Mr Tatishev was also responsible for arranging a change in the currency of the loan thereafter, with the loan ultimately being made in the equivalent amount of euros. He also states that Ms Tolegenova acted for Mr Tatishev, and referred to herself as his accountant in WhatsApp messages in October 2018. I note that this is long after the entry into the Loan Agreement and the Guarantee.

15. Mr Tatishev thus raises the following defences to the debt claimed in the statutory demand:

    i) he did not sign the Guarantee;

    ii) though he did sign the Settlement Agreement, it

        a) can be set aside for misrepresentations made in the First Letter of Claim and the Settlement Agreement itself that he was liable under the Guarantee and as to the amount outstanding;

        b) is void for common mistake as to his liability under the Guarantee.

16. Zimmerz' position on this is that the Guarantee is irrelevant. Mr Tatishev chose to sign the Settlement Agreement under which he assumed liability and there is no real basis on which it could be set aside.

The legal framework for setting aside a statutory demand

17. The relevant principles are not in dispute. Rule 10.5(2) of the Insolvency (England and Wales) Rules 2016 provides:

> "The court may grant the application if
>
> …
>
> (b) the debt is disputed on grounds which appear to the court to be substantial…"

18. This is the same test as that for summary judgment. The key principles were set out by Popplewell J in *A L Challis Ltd v British Gas Trading Ltd* [2015] EWHC 141 (Comm) at paragraph 7. Mr Loveday, for Mr Tatishev, offered the following further summary of those principles –

    i) The court must consider whether the applicant has a "realistic" prospect of success, i.e. more than a fanciful one.

    ii) In reaching its conclusion the court must not conduct a "mini trial".

    iii) This does not mean the court must take the applicant's assertions at face value. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

iv) The court should hesitate about making its final decision without a trial where reasonable grounds exist for believing a fuller investigation to the facts of the case would add to, or alter, the evidence available to a trial judge and so affect the outcome of the case.

v) Where the application gives rise to a short point of law or construction, and the Court is satisfied that it has all the necessary evidence for the proper determination of the question, it may grasp the nettle and decide it.

I bear in mind that the threshold is a low one and in the analogous case of applications to restrain presentation of winding up petitions, it has been stated that even what would be described in the context of summary judgment as a "shadowy" defence may be sufficient to surmount it.

19. Mr Garg, who appeared for Zimmerz, referred to *Ashworth v Newnote* [2007] BPIR 1012, at paragraph 31, in which Lawrence Collins LJ, as he then was, considered the position under the predecessor to IR 10.5(5)(b). He submitted that, in order to demonstrate that the debt is disputed on substantial grounds, the burden is on the applicant to put forward an argument that has:

> "[A] realistic as opposed to fanciful prospect of success, carrying some degree of conviction (and not merely arguable: *Swain v Hillman* [2001] 1 All ER 91, at 92; cf. *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472, at [7]-[8], [31]."

At paragraph 34, he continued:

> "In each case it is open to the court to reject evidence because of its inherent implausibility or because it is contradicted by or not supported by the documents."

20. With those principles in mind I shall set out the circumstances surrounding the Guarantee and the Settlement Agreement in a little more detail.

The Guarantee

21. The Guarantee is written in both Russian and English and bears what is said to be Mr Tatishev's signature. It is written in blue ink next to the printed name "Tatishchev Alpamys", the transliteration of Mr Tatishev's name being different to that adopted in this application. It is fair to say that it looks, superficially, quite different to a signature appearing next to Mr Tatishev's name on the Settlement Agreement, which Mr Tatishev accepts that he did sign. There is no evidence from a forensic document examiner but, as I have explained, there is a letter, in Russian but with a certified translation, apparently signed by Mr Kozhabayev, in which he says:

> "However I would like to inform you that Tatishev Alpamys did not actually sign the above agreement dated 26th September 2017 and therefore did not actually act as a guarantor for my debt repayment obligations. I signed this Guarantee Agreement on 26th September 2017 instead of Tatishev Alpamys, who was

> not aware of this fact. At the same time, I declare that I personally do not refuse my debt repayment obligations and I intend to repay my debt as soon as possible."

22. Mr Tatishev's case is that there is a substantial dispute as to whether he signed the Guarantee. Mr Loveday submitted that Zimmerz relies on "scraps" of circumstantial evidence to support the proposition that Mr Tatishev was involved in the transaction. One such piece of evidence is the loan agreement forwarded to Mr Smolianov attached to the email dated 27th February 2017. The differences in the format and terms of this draft and the Loan Agreement are obvious. Significantly, there is no mention of a guarantee at all. Mr Loveday thus says that one cannot consider the February 2017 draft to be a draft of the Loan Agreement entered into seven months later. I have referred to Mr Smolianov's explanation of this but I was not referred to any intermediate drafts between February to September 2017.

23. I was, however, taken to WhatsApp messages between Mr Tatishev and Mr Smolianov between 7th September 2017 and 19th September 2017. Mr Tatishev opened on 7th September 2017 by saying:

> "Aleksei, are you available to talk today?

There was no reply to that. On 12th September 2017 Mr Tatishev followed up with:

> "Aleksei, I confirm that I will act as Aman's guarantor for this loan agreement.

Mr Smolianov's response came half an hour later:

> "Good day
> We will send you the draft of the agreements today."

Mr Tatishev responded on 15th September 2017 with:

> "Good day, Aleksei, About the agreement – have you sent it to Aman?".

There does not appear to be a reply to this message and, on 18th September 2017, Mr Tatishev followed up with:

> "Aleksei, let me know if something doesn't work out."

Mr Smolianov's reply was:

> "Good day, we will have the money on Tuesday-Friday. I am expecting income from the sale of goods. On Thursday I will be able to tell you for sure. With a 90% probability I will be able to transfer the required amount on Friday or Monday".

19th September 2017 was a Tuesday so it is a fair assumption that the Friday or Monday referred to were 22nd September and 25th September 2017, the latter of course being the day before the date of the Loan Agreement and Guarantee. Mr Loveday said that the reference to sale of goods added further confusion to the making of the loan,

although this message seems to me to be quite clear that Mr Smolianov was expecting monies to come in order to make a payment, though there might be some doubt as to what that payment related.

24. On 26th September 2017 Mr Smolianov wrote to Ms Tolegenova as follows:

> "Aelita, please check that everything is correct in the agreements, including the payment details. Sign with Aman and ask Alpamys to sign the agreement Please send via DHL 3 copies of the loan agreement with Aman's signature, the originals of the signed loan agreement for the amount of 143,000 dollars (3 copies), also the supplementary agreement to it on the terms and rate also in 3 copies… Ask Alpamys to also send to this address the signed surety agreement for the first loan agreement for USD 143,000 and the second for USD 490,000.
>
> I have sent all the agreements in wordpress again so you do not have to look for them."

25. It is relatively clear and, indeed, is accepted by Mr Tatishev, that he was proposing to act as guarantor of two loans made to Mr Kozhabayev. That being so, it would be most surprising if he was unaware of the making of the loan. No reason is advanced as to why, if Mr Tatishev was willing to act as guarantor for these two amounts at least, had chased Mr Smolianov for an update and been told that monies were expected to come in and he would be told "on Thursday… for sure", he would thereafter have assumed that the transaction was not proceeding. The evidence was that Mr Tatishev was personally involved in chasing updates on a transaction involving Mr Kozhabayev at a time very close to the execution of the documents and the making of the loan.

The First Letter of Claim and the Settlement Agreement

26. The First Letter of Claim sets out full particulars of the Loan Agreement and the Guarantee including the date of the documents and the relevant terms. It demands payment in the sum of €683,123.43 to be made to a specified account. On 27th June 2019 Ms Tatiana Kormilitsyna, Mr Tatishev's lawyer, emailed Ms Tatiana Shchelkunova, the lawyer for Zimmerz. The subject was "Agreement for Pre-Trial Debt Settlement under the Guarantee Agreement". She said:

> "Tatiana, good afternoon!
>
> I am hereby submitting a draft agreement on pre-trial settlement of debt, as agreed by my Principal.
>
> To my great regret, in the process of agreeing with Alpamys, at his request, we had to deviate from the previously agreed terms of payment and the currency of payment.
>
> I understand that this version of the agreement will cause the need to re-agree the terms with your Principal, nevertheless, I

> ask you to consider the draft agreement as our proposal for pre-trial settlement.
>
> I hope that a compromise will be found.
>
> Thank you very much for the opportunity for a pre-trial settlement."

Mr Garg emphasised the reference to "our" proposal, in other words that the proposal attached to the email represented the proposal of Mr Tatishev and his lawyers.

27. He further referred to the WhatsApp messages between the two lawyers. It appears that Ms Kormilitsyna sent the amended draft settlement agreement by WhatsApp too on 27th June 2019. Ms Shchelkunova replied that she:

> "Got this in the mail just now too".

She followed up on 28th June 2019 with a text saying:

> "I have sent to your email our amended draft of the agreement".

Ms Kormilitsyna replied within the hour to say:

> "Tatiana, since the amendments in the draft are mostly regarding the amounts, not the law, I have sent it to Alpamas for approval. Now we wait."

Ms Shchelkunova replied shortly thereafter to say:

> "Thank you. Regarding the amounts we only increased the period until the signing (if we can agree fast, then we propose to put today's date)".

Ms Kormilitsyna's response came on 4th July 2019 (the translation says 2020 but this is obviously a typographical error):

> "We agreed that the Principal signs, transfers the scan to me and sends the originals to my office. Upon receiving, I will send you the scan to you and then sent you the original copies. Are there any objections".

Ms Shchelkunova asked for this to happen that day, which Ms Kormilitsyna confirmed, sending a scan by WhatsApp later that day.

28. The Settlement Agreement, as signed, stated that it was made between Zimmerz and Mr Tatishev:

> "taking into account that:
>
> - the Guarantor and the Creditor concluded a Surety Agreement of 26.09.2017 under which the Guarantor has undertaken to be jointly liable to the Creditor for the

execution by the national of the Republic of Kazakhstan of Aman Sarsengaliuly Kozhabayev (hereinafter "Debtor") of the obligations to return in full the funds specified in the Loan Agreement of 26.09.2017 with the term return of the loan of 31.12.2018 inclusive;

- on the date of the present Agreement the obligations of the Debtor to the Creditor have not been fulfilled, the funds under the Loan Agreement of 26.09.2017 not returned and interest for the use of the loan and penalties for breach of loan repayment terms have not been paid;

- on 03.04.2019 the Creditor applied to the Guarantor with a claim for the return of funds under the Loan Agreement of 26.09.2017;

- the Guarantor is willing to voluntarily fulfil out of court the obligations of the Debtor to return the loan, interest for the use of the loan and penalties for breach of loan repayment terms in the amount as at the date of the conclusion of the present Agreement, by repaying debt in US dollars at the Forex rate as at 28.06.2019 – 1.13 US dollars for 1 euro;

- the Creditor is willing to accept the execution by the Guarantor of the obligation to repay the loan, interest on the loan and penalties for breach of loan repayment terms in the amount as of the date of the conclusion of the present Agreement in US dollars at the Forex rate as at 28.06.2019 – 1.13 US dollars per 1 euro;

The Parties have concluded this Agreement on the following:

1. the amount of the claims of the Creditor against the Guarantor under the Loan Agreement of 26.09.2017 and Surety Agreement of 26.09.2017 as of 28.06.19 (inclusive) **is 747,566.74 euros, which amounts to 849,759.34 US dollars** including:

- 501,828.76 euros, which amounts to 570,428.91 US dollars - in overdue principal debt;

- 155,910.63 euros, which amounts to 177,223.66 US dollars - in interest for the loan for the period from 07.10.2017 to 28.06.2019;

- 89,827.35 euros, which amounts to 102,106.77 US dollars - in penalties for a breach of the loan repayment deadline for the period from 01.01.2019 to 28.06.2019.

2. The Guarantor recognises the debt to the Creditor under the Loan Agreement of 26.09.2017 and Surety Agreement of

> 26.09.2017 as of 28.06.19 (inclusive) **is 747,566.74 euros, which amounts to 849,759.34 US dollars,** as specified in Clause 1 of the present Agreement;
>
> 3. the obligation to pay debts under this Agreement is performed by the Guarantor **no later than 31.01.2020** in accordance with the following payment schedule:…"

There is then a schedule of payments and details of the account into which payments should be made. The remaining relevant clauses are as follows:

> "6. In the event of a violation of the established procedure, amount and terms of debt repayment stipulated by the present Agreement (including failure to make payment on time or making it in an amount less than that stipulated in Clause 3 of this agreement) for more than 5 working as well as in the event of failure to fulfil or improper fulfilment of other conditions established by the agreement, the Guarantor shall pay to the Creditor a penalty in the amount of 0.1% of the amount of payment is not made in the period specified in Clause 3 of the agreement for each day of delay, and the Creditor may apply to court for collection from the Guarantor of the amount of debt under the Loan Agreement of 26.09.2017 and the Surety Agreement of 26.09.2017.
>
> 7. The Parties have established that subject to the proper performance of the Guarantor's obligations to the Creditor to repay the debt in accordance with the terms of the present agreement, the debt in the amount of, as specified in Clause 1 of the present Agreement, is final, and interest for the use of the loan and penalties for breach of the loan repayment terms are not charged for the period from 29.06.2019."

There is no dispute as to law and jurisdiction for the purposes of this application but it is worth mentioning that the Settlement Agreement provides at clause 10 for English law to apply and for the courts of England to have jurisdiction. It is signed on behalf of Zimmerz as "Creditor" and Mr Tatishev as "Guarantor".

29. Following the entry into the Settlement Agreement three payments were indeed made. These ceased in October 2019. On 1st April 2020, Ms Shchelkunova messaged Mr Tatishev and said:

> "Good afternoon, Alpamys. You are not performing your duties under the agreement that we concluded in the summer. We have sent you a letter of claim."

The Second Letter of Claim and calculation of the sums said to be due appear to have been sent as attachments at the same time. Mr Tatishev replied on 10th April 2020 to say that he had sent them to his lawyer. Ms Shchelkunova responded on the same day to say:

> "Are you not planning to fulfil your obligations?"

Mr Tatishev replied:

> "I do plan on doing it, Tatiana, there are big problems now we are trying to resolve it all. I am stuck in Kazakhstan myself in quarantine."

Ms Shchelkunova responded almost immediately:

> "But bank transfers are not depending on the quarantine. How much time do you need to pay off the debt? We can wait for a few weeks at most, but we will go to court after that. We are on the second year of non-fulfilment of the obligations."

There does not appear to have been any reply to that message.

Does the alleged debt arise under the Guarantee or the Settlement Agreement?

30. The statutory demand is predicated on the Settlement Agreement and this was the focus of Mr Garg's argument. I do not accept Mr Loveday's submission that this represents an extraordinary volte face on the part of Zimmerz. While much of the evidence does explore the background to the Guarantee, the statutory demand itself defines "the Debt" as the sums due to Zimmerz under the Settlement Agreement.

31. I similarly reject Mr Loveday's contention that:

> "the settlement agreement does not give rise to a free-standing debt. It is relevant as an alleged admission or acknowledgement that money is owed under the purported guarantee agreement."

The Settlement Agreement of course recites the background, but it is clear from its terms that it is intended to create a "free-standing" debt. It refers to Mr Tatishev being "willing to voluntarily fulfil out of court the obligations of the Debtor". It sets out the agreement as to the amount of the debt, establishes a schedule of payments and gives a date for repayment (different to that set out in the Guarantee itself). Clause 3 expressly refers to Mr Tatishev's "obligation to pay debts <u>under this Agreement</u> [emphasis added]" by that date. The question is thus whether the Settlement Agreement can be vitiated.

Grounds of challenge

<u>Factual basis</u>

32. Mr Loveday contends that there is a plain dispute of fact that can only be resolved at trial. I have to say that I consider that Mr Tatishev's case is evidentially inadequate, even bearing in mind the low threshold that he has to reach. In this case:

    i) he accepts he was proposing, in principle, to guarantee a loan made for the benefit of a business associate to the extent of $590,000 (as said in his first witness statement) or two loans, one of $143,000 and another of $490,000 (as said in his second witness statement);

ii) he made enquiries of the representative of the lender as to the up to date position a matter of days before the loan was made and the Guarantee was apparently signed;

iii) when pressed for payment he referred the matter to his lawyers and, after negotiations, entered into a Settlement Agreement, and made three tranches of £50,000 payments pursuant to it, the last being made some five months after the date of the Settlement Agreement;

iv) when, having stopped paying, he was asked some ten months after the Settlement Agreement if he intended to fulfil his obligations he said he planned to do so and made no mention of any mistake in entering into the Settlement Agreement until service of the statutory demand.

Yet, in this application, he asks the court to accept as realistic a case that he thought nothing came of the proposed loans. Though he thought it necessary to refer the matter to his lawyers when payment was sought in respect of them, and negotiated the terms of the Settlement Agreement, he nonetheless took his liability on trust until, for reasons that are not clear, he discovered that he had not signed the Guarantee at all. He seeks to explain his message that he planned on fulfilling his obligations as an expression of an intention to fulfil such obligations as he "legally and properly" had, which is a strained reading of the message, the translation of which is not challenged, and there is no reason offered as to why more than five months after discovering what he contends was the reality he did not advance that case.

33. That is an inherently incredible case and there is a marked absence of evidence from critical witnesses. Mr Kozhabayev has not produced a witness statement to confirm that he signed the Guarantee in Mr Tatishev's name, nor to explain why he did so in circumstances where Mr Tatishev seems to have been happy to guarantee, at the very least, the vast bulk of the loan made to him. Nor is there any evidence from Mr Tatishev's Russian lawyers to explain what was understood about the Guarantee at the time that the Settlement Agreement was negotiated. Such evidence appears to me to be essential to support what Mr Tatishev now says about the entry into both the Guarantee and his extraordinary naivety in entering into the Settlement Agreement. It would have been easily obtainable. As it is, his claim that he signed the Settlement Agreement in the erroneous belief that he was liable under the Guarantee is both inherently incredible, contradicted by the evidence available, and unsupported by evidence that one would have expected to be offered to give the claim substance.

34. Mr Tatishev has not satisfied me that he has a substantial defence to the debt set out in the statutory demand. It is accepted that the statutory demand did not take into account the payments of $150,000 made. That, rightly, was not pursued as a reason for setting aside the statutory demand. It is well-established that overstating the debt in a statutory demand does not provide a ground for setting it aside.

35. I will however consider the position on the assumption that Mr Tatishev signed the Settlement Agreement under the mistaken belief that he was liable under Guarantee on the basis of what he was told by the representatives of Zimmerz in the documents to which I was referred. I shall consider the grounds in turn.

Misrepresentation

36. The first ground relied upon is misrepresentation. That was not set out in the application to set aside the demand itself but was raised in Mr Tatishev's second witness statement. Both Mr Loveday and Mr Garg were agreed with the following broad summary of the law. A contract may be set aside for misrepresentation if:

    i) one party made a statement of fact;

    ii) that statement was false; and

    iii) it induced the other party to enter into the contract.

37. In respect of the requirement that the misrepresentation induce the contract, Mr Tatishev relied on *Zurich Insurance Co plc v Hayward* [2016] UKSC 48. It was submitted that the following principles may be drawn from the judgment of Lord Clarke (with whom Lord Neuberger, Lady Hale and Lord Reed agreed) –

    i) Inducement is a question of fact (see paragraphs 29, 40, 44).

    ii) It is presumed if the false statement is material, in the sense that it was likely to induce the contract (see paragraphs 29, 33-38)

    iii) There may be inducement even where the representee had reason to suspect the representation might be untrue. The representee has no duty to be careful, suspicious or diligent in research (paragraphs 19 and 39).

38. Mr Tatishev relies upon the First Letter of Claim, which, he says, falsely represented that he guaranteed Mr Kozhabayev's obligations and was liable pursuant to the Guarantee and also falsely represented that Mr Kozhabayev had made no payments under the Loan Agreement.

39. Mr Garg's principal argument is that he says that neither the First Letter of Claim nor the Settlement Agreement constitute any sort of representation. The First Letter of Claim is precisely that – a claim, akin to a letter before action in which one party's contentions or opinions are set out for consideration by the other and admission or denial accordingly.

40. He referred me to the decision at first instance in *Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters subscribing under policy 019057/08/01* [2006] EWHC 607 (Comm), in which Mr Jonathan Hirst QC, sitting as a Deputy High Court Judge, said at paragraph 47:

> "I do consider that care is needed in examining what was said in the course of negotiations, whether it truly amounted to a representation as opposed to an argument or a contention, and if so what the representation was. In the course of settlement negotiations, parties are likely to make a number of assertions. The Court should guard against misrepresentation being used – or rather abused – as an improper means of re-opening a compromise agreement."

At paragraph 51, he explained that the statement said to constitute the misrepresentation:

> "must be judged objectively according to the impact that it might be expected to have on a reasonable recipient and with the known characteristics of the actual recipient (*Primus Telecommunications PLC v. MCI Worldcom International Inc* (CA unrep.) [2004] EWCA Civ 957 at §30). It must also be read, in my judgment, in the context of the contemporary circumstances which were known to both parties."

He construed the statement at issue in that case constituting a contention, an argument or opinion, not a representation.

41. The Deputy Judge's decision was upheld on appeal at [2007] EWCA Civ 57. Neuberger LJ, as he then was, said at paragraph 33:

> "33. I appreciate that, as a matter of linguistics, the letter of 9 May 2002 can be said to be purporting to state facts (in particular in the light of the verbs used – 'confirm', 'is', and 'will be'). However, read in the context which the Judge considered (after applying the correct principles) to be appropriate, I think that, to put it at its lowest, the Judge was entitled to conclude that it should be read as a contention, not as a representation. As has been said (albeit perhaps a little extravagantly) in relation to issues of interpretation, context is all. Thus, barristers, when making submissions in court, frequently express themselves in the form of unqualified positive averments: that does not change the characterisation of how they will and should be understood by a judge, namely as making submissions.
>
> 34. In this case, the defendant insurer's position as to the meaning of the relevant insurance policy was relayed to Mr Dymant, an experienced and professional loss assessor, acting for the insured claimant. He had the schedule, which itself should have made the matter pretty clear, and Mr Stafford was entitled to assume that he had a copy of the Policy, which would have rendered it even clearer (especially to an experienced loss assessor). Mr Dymant could, indeed would, reasonably have been expected to form his own informed view and to advise his client accordingly. Mr Dymant's position was, as I see it, little different from that of a solicitor acting for an insured, to whom an interpretation of the relevant policy was forcefully put by or on behalf of the insurer."

I note that *Kyle Bay* was doubted in *Zurich*, but not in relation to the above discussion of what might constitute a representation. I was also taken to paragraph 7-010 of Chitty on Contracts (33rd ed.), which says as follows:

> "Equally, propositions put forward by parties engaged in negotiating the settlement of a dispute are likely to be treated as mere statements of opinion and, at least when the negotiations are conducted by experienced professionals in good faith, are unlikely to be treated as including a representation that they are based on reasonable grounds."

Thus, here, Mr Garg argues says that the letter of claim merely set out Zimmerz' understanding of what was owed in the context of negotiations between experienced professionals with the benefit of advice. I agree and I do not see that Mr Tatishev has raised anything in connection with the First Letter of Claim to suggest that any further enquiry at a trial is necessary. This is no more than a conventional letter before action sent by one commercial party to another commercial party, who had the benefit of legal advice. There is nothing to suggest that the contentions set out in it were not made in good faith or on reasonable grounds. Zimmerz had a guarantee, on its face signed by Mr Tatishev. It set out what it understood to be due pursuant to it and proposed early payment to avoid court action. The impact that it could be understood to have on a reasonable recipient would be that the recipient would consider the basis of the demand and its calculation and either agree it or deny it. That applies *a fortiori* in the case of Mr Tatishev, who is a commercially sophisticated individual with a range of advisors. There is nothing in any of the evidence to suggest that any other impact might have been anticipated. I cannot see that there is a real prospect of showing that the First Letter of Claim constituted a representation that Mr Tatishev was liable under the Guarantee. It was an account of what Zimmerz understood to be the position, which anticipated consideration and response.

42. In relation to the statement that no sums had been paid by Mr Kozhabayev, the same applies. Mr Garg's secondary position is that, if there is misstatement as to this, it is simply *de minimis*, standing at a mere 3% of the debt and could not be regarded as having induced the Settlement Agreement. Here he relies upon the statement in Chitty at 7-039 as follows:

> "It seems to be the normal rule that, where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation. Certainly this is the case when the misrepresentee claims damages in tort for negligent misstatement; and it seems also to be required if damages are claimed for fraud. It seems likely that the same rule applies if he seeks to rescind on the ground of an innocent or negligent misrepresentation."

I disagree that the alleged misstatement of the amount of the debt is so *de minimis* as to be disregarded as far as inducement is concerned. One would anticipate that a person confronted with a draft agreement to pay $26,000 more than they owed would decline to sign it unless they received some equivalent advantage. In my judgment however, the true significance of the amount is that it does not provide any support of the proposition that the First Letter of Claim was deliberately misleading so as to call into question the Zimmerz' good faith in its claims as to the debt. There was some argument as to whether Mr Kozhabayev's attempt to make a payment to a bank

account that was no longer accepting payments constituted a fulfilment of his contractual obligation under the Loan Agreement. However that may be, there is nothing to suggest that the failure to include this small sum in the calculation of the outstanding debt (assuming it was received at all) was a deliberate attempt to mislead. Again, I emphasise the context and the impact that the First Letter of Claim might be expected to have. It is accepted that Mr Kozhabayev was a business associate of Mr Tatishev, as was known to Zimmerz. It would have been entirely straightforward for Mr Tatishev to ask Mr Kozhabayev what, if anything, he had paid. In saying that I bear in mind that a person to whom a misrepresentation has been made is under no obligation to check the truth of it, but that is not the position I am considering. I am considering whether the statements in the First Letter of Claim can be considered to be representations at all. They are not. They are a setting out of Zimmerz' position as to the debt, inviting consideration, acceptance or denial.

43. As to the contention that there could be misrepresentations in the Settlement Agreement itself I have to say that I cannot see how that can be so. The Settlement Agreement was the product of negotiation between lawyers and signed by the parties. I have recited the relevant parts of it above. It is clear that it contains a recital of the mutually understood position and clauses 1 and 2 are statements of what Zimmerz, on the one hand, and Mr Tatishev, on the other, accepted to be Mr Tatishev's obligations. In my judgment there is no scope to say that either the First Letter of Claim or the Settlement Agreement contain actionable misrepresentations.

Mistake

44. Mr Tatishev relies, next, on common mistake of fact. The parties signed the Settlement Agreement in the mistaken belief that Mr Tatishev had entered into the Guarantee. I was referred to the following statement of the relevant principles in Chitty on Contracts (33rd edition) at 6-015:

> "In summary, if: (i) the parties have entered a contract under a shared and self-induced mistake as to the facts or law affecting the contract; (ii) under the express or implied terms of the contract neither party is treated as taking the risk of the situation being as it really is; (iii) neither party was responsible for or should have known of the true state of affairs; and (iv) the mistake is so fundamental that it makes the 'contractual adventure' impossible, or makes performance essentially different to what the parties anticipated, the contract will be void."

45. Mr Loveday says that all parties were proceeding on a false assumption. He sought to distinguish the case from the settlement of doubtful legal rights in which the parties determine how they are to deal with ambiguities as to their obligations. It is not open to the parties in such cases to seek to reopen the settlement on the basis of subsequently acquired information.

46. In this regard he referred to *Brennan v Bolt Burdon (A Firm)* [2005] QB 303, at paragraph 13, in which Maurice Kay LJ cited with approval the judgments in the earlier case of *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273. At first instance in that case Vaughan William J said at 278:

> "if the arrangement come to was a compromise of doubtful rights and a give-and-take arrangement, parties to it could not afterwards have the compromise set aside because upon obtaining fuller information they thought they had made a bad bargain."

On appeal, Kay LJ had said, at 285:

> "A compromise takes place when there is a question of doubt and the parties agree not to try it out, but to settle it between themselves by a give-and-take arrangement. I quite agree that if this was a case of that kind it would be extremely difficult to interfere with the order."

47. As to the fundamental nature of the mistake Mr Loveday referred me to *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] EWHC 1348 (Comm), in which Mr Peter MacDonald Eggers QC, sitting as a Deputy High Court Judge, said:

> "the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical."

Mr Loveday said that nothing could be more radical than this case. The assumed state of affairs was that Mr Tatishev had guaranteed the debt, the reality was that he had not.

48. Mr Garg's position was that the Settlement Agreement was a true compromise of doubtful legal rights of the sort set out in *Brennan v Bolt Burdon.* There was a threat of legal action, there was negotiation and there was an agreement for give and take. He pointed to a number of particular features. It:

i) compromised any right to bring proceedings before the Russian courts at the time.

ii) deferred repayment of the loan under the Loan Agreement, which would otherwise have been due in December 2018; and

iii) waived any right to claim interest for breach of the terms of the Loan Agreement in respect of the period from 29 June 2019.

49. Even if that is not right, Mr Garg said that the elements for setting aside the transaction for mistake are not made out. He took me to Chitty at paragraph 6-035, which sets out the judgment of the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407 at paragraph 87:

> "the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as

> to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render contractual performance impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."

50. Mr Garg says that there are plainly warranties as to the existence of the state of affairs. Mr Tatishev is expressed to be willing "voluntarily" to fulfil out of court the obligations of the principal debtor. He says that warranties were given in the very recitals to the agreement. Nor does any mistake alter the fundamental nature of the "contractual adventure" or make it impossible to perform. Mr Tatishev agreed to pay. He still can.

51. The Settlement Agreement is not in the form it might be if it had been drafted by English lawyers but the translation, which is not disputed, sets out various matters that the parties "take into account". Those are the assumptions on which the parties are working and do not appear to be warranties that a pre-existing state of affairs exists. The operative clauses do however seem to me to be a clear statement that the sums calculated up to 28th June 2019 are due. Clause 1 is an acceptance on behalf of the creditor of the limit of its claim and clause 2 is an acceptance by the debtor that that amount is due. It is a mutual acceptance of an obligation to pay and the amount due.

52. In relation to the next element – that the non-existence of the state of affairs must not be attributable to the fault of either party or, to put it another way, neither party was responsible for or should have known the true position, the position is clear. The only party who was in a position to know the truth was Mr Tatishev. He either signed the Guarantee or he did not. Alternatively, it was signed on his behalf and with his knowledge or it was not. Its existence as an enforceable contract was dependent upon his own actions and it was within his ability to establish whether he had entered into it very simply. Indeed, Mr Loveday drew my attention to the obvious superficial difference between the signature on the Guarantee and that on the Settlement Agreement. Nonetheless, on his case, he took the risk. He entered into the agreement without checking. In *Associated Japanese Bank v Credit du Nord* [1989] 1 WLR 255 at page 268H Steyn J said:

> "What happens if the party, who is seeking to rely on the mistake, had no reasonable grounds for his belief? An extreme example is that of the man who makes a contract with minimal knowledge of the facts to which the mistake relates but is content that it is a good speculative risk. In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds for such belief: cf. *McRae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, 408. That is not because principles such as estoppel or negligence require it, but simply because policy and good sense

> dictate that the positive rules regarding common mistake should be so qualified."

That is the position here. Only Mr Tatishev knew what he had signed, or authorised, or he could have established that very simply.

53. Finally, there is the question of whether the contractual adventure is fundamentally different from that contemplated. Zimmerz wanted to be paid, as it considered itself entitled to be under the Guarantee. Mr Tatishev agreed to pay, albeit on more advantageous terms than provided for in the Guarantee. His agreement was not to comply with the terms of any pre-existing guarantee that he might have signed but a free-standing agreement to make payments in accordance with the Settlement Agreement. That obligation remains the same whatever the basis on which Mr Tatishev agreed to it might have been. It remains performable whether the Guarantee was signed nor not.

54. In my judgment there are no grounds for setting aside the Settlement Agreement for mistake. Leaving aside the fact that I find it impossible to accept that Mr Tatishev, or those instructed on his behalf, would not have made enquiries as to whether he was liable under the Guarantee, even if that is so, the fault lies with Mr Tatishev for not doing so. The Settlement Agreement remains performable, as agreed. Indeed, I agree with Mr Garg that it represents a true compromise – a threat of legal action for immediate payment was compromised on alternative payment terms. It is not open to Mr Tatishev now to seek to resile from that agreement, even assuming that one accepts that he subsequently discovered that he was not liable under the Guarantee.

Conclusion

55. Despite Mr Loveday's well-argued submissions, the application must be dismissed. The court has to approach the case of an application with a degree of realism. The suggestion that a party faced with a significant claim would repeatedly accept liability under that claim without checking it is inherently incredible. Some corroborating evidence is necessary and there is none. On the contrary, the evidence tends to show repeated acceptance of liability. Even accepting Mr Tatishev's case as true, however, it appears to me that it is not open to him to challenge the Settlement Agreement on grounds of misrepresentation or mistake. He voluntarily entered into a pre-action settlement that stated that the parties had established the amounts due under the Loan Agreement and that Mr Tatishev undertook to pay them. The power was entirely in Mr Tatishev's hands to establish the true position in relation to the Guarantee, if different from that stated in the Settlement Agreement, and the fault for not doing so lies entirely with him. Nor does the mistake render performance fundamentally different from that assumed by the Settlement Agreement. The contractual debt can be paid as contemplated and it should be.

56. IR 10.5(8) requires me, on dismissing an application to set aside a statutory demand, to make an order authorising the creditor to present a petition. In the circumstances I shall authorise the presentation of a petition after 14 days.