Neutral Citation Number: [2021] EWHC 1853 (Comm)

Case No: LM-2020-000069

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2021

Before:

Stephen Houseman QC (Sitting as a Deputy Judge of the High Court in the London Circuit Commercial Court)

- -

Between:

MOUNTAIN ASH PORTFOLIO LIMITED (as Trustee of CF STRUCTURED PRODUCTS BV)	**Claimant**
- and -	
BORIS TSIBENOVICH VASILYEV	**Defendant**

- -
- -

Tom Poole QC & Chloe Shuffrey (instructed by **Edmans & Co**) for the **Claimant**
Richard Power (instructed by **Dentons UK & Middle East LLP**) for the **Defendant**

Hearing date: 23 June 2021
Draft circulated: 5 July 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 3pm on 7 July 2021.

- -

Stephen Houseman QC Sitting as a Deputy Judge of the High Court:

INTRODUCTION

1. By application notice dated 5 February 2021 ("**Set Aside Application**") the Defendant seeks to set aside a default judgment entered against him on 23 September 2020 in the sum of £101,404,140 ("**Default Judgment**"). The Set Aside Application is made pursuant to CPR 13.3.

2. These proceedings were issued by the Claimant ("**MAP**") against the Defendant ("**Mr Vasilyev**") on 29 April 2020. All court documents on the file indicate that the case was issued in the Commercial Court and assigned to the Financial List. The Set Aside Application was listed and heard by me sitting in the London Circuit Commercial Court. Both parties were content for me to proceed to determine the application in this capacity notwithstanding the absence of any order or direction transferring this action from the Commercial Court or Financial List. The title to this judgment seeks to reflect that position.

3. The underlying claim concerns a debt said to be due pursuant to a shareholders' guarantee dated 1 November 2007 whereby Mr Vasilyev - together with his then co-shareholder, Georgy Trefilov ("**Mr Trefilov**") - jointly and severally guaranteed the obligations and liabilities of MARTA Unternehmensberatungs GmbH ("**MUG**") under a loan entered into by that company on 31 October 2007 ("**Guarantee**"). The original lender and suretyship-beneficiary was a Dutch corporate vehicle known as CF Structured Products BV ("**CFSP**"). MUG defaulted on the loan during 2008. It was placed into insolvency process in early 2009 and subsequently liquidated in 2017.

4. Mr Vasilyev disputes the authenticity of his purported signature on the Guarantee, in effect disowning or disavowing the instrument altogether, and thereby denying liability in this action. In essence he contends that this litigation is fraudulent in nature. (References to the "Guarantee" or its signature/execution or any steps taken pursuant to its terms are descriptive and take account of Mr Vasilyev's position.) Mr Vasilyev separately disputes whether the Guarantee was executed as a deed on 1 November 2007 in accordance with statutory requirements under English law, and on this basis says that the claim against him is time-barred. More broadly, he contends that these fraudulent proceedings form part of a campaign being waged against him by Mr Trefilov. Mr Vasilyev seeks to set aside the Default Judgment on these and other stated grounds, addressed below.

5. A volume of witness evidence has been filed in relation to the Set Aside Application, together with substantial documentary evidence forming the exhibits to such witness statements. The majority of it is from MAP, including a statement from Mr Trefilov himself, in opposition to the Set Aside Application. Much of the factual evidence is directed towards the intrinsic merits of Mr Vasilyev's substantive position. It also covers the circumstances in which these proceedings were served or otherwise brought to his attention (prior to and since the Default Judgment) and his subsequent response.

6. In addition to the factual witness evidence, both sides sought permission under CPR Part 35 to rely upon independent opinion evidence as to the authenticity of Mr Vasilyev's alleged signature on the Guarantee. See paragraphs 33 to 35 below.

7. Despite some discussion about validity of service of the claim form on/before 29 August 2020, i.e. within its initial four month period of validity following issuance of proceedings on 29 April 2020, the Set Aside Application was not based upon the mandatory ground in CPR 13.2. Mr Vasilyev seeks to set aside the Default Judgment on discretionary grounds under CPR 13.3.

BACKGROUND

8. There is a substantial amount of background to this dispute, both prior to execution of the Guarantee on 1 November 2007 and since. I will summarise what matters for present purposes.

9. Until April 2008 Mr Vasilyev was employed as vice president for retail of the Marta group of companies which by mid-2007 owned a chain of supermarkets under the 'Grossmart' brand within the Russian Federation. Mr Trefilov was the founder and majority stakeholder in the Marta group. MUG, an Austrian-registered entity, is or was the group parent company. As at the date of the Guarantee, Mr Trefilov owned 75% of the shares in MUG whilst Mr Vasilyev owned 25%. The precise reason for this minority shareholding belonging to Mr Vasilyev is not material.

10. From around June 2007 there were discussions about selling the Grossmart chain to Rewe, a German business with whom the Marta group had undertaken a joint venture over several years through another Austrian company, Billa Russia GmbH ("**Billa**"). This proposed deal was known internally as 'Puma-3'. It contemplated obtaining additional financing and re-financing for the Marta group, including MUG. MUG obtained short-term interim loans from a Russian bank, KIT Finance Investment Bank OJSC ("**KIT**"), in the sum of RUB 1.015 billion which were repayable on 1 November 2007.

11. On 28 September 2007, MUG and Billa entered into a Framework Agreement to implement the Puma-3 deal. Mr Trefilov was subsequently accused by Austrian authorities of having forged signatures on the Framework Agreement and a related share purchase contract, although a request for his prosecution was withdrawn in September 2013 in light of Mr Trefilov's conviction in the UK in May 2013 for using false identification documentation. I mention this here as it featured in Mr Vasilyev's evidence and analysis on the Set Aside Application.

12. I was referred to contemporaneous documentation, mostly emails to or from Mr Vasilyev during the period June to October 2007, suggesting that Mr Vasilyev was more directly or integrally involved in this (re-)financing project, including the Framework Agreement, than his witness evidence would suggest. It does appear from these communications that Mr Vasilyev was informed of and involved in such matters, consistent with him being named a co-surety as a principal shareholder of MUG in the Guarantee.

13. On Wednesday 31 October 2007, MUG as borrower and CFSP (a Dutch SPV set up by KIT) as lender entered into a loan agreement in the sum of US$100m ("**Loan Agreement**"). This loan was part of a complex transaction which facilitated the provision of financing to MUG by Ashmore, an English investment fund which was the ultimate source of the financing. The Guarantee relates to the liability under the Loan

Agreement. It is governed by English law. CFSP is the named beneficiary/creditor in the Guarantee.

14. On the same day, Clifford Chance CIS Limited ("**CC-CIS**"), who were acting on behalf of KIT in this financing project, received a number of documents relating to Puma-3 which were purportedly signed by Mr Vasilyev. These included a signature page for the relevant guarantee that had apparently been signed that day but not witnessed or properly executed - referred to as the "**31 October Guarantee**" for descriptive purposes. CC-CIS informed the parties, including Mr Trefilov and Mr Vasilyev, by email later that day that a fresh version of the guarantee would require signing and executing the next morning, Thursday 1 November 2007, at the offices of Noviy Registrator CJSC ("**New Registrar**") in Moscow. The New Registrar acted as the registrar of the shares of a Russian company in the Marta group. These events were subsequently explained in a letter dated 22 January 2021 from Clifford Chance LLP in London to Mr Vasilyev's solicitors (Dentons) to which I return below.

15. It appears that the deficiency in the execution of the 31 October Guarantee was that the (purported) signatures of both Mr Trefilov and Mr Vasilyev appeared where the witness signature for each should be signed, there being no separate witness signature or details for either (purported) surety signature. It remains unclear where or when these surety signatures were placed on the 31 October Guarantee.

16. A meeting on the morning of Thursday 1 November 2007 appears to have taken place at the offices of the New Registrar ("**1 November Meeting**"). Time was of the essence to complete the (re-)financing that day in light of the expiration of MUG's short-term financing described above. The meeting was scheduled to start at 10am. A contemporaneous agenda for the meeting makes no reference to the (re-)execution of the Guarantee, although that may be because this further step wasn't contemplated at the time the agenda was prepared or else it was not seen as a piece of primary business (to be) conducted at such meeting. It appears that the meeting was required for completion of relevant financing documentation, including re-registration of shares in a Russian company. Representatives of CC-CIS and KIT were expected to be present, as was Mr Trefilov, Mr Vasilyev and a security analyst employed by Marta Finance CJSC, Ms Irina Lerner (known by her unmarried name at the time, Ms Kozlova), who would witness their signatures ("**Ms Lerner**").

17. Mr Vasilyev says he has no recollection of attending the 1 November Meeting and denies that the signature placed on the Guarantee dated 1 November 2007 is his own. He contends that the purported signature is a forgery. I refer to this for convenience and without prejudice as to the burden of proof at any trial as the "**Forgery Issue**".

18. According to its terms the Guarantee appoints Clifford Chance Secretaries Limited in London ("**CCS**") as Mr Vasilyev's agent for service of process (clause 20.2). MAP relied upon this provision in order to effect service of the present proceedings upon Mr Vasilyev via CCS on 26 August 2020 pursuant to CPR 6.11(1). That was just two clear business days before expiration of the claim form on 29 August 2020 (CPR 7.5(1)). Mr Vasilyev disputes the existence of any valid appointment of CCS as his service process agent, so far as relevant.

19. Pausing there, if it turns out that the Guarantee was never signed by Mr Vasilyev, as he contends, then it follows that this method of service upon him as a foreign-domiciled

defendant was not effective, meaning that these proceedings have not yet been served. However, since Mr Vasilyev is not in a position to *show* that this is so at this stage, he is unable to set aside the Default Judgment under CPR 13.2 and does not seek to do so. This point, therefore, adds nothing to the primary ground under CPR 13.3, i.e. the Forgery Issue. Mr Vasilyev has made no challenge to jurisdiction or service upon him under CPR Part 11 and, in the absence of any acknowledgement of service on his behalf, has not formally indicated an intention to make such challenge.

20. Returning to the circumstances of the purported execution of the Guarantee, the signature page shows Ms Lerner as having signed as the witness to both Mr Vasilyev's and Mr Trefilov's signatures; her name and address are handwritten in the appropriate spaces for the witness details against each surety signature. As outlined above, Mr Vasilyev separately disputes that Ms Lerner witnessed his signature in his presence. If he is correct about that then the Guarantee was not executed as a deed under English law (see paragraph 57 below). If that is the case, then the present claim would be time-barred or, at any rate, there is (at least) a real prospect that it would be so for present purposes. I refer to this issue for convenience and without prejudice to the burden of proof at any trial as the "**Witness/Deed Issue**".

21. Pursuant to the Guarantee Mr Trefilov and Mr Vasilyev are each jointly and severally liable in respect of MUG's liabilities under the Loan Agreement to the maximum sum of US$126,000,000 (clause 3.2).

22. As noted above, Mr Vasilyev left his employment with the Marta group in April 2008. This followed, according to him, a physical altercation with Mr Trefilov about a month earlier in a casino in Moscow. Mr Vasilyev says that he was assaulted by Mr Trefilov on that occasion.

23. MAP places significant emphasis upon an email dated 19 January 2009 from Olesya Turchina to Mr Vasilyev. This email forwards an email dated 16 January 2009 from a Dr Manfred Biegler to Ms Turchina. The email chain has a subject heading: "*Guarantee Boris Vasilyev*". A total of eight pdf documents are attached, six of which include the word "*Guarantee*" and what appears to be the date of 31 October 2007 rendered as "*071031*". I refer to this email chain for convenience and given its potential significance as the "**January 2009 Email**".

24. Further as regards the January 2009 Email:

    (a) The email dated 16 January 2009 from Dr Biegler to Ms Turchina states (in translation): "*As agreed please find enclosed the guarantee of Boris Vasilyev in connection with the USD 100 Mio. Loan of [MUG] with [CFSP / KIT] […] Should you have any additional questions or queries please do not hesitate to contact me.*."

    (b) Dr Biegler is Marta's former accountant in Austria who worked for or provided professional services to Mr Vasilyev post-Marta. Ms Turchina was Mr Vasilyev's secretary during his employment, but she left at the same time or after he left and became his personal or private secretary. These details were provided to me on instruction by Mr Poole QC on behalf of MAP after the hearing.

    (c) Ms Turchina appears to have forwarded Dr Biegler's email (with its attachments) to Mr Vasilyev on 19 January 2009, stating (in translation): "*here are the*

documents you asked to get from Biegler [i.e. Biegler Manfred] at the meeting in Vienna".

(d) Dr Biegler's email (16 January 2009) was sent to Ms Turchina's private email address. Ms Turchina then forwarded it from that email account to Mr Vasilyev's private email address. (So far as may be relevant, there are no indecipherable characters on the face of this email chain.)

(e) The January 2009 Email was about nine months after the end of Mr Vasilyev's employment within the Marta group and at a time when Mr Vasilyev was engaged in legal proceedings in Moscow concerning the authenticity of his signatures on several guarantees related to the Puma-3 deal (see paragraph 26 below).

25. I requested in the hearing an explanation for how MAP came to have the January 2009 Email. Such explanation had been sought between solicitors but not forthcoming with any real specificity prior to the hearing. Such explanation was provided to me on instruction by Mr Poole QC on behalf of MAP after the present hearing. That explanation has not been challenged. Whilst Mr Vasilyev does not specifically comment on the January 2009 Email in his reply evidence, he does raise a concern about the authenticity of emails emanating (as he suspects) from or via Mr Trefilov, including by reference to indecipherable characters appearing on some of them - although that concern does not arise in this specific context, as noted above. I consider the January 2009 Email in my analysis of the Forgery Issue below.

26. BTA Bank commenced legal proceedings against Mr Vasilyev in the Moscow court during 2008 seeking to enforce guarantees dated 13 August 2007, 11 February 2008 and 27 March 2008 concerning related financing arrangements (together, "**BTA Guarantees**"). By a judgment dated 6 September 2010 such claims failed, in short because BTA Bank did not prove that Mr Vasilyev's signature on the relevant instruments was authentic or genuine ("**Moscow Judgment**"). Mr Vasilyev relies upon the Moscow Judgment as similar fact evidence suggesting a pattern of forging of his signature on the part of others to his detriment. This is said to support his case theory that the present litigation is itself fraudulent.

27. After MUG was placed into insolvency process under Austrian law, Deutsche Trustee Company Limited ("**DTCL**"), as assignee of CFSP's rights as beneficiary under the Guarantee, demanded payment from Mr Vasilyev under the Guarantee by letter dated 27 April 2009 ("**Demand Notice**"). This notice is said to have started time running for any claim under the Guarantee, hence the limitation defence said to arise by virtue of the Witness/Deed Issue, as noted above. Mr Vasilyev denies receiving the Demand Notice. MAP subsequently succeeded DTCL by assignment during 2018 and therefore claims to enforce the Guarantee in these proceedings.

28. Mr Vasilyev contends that the current proceedings have been instigated and pursued against him by or at the behest of Mr Trefilov as part of an ongoing personal and business conflict stretching back to the circumstances of Mr Vasilyev's departure from the Marta group in April 2008. There is no direct evidence of this, although Mr Trefilov has provided a witness statement in opposition to the Set Aside Application. The precise circumstances as to how Mr Trefilov 'crossed the line' or else collapsed the original commercial conflict between lender/borrower remain unknown. For his part Mr Trefilov denies being behind these proceedings against Mr Vasilyev, but does not

deny that there is a degree of antagonism between the two men. This much is evident from the evidence before the Court.

29. As for Mr Trefilov's own liability as co-surety under the Guarantee, this was effectively compromised or commuted in the sum of £76,262.62 by Mr Trefilov's trustee in bankruptcy after he was declared bankrupt in this jurisdiction. A further sum of €512,508.69 is said to have been received from MUG during its liquidation process in 2017, but that did not reduce the total indebtedness below the US$126,000,000 cap in the Guarantee. After deducting the sum received from Mr Trefilov, and making relevant adjustments for foreign currency exchange, MAP sought £101,394,000 (being US$125,905,301.50 at the relevant conversion date) from Mr Vasilyev in its Particulars of Claim in the present action. The Default Judgment was entered in the sum of £101,404,140, which includes £10,140 of legal costs.

30. For reasons that are not explained, the Claim Form refers to a "*Deed of Guarantee entered into on 31 October 2007*" whilst the Particulars of Claim filed almost four months later on 24 August 2020 refer (at paragraph 13) to a "*deed of guarantee dated 1 November 2007*". Mr Vasilyev's counsel drew attention to this discrepancy as part of the overall submission that the circumstances surrounding execution of the Guarantee remain unclear and ought to be explored through the forensic rigours of the trial process after disclosure.

31. There is a relatively detailed procedural and logistical history surrounding steps taken to serve or bring these proceedings and/or the Default Judgment to the attention of Mr Vasilyev at his home address in Moscow during September-October 2020. I deal with this aspect, so far as material, in the relevant section(s) of my analysis below.

32. It suffices at this stage to note that Mr Vasilyev didn't purport to disown the Guarantee until 30 December 2020, some ten weeks or so after receiving the Default Judgment (as he says) on 19 October 2020. His disavowal of the Guarantee at that time coincided with learning that MAP had recently (on 22 December 2020) made an application seeking recognition of the Default Judgment in Switzerland ("**Recognition Application**").

EXPERT EVIDENCE PERMISSION

33. Mr Vasilyev sought permission by application notice dated 8 June 2021 to adduce and rely upon a report by Sergey Khmyz of the Russian Federal Centre for Forensic Science dated 29 March 2021 ("**Khmyz Report**"). MAP contingently sought permission to adduce and rely upon two reports, namely a report by Ms Ismatova dated 21 May 2021 addressing the methodology in the Khmyz Report ("**Ismatova Report**") and a report by Ms Shvarts dated 10 June 2021 ("**Shvarts Report**") by separate application notices dated 9 and 14 June 2021, respectively.

34. I refused permission in respect of the Khmyz Report in a separate ruling given orally during the hearing. I do not repeat the reasons for that ruling, save to observe that such report does not contain any statement of compliance with CPR Part 35 or equivalent language nor a statement of truth. Mr Power, appearing for Mr Vasilyev, understandably did not endeavour to persuade me that the Khmyz Report qualified as "expert" evidence within the meaning of CPR 35.2(1). I was accordingly not asked to grant permission in respect of the Ismatova Report or Shvarts Report and did not do so.

35. I proceeded on the basis, as encouraged by Mr Power and not disputed by Mr Poole QC, that all three reports contain hearsay evidence and it is for me to weigh such evidence in the context of Mr Vasilyev's burden of proof on the Set Aside Application.

LEGAL FRAMEWORK

36. The legal framework is uncontroversial. Both sides cited authority for emphasis rather than to resolve any material issue of principle. I do the same below.

37. The two limbs or gateways in CPR 13.3(1)(a) and (b) are disjunctive. If either is satisfied, the Court then has a broad discretion as to whether to set aside the relevant default judgment. The applicant/defendant has the burden both as to satisfaction of one or other gateway and also the exercise of discretion in its favour. This reflects the underlying policy of legal certainty which protects a claimant's legitimate expectation qua judgment creditor to act upon and take the benefit of a judgment which has been properly entered in its favour.

38. Consistent with such policy, an applicant/defendant under CPR 13.3 must show that it has acted promptly in making such application: CPR 13.3(2). Promptness depends on the particular circumstances, and should ordinarily be measured from the time when the defendant learns of the default judgment. Further, it is now established that an applicant/defendant under CPR 13.3 must also satisfy the test for 'relief from sanctions' under CPR 3.9, reflecting the fact that the relief sought from the Court arises from that party's own prior procedural default - in this case, failure to file acknowledgement of service within 14 days of (assumed) service of the claim form: CPR 58.6(2).

39. As regards the first gateway (CPR 13.3(1)(a)), the leading authority is the Court of Appeal decision in *ED&F Man Liquid Products Ltd v. Patel* [2003] EWCA Civ 472; [2003] All ER (D) 75 which sets the threshold merits test as equivalent to summary judgment albeit with the burden reversed. This means that a defendant must show it has a realistic as opposed to fanciful prospect of successfully defending the claim. A realistic prospect is one that carries some degree of conviction and not one that is merely arguable - it must have real substance: see *JSC VTB Bank v. Skurikhin & Others* [2014] EWHC 271 (Comm).

40. As regards the second gateway (CPR 13.3(1)(b)), the decided cases are somewhat equivocal as to whether a defendant's non-receipt of the proceedings prior to the default judgment should itself constitute a 'good reason' for setting aside and/or permitting him to defend the claim: 2021 White Book at 13.3.2. This appears to be a contextual analysis involving circumstances such as whether the claim was brought out of the blue or without pre-warning: see *S T Shipping & Transport Inc v. Vyzantio Shipping Ltd (The "Byzantio")* [2004] EWHC 3067 (Comm); [2005] 1 Lloyd's Rep. 531 (HHJ Havelock-Allan QC). In some cases, the defendant's lack of actual awareness of the proceedings prior to default judgment did not provide sufficient 'good reason' for this purpose: see *Wards Solicitors v. Hendawi* [2018] EWHC 1907 (Ch).

41. At paragraph [42] of *Wards Solicitors*, HHJ Paul Matthews (sitting as a Judge of the High Court) summarised the case law as follows:

"*It may not be necessary to show an arguable defence, but it is necessary to show how setting aside the judgment will serve some useful purpose, such as in relation to reputational or costs issues.*"

42. As regards the requirement for promptness (CPR 13.3(2)), this is always an important factor in the Court's exercise of discretion: see 2021 White Book at 13.3.3. There are no hard and fast rules or even indicative tariffs in play, it all depends on the circumstances of each case. This inquiry is at heart about justified as distinct from unjustified delay in bringing the application. That in turn requires the Court to be satisfied that any apparent delay has been properly explained by the defendant/applicant. Delay may be justified where investigations are necessary in a foreign country: see e.g. *Shandong Chenming Paper Holding Ltd v. Saga Forest Carriers Ltd AS* [2008] EWHC 1055 (Comm).

43. The impact of any unjustified delay (i.e. lack of promptness) should be considered as part of the Court's exercise of discretion under CPR 13.3. This includes whether such unjustified delay has caused prejudice to the claimant qua judgment creditor, i.e. whether the setting aside of the default judgment notwithstanding such delay would cause prejudice to the claimant.

44. CPR 13.3 itself makes it clear that the Court is empowered by CPR 3.1 to attach conditions when making any order under this provision. There is no fetter on the nature or scope of conditions that may be attached. The Court must further the Overriding Objective of the CPR when attaching conditions to any order.

ANALYSIS OF SET ASIDE GROUNDS

45. Broadly speaking three issues arise for determination by reference to the legal framework outlined above:

(1) Threshold Merits. Has Mr Vasilyev shown that he has (at least) a real prospect of defending the claim, pursuant to CPR 13.3(1)(a), by reference to the Forgery Issue and/or the Witness/Deed Issue?

(2) **Good Reason.** Alternatively, has Mr Vasilyev nevertheless shown that there is a good reason to set aside the Default Judgment or allow him to defend the claim, pursuant to CPR 13.3(1)(b)?

(3) Discretion. If either (1) or (2) above is satisfied, should the Court exercise its discretion to set aside the Default Judgment having regard, in particular, to whether the Set Aside Application was made promptly?

46. Issues (1) and (2) are alternatives, in the sense that Mr Vasilyev doesn't need to resort to Good Reason if he satisfies Threshold Merits. If he is required to show Good Reason, then that must fall to be determined in light of the negative answer to Issue (1), i.e. a good reason to allow the proceedings to go forward notwithstanding the absence of a showing of a real prospect of successfully defending them on current materials.

47. I address each of these issues in turn below.

(1) Threshold Merits: CPR 13.3(1)(a)

48. Mr Vasilyev says that he has (at least) a real prospect of successfully defending this claim on the basis of the Forgery Issue and the Witness/Deed Issue. Either will suffice for present purposes. I deal with them in reverse order below, for reasons that will become apparent.

49. Before doing so, it is worth emphasising that the crucible of this dispute concerns events that occurred in October/November 2007, almost 13 years before the Default Judgment was entered against Mr Vasilyev. The claim depends upon underlying events of default on the part of MUG pursuant to the Loan Agreement which occurred in April-November 2008 and led to the Demand Notice being sent in April 2009. Whilst MUG was only liquidated in 2017 and MAP only succeeded (via DTCL) to the position of CFSP during 2018, there is no obvious reason why these proceedings were commenced in April 2020.

50. The 12 year limitation period applicable on the assumption that the Guarantee is a valid deed under English law would appear to have expired in the meantime on 27 April 2021, i.e. 12 years after the Demand Notice. It isn't clear why this action was commenced a year before that perceived limitation deadline. More importantly, it isn't clear why this action wasn't commenced much sooner than it was given the amount at stake on the face of things and the obvious interest on the part of MAP (or its predecessors) in recovering such substantial sums.

51. There is no current suggestion by Mr Vasilyev that this action is an abuse of process in the sense of being pursued against him as an instrument of oppression or for illegitimate or illicit reasons, although he contends that it is a fraudulent claim being pursued as part of the personal and business feud between himself and Mr Trefilov. Nevertheless, the fact that the action turns on events which took place so long ago, and would require MAP to prove at any trial that the Guarantee was signed by Mr Vasilyev and witnessed by Ms Lerner in his presence at the 1 November Meeting, creates an inevitable probative gradient for MAP but for the Default Judgment. On the face of things, MAP and whoever is moving this claim behind the scenes on its behalf have created this situation for themselves by waiting so long to commence proceedings. This provides important context to the evaluation of Threshold Merits.

52. All that said, there are certain inherent probabilities that weigh in favour of the conclusion that the Guarantee was properly and lawfully executed at the 1 November Meeting. Representatives of CC-CIS and KIT attended that meeting. It seems implausible that Mr Vasilyev's signature could have been forged in his absence or that Ms Lerner did not properly witness his and Mr Trefilov's signatures in their presence as confirmed on the Guarantee. It is implausible, absent explanation, that such a substantial financing deal was completed or treated as having been duly completed in that meeting without proper execution of the Guarantee, forming one of its important components.

53. Mr Vasilyev offers no theory as to how the forgery of his signature occurred as a matter of fact, bearing in mind the presence of CC-CIS and KIT at that completion meeting. If, as now suggested, Ms Lerner did not witness Mr Vasilyev's signature in his presence at that meeting, it remains unclear how CC-CIS would have proceeded with completion given that it was the absence of witnessing on the 31 October Guarantee that had caused

them to require re-execution of such instrument at the 1 November Meeting. No explanation has been proffered by either side as to the circumstances of the (purported) signing, albeit unwitnessed, of the 31 October Guarantee.

54. As addressed below, there is in fact no direct corroborative witness evidence on either side as to whether Mr Vasilyev attended or signed the Guarantee in the 1 November Meeting or whether Ms Lerner witnessed such signature in his presence. No witness evidence has been obtained from either CC-CIS or KIT and none may be forthcoming. None of the witnesses or other hearsay evidence relied upon by MAP has any direct bearing. The only witness evidence from people 'in the room' is that of Mr Trefilov and Mr Vasilyev themselves. They disagree about what occurred, just as they appear to disagree about almost every detail of this dispute. In terms of direct evidence, it is one man's word against the other's on the central factual issue in these proceedings.

(a) Witness/Deed Issue

55. Ms Lerner provided a notarised statement in her native language dated 15 April 2021 for the benefit of Mr Vasilyev on the Set Aside Application ("**Lerner Statement**"). The translated version records (in paragraph 1) that she was provided with a copy of the Guarantee "*bearing an outward resemblance to my signature*" on 14 April 2021, i.e. the day before her statement was notarised in Moscow. In paragraph 2 she describes her role as a security analyst for Marta Finance CJSC during 2006-2008, a role which often required her to attend at the offices of the New Registrar in Moscow (paragraph 4) although coordinating and formalising sureties, especially those in English such as the Guarantee, were not within her direct responsibility (paragraph 5).

56. Paragraph 3 contains Ms Lerner's purported recollection as to witnessing Mr Vasilyev's and Mr Trefilov's signatures on the Guarantee at the 1 November Meeting. She says (at sub-paragraph (i)) that she "*cannot rule out*" after such a long period of time that her certification as a witness of such signatures "*may have taken place*" due to the "*outward similarity*" of her signatures on the Guarantee with her own genuine signature. However, she is clear that this did not occur in the physical presence of either Mr Trefilov or Mr Vasilyev, the co-owners of the business, neither of whom she met in person other than on one occasion at a corporate holiday event for employees (sub-paragraph (iii)). In particular:

(a) At paragraph 3(ii), Ms Lerner says that if the witness signatures are hers then she is "*sure that this was done not in the personal presence of*" either Mr Trefilov or Mr Vasilyev.

(b) At paragraph 3(v), Ms Lerner says that if the witness signatures are hers then "*they may have been executed by me, for example, at the request of one of the employees of the legal or finance department or other employees*" … "*but definitely not at the request or in the personal presence of*" either Mr Trefilov or Mr Vasilyev.

57. On the face of it, the Lerner Statement casts significant doubt as to whether the Guarantee was duly executed as a deed as a matter of English law. Section 1(3)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 requires, for present purposes, that the witness is present to attest the signature of a deed. Ms Lerner's

specific recollection is that she was not present when either Mr Trefilov or Mr Vasilyev signed the Guarantee.

58. If accurate, the Lerner Statement does not reflect well on Ms Lerner's professional integrity. She says that if she signed the Guarantee as a witness it was other than in the presence of the surety signatories. Although she is not to be assumed to be familiar with English law, such conduct does not accord with normal business standards or common sense or good conscience. The Lerner Statement is, in this specific sense, self-incriminatory.

59. MAP disputes the veracity of the Lerner Statement. The basis for this submission is that it results from intimidation of Ms Lerner in the weeks before she made her notarised statement. MAP says that Ms Lerner's free will was overborne by intervention of the Federal Security Service of the Russian Federation ("**FSB**") at some point between 24 February and 30 March 2021. In this context, MAP refers to the unexplained change of heart on the part of Ms Lerner after she first appeared to evade contact by Mr Vasilyev (according to his first witness statement dated 4 February 2021) and subsequently told one of MAP's witnesses (Natalia Maslennikova) on 24 February 2021 that she didn't want to get involved in this legal dispute.

60. I was referred in this context to an email sent at 10.51pm on Thursday 1 April 2021 from Ms Maslennikova to MAP's solicitors ("**1 April Email**"). In this email Ms Maslennikova describes a phone call she received from Ms Lerner. The date of the call is not disclosed - it may have been earlier that same day given the sensitive subject-matter and the timing of the email itself. According to the email, Ms Lerner told Ms Maslennikova in the phone call about having been called out of the blue by the FSB (again, on an undisclosed date) and "*invited to have a talk*" at their office at Bolshaya Lubyanka 2 in Moscow "*about the Marta Holding case*". No details are provided. Ms Lerner is recorded as saying that she attended and spoke to the FSB, but the date and duration of such meeting/interview are not revealed. Ms Lerner is recorded as expressing concern about her phone being "*tapped*" and that she "*didn't want to talk to [Ms Maslennikova] or to anyone else about Marta, and that she didn't want to talk about anything at all*". Ms Masslenikova observes in this email that Ms Lerner "*was clearly very nervous*" and goes on to comment about why the FSB would wish to speak to Ms Lerner about "*the Marta Holding case after so much time".* She observes that no one else has been contacted by the FSB in relation to the Marta group to her knowledge.

61. MAP's solicitors (Edmans & Co) wrote to Mr Vasilyev's solicitors (Dentons) on Sunday 4 April 2021, which was Easter Sunday, raising their concerns as to the contents of the 1 April Email and seeking assurances. The opening paragraph of the letter says: "*A matter has come to our attention, which we feel professionally bound to bring to your immediate attention.*" The letter ended by asking that Dentons confirm its receipt and "*revert after you have investigated this matter and spoken to your client*". No response was received from Dentons until a letter dated 4 June 2021, exactly two months later and despite a chaser in the meantime. In that letter it is denied that Mr Vasilyev could have exerted or did exert any influence over the FSB or has any knowledge of the FSB's alleged communication with Ms Lerner as recorded in the 1 April Email. It is not clear why it took Dentons two whole months to reply to the urgent inquiries made of them on 4 April 2021.

62. As noted above, the Lerner Statement is dated 15 April 2021 and refers to her having been provided with a copy of the Guarantee the previous day by someone on behalf of Mr Vasilyev. No explanation was provided by Mr Vasilyev in his second witness statement dated 30 April 2021, introducing and exhibiting the Lerner Statement, as to the impetus for contacting Ms Lerner afresh and sending her the Guarantee on 14 April 2021 or what may have prompted Ms Lerner to cooperate in this way after her initial and repeated reluctance to get involved on either side, as summarised above. MAP urges me to draw adverse inferences from the absence of such explanations when they could have been provided.

63. These events, albeit recorded in hearsay evidence in the 1 April Email, are a matter of serious concern for obvious reasons. It separately concerns me that Dentons did not respond on this matter for two whole months and did not volunteer any explanation for such a long response period, as to which see paragraph 135 below.

64. When I pressed Mr Poole QC to articulate the precise basis for MAP's challenge to the veracity of the Lerner Statement, he made it clear that he did not suggest that Mr Vasilyev himself had procured or influenced the intervention of the FSB in order to pressurise Ms Lerner to provide helpful evidence for the Set Aside Application. MAP nevertheless invites me to infer from the circumstances that Ms Lerner's will was overborne through intimidation by third party agency and that her notarised evidence should not be accepted at face value.

65. In the absence of any suggestion or evidence to suggest that Mr Vasilyev was personally involved in the FSB's request to speak with Ms Lerner - assuming, for present purposes, that Ms Lerner's account of what occurred as recorded in the 1 April Email is substantively accurate - the contention that the Lerner Statement does not represent Ms Lerner's genuine recollection expressed as a matter of her own free will becomes less easy to appreciate or accept. It is possible - and I stress the word possible - that Ms Lerner felt sufficiently pressurised by the FSB's intervention to give self-incriminatory evidence in these proceedings despite her initial reluctance to get involved, but that doesn't in itself vitiate her recollection as recorded in her notarised statement. I cannot dismiss the possibility that Ms Lerner felt pressurised to give substantially accurate evidence as to her recollection of witnessing the execution of the Guarantee, rather than being pressurised to give false or partial evidence.

66. I am not in a position on the present application to reach anything approaching a concluded view on these specific and troubling matters. It all ultimately goes to credibility and probative value. Whilst expressing my concern as to the events recorded in the 1 April Email, coupled with the conspicuous absence of explanations from or on behalf of Mr Vasilyev, I am nevertheless driven to conclude that the Lerner Statement creates genuine doubt as to whether the Guarantee was validly executed as a deed at the 1 November Meeting.

67. As noted above, the precise sequence of events on Wednesday 31 October and Thursday 1 November 2007 remains unclear. This much was accepted by Mr Poole QC on behalf of MAP. It is, as I have observed above, something of MAP's own making or doing after commencing this litigation so many years after the relevant events. MAP has created or increased forensic hazard for itself this way. Mr Vasilyev is entitled to exploit that hazard within legitimate limits.

68. It is not merely fanciful to speculate that Ms Lerner may have witnessed the two surety signatures, i.e. whether or not Mr Vasilyev's signature itself was genuine, other than in the presence of the relevant signatories. Her notarised evidence is adamant on this key factual circumstance, backed up by her insistence that she only ever met the business owners once at a corporate holiday event. If Ms Lerner did purport to witness the surety signatures retrospectively whilst not in the presence of the signatories, this is unlikely to have been the first (or last) instance of such occurrence throughout the world, however irregular or improper such behaviour.

69. Mr Trefilov has not asserted positively under statement of truth that Ms Lerner was present at the 1 November Meeting where she witnessed both his and Mr Vasilyev's signatures on the Guarantee. Further, and despite opportunity to do so, Mr Trefilov has not challenged Ms Lerner's stated recollection (in paragraph 3(iii) of her notarised statement) that she only ever met him on one occasion that was not at the offices of the New Registrar in Moscow. These omissions are noteworthy in the context of MAP's attack on the Lerner Statement. This all feeds into the forensic matrix in which MAP's burden of proof would ultimately fall to be discharged at any trial, including through cross-examination.

70. I take on board the points, well made on behalf of MAP, regarding inherent implausibility. No explanation exists for how or why the representatives of CC-CIS or KIT present at the 1 November Meeting could or would have regarded the financing documentation as properly executed and completed if they had not been validly witnessed 'in the room' by Ms Lerner. CC-CIS appears to have been alive to this formality as a matter of English law, having spotted the deficiency in the execution of the 31 October Guarantee. All of this remains unexplained and in large part unexplored. As already noted, there is no witness evidence from anyone on behalf of CC-CIS or KIT to assist at present.

71. In these circumstances, I conclude albeit with some instinctive hesitation that Mr Vasilyev has done enough to discharge his burden of showing that he has a real prospect of successfully defending the claim on the basis of the Witness/Deed Issue. If the Guarantee, even if otherwise valid and enforceable, was not executed as a deed in accordance with the statutory requirements of English law, then Mr Vasilyev has (at least) a real prospect of defending this claim on the basis of limitation, as explained above.

72. I therefore find that Mr Vasilyev has satisfied the gateway in CPR 13.3(1)(a) in respect of the Witness/Deed Issue. The degree to which, or margin by which, Mr Vasilyev has demonstrated threshold merits on the Witness/Deed Issue is a factor that the Court may take into account when exercising its broad discretion under CPR 13.3, addressed further below.

(b) Forgery Issue

73. This issue dominated the hearing before me, although the Witness/Deed Issue was embraced by Mr Power - with some judicial prompting - as 'route one to goal' on Threshold Merits. My conclusion above takes the pressure off the Forgery Issue.

74. The Forgery Issue is more complex and involved than the Witness/Deed Issue. The same broad themes concerning inherent implausibility and passage of time are in play,

of course. I have to approach the evidence on both sides with a keen eye on the standard of proof applicable in this context.

75. On behalf of Mr Vasilyev it is said that the Forgery Issue ultimately boils down to one man's word against another's and that, accordingly, there is (by definition) a triable issue on this pivotal dispute of fact. Mr Vasilyev makes the following points:

(a) Mr Trefilov and Mr Vasilyev have been engaged in a personal and business feud for many years. The current litigation appears to be orchestrated or influenced by Mr Trefilov behind the scenes, and is at any rate visibly and vociferously supported by him through witness evidence. Mr Trefilov's modest payment in apparent discharge of his liability as co-surety under the Guarantee compares tellingly with the £101,394,000 sought from Mr Vasilyev. This all suggests a bogus claim, it is said.

(b) Mr Trefilov is not to be trusted. He was convicted and given a custodial sentence in this jurisdiction during 2013 for using falsified identification documentation (see paragraph 11 above). He also had summary judgment entered against him in prior proceedings concerning a guarantee before the Commercial Court during 2014: see *OJSC Alpha-Bank v. Trefilov* [2014] EWHC 1806 (Comm).

(c) The Moscow Judgment shows that Mr Vasilyev has been the victim of forged signatures on financing documentation during 2007-2008 relating to the Puma-3 deal (see paragraph 26 above).

(d) The precise circumstances or sequence of events on Wednesday 31 October and Thursday 1 November 2007 remain opaque. Crucially, there is no evidence from CC-CIS or KIT or indeed anyone 'in the room' at the 1 November Meeting to corroborate Mr Trefilov's assertion that Mr Vasilyev attended and signed the Guarantee. A letter from Clifford Chance LLP dated 22 January 2021 which explains what occurred in respect of the 31 October Guarantee does not say anything about what occurred at or who attended the 1 November Meeting. An email sent to Mr Vasilyev and others at 9.38am on 1 November 2007 attaching the final version of the Guarantee does not, according to Mr Vasilyev, show that it was signed by him at the meeting starting 22 minutes later in Moscow - if anything, it refutes or undermines such inference.

(e) Mr Trefilov's own evidence is vague as to dates and details in general, making his (uncorroborated) recollection that Mr Vasilyev attended to sign the Guarantee less than compelling.

(f) The Khmyz Report, so far as admissible or material, concludes that the signature on the Guarantee is probably not that of Mr Vasilyev.

76. MAP says that Mr Vasilyev's word should not be taken at face value and there is enough circumstantial evidence to prove that he did sign the Guarantee at the 1 November Meeting. This is especially so when combined with the inherent implausibility that CC-CIS or KIT would have accepted the financing documentation without it being properly (re-)executed before their eyes in that completion meeting. MAP makes the following points:

(a) The contemporaneous documentation summarised in paragraph 12 above undermines Mr Vasilyev's attempt in his witness evidence to distance himself from the financing project at the relevant time. This is said to undermine the credibility of his specific denial that he signed the Guarantee - why else would he strain to distance himself from the project?

(b) The January 2009 Email suggests on its face that Mr Vasilyev spoke about, requested and was provided with an executed version of the Guarantee in early 2009. This was nine months or so after he left the Marta group following (as he says) being physically assaulted by Mr Trefilov in Moscow. Mr Vasilyev doesn't specifically address this email or challenge its authenticity in his reply evidence or submissions at the hearing.

(c) Mr Vasilyev's reaction when learning of the Default Judgment is telling, says MAP. On Mr Vasilyev's own case he received the Default Judgment (together with these proceedings, for the first time) when he returned to his home address in Moscow on Monday 19 October 2020, as addressed further below. Mr Vasilyev's solicitors, Dentons, wrote a detailed letter to MAP's solicitors some five weeks later on 24 November 2020 in which both liability and quantum were disputed, but no reference made to any denial by Mr Vasilyev that he ever signed the Guarantee. Dentons made reference to misrepresentation(s) inducing the Guarantee and a time bar defence based upon when any liability arose. It was only after Mr Vasilyev became aware of the Recognition Application in late December that he first disavowed the Guarantee.

(d) The troubling circumstances surrounding production of the Lerner Statement undermine Mr Vasilyev's denial as to having signed the Guarantee.

(e) The Khmyz Report is worthless. Its methodology is challenged in the Ismatova Report and there is evidence that the Russian Federal Centre for Forensic Science (to which Mr Khmyz belongs) has been accused of corruption in conducting handwriting analysis. The Shvarts Report concludes that Mr Vasilyev's signature on the Guarantee matches the signature samples analysed for him and that he probably signed it.

(f) MAP denies that Mr Trefilov is behind these proceedings or that they form part of any ongoing feud between the two individuals, so far as relevant. MAP contends that Mr Vasilyev is being opportunistic in his retrospective denial of having signed the Guarantee, that he is in effect playing a form of tactical burden of proof arbitrage in the absence of an original version of the Guarantee. In short, the forgery allegation is a bogus defence.

77. The above is a summary of each side's position on the Forgery Issue, doing my best to distil the main points. Each side criticised or sought to neutralise the effect of the points made by the other. As noted above, none of the handwriting analysis reports has been adduced as expert evidence pursuant to CPR 35. I regard them of marginal utility in the context of my evaluation as to the threshold viability of the Forgery Issue.

78. As regards the suggestion that Mr Trefilov is behind this litigation, there is some limited circumstantial evidence that this may be the case. The simple fact is obvious that Mr Trefilov's interests are now aligned with those of the successors to the original lenders.

Since I regard this as a neutral point, even if correct, I don't separately consider it or make any further observations about it. The existence of personal animus motivating these proceedings would not suggest that such proceedings were fraudulent in basis, even if it could be inferred that Mr Trefilov is the moving force behind the proceedings.

79. I am troubled by key aspects of Mr Vasilyev's position on the Forgery Issue. In particular, the absence of explanation for the January 2009 Email and the palpable delay between receiving the Default Judgment on (at latest) 19 October 2020 and first alleging through Dentons' letter dated 30 December 2020 that he had no recollection of signing the Guarantee. As to these two points:

(a) **January 2009 Email.** As described above, this email chain materially undermines Mr Vasilyev's contention that the Guarantee is a fraudulent instrument. If Mr Vasilyev challenged the authenticity of the January 2009 Email, I would have expected such challenge to be made and explained. It was not. Mr Vasilyev appears to have brushed aside this inconvenient piece of evidence. No suggestion is made that the Guarantee was not attached to the email (cf. 31 October Guarantee) despite the fact that the name of the pdf attachments might suggest otherwise. It remains unclear why Mr Vasilyev requested sight of the Guarantee in January 2009. MUG's events of default and various notices under the Loan Agreement were taking place at or around this time. The Demand Notice was sent, according to MAP, three months later on 27 April 2009. The Moscow proceedings brought against Mr Vasilyev by BTA Bank (in which the Moscow Judgment was later given) were afoot and live in early 2009, so it may be that Mr Vasilyev wished to check the Guarantee in the context of his challenge to the authenticity of his signatures on the BTA Guarantees. If Mr Vasilyev never signed the Guarantee, his conduct evidenced by the January 2009 Email makes no sense. I note also that Mr Vasilyev's solicitors (Dentons) chose not to reply to a letter dated 11 June 2021 from MAP's solicitors concerning Mr Vasilyev's access to his private email address.

(b) **Belated Forgery Allegation.** It is not immediately obvious why it took so long for Mr Vasilyev to disown the Guarantee when that is such a fundamental or foundational basis for disputing a claim of this kind, especially one where judgment has already been entered against him personally for £101 million. Mr Vasilyev is unlikely to have forgotten about the Moscow Judgment concerning other challenged signatures on financing documentation relating to Puma-3. It is not clear why Mr Vasilyev instructed his solicitors initially (see paragraph 76(c) above) to raise matters such as misrepresentation and limitation by way of defence to liability under the Guarantee: the misrepresentation allegation presupposes that Mr Vasilyev *did* execute the Guarantee; it is anathema to the forgery/fraud thesis. The timing of this core allegation, raised this way for the first time in the context of the Recognition Application late last year and only after MAP's solicitors confirmed that they did not have an original 'wet ink' version of the Guarantee, is apt to raise an eyebrow.

80. With all that said, however, it remains the case that MAP would have the burden of proof as to the authenticity of Mr Vasilyev's signature on the Guarantee were this matter to proceed to trial. Mr Vasilyev need only show that he has a real prospect of defending the claim on this basis for present purposes. His core point - vis. this is effectively one man's word against another's on the key factual issue in dispute - casts an inevitable

shadow over this threshold merits evaluation, however sceptical one might be as to the ultimate prospects of the Forgery Issue by reference to inherent probabilities or forensic exigencies.

81. In light of my conclusion on the Witness/Deed Issue, it isn't necessary for me to reach a conclusion as to threshold merits on the Forgery Issue. I am conscious that the evidential landscape may evolve or mature, including direct evidence from someone else who was 'in the room' at the 1 November Meeting, or perhaps further evidence surrounding the January 2009 Email.

82. As matters currently stand, I would be barely satisfied that Mr Vasilyev has discharged the burden upon him under CPR 13.3(1)(a) on the Forgery Issue. I say no more than that at the present stage, so as to preserve the substantive position in this litigation going forward - including any summary judgment application that MAP might wish to make against Mr Vasilyev in light of his pleaded defence and any additional evidence that may emerge (or, indeed, conspicuously not emerge) in the meantime.

83. In summary, I find that the threshold merits gateway in CPR 13.3(1)(a) has been satisfied by Mr Vasilyev in respect of the Witness/Deed Issue. I do not base my finding in this regard on the Forgery Issue. For the avoidance of doubt, nothing I have said about the Witness/Deed Issue should foreclose any summary judgment application that MAP may wish to make in future in light of any evidential developments that shed further light on the circumstances giving rise to the Lerner Statement or any adverse inferences that may be drawn in that context.

(2) Good Reason: CPR 13.3(1)(b)

84. This alternative gateway does not arise in light of my conclusion as to Threshold Merits. I will deal with it briefly.

85. The main ground invoked on behalf of Mr Vasilyev to satisfy his burden under CPR 13.3(1)(b) is that these proceedings were not brought to his attention prior to entering of the Default Judgment. A subsidiary ground advanced at the hearing concerned the magnitude of the Default Judgment.

86. Neither of these grounds, separately or cumulatively, would constitute a good reason to set aside the Default Judgment or allow Mr Vasilyev to defend this claim if, contrary to my conclusion above, there was not a real prospect of him successfully defending the claim itself. As already discussed, the authorities in this context speak about the existence of a legitimate basis or "*some useful purpose*" for allowing the proceedings to go forward notwithstanding the absence of threshold prospects of defending them.

87. There is some uncertainty on the available evidence as to whether the claim pack in these proceedings was received by Mr Vasilyev at his home address in Moscow prior to the Default Judgment being entered against him on 23 September 2020. This discrete factual issue turns on the interpretation of courier tracking records and covering explanations provided by CCS relating to attempted service on/before 3 September 2020. Mr Vasilyev denies receiving notice of these proceedings until 19 October 2020 when he returned to his home address in Moscow to find a letter dated 12 October 2020 enclosing the claim pack as well as the Default Judgment.

88. MAP's solicitors (Edmans & Co) provided the claim pack to CCS in London by courier on Tuesday 25 August 2020. For present purposes, this is assumed to have been valid service upon Mr Vasilyev on Wednesday 26 August 2020 pursuant to CPR 6.11(1) (see paragraph 7 above).

89. On Saturday 29 August, CCS contacted Edmans & Co by email seeking an address for Mr Vasilyev in Moscow for onward transmission of the claim pack by courier. On Monday 31 August, the Late Summer Bank Holiday, Edmans & Co provided CCS by email with two addresses for Mr Vasilyev in Moscow: a home address and an office address. It is common ground that the home address contained a mis-spelling of the street name, namely "Kislov**o**skiy" instead of "Kislovsky". There is no street with the mis-spelt name in Moscow. In order to test the point, once raised in this application, MAP sent a letter to Mr Vasilyev's home address using the mis-spelt street name which was delivered.

90. Two days later, on Wednesday 2 September, CCS emailed Edmans & Co reporting that the documents had been couriered "*last week*" to the office address provided by Edmans & Co, but it was "*undelivered*". Pausing there, it isn't clear how this explanation works as a matter of chronology, since the office address had only been provided to CCS on the Monday of that current week. CCS also stated that they had yesterday, i.e. Tuesday 1 September, asked the courier company to deliver the documents to the home address provided for Mr Vasilyev, ignorant of the mis-spelt street name.

91. CCS did not report back until 22 October 2020 to explain that the package had been "*undelivered*" at Mr Vasilyev's "*additional address*", i.e. his home address in Moscow. They provided courier tracking records. Those records state three things as material for this inquiry: (i) address information was needed and sought on Friday 28 August, which presumably prompted the inquiry from CCS the following day, described above; (ii) delivery was attempted but "*recipient not home*" on 3 September, consistent with the instruction evidently given to the courier by CCS that week, described above; and (iii) the package was subsequently returned to shipper (CCS) on 14 September. There is no reference to any failed delivery attempt prior to 3 September 2020.

92. Some energy and cost has been burned by both sides deciphering this evidence and contesting the factual issue of when Mr Vasilyev received actual notice of these proceedings. MAP contends that the evidential picture is incomplete or ambiguous, asking me to draw adverse inferences from Mr Vasilyev's refusal to authorise CCS to release full courier tracking records. For his part Mr Vasilyev denies he received the claim pack at his home address on or around 3 September 2020 or any notice of these proceedings until 19 October 2020. He disputes that CCS has been validly appointed as his process service agent and says it is not for him to authorise CCS to explain or disclose anything. He contends that the courier tracking records provided by CCS, together with the covering explanation, demonstrate with sufficient clarity that the claim pack was not delivered to his home address when such delivery was attempted on Thursday 3 September 2020.

93. I have summarised the evidence touching on this issue because, even though the absence of actual notice of the proceedings would not provide a 'good reason' in and of itself to set aside the Default Judgment, this inquiry nevertheless remains relevant to relief from sanctions addressed under Discretion below.

94. I agree that there are some ambiguities in the information provided by CCS. However, the reference to "*recipient not home*" in the courier tracking records coupled with the two references by CCS itself to attempted delivery at Mr Vasilyev's home address (albeit mis-spelt) tends to suggest on balance that delivery was attempted unsuccessfully at his home address on Thursday 3 September 2020 and not re-attempted. The mis-spelling of the street name appears to be a red-herring in this context.

95. I therefore conclude, with some hesitation in light of the incomplete or ambiguous evidential position, that these proceedings were not brought to Mr Vasilyev's attention prior to the entering of Default Judgment on 23 September 2020. This was through no fault on the part of MAP or CCS.

(3) Discretion

96. It remains for Mr Vasilyev to satisfy me that it is just and appropriate to set aside the Default Judgment in all the circumstances. As already noted, those circumstances include whether the Set Aside Application was made promptly (CPR 3.12(2)) and the degree to which he has satisfied the gateway in CPR 13.3(1)(a). I must also be satisfied in this context that it is appropriate to grant relief from sanctions in accordance with CPR 3.9 and associated jurisprudence.

97. On Mr Vasilyev's case, which I accept for the purposes of this analysis, he did not become aware of the Default Judgment until 19 October 2020.

98. The Set Aside Application was made on 5 February 2021. The intervening period of 15½ weeks included 72 business days in this jurisdiction, allowing for the Christmas and New Year holidays. Mr Vasilyev appears to have instructed Dentons in London immediately, as they wrote to MAP's solicitors on 21 October 2020 and identified Mr Power as having been already instructed as counsel on behalf of Mr Vasilyev.

99. At first blush this is a startling amount of time for the making of an application under CPR 13.3. There is nothing prompt about it.

100. The explanation provided on behalf of Mr Vasilyev is that it was necessary during this period to investigate underlying matters and request information from various sources in order to formulate and issue the Set Aside Application. Mr Vasilyev says that he was ill during November 2020 which meant he couldn't assist or investigate matters for a period of three weeks. COVID-19 restrictions are cited as contributing to the delay, although this is not explained in practical terms relevant to investigation of underlying matters or preparation of the Set Aside Application. Western and Orthodox Christmas and New Year holidays on 24-28 December 2020 and 31 December 2020 to 11 January 2021, respectively, are also cited as somehow causative, but without any attempt to explain why or how by reference to the preparation of the Set Aside Application.

101. Mr Power invokes the magnitude of the Default Judgment as justifying the delay in bringing the Set Aside Application by reference to the concept of proportionality. The equal and opposite point could just as well be made against Mr Vasilyev or Dentons: an individual against whom a default judgment of such magnitude has been entered in his personal capacity and on a presumptively regular basis should be at strains to apply to set it aside without delay.

102. If there is to be a justification for the absence of promptness in this case, it has to lie in the need for Mr Vasilyev and his legal team to investigate underlying events and seek information from third parties before being in a position to make the Set Aside Application. I consider this aspect in more detail below.

103. The Set Aside Application itself is not a complex or substantial offering. The application notice and draft order were accompanied by a single witness statement from Mr Vasilyev dated 4 February 2021. His witness statement runs to 76 paragraphs spanning 14 pages of substantive text. The exhibit to which he refers has about 400 pages, including a substantial number of documents in both original Russian and translated into English. A Draft Defence dated 4 February 2021 was also provided with the Set Aside Application. It is settled by Mr Power. It contains 25 paragraphs and comprises about 7½ pages of substantive text. (The Khmyz Report is dated 29 March 2021 and formed part of Mr Vasilyev's reply evidence, not original supporting evidence, so is not relevant for present purposes. A similar point applies to the Lerner Statement.) The Set Aside Application is a relatively modest package all things considered.

104. When evaluating promptness in a context like the present, it may be instructive to look at what could have been done sooner. This isn't the same thing as asking whether the Set Aside Application itself (i.e. in its final form as issued) could or should have been prepared faster or made sooner. It is also legitimate to view the Default Judgment in the context of the unexplained timing of the legal proceedings themselves in circumstances where limitation was most likely triggered by the Demand Notice sent 11 years earlier in April 2009.

105. I do not lose sight of the fact that fraud and forgery are strong things to allege and should only be advanced on a proper and considered basis. An applicant under CPR 13.3 should not be held to a timeframe that would punish him for having acted responsibly before making such serious allegations by way of set aside application. This depends to a large extent on the evidential basis of the Set Aside Application, i.e. the first witness statement of Mr Vasilyev.

106. I have no basis for doubting Mr Vasilyev's evidence that he was ill for three weeks in November 2020 and that this affected his ability to provide instructions or discuss this case with Dentons. I am, however, concerned that he gives no dates for or details about his illness and alleged physical incapacitation during that period. Further, his evidence that he "*could not discuss any case-related matters with [his] lawyers*" during this undisclosed three-week period during November appears to require qualification. In his second witness statement Mr Vasilyev says he first met with his lawyers (presumably, Dentons) on 13 November 2020. This was, by definition, within any three-week period whenever it may have occurred during the month of November.

107. Dentons sent a detailed letter on 24 November 2020 disputing matters of quantum and liability, as described above. Whilst this letter makes repeated references to investigations being ongoing and rights being fully reserved, it nevertheless suggests some prior substantive input from or on behalf of Mr Vasilyev as well as time for reviewing documents and drafting by the legal team. The letter attached three Appendices (lettered A, B & C) each with translated versions, which together span 27 pages including cover sheets. Further, three of the six lines of inquiry to third parties relied upon by Mr Vasilyev in his first witness statement as explaining the delay in

making this application involved letters sent on/before 19 November 2020. In one case, information was received from MUG's insolvency practitioner, Mr Christof Stapf, on 6 November 2020, although no details are given (including the date) of the inquiry prompting this response from Mr Stapf. These matters, asserted by Mr Vasilyev himself, put a dent in his own evidence as to a complete 'blackout period' of three weeks during November 2020.

108. Mr Vasilyev's main point is that he needed time to request and obtain pertinent information from third parties such as CC-CIS, DTCL, CFSP and KIT's successors, because he retained no papers from his employment with the Marta group. He describes this process as a "*time consuming and difficult exercise*" in his first witness statement.

109. I am concerned by the lack of detail surrounding this investigative process. I am also somewhat sceptical as to its causal impact on the timeline to issuance of the Set Aside Application. It is apparent from Mr Vasilyev's evidence that in five of the six identified cases there had been no meaningful response (to borrow his words) from the relevant third party by the time of signing his witness statement in support of the Set Aside Application. It is not clear how such (fruitless) inquiries bore upon the critical path to making the application on 5 February 2021. The Set Aside Application is based, at least in part, on the fact that no evidence has been received from CC-CIS or KIT (for example) which bears upon the Forgery Issue. No details are given by Mr Vasilyev as to what information was being sought from any of the six identified third parties.

110. The January 2009 Email shows that Mr Vasilyev was able to call for documentation relating to his (former) status as a shareholder of MUG and/or senior employee within the Marta group. Dr Biegler is not identified as a third party source contacted for information following notification of the Default Judgment.

111. It is not clear to me how Mr Vasilyev could not have had in mind, upon reading the Default Judgment and seeing that the claim is based upon the Guarantee, that he had successfully resisted claims against him on the BTA Guarantees before the Moscow court in September 2010. Whilst that was a decade earlier, it is the kind of thing that an individual in Mr Vasilyev's position, especially given the history of antagonism with his co-surety and former co-shareholder, would naturally have recalled quite readily, all things being equal. Mr Vasilyev had 101 million good reasons to recall the Moscow Judgment at that point in time, it might be said. The Moscow Judgment features prominently in his supporting evidence and Mr Power's submissions on behalf of Ms Vasilyev.

112. Mr Vasilyev's evidence is that he only located a copy of the Moscow Judgment on 16 December 2020, almost two whole months after receipt of the Default Judgment. He gives no evidence about when he started looking for it, where he found it or who provided it or how long it took to locate a copy of it. These omissions are concerning and telling. It might be inferred from the contents of Dentons' substantive letter dated 24 November 2020 that no mention had as yet been made by Mr Vasilyev of the Moscow Judgment or any doubt raised by him as to whether he had signed the Guarantee. This remains unexplained.

113. Mr Vasilyev first disputed the authenticity of his signature on 30 December 2020. The process leading to that allegation being made then, but not sooner, appears to be as follows: Dentons asked Edmans & Co by email on 17 December whether they or MAP

had a "*the full wet-ink signed original of the Deed of Guarantee purportedly entered into on 31 October 2007*". Edmans & Co responded after the festive holiday break on 30 December, confirming they neither they nor MAP were in possession of the original instrument. In the meantime, MAP issued the Recognition Application on 22 December. Mr Vasilyev became aware of that application in late December. Dentons then sent an email to Edmans & Co on 30 December stating that Mr Vasilyev had no recollection of signing the Guarantee and in light of other frauds perpetrated upon him in relation to similar guarantees (an allusion to the Moscow Judgment) there was an "*obvious concern that this is another fraudulent instrument*".

114. As noted above when addressing the Forgery Issue, MAP made something of the coincidence in timing between the forgery allegation first being made on 30 December 2020 and Mr Vasilyev learning about the Recognition Application. The trigger, on the face of things, appears to have been Mr Vasilyev's location of a copy of the Moscow Judgment on 16 December leading to Dentons' inquiry about the 'wet ink' version of the Guarantee the following day, as described above. Whilst that may explain the timing of the inquiry for a 'wet ink' version first being made, it doesn't meet the separate concerns arising in respect of the opaque process prompting the search for or leading to the location of the Moscow Judgment on 16 December rather than many weeks earlier, addressed above.

115. MAP suggests that the raising of the forgery allegation on 30 December 2020 was an opportunistic response by Mr Vasilyev to being told that day that MAP didn't have the 'wet ink' version of the Guarantee. That is a matter which goes to Mr Vasilyev's credibility and the ultimate merits of the Forgery Issue, rather than the present inquiry as to the delay in bringing the Set Aside Application.

116. Mr Vasilyev provides no evidence as to whether or when he searched his private email address or any archives for that email account at any time after receipt of the Default Judgment. If he had searched the word "guarantee" he would have presumably found the January 2009 Email attaching the Guarantee as executed by him. As noted in paragraph 79(a) above, Mr Vasilyev has remained conspicuously silent about whether he has looked for or located the January 2009 Email since it was exhibited to MAP's responsive evidence.

117. No explanation is provided at all for why it took another <u>five weeks</u> to issue the Set Aside Application after being told on 30 December 2020 that MAP did not have the 'wet ink' version of the Guarantee. It appears that Dentons contacted Clifford Chance LLP in London by email on Monday 18 January 2021 with inquiries concerning the execution of the Guarantee. (This email was not in evidence before me, but is referenced in the response from Clifford Chance LLP.) Clifford Chance LLP responded by letter dated 22 January 2021, from which it was apparent *inter alia* that they would not be able to get access to the 'wet ink' version of the Guarantee.

118. No explanation for the timing of this inquiry from Dentons has been given. Dentons ought to have appreciated by 30 December 2020 that time was by then of the essence if they were to seek to set aside the Default Judgment on behalf of their client. They waited 11 business days, making allowance for New Year's Day, to make this further inquiry on what must have been appreciated to be the central issue in the case and any application to set aside the Default Judgment.

119. I note that the Schedules of Costs provided for Mr Vasilyev, one for each of the two Dentons offices involved in this matter - namely, London and Moscow - show that three partners plus a team of associates and others have been engaged. The total costs claimed are £345,607.71 (including counsel's fees of £48,355). This level of law firm engagement serves to underscore the point made in the previous paragraph.

120. Mr Vasilyev's bland invocation of the Orthodox Christmas and New Year holiday period, between 30 December 2020 and 11 January 2021, is unimpressive and I disregard it. There is no evidence that this had any specific practical impact upon the timing of the Set Aside Application. Dentons corresponded with Edmans & Co during this period, first on 30 December 2020 (as described above) and again on 10 January 2021 in response to an email dated 5 January 2021 from Edmans & Co. In their latter email, sent at 5.29pm on Sunday 10 January 2021, Dentons chased for information about MAP's foreign enforcement steps, demanding a response by close of business the next day.

121. I have asked myself whether the 22 January 2021 letter from Clifford Chance LLP made a material difference to Mr Vasilyev's ability to bring a viable or credible set aside application sooner than 5 February 2021. I am not convinced that it did, and at any rate there is no evidence from Mr Vasilyev suggesting that this letter impacted the timing of his application. Mr Vasilyev refers to this letter in his first witness statement under a separate heading, "*The Guarantee was not executed as a deed*", rather than as material to support his primary allegation about forgery/fraud. As noted above, no explanation has been given for why Dentons did not contact Clifford Chance LLP prior to 18 January 2021 requesting details about the execution of the Guarantee. Mr Vasilyev states that there had been no meaningful response from CC-CIS to his inquiry dated 19 November 2020.

122. No explanation is given for why the Set Aside Application was not then issued until 5 February 2021, a full fortnight after receipt of the letter dated 22 January 2021 from Clifford Chance LLP. As described above, the Set Aside Application itself is a relatively modest offering.

123. These delays and the significant gaps in evidence to explain them are a cause of genuine concern for me in terms of acceding to the Set Aside Application. An applicant in the position of Mr Vasilyev could and should do more, both in terms of bringing his application sooner and explaining any delays with cogent evidence when making such application. Despite being challenged to do so, Mr Vasilyev has not explained <u>how</u> certain matters identified by him actually impacted the timeline towards issuing the Set Aside Application. Whilst due allowance should be given to the protection of privileged communications, with a margin of prudence around such matters, the onus is upon an applicant to explain and justify delay, not just to identify steps taken.

124. Solicitors on the record for a defendant in the position of Mr Vasilyev should do their utmost to progress an application of this kind to ensure that it is made promptly, otherwise their client risks losing such application and being stuck with a default judgment on avoidable procedural grounds. The impression from the file in this case is that Dentons did not move this matter forward with utmost diligence and dispatch. The Set Aside Application could and should have been made sooner.

125. I am required to take account of this absence of promptness when weighing all the circumstances in the exercise of my discretion. I also take into account what I regard to be the slim margin by which Mr Vasilyev has satisfied CPR 13.3(1)(a) on the Witness/Deed Issue, as analysed under (1) above.

126. Against these considerations, I take into account the following matters: (a) these proceedings were commenced in April 2020 without any obvious reason for their timing or impetus by reference to the Demand Notice (11 years earlier) or prospective expiration of limitation on the assumption that the Guarantee is a deed (one year later) (see paragraphs 49 to 52 above); (b) the central challenge to liability raises serious issues of forgery and fraud that cannot be and could not have been made without due investigation and consideration; (c) the key factual events took place in October/November 2007 in Moscow; (d) there was a legitimate need to exhaust lines of inquiry that may have cast light on events that took place so long ago, even if they ultimately did not do so; (e) the Default Judgment against Mr Vasilyev personally is for a very substantial amount; and (f) there is no suggestion or evidence of any specific prejudice to MAP qua judgment creditor caused by the fact that the Set Aside Application was made on 5 February 2021 rather than, say, mid-late December 2020.

127. As to point (e) above, whilst I can see how this feature pulls both ways (see paragraph 101 above) it is legitimate to give it some weight in favour of setting aside the Default Judgment in light of the other factors identified above. All things being equal, an individual defendant deserves a chance to contest proceedings of this nature and magnitude, even if the Court at the present stage views his putative defences with some scepticism. Whilst not about proportionality, the magnitude of the Default Judgment is a factor feeding into the balance of injustice on the present application.

128. As regards paragraph (f) above, the causative impact of any unjustified delay on the part of Mr Vasilyev should be viewed in the context of the subsequent listing and determination of the Set Aside Application. Having been issued on 5 February 2021, the matter was listed and heard on 23 June 2021 after three rounds of responsive or reply evidence. Whilst MAP took steps pursuant to the Default Judgment prior to Mr Vasilyev's first disavowal of the Guarantee on 30 December 2020, i.e. by issuing the Recognition Application a week or so earlier, that can be dealt with by way of costs (on the indemnity basis) in so far as capable of constituting a form of detrimental reliance induced by unjustified delay in seeking to set aside the Default Judgment.

129. When considering all these matters, I am marginally satisfied that it is just and appropriate to set aside the Default Judgment under CPR 13.3 subject to conditions. As with Threshold Merits, I have reached this conclusion after some hesitation and with some reluctance. I am prepared to accept Mr Vasilyev's evidence that he only located a copy of the Moscow Judgment on 16 December 2020. This appears to have triggered a chain of inquiry that led to the central line of defence forming the basis or focus of the Set Aside Application. Whilst matters could and should have moved forward much more quickly than they did from that point, there is no suggestion by MAP that it has suffered specific prejudice by the delay in subsequent issuance of the Set Aside Application.

130. Mr Vasilyev should know that this was right on the line and could have ended up in the refusal of his application by reason of delay alone. The position was not optimised for him through his explanation of delay or aspects of the conduct of the matter on his

behalf by Dentons. Whilst I have sympathy for MAP's perception that Mr Vasilyev is playing forensic Black Jack in proceedings that relate to the signing of a security instrument a very long time ago, I am ultimately persuaded that it is just and appropriate in all the circumstances for such substantive matters to be investigated and determined on a contested basis, rather than through procedural default on the part of Mr Vasilyev.

131. I am further satisfied that Mr Vasilyev has met the requirements for relief from sanctions under CPR 3.9 and associated jurisprudence. The position prior to the Default Judgment is covered in paragraphs 88 to 94 above. My conclusion as to the effect of lack of promptness is relevant to the period since Mr Vasilyev became aware of the Default Judgment. I did not understand MAP to contend that relief from sanctions would operate as an independent ground for refusal to set aside in this context, assuming I was otherwise satisfied that this was the just and appropriate course to adopt under CPR 13.3. In so far as relief from sanctions forms part of the exercise of discretion under CPR 13.3 itself, I am satisfied for the reasons given above that the Default Judgment should be set aside subject to conditions (see below).

DISPOSITION

132. The Set Aside Application has not been a simple one for me to determine, as reflected in the length of this judgment. I have serious reservations both as to the substantive merits of Mr Vasilyev's proposed defences to this action and the explanation provided by him and on his behalf for the significant delay in bringing this application since learning of the Default Judgment. Difficult matters remain unexplained. Mr Vasilyev can expect to be cross-examined on them in detail at any trial.

133. I will set aside the Default Judgment subject to conditions. The precise terms of those conditions will be contained in the Order which I make in due course. These conditions should include, at least, an order that Mr Vasilyev pays MAP's costs of and occasioned by entering the Default Judgment, making the Recognition Application and dealing with the Set Aside Application. The Default Judgment will not be set aside until those costs have been paid in full. I will need persuading that such costs order should be other than on the indemnity basis given the circumstances. I say no more at this stage about further conditions (e.g. security for a proportion or stage of MAP's projected future costs in these proceedings) until I have heard full argument about matters consequential upon issuance of this judgment.

134. Mr Vasilyev should be in no doubt after reading this judgment that he has managed to set aside the Default Judgment by the skin of his teeth and only on the basis of conditions yet to be determined as to such setting aside. His victory on this occasion comes with a price, payment of which is a pre-condition to the setting aside of the Default Judgment.

135. When circulating the draft version of this judgment at 9am on Monday 5 July 2021, I invited the responsible partner(s) at Dentons, acting on behalf of Mr Vasilyev, to provide a written explanation to me by 2pm on Wednesday 7 July as to why they did not respond to Edmans & Co's letter dated 4 April 2021 for two whole months (see paragraph 61 above). I noted from the inter-solicitor correspondence bundle that Dentons placed strict time limits on responses to letters they wrote to Edmans & Co. I received a letter from Dentons at 1.58pm on Wednesday 7 July providing their explanation. MAP may wish to refer to it when addressing me on costs in due course.