Neutral Citation Number: [2021] EWHC 3265 (Ch)

Case No: CH-2020-000253

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 6 December 2021

Before :

Jon Turner QC sitting as a Deputy High Court Judge

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Between :

DALE SWALLOW	**Appellant**
- and -	
MASHREQBANK PSC	**Respondent**

- -
- -

Madeline Dixon (instructed by **RadcliffesLeBrasseur**) for the **Appellant**
Michael Smith (instructed by **Coyle White Devine**) for the **Respondent**

Hearing date: 16 November 2021

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APPROVED JUDGMENT

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JON TURNER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on Monday 6 December 2021.

Jon Turner Q.C. sitting as a deputy High Court Judge:

1. This is an appeal against an Order of District Judge Parker sitting in Slough County Court, made on 5 October 2020. The central issue in the appeal concerns the principles that the Court should apply when assessing evidence put forward in opposition to a statutory demand for a debt, which is intended to show that there is a substantial ground for disputing it.

2. By his Order, the District Judge dismissed an application by Mr. Swallow to set aside a statutory demand that had been served on him on 7 July 2018 by Mashreqbank PSC ("**the Bank**"). The sum demanded was 832,618.02 AED (dirhams), equivalent at the date of the demand to £188,098.50. The debt was said to arise pursuant to (i) a credit card agreement dated 30 March 2009 ("**the credit card agreement**"), and (ii) a loan agreement between the parties, executed on 12 August 2009 ("**the loan agreement**"). Both agreements were said to be governed by the law of the UAE.

3. On 20 July 2018, Mr. Swallow applied to set aside the statutory demand ("**the Set Aside Application**"). His witness statement in support of the Set Aside Application stated that "*the debt demanded by Mashreqbank has not been evidenced and is disputed by me on genuine and substantial grounds.*" Specifically, he asserted that "*I have had no dealings with Mashreqbank whatsoever and consequently I have not entered into any agreements with them, whether as alleged or otherwise.*"

4. Accordingly, the essential ground relied on by Mr. Swallow was that set out in r.10.5(5)(b) of the Insolvency (England and Wales) Rules 2016 ("**the Rules**"): "*the debt is disputed on grounds which appear to the court to be substantial*".

5. The Bank filed a witness statement in response to the Set Aside Application on 21 January 2019. The statement was made by its solicitor, Mr. Letheren of Coyle White Devine Limited. The evidence exhibited to Mr. Letheren's statement ran to 285 pages. It included documents purporting to show that Mr. Swallow had indeed entered into the credit card and loan agreements with the Bank. These included:

   i) copies of the signed applications for the credit card and loan, and supporting documents such as copies of Mr. Swallow's passport;

   ii) a run of credit card statements in Mr. Swallow's name, apparently showing the use of the credit card facility by him over a period of 16-17 months;

   iii) a run of print-outs of bank statements, in Mr. Swallow's name and that of the company by which he was employed when he lived in Dubai. The print-outs appeared to show that Mr. Swallow was himself making payments towards the amounts outstanding under the credit card and loan agreements until late 2010. They also appeared to show regular payments each month of AED 90,000 from the company bank account into the personal bank account which was used to service the credit card facility and the loan. Mr. Letheren pointed out in his witness statement that this figure of AED 90,000 per month corresponded to the amount which had been stated to be Mr. Swallow's salary in a letter apparently from Mr. Swallow's employer, supporting the credit card application. This, in turn, gave additional support for the proposition that the

destination bank account (the 608 account), which was used to service the credit card facility, did belong to and was operated by Mr. Swallow.

6. On 7 May 2019, Mr. Swallow served a witness statement in reply. In it, he maintained his position, and called into question the authenticity of the key documents relied on by the Bank. He suggested that there may have been "*a fraud perpetrated upon me by parties unknown*."

7. The matter was heard before the District Judge on 14 May 2019. It was common ground before the District Judge that the essential legal test to be applied is whether the dispute involves a genuine triable issue: see per Arden LJ in Collier v. P&M.J. Wright (Holdings) Ltd. [2007] EWCA Civ 1329, at [21]. The District Judge decided that there was no genuine triable issue. He delivered an extempore judgment, in which he concluded that the Appellant's denial of the debt was "*no more than fanciful*", and was "*incredible or virtually incredible*".

8. However, the Judge did not make an order on the Set Aside Application on that occasion. That was because a separate question had also been raised as to whether the debt claim was in any event time-barred, under the law of the UAE. The Bank had applied to rely upon expert evidence on that question, but there was insufficient time to deal with it. The hearing was therefore adjourned with directions. Mr. Swallow subsequently decided not to pursue an argument that the debt claim was time-barred. The matter came back before the District Judge on 5 October 2020, when he dismissed the Set Aside Application.

9. The Appellant now advances two grounds of appeal.

10. The first of these, for which the District Judge himself gave permission to appeal on 5 October 2020, is that the District Judge erred in law in that he failed to consider not only the evidence before him, but also the evidence that could reasonably be expected to be available at a trial.

11. The second ground, for which permission to appeal was given by Fancourt J. on 24 December 2020, is that the District Judge's conclusion based on the evidence which was before him was also wrong, for a group of reasons. Those reasons include both matters of substantive appraisal, such as an argument that the District Judge should not have accorded weight to the consideration that "*if this is a fraud by the bank, it is an astonishingly elaborate and sophisticated fraud*", and matters of approach, including arguments that the District Judge wrongly criticised the Appellant for having failed to put forward any evidence to address certain points, and that the District Judge ought not to have (implicitly) decided that the Appellant was lying without having seen him cross-examined.

The facts in more detail

12. The Appellant is a dentist. The Respondent is a bank operating in the United Arab Emirates.

13. Mr. Swallow lived in Dubai between (at the latest) December 2007 and November 2010, when he returned to the United Kingdom. His employer in Dubai was The UK Dental Clinics, which he stated was a company incorporated in Dubai on 1 July 2007. Mr. Swallow produced evidence showing that he was originally a shareholder in The UK Dental Clinics jointly with his wife, Margaret Swallow, with a 50:50 ownership holding, but that in the course of July 2007 he sold his shareholding to a third party, Mrs Deborah Fraser. Mr.

Swallow's evidence included a Board Resolution of 22 July 2007 resolving that his wife would then be the (only) authorized person to open and operate the company bank accounts with her sole signature, and recording that Mrs Deborah Fraser was a sleeping partner in the company who did not have a UAE resident visa. Mr. Swallow himself continued thereafter as the "Manager" of The UK Dental Clinics.

14. As indicated above, the Bank's case is that two relevant financial arrangements were made with it by Mr. Swallow in 2009. These were the credit card agreement, and the loan agreement.

The alleged credit card agreement

15. The alleged credit card agreement was initiated by an application for a credit card account, on 30 March 2009. The Bank's evidence includes what it contends is a true copy of the application form, signed by Mr Swallow. That document was accompanied by copies of Mr. Swallow's then current passport, his expired passport, his residence visa and his employee card, each of which was stamped "Original Seen". His wife was listed on the application as secondary card holder. Stamped copies of her then current passport and a recently expired passport were also included. The application was also accompanied by a letter purportedly from The UK Dental Clinics confirming Mr. Swallow's passport number, and his employment as a dental surgeon for the company, and that he was paid a monthly salary of 90,000 AED.

16. Mr. Swallow denies that the application for a credit card account is genuine, or that it has anything to do with him. He does accept that the copy of his passports and identity card, which were part of the application, are genuine documents,

but in his second witness statement he says: "*In terms of my passport and ID card, those could have very easily been supplied to Mashreqbank by Dubai Healthcare City without my knowledge or consent. It is my experience of institutions in Dubai that they frequently supply and coordinate paperwork with each other as they are owned by the same parties.*" The District Judge observed in his judgment that "*Dubai Healthcare City seems to be where the dental practice was based … No further evidence was put forward to show that Mashreqbank and Dubai Healthcare City were owned by the same parties.*"

17. At the hearing before me, it was clarified that Mr. Swallow was not claiming that he had any particular reason to think that there was common ownership of the Bank and Dubai Healthcare City; his meaning was that the possibility of common ownership could not be excluded.

18. The credit card facility was duly set up, and it was then used throughout the period from June 2009 to November 2010. The Bank produced in evidence a copy set of what it said were all the relevant credit card statements. These statements were addressed to "Dale Derick Swallow, UK Dental Clinics, PO Box 102727, Dubai".

19. The Bank's evidence indicated that, over many months, the monthly balance on the credit card account was consistently cleared by the user, with funds from a Mashreqbank bank account ending with the number "-608" (the "**608 account**"). The Bank relied on (i) copies of the full set of credit card statements, starting in June 2009; and (ii) print-outs of a full set of bank statements for the period from 2007 to 2010 for the 608 account. The credit card statements showed payments coming in from the 608 account, to clear the balance. The

608 account statements showed corresponding payments out of that same account, marked "cr. card pay". The 608 account apparently bore the name: "Dale Derick Swallow, UK Dental Clinics Bldg …": see the copy statement at page 164 of the exhibit to Mr. Letheren's statement.

20. The same page of the exhibit shows monthly payments of 90,000 AED for each of September, October and November 2007 entering the 608 account by standing order from a separate bank account ending "-216" (the "**216 account**"). Other pages in the set of statements for the 608 account show the same regular payments continuing.

21. The 216 account copy statements which are in evidence indicate that this account belonged to "The UK Dental Clinics FZ-LLC", that is Mr. Swallow's company, for which his wife was the authorized signatory and for which he was the Manager. Those statements show corresponding payments made by standing order each month of 90,000 AED, into the 608 account.

22. However, Mr. Swallow denies that at least the 608 account statements, or the credit card statements, are genuine, or have anything to do with him:

    i) So far as the credit card statements are concerned, his second statement says at paragraph 8.4: "…*I maintain these are false and are consistent with a fraud perpetrated on me by parties unknown.*"

    ii) So far as the 608 account statements are concerned, Mr. Swallow's first statement compendiously alleges at paragraph 9: "*I have had no dealings with Mashreqbank whatsoever and consequently I have not entered into any dealings with them, whether as alleged or otherwise.*"

23. So far as the 216 account statements are concerned, Mr. Swallow did not expressly deny that these were genuine, but the thrust of his case was to call into question whether they were forgeries too. His counsel laid emphasis in her skeleton argument on "*the potential difficulties which would be faced by [Mr. Swallow] in (i) providing evidence that the account ending -216 was not the Company's account when he was not a signatory to any of the accounts (ii) providing evidence of any other bank accounts operated by the Company in those circumstances or (iii) obtaining evidence to this effect from any source some nine years after he had left Dubai*." At the hearing I asked about these "potential difficulties", given that on the face of it Mr. Swallow would have been able simply to ask his wife for confirmation of the position - she was, according to his own evidence, the sole authorized signatory for any bank account operated by The UK Dental Clinics in Dubai. The response given was that "*Mr. Swallow wanted to involve his wife as little as possible and so did not obtain a statement from her.*"

24. On behalf of Mr. Swallow, it was also pointed out before the District Judge (and again on appeal) that all the bank account print-outs exhibited to Mr. Letheren's statement (i.e., for both the 216 and 608 accounts) had been generated as hard copies only in the year 2018. It was contended on behalf of Mr. Swallow that those documents were therefore not properly to be regarded as "contemporaneous" with the period they purported to cover, ending in 2010.

25. In a helpful schedule attached to Mr. Smith's skeleton argument on behalf of the Bank on this appeal, he analysed the pattern of payments shown by the credit

card statements and the 608 account statements. This showed that, according to these two groups of documents (if authentic):

i) the full credit card balance was cleared each month by the beneficiary of the credit facility from the 608 account until June 2010;

ii) the minimum payment to service the credit card account was then made each month until October 2010;

iii) a payment for less than the minimum payment was then made in respect of the November 2010 statement; and

iv) no payments were made thereafter.

26. Accordingly, the pattern of payments revealed a sharp change in behaviour coinciding with the timeframe of Mr. Swallow's return from Dubai to the UK in November 2010.

27. Moreover, the content of the credit card statements relied on by the Bank provided a further link with Mr. Swallow. Until November 2010, the transactions are generally recorded as taking place in Dubai. But the transactions on the card made after 16 November 2010 – that is, the same month that Mr. Swallow returned to the UK – were UK-based transactions.

28. Thus, the copy credit card statements exhibited by the Bank indicate among other things the use of the card at Marks & Spencer, Tesco and Boots, all in Maidenhead, and a payment to Cancer Research in Maidenhead, and a payment to Budget Car Rentals in High Wycombe (see page 49 of the exhibit to Mr. Letheren's statement).

29. In view of the cluster of references in that credit card statement to modest (grocery) and benevolent (cancer research) payment transactions having taken place in the Maidenhead area in November 2010, the Bank also referred the Court to evidence of connections between Mr. Swallow and that particular geographic area, in order to add support to the argument that this spend on the credit card account was indeed spend by Mr. Swallow, not by a fraudulent third party.

30. The District Judge highlighted in his judgment one particular point, which was indicative of a connection between Mr. Swallow and the Maidenhead area (see paragraphs 30 and 38 of the judgment). This was that, on a copy of a 1998 passport belonging to Mr. Swallow, the emergency contact address supplied by Mr. Swallow was given as Holyport Road, although misspelt as "Holly Port Road". The District Judge pointed out that the village of Holyport is in the Maidenhead area. Moreover, in his witness evidence in these proceedings, Mr. Swallow himself noted that the disputed loan application, which the copy 1998 passport was intended to support, referred to Mr. Swallow's UK address more completely as "Holly Port Road, Maidenhead, Berkshire, SL6 2HD, UK". Mr. Swallow's comment on this statement of his UK home address was not a denial; it was that "Holyport Road" had been incorrectly spelt as "Holly Port Road": see paragraph 7.4.2 of his second witness statement. And on that point, the District Judge observed in paragraph 38 of his judgment, in relation to the mis-spelling: "*That does not remotely assist Mr. Swallow given that his own passport at page 116 contains precisely the same mis-spelling, and, as Mr. Smith has pointed out, the loan document under challenge contains other*

details, including the postcode, and therefore has not simply been copied across from the passport."

31. It is true that, in his witness evidence, Mr. Swallow also said at paragraph 8.4: "*I have not lived in Maidenhead itself in the last 35 years*" (emphasis added). However, this was not to say that Mr. Swallow has not lived in the general area of Maidenhead (e.g., Holyport), nor, more pertinently, that it is unlikely that Mr. Swallow was spending money in the Maidenhead area in November 2010. In his judgment below, the District Judge commented at paragraph 31: "*Mr. Swallow was conspicuously careful not to give details of any address where he had lived since 2010. His witness statement itself only gave a business address, and the only other clue to where he may have lived was a statement that in, I think, 2017 or thereabouts he was living in Gerrards Cross, although no further details were given.*"

32. As respects the question whether the November 2010 expenditure in Maidenhead that was shown on the credit card statement was in fact attributable to him, Mr. Swallow's position was put in the following terms, at paragraph 7.3 of his second witness statement: "*I have carefully read the credit card statements … and I do not recall the expenditure listed on those statements. I am not convinced that these statements are genuine bank statements, and I am concerned that these could simply be documents made to look like genuine bank statements, but with false entries made*" (emphasis added).

33. In view of the careful manner in which Mr. Swallow expressed himself ("…*I do not recall the expenditure…*", rather than "*This would not have been expenditure by me because …*"), I asked Ms Dixon to define his position at the

hearing. She clarified that Mr. Swallow does not accept that the credit card documents show any expenditure that he would have made. That position is consistent with Mr. Swallow's more forceful statement of his position later in his witness statement (at paragraph 8.4) that: "*In terms of the credit card statements relied upon by Mr. Letheren as evidence of my receiving monies, I maintain these are false and are consistent with a fraud perpetrated upon me by parties unknown. I have not lived in Maidenhead itself in the last 35 years.*"

The loan agreement

34. Mr. Letheren exhibited to his statement a copy of a signed "small business-owner loan application" dated 28 July 2009. The principal sum was 200,000 AED. The application was supported by various documents, including copies of Mr. Swallow's passports.

35. The loan application was approved and the exhibits include a copy of a purported loan agreement executed on 12 August 2009.

36. The copy 608 accounts show that 200,000 AED was paid as a "loan disbursement" to the current account in Mr. Swallow's name on 13 August 2009.

37. Monthly payments of 7,649.29 AED were then made between August 2009 and November 2010, from the 608 account. Mr. Smith set out in his skeleton argument on behalf of the Bank a second schedule, which traced 16 monthly payments in that amount, by reference to (i) a Bank document entitled "Financial Transaction Inquiry" (dated 1 May 2018) concerning the operation of the loan account, and (ii) pages of the exhibited set of 608 account statements purportedly belonging to Mr. Swallow.

38. No payments servicing the loan account were made after November 2010, i.e. the date when Mr. Swallow returned to the UK.

The District Judge's judgment

39. The District Judge relied on the following principal considerations in reaching his conclusion that Mr. Swallow's denial of liability was "*no more than fanciful*" and "*incredible or virtually incredible*". It is important at the outset to underscore that he relied on all those matters in the round, i.e. "*look[ing] at the whole picture*" (paragraph 33, and also paragraph 42):

    i) The Bank produced a collection of documents, including signed bank documents, showing that Mr. Swallow had dealings with them. Although they were alleged by Mr. Swallow to be forgeries, they certainly included authentic copy passports and other documents. Mr. Swallow conjectured in his witness evidence that an institution called Dubai Healthcare City, which had access to those authentic documents, may have been in common ownership with the Bank.

    ii) Both the credit card and the loan were reliably serviced over a very long period, with regular monthly payments towards those debts being made until November 2010. The Judge commented at paragraphs 13 and 14:

    "*As Mr Smith says, and I am forced to agree, it would be remarkable indeed if a third party fraudster, somebody who was independent both of the bank and of Mr Swallow, had fraudulently obtained the loan and the credit card but had then diligently serviced the debts over a long period*."

"*I would have to say it does seem to me verging on the fanciful, or verging on the inconceivable, that a fraudster would behave in that way. I accept it is easier to imagine that a fraudster would think it worthwhile to obtain a substantial loan and then avoid detection by servicing it - they could, of course, even use the proceeds of the original loan to service it - but the credit card is very difficult indeed to explain on the hypothesis that there is a third party fraudster. If that fraudster were able to service the credit card debt, then it is hard to conceive why they would have bothered fraudulently taking out the credit card in somebody else's name in the first place*."

iii) The bank account that was used to service both the credit card and the loan agreement was apparently held in Mr. Swallow's name (see paragraph 16 of the judgment). Although it was possible that this too was a fraudulent device, there was an additional reason to think that the 608 bank account did belong to Mr. Swallow. This was that there was evidence that a separate bank account (the 216 account) in the name of Mr. Swallow's employer, The UK Dental Clinics, was regularly paying 90,000 AED into the 608 account. That figure of 90,000 AED was plausibly what one might expect Mr. Swallow to receive as a monthly salary, and concretely there was a letter from The UK Dental Clinics in the exhibited evidence, confirming expressly (if not a forgery) that Mr. Swallow's monthly salary was 90,000 AED. Mr. Swallow's witness evidence did not dispute that this was, at the material time, the amount of his salary. (At the appeal hearing, Mr. Swallow's counsel told me "on instructions" that this point was disputed, and I deal with that below).

iv) The significance of these payments from the 216 account was that, although Mr. Swallow did not expressly accept that it was a genuine account either, a challenge by him to its genuineness "*would have to entail the suggestion that the bank has, as part of an increasingly elaborate looking process of falsification, created a number of fabricated entries for account number -216 as well. That would include the fabrication of the overdraft application at Tab 11, page 123, or at least the doctoring of that agreement so as to cross-reference it to the bank account -216*" (paragraph 24 of the judgment).

v) If the 608 account did indeed belong to Mr. Swallow, then "*it seems to me extremely unlikely those payments could have been going out of Mr Swallow's bank account over a period of something approaching two years without him noticing - and extremely unlikely that, if he was aware of those payments, he would have allowed them to continue unless he had good reason to believe that he did actually have a liability to the respondent*" (paragraph 28 of the judgment).

vi) A further factor linking Mr. Swallow to, at least, the credit card usage was that Mr. Swallow returned to the UK around November 2010. The District Judge noted that from this point in time forward, the expenditure on the credit card was made in the UK. He said, at paragraph 29 of the judgment: "*Mr Swallow's evidence is that he returned to the UK in around November 2010; the respondent points to the credit card statement dated 14th December 2010, which shows a series of entries for transactions in the UK … all in Maidenhead for a variety of amounts,*

some very modest. The dates fit perfectly in that the dates of the transactions match the dates when, on his own account, Mr Swallow was back in the UK."

vii) Next, the District Judge placed weight on the fact that: "*the area where the transactions took place was an area to which Mr Swallow demonstrably has some connection*": paragraph 30 of his judgment. His conclusion about this was expressed in trenchant terms, in paragraph 32: "*It seems to me the evidence about the High Wycombe and Maidenhead transactions makes it vanishingly unlikely and entirely incredible that there would have been fraud perpetrated by an unconnected third party. That is because it is difficult to see how that third party could have tracked Mr Swallow's movements so accurately, or why they would have bothered to do so, and - if they were going to follow him back to the UK so as to spend money in a particular area connected with him - why they were only making such modest use of the card*."

viii) According to the District Judge, that disposed entirely of any realistic possibility that there had been a fraud perpetrated by an unconnected third party. He then considered an alternative explanation that this could have been in fact a fraud created by the Bank itself. As to this, he said at paragraph 33: "*The alternative explanation, that this is in fact a fraud created by the bank, is still theoretically open to Mr Swallow, but, as I think has become clear, if this is a fraud by the bank it is an astonishingly elaborate and sophisticated fraud. The bank has gone to the trouble of somehow (and one would have to speculate how) finding out where Mr*

Swallow had apparently gone to within the UK and then creating a whole series of modest false entries simply to bolster a case. To suggest that in isolation is, I suppose, in itself not absolutely fanciful, but in looking at this issue one has to look at the whole picture, and at that point I really begin to have difficulties with the applicant's suggested explanations." In other words, the alternative explanation too was wholly unrealistic, when all the available evidence was looked at in the round.

ix) The District Judge considered and rejected a series of submissions made by the then counsel for Mr. Swallow, in paragraphs 34 – 41 of his Judgment. One of these was that she had at one point in her argument referred to a comparison of the signatures in the different documents (comparing for example the signatures in the disputed credit card application against the signature in the copy passport accompanying the application). She had submitted that there were apparent differences between these signatures, although at the same time submitting that an examination of the differences was not an exercise that the Court ought to undertake. The District Judge responded to this in paragraph 36 of his judgment. He said he tended to agree that a comparison of the signatures was not really an exercise the Court should go through, but – meeting the argument which had been made on its own terms – he observed: "… *there is also a very marked difference between the [authentic] signature on Mr Swallow's passport and the [authentic] signatures on his witness statements, and to an untrained eye and at a casual glance there is no very conspicuous difference between the*

[authentic] passport signature and the [disputed] signatures on the bank documents. So I do not consider that any point about signatures beyond his own assertion of forgery assists Mr Swallow."

x) Finally, the District Judge drew the different strands together in his conclusion at paragraph 42: "*Ultimately I have to stand back and look at the evidence as a whole, and I am very conscious that in doing so I am not deciding the case on the balance of probabilities but by asking myself whether the respondent has been able to persuade me that, when I look at all the material that has been put forward, it can be said that the applicant's denial of this debt is no more than fanciful and that it is incredible, or virtually incredible. It seems to me I can reach that conclusion for all of the reasons I have stated, but centrally because of the pattern of payments demonstrated by looking at the two bank statements for accounts -608 and -216*."

Discussion: the correct approach to be adopted in deciding whether there are grounds for disputing the debt "which appear to the court to be substantial"

40. It was common ground that the correct approach for the Court to adopt in deciding whether there are grounds for disputing the debt "which appear to the court to be substantial" (pursuant to rule 10.5(5)(b) of the Rules) was to ask whether there is a genuine triable issue. As explained by Arden LJ (as she then was) in Collier v. P & M.J. Wright Holdings [2007] EWCA Civ 1329, this is equivalent in substance to asking whether the party disputing the debt would stand a real prospect of success at trial – that is, the test for whether to grant summary judgment.

41. At [21], Arden LJ amplified what it was that a party in the position of the Appellant in this case needs to show:

"*In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it was inherently implausible or if it was contradicted, or was not supported, by contemporaneous documentation (see also per as Lawrence Collins LJ states in Ashworth at [34]). But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties*."

42. In the present case, it is true that the Appellant, Mr. Swallow, has put forward two (short) witness statements. For the most part, however, these consist only of a series of simple denials of the central facts relied on by the Bank.

43. For example, despite the content of Mr. Letheren's witness statement on behalf of the Bank, and the significant documentary evidence that Mr. Letheren produced:

i) Mr. Swallow did not deal at all in his evidence with the obviously relevant question whether his salary in Dubai in fact <u>was</u> 90,000 AED a month, which is what the documents produced by the Bank appeared to demonstrate. It would have been straightforward for him to produce

some material showing that this was wrong, if it was. Nor, until the hearing before me, did Mr. Swallow even suggest that this was not the amount of his salary in Dubai. The issue was raised on appeal before me, and Ms Dixon responded "on instructions" merely with the assertion that it was incorrect, which did not take the matter materially further.

ii) Nor did Mr. Swallow deal in his evidence with the question whether the set of 216 account statements, placed in evidence by the Bank, did or did not belong to The UK Dental Clinics, although this issue too was obviously highly material to the case against him. His wife was – according to his own evidence – the sole signatory of the company bank accounts and she could have been expected to be able to clear this up instantly, even if he - as the company Manager at the time - was unable to do so. The further statement made to me "on instructions" at the hearing, to the effect that Mr. Swallow wanted to involve his wife as little as possible, did not enhance the substantiality or "genuineness" of his case.

iii) As the District Judge noted, Mr Swallow did not give details of any UK address where he had lived since 2010 (in contrast to saying where in the past he had not lived). This was so, despite the fact that it was obviously relevant to the question of his connection with the Maidenhead area, where the credit card had been used following Mr. Swallow's return to the UK in November 2010.

44. Ms Dixon submitted that it was wrong to have expected Mr. Swallow to do any more than he did in his two witness statements. She cautioned that the exchange

of evidence in a case of this kind should not be equated to an exchange of formal pleadings between two litigants, where each allegation by a claimant falls to be addressed by a defendant. I have no difficulty accepting that the witness evidence of a party disputing a statutory demand in a case of this kind should not be equated to a formal pleading. However, that is not to the point. The witness evidence put forward by a party in the position of Mr. Swallow must be sufficient to overcome the hurdle of "substantiality" referred to by Arden LJ in Collier. If it does not deal with matters of obvious importance, the Court is entitled to take that into account, as the District Judge did in the present case.

45. Nor is it right to suggest, as Ms Dixon appeared to do on occasion, that such an approach amounts to an inappropriate reversal of the burden of proof. In a case where a party seeks to dispute a statutory demand under rule 10.5(5)(b) of the Rules, it is they who must show that there is a dispute founded on substantial grounds.

46. The correctness of such an approach as a matter of judicial policy is supported by the judgment of Chadwick J. (as he then was) in Re a Company No. 006685 of 1996 [1997] BCC 830. That was a case of a company applying to restrain advertisement of a winding-up petition presented in relation to it, on the basis of a debt which the company claimed was disputed. Chadwick J. cited the earlier decision of the Court of Appeal in Re Claybridge Shipping Company SA [1981] Com LR 107, in which Oliver LJ had explained the reasons of judicial policy for requiring a party disputing a winding-up petition to show that its objections had real substance. Chadwick J concluded his judgment, at p.841B-C:

"*For those reasons, I reach the conclusion that this is a case in which the dispute now said to exist is not founded on any substantial grounds. Rather, this is one of those cases in which, as Oliver LJ observed in Re Claybridge Shipping Company SA., an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute of fact exists which cannot be determined without cross-examination so that the petition cannot be allowed to proceed. Staughton LJ pointed out in Re Taylor's Industrial Flooring Ltd that anything that the law could do to discourage such behaviour should be done*."

47. Furthermore, I consider that it is unimpeachable – indeed, it is appropriate - for the Court to assess the evidence adduced by parties in a context such as the present "in the round", which is exactly what the District Judge did in this case. It is not good enough for a party disputing a statutory demand on grounds that are said to be substantial to claim that each factual element of the case against it should be examined in total isolation from the remainder. If there are multiple separate reasons given for finding a certain fact, they may in the particular circumstances of the case be mutually reinforcing of each other - even taking into account that there is a theoretical possibility that each of them if viewed in isolation could be undermined - and the overall picture which all of them create together may be irresistible.

The first ground of appeal

48. The first ground of appeal on behalf of Mr. Swallow is that the District Judge failed to consider not only the evidence before him but also the evidence that could reasonably be expected to be available at trial.

The threshold issue

49. In giving permission to appeal on this ground (at the hearing on 5 October 2020, nineteen months after delivering his judgment) the District Judge stated: "*Although it might be arguable that one could infer what my position about that would be, I accept that there is a possibility of success on that ground.*"

50. There was a threshold issue raised at the hearing concerning what the grant of permission actually meant. On behalf of the Bank, Mr. Smith argued that:

"*It is clear from the reasons given by the Judge granting permission on Ground 2 that he believed he impliedly took into account the "future evidence" points raised by A. Those reasons were written 19 months after the Judgment. A's appeal on this ground – which is really a "Reasons" appeal – rather than an appeal of substance, should have been preceded by a request for the Judge to clarify his judgment when it was fresh in his mind*."

Mr. Smith observed that the District Judge's judgment was delivered extempore, which meant that the reasons in it were not as fully developed as they might have been if it was a reserved judgment. At the time of reaching his decision on permission to appeal, some 19 months later, the District Judge was naturally in a difficult position in clarifying more fully the basis of his judgment.

51. Ms Dixon responded simply and trenchantly that the District Judge gave permission to appeal his Order on the grounds that he did "fail to consider" the evidence that could reasonably be expected to be available at trial. One should not go behind that clear statement of the position.

52. On this threshold issue, I have some sympathy with Mr. Smith's point. It is difficult to see what the District Judge could have meant when he said in his

permission ruling that it might be arguable that one could "*infer what his position would be*", on the issue of evidence that would be reasonably available at trial, if the District Judge did not intend to suggest by this that a close reading of his judgment would tell one the answer. However, my view is nonetheless that this is an insufficient foundation to support Mr. Smith's contention, and I prefer Ms Dixon's simple submission.

53. Nor, indeed, did Mr. Smith seek strongly to support his contention in the way he put the Bank's case in the appeal. He did not refer to a series of specific passages in the District Judge's judgment that supposedly gave rise to the alleged implication, as might have been expected. All he did was to take the Court to one passage in the final conclusion in paragraph 42, where the District Judge said "*Ultimately I have to stand back and look at the evidence as a whole … [and ask] whether the respondent has been able to persuade me that when I look at all the material that has been put forward, it can be said that the applicant's denial of this debit is no more than fanciful …".* Mr. Smith argued that this reference to "*all the material that has been put forward*" was intended to encompass a reference to the submissions of counsel, not just the evidence, and that those submissions included the point that it was necessary to take into account evidence which was not then available but which could be expected to be available at trial. I do not read the District Judge's words in that way, and consider that the natural interpretation of the extempore judgment is that "evidence" and "material" were just meant to refer to the same thing.

54. Accordingly, on this threshold issue, I am with Ms. Dixon. However, that does not in itself dispose of the appeal in favour of Mr. Swallow. I canvassed with

counsel at the outset of the appeal hearing whether it would be permissible for me to uphold the District Judge's order as correct even if he had failed to address a relevant consideration, on the grounds that the relevant consideration was ventilated before me on appeal, and my judgment was that it did not alter the correctness of the District Judge's substantive conclusion. Both counsel agreed with this basic proposition.

The issue of law

55. Next, there was a skirmish between the parties about the precise nature of the legal test for assessing whether there was material that could reasonably be expected to be available at trial.

56. Both parties focused on the judgment of Lewison J. (as he then was) in Easyair Limited (trading as Openair) v. Opal Telecom Limited [2009] EWHC 339 (Ch). Ms Dixon referred to sub-paragraphs (v) and (vi) in paragraph 15, where Lewison J. held in particular:

i) the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial; and

ii) the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case.

57. Those two sub-paragraphs involve a two-stage test. One asks: (a) what additional evidence can reasonably be expected to be made available at a trial? and (b) assuming such additional evidence would be available, are there reasonable grounds to suppose that it would affect the outcome of the case? I pause to observe that although Lewison J's judgment refers to "would affect the outcome of the case", it is very unlikely that the learned Judge meant this in the sense of "would change the outcome of the case". What it seems he meant was that it "would bear on the outcome of the case, even if the outcome were ultimately the same".

58. This interpretation is in fact supported by the next passage in Lewison J's judgment, on which Mr. Smith placed his own emphasis: sub-paragraph 15(vii). That sub-paragraph is essentially concerned with the category of cases where a summary judgment application gives rise to a short point of law of construction. However, Mr. Smith argued that the reasoning in the second part of the sub-paragraph is not limited to that category of cases, and it should be understood as making a general point. It reads as follows:

"…*If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction*".

59. Mr. Smith gained from this wording that, at what I have described as the first stage of the test, it must generally be established (i) that additional material is likely to exist, and (ii) that it can be expected to be available at trial. In other words, it is not good enough if there is only a reasonable possibility of particular additional material being produced at a trial. This distinction mattered, because, as discussed below, he argued that certain elements of the material which Ms Dixon contended would be available at trial (mainly, meta-data embedded in the electronic bank statements which had been printed off in 2018 for the purposes of Mr. Letheren's witness statement on behalf of the bank) could not be said to be likely to exist, nor to be expected to be available at a trial – it was a matter of speculation.

60. I agree with Mr. Smith that the second part of sub-paragraph 15(vii) in Lewison J's judgment is material, albeit for a slightly different reason from his submissions. I consider that all of sub-paragraph 15(vii) is focused on a particular category of cases (those involving a short point of law or construction), but that sub-paragraph must still be read consistently with the preceding sub-paragraphs, and the reasoning in them all should tie up neatly. There is no good reason for the Judge to have switched from a test of "reasonable possibility of availability of further material" in the earlier sub-paragraphs to a test of "likelihood of availability" in the seventh sub-paragraph. In any case, Lewison J's reference in the fifth sub-paragraph to "*the evidence that can reasonably be expected to be available at trial*" does indicate a test of likelihood.

The substance of the first ground of appeal

61. Ms Dixon powerfully developed submissions at the hearing that the point which the District Judge had overlooked in his judgment - about evidence that can reasonably be expected to be available at trial - really does matter in this case, and that, properly appreciated, it led to the conclusion that there were indeed substantial grounds for disputing the debt, which in fairness had to be tested at a trial.

62. She divided this into three main groups: (i) oral evidence of witnesses; (ii) further documentary evidence; and (iii) expert evidence.

63. As respects oral evidence, she submitted that its potential to affect the outcome of this case was obvious. The Bank's case against Mr. Swallow was tantamount to an accusation of dishonesty, and she said that in such circumstances an assessment of his credibility by means of oral examination was essential. Also, at a trial, Mr. Swallow would have the chance to explain to the Court why there were the "gaps" in his written statements that the District Judge had picked up on critically - e.g., at paragraphs 18 and 24 of his judgment.

64. Ms Dixon added that significant oral evidence from the Bank as well would also be expected to be adduced at a trial, emphasising that there was so far nothing from any Bank employees with knowledge of Mr. Swallow's case, who could talk about matters such as the identity checks carried out when approving the credit card and loan applications in 2009, and who could be asked about apparent curiosities such as the fact that the copy loan application in the file (at page 111 of Mr. Letheren's exhibit) left blank the section on existing "personal borrowings", even though by the time of the loan application there was

purportedly already a credit card arrangement with the Bank. Ms Dixon urged that so far there was only a witness statement from the external solicitor, Mr. Letheren in 2018, who was acting on instructions given to him by a Mr. Arvind Khan, from the Bank's risk management team responsible for the recovery of outstanding liabilities.

65. I asked Ms Dixon if her submission was that it was realistic to expect the Bank to be able reliably to produce at trial witnesses with direct knowledge of those initial dealings back in 2009, which would add materially to the sum of knowledge in the case. She responded that the Bank had waited 8 years before serving a statutory demand following the cessation of payments on the loan and the credit card in 2010, and that if in those circumstances the Bank could not find a person with direct evidence of the transactions in 2009, that was the Bank's problem rather than Mr. Swallow's.

66. As respects the prospect of further documentary evidence being made available at a trial, Ms Dixon referred to meta-data belonging to the electronic bank statements and to documents relied on by the Bank in Mr. Letheren's exhibit. She said that this sort of material could shed light on whether those documents were or were not authentic, given Mr. Swallow's categorical position that they were forgeries. Ms Dixon also referred to the fact that one could expect the pre-trial process to yield disclosure of contemporaneous emails and other correspondence concerning the alleged credit card and loan agreements, which would similarly shed light on the question of the genuineness of those agreements.

67. Finally, as respects expert evidence, Ms Dixon focused on the prospect of handwriting experts being called at trial, who could opine on Mr. Swallow's assertion that the signatures in the credit card and loan applications were not his, and who might align with Mr. Swallow's case.

68. Despite the skill with which Ms Dixon presented her case on this first ground of appeal, I do not accept her submissions.

69. As respects enabling oral evidence to be given by Mr. Swallow at trial, I acknowledge straight away the importance of these proceedings to him. I acknowledge too that he has given an account of the primary facts which is diametrically opposed to the Bank's case. He alleges that a large number of the key documents relied on against him are forgeries, and that he has been the victim of an elaborate fraud.

70. However, two points fall to be made.

71. The first is that, as Mr. Smith correctly argued, the Bank's civil claim does not depend on establishing subjective dishonesty and bad faith on Mr. Swallow's part. More particularly, the assessment whether to set aside the Bank's statutory demand turns on an assessment "in the round" of all the material made available and which might be expected to be available at a trial, in order to decide whether Mr. Swallow has shown substantial grounds to dispute the debt. That does not require a determination of Mr. Swallow's subjective state of mind, including whether he is deliberately lying, or whether he may genuinely have convinced himself of the correctness of certain facts that are not true.

72. The second point is that, while in some circumstances it may be necessary and appropriate to allow a party the chance orally to amplify aspects of their written evidence that are vague or incomplete, where doing so could realistically affect the outcome, in my judgment this is simply not such a case. Mr. Swallow has availed himself of the opportunity to show that there are solid (i.e. substantial) grounds to dispute the debt, in his two rounds of written evidence supporting his application to set aside the statutory demand on those grounds. As Mr. Smith trenchantly pointed out, it is plain that in preparing his second statement Mr. Swallow scrutinised with great care the witness statement and exhibited documents produced by the Bank: he did not hesitate to contradict detailed elements in them which he said were false. For example, in paragraph 7.4 of his second witness statement, Mr. Swallow said that the loan application form contained a number of inaccuracies, such as the misspelling of his UK home address as "Holly Port Road" rather than "Holyport Road", and a suggestion that the loan amount appeared to have been altered because there seemed to be a number beneath the second "0" that had been written over. In contrast, there are major gaps in Mr. Swallow's account, highlighted by the District Judge, which are matters that Mr. Swallow could have been expected to deal with in his response to the Bank's case. These include, notably: the conspicuous failure to refer to his UK home address in his second witness statement (or at all); the failure to deal in his evidence with whether his salary was 90,000 AED - as the Bank's documentation specifically indicated; and the failure to deal anywhere in his evidence with the genuineness of the 216 account, including by asking for confirmation from his wife about it.

73. In my judgment, it is not the case that where a party puts forward a witness statement with a view to showing that there are substantial grounds to dispute a debt, and it is evident that the written evidence has conspicuous and serious failures to address points clearly made by the opposing party, he or she nonetheless has an entitlement to go to trial so that they can deal with those omissions orally – in other words, a second bite of the cherry.

74. As respects the argument that there ought nonetheless to be an opportunity to test oral evidence from Bank employees who have direct knowledge of the initial dealings in 2009 with Mr. Swallow or The UK Dental Clinics, or at least having knowledge of the Bank's relevant protocols and checks at that time, I consider that this submission too is wrong. The opposing party has a choice as to what evidence they decide to lead at a trial. If the Bank chose not to adduce such evidence at a trial, this would not mean that the Bank was bound to lose. In the circumstances of this particular case, it does not appear at all likely that useful oral evidence concerning these detailed events in 2009, capable of affecting the outcome of the dispute in view of the evidence looked at in the round, would necessarily even be available at trial from the relevant (but currently unknown) individuals employed by the Bank.

75. I turn to the submission that it can be expected that valuable additional documentary evidence would be available at a trial, including meta-data for the bank statements and email correspondence about the alleged credit card and loan applications in 2009. I have no hesitation in rejecting this argument too. For one thing, I agree with Mr. Smith that it is not at all clear that such meta-data is available: this seems to me to be speculation. Assuming that such

material is uncovered and is produced, it seems to me that opening up this new front does not stand a reasonable prospect of affecting the outcome of the case. That is because, in common with the District Judge, I consider that the combination of all the different elements outlined in his reasoned judgment result in an overwhelming case that Mr. Swallow is properly made liable for the claimed debt.

76. Standing back, I differ from the District Judge in my own assessment mainly in that I consider the most important elements to be (i) the fact that both the credit card and loan were regularly serviced over around a full year-and-a-half; (ii) the fact that this pattern sharply changed at the very time Mr. Swallow moved back to the UK, and (iii) the fact that thereafter the spend on the credit card in November 2010 was of a nature, and was carried out in a geographic area, that make it fanciful to suggest that anyone other than Mr. Swallow was responsible for it. I observe that Mr. Swallow's criticism in relation to his UK home address on the loan application form was that the street name was misspelled, not that it was wrong, and I also note that the details of the UK home address given in the loan application form were more complete than those found in the accompanying copy passport, meaning that a fraudster could not simply have copied them across.

77. I consider it equally fanciful to suggest that senior individuals within the Bank or an unconnected fraudulent third party could have engineered such an elaborate fraud. In this regard, I discount at the outset as entirely fanciful the possibility that someone in the Bank could have ingeniously manufactured the entire set of documentation in the year 2018 in order to frame Mr. Swallow. As

Mr. Smith pointed out, the elaborate fraud on Mr. Swallow would therefore have necessarily involved servicing all the credit card and loan facilities over around a full year-and-a-half, then tracking Mr. Swallow's physical movements both to and within the UK, and then falsifying modest grocery and charity spending in November 2010. This is also not capable of belief. Against this context, Ms Dixon's argument that something may nonetheless turn up via disclosure in a trial context that could affect the outcome, seems to me to be insubstantial.

78. I turn finally to the argument that handwriting experts are needed in order to assist the Court with their opinions on whether the signatures on the credit card and loan application forms were forged, as Mr. Swallow says they were.

79. I do not accept that there is any mileage in this argument, in view of (i) the wealth of other evidence in the case pointing firmly to the conclusion that Mr. Swallow is properly held liable for the debt; and (ii) the fact that, in a similar way to the District Judge in paragraph 36 of his judgment below, it seems to me that to an untrained eye there are no conspicuous differences between the allegedly false signatures on the bank documents, and the admittedly authentic signatures on Mr. Swallow's passports: compare e.g. the signature on the second page of the credit card application, at p.2 of Mr. Letheren's exhibit, with the signature on the 1998 passport, at p.116. I am prepared to refrain from treating the fact of the similarity between those signatures as an additional factor pointing to Mr. Swallow's liability for the debt; but I consider that it at least strengthens the conclusion that there are no reasonable grounds for thinking that the evidence of a handwriting expert would affect the outcome of this case.

80. For all these reasons, I reject the first ground of appeal.

The second ground of appeal

81. Mr. Swallow's second ground of appeal (which is ground 3 in the written grounds) is that, for various reasons, the District Judge was wrong to conclude that Mr. Swallow's denial of the debt was fanciful. I address each of these reasons in turn in the following paragraphs.

(a) The District Judge failed entirely to deal with the loan debt

82. This allegation, as it was framed in the written grounds, is plainly incorrect. Mr. Smith pointed out in his skeleton argument on behalf of the Bank that the loan debt, and the parties' submissions and evidence in respect of it, are expressly referred to and considered in the course of the District Judge's judgment. In Ms Dixon's skeleton argument for this appeal, and in her oral submissions, she accepted that the loan agreement was mentioned in the judgment, but she put the argument differently. She argued that the District Judge did not explain why he considered Mr. Swallow's denial of the debt arising from the loan agreement was fanciful. Indeed, she pointed out that the District Judge accepted that it was easier to imagine that a fraudster would service a large loan over an extended period in order to cover their tracks than it was to imagine that a fraudster would service a credit card account taken out in someone else's name, over an extended period.

83. I have no hesitation in rejecting this ground. The District Judge made clear in his judgment that he was looking "at the whole picture", and was assessing the case in the round: see the summary at paragraph 39 above. The issues concerning the loan and the credit card debts were overlapping and interlinked. In particular, the loan and the credit card were serviced from a single bank

account in Mr. Swallow's name (the 608 account), which he denied was genuine or had anything to do with him. The evidence and reasoning linking the 608 account to Mr. Swallow supported the debt claim in relation to the loan agreement, as well as the credit card agreement. As respects Ms Dixon's argument that the District Judge said it was easier to imagine a fraudster servicing a substantial loan over an extended period than to imagine a fraudster servicing a credit card, in fact he was treating both possibilities as highly unlikely; his point was that – taken by itself – it seemed entirely incredible in the case of a credit card arrangement.

(b) The Judge implicitly decided that Mr. Swallow had repeatedly lied in his written evidence, although such a conclusion should not have been made in the absence of cross-examination

84. Ms Dixon's point, essentially, was that in view of Mr. Swallow's repeated and categorical denials of any connection with the loan or credit card agreements (or indeed any anterior relationship with the Bank), a necessary element of the District Judge's decision was that Mr. Swallow had lied. She submitted that such a conclusion was not properly open to the District Judge without having seen Mr. Swallow cross-examined.

85. I do not accept either the premise or the conclusion of this point. As mentioned at paragraph 71 above, the issue decided was that Mr. Swallow's account was not credible, as a matter of objective assessment of the case in the round. It was not that he was deliberately lying. (This distinction was made by the District Judge himself, in the course of refusing to give permission on this sub-ground, and was not contradicted by anything in Fancourt J's reasons for deciding

subsequently to grant permission compendiously on Ground 3 in the written grounds). The case authorities are also clear that the fact that a witness' written evidence concerning significant primary facts is disputed by the opposing party, in a context such as the present, does not automatically trigger the need for cross-examination at a trial. In Long v. Farrer [2004] EWHC 1774 (Ch) at [57]-[61], Rimer J. (as he then was) discussed the principles. At [60], he quoted with approval the judgment of Chadwick J. (as he then was) in In re a Company (No. 006685 of 1996) stating:

"*I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross-examination where there is credible evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a proper understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible.*"

86. In the present case, the evidence asserted in Mr. Swallow's witness statements was, on a proper understanding of the documents, not credible. Ms Dixon urged in her oral submissions that Mr. Swallow's essential case was that he had been a victim of a fraud – and this proposition was by no means incredible. If one puts the case only at that high level of abstraction, that is true but uninformative: the real point is that Mr. Swallow's specific denials were not believable in view of the overwhelming documentary evidence against them.

(c) The Judge took into account irrelevant evidence

87. The written grounds refer to four separate matters as evidence taken into account wrongly by the District Judge because it was "irrelevant". These are

i) the copy bank statements for the 608 and 216 accounts – since these had been printed off only in 2018, and they were challenged by Mr. Swallow;

ii) the District Judge's own impression that 90,000 AED was approximately the sort of figure that "*one might expect Mr. Swallow to receive in the capacity in which he says he was working*";

iii) the District Judge's supposedly "tautologous" reasoning that the payments of 90,000 AED into the 608 account from the 216 account meant that this must be Mr. Swallow's salary, and that because it must be Mr. Swallow's salary the 608 account must belong to Mr. Swallow;

iv) the District Judge's reliance on the fact that Mr. Swallow referred to a UK address given in his 1998 passport as sound evidence that he had a connection in the same area 12 years later (in 2010).

88. I reject each of these points:

i) The evidence of the bank statements for the 608 and 216 accounts was certainly not irrelevant to the question before the Court - whether there were substantial grounds for disputing the debt. There was, rather, a question as to the weight to be accorded to the evidence of the bank statements, in view of the fact that they were printed off in hard copy only in 2018. The District Judge did not err in according them weight, in view of the indications in the material (discussed in paragraphs 21-28 and 40 of his judgment) that each was genuine. Ms Dixon suggested that the copy bank statements should be disregarded for present purposes because they were not contemporaneous documents. However, if

authentic, then they were copies of contemporaneous documents: the issue was authenticity.

ii) It is true that the District Judge commented in paragraph 25 of his judgment that it was plausible from his perspective that 90,000 AED was the amount one might expect Mr. Swallow to have received as a monthly salary. However, this was not the District Judge's only basis for inferring that the 90,000 AED figure represented Mr. Swallow's salary. The District Judge went on, in the immediately following paragraph, to refer to the fact that there was a copy letter in the Bank's evidence apparently from The UK Dental Clinics, supporting the credit card application. That letter referred expressly to Mr. Swallow's salary being 90,000 AED.

iii) The process of reasoning by the District Judge which Ms Dixon points to is not "tautologous" (nor circular). The District Judge set out good reasons for supposing that the payments of 90,000 AED out of what appeared to be The UK Dental Clinics account (i.e. the 216 account) were Mr. Swallow's salary. He said in paragraph 25 of his judgment: "*If -216 is UK Dental Clinic's bank account, it seems to me highly significant that one cannot identify any other regular payments coming out of it (other than the 90,000) which could plausibly be suggested to be Mr Swallow's salary. I have not been able to spot any other regular monthly payments coming out of -216 of any other rounded sums…*". The District Judge's inference that if Mr. Swallow's salary was paid into

the 608 account, then the 608 account must belong to Mr. Swallow was a fair one. There was no "tautology".

iv) The fact referred to by the District Judge that Mr. Swallow's 1998 passport had an address in Holyport Road was relevant to the question whether Mr. Swallow had a connection to the Maidenhead area in 2010. (I have commented above on the further point that the signed loan application form in 2009 also gave Holyport Road as Mr. Swallow's home address in the UK).

(d) The Judge wrongly criticised Mr. Swallow on several occasions for failing to put forward evidence on certain points.

89. The short answer to this point is that Mr. Swallow had the task of showing that there were substantial grounds to dispute the debt: see paragraph 45 above. I recognise that the District Judge suggested at paragraph 5 of his judgment that if the applicant on a set-aside application merely puts forward a witness statement entering denials, the consequence is that the burden shifts to the respondent to demonstrate that those denials are manifestly or virtually incredible. That is not quite right. As Roth J. pointed out in Crossley-Cooke v. Europanel (UK) Limited [2010] EWHC 124 Ch at [16]: "*The test as to whether that ground is satisfied is whether the alleged debtor can show "a genuine triable issue"*" (emphasis added). If Mr. Swallow failed to deal with central points clearly raised in the Bank's case, it was fair and correct for the Judge to refer to that in his reasoning.

(e) The Judge failed to take into account that some of the points which he said called for explanation were in fact explained by the Appellant's evidence that

he had never had dealings with the Respondent and did not deal with The UK Dental Clinics' financial affairs

90. The main points which the District Judge mentioned as calling for explanation were: Mr. Swallow's failure to deal with the question whether the 216 account belonged to The UK Dental Clinics (paragraph 24); his saying nothing at all to dispute the Bank's case that 90,000 AED was at the time his salary (paragraph 27); his failure to give his UK home address or addresses, although being willing to say where he had not lived (paragraphs 31 and 41). There was nothing objectionable in the District Judge's approach. These points did not depend on an assumption that Mr. Swallow had dealings with the Bank, and Mr. Swallow's protestation that he was not in a position to comment on whether the 216 account belonged to the UK Dental Clinics is unconvincing in view of the fact that his wife controlled the company bank account.

(f) The District Judge was wrong to consider what type of fraud was said to have been practised on Mr. Swallow

91. In her skeleton argument, Ms Dixon argued that the burden did not fall on Mr. Swallow to explain how the fraud had been perpetrated or why; rather, it was for the Bank to prove that Mr. Swallow had entered into the credit card and loan agreements. This submission misunderstands what the District Judge was doing. For example, his statement in paragraph 33, that if the Bank was responsible for the fraud then it was "*an astonishingly elaborate and sophisticated fraud*", was making a fair point about the inherent improbability of that scenario.

(g) The Judge failed to take into account relevant evidence

92. This ground of appeal outlines four matters with which it is suggested the District Judge failed to deal. Those are: the fact that Mr. Swallow's assertion that he had not signed the bank application forms was uncontradicted by expert evidence from the Bank or else by a witness saying he saw Mr. Swallow sign them; there were differences between the signatures which required explanation; Mr. Swallow's assertion that he had had no dealings with the Bank; and the fact that Mr. Swallow said he had no involvement in The UK Dental Clinics' finances. There is no substance in this. Each of these matters was properly and sufficiently addressed in the District Judge's judgment.

(h) "The Judge appears to have reached his conclusion because if there was a fraud it was a good fraud, that was not a sound basis for his decision"

93. This final point of appeal raises essentially the same issue as has already been addressed under heading (f) above. It mischaracterises what the District Judge was saying. His point was not that "if there was a fraud it was a good fraud". He was drawing attention to the inherent implausibility of what would need to be assumed in order for Mr. Swallow's case to be accepted.

Conclusion

94. For all the above reasons, I dismiss the appeal.