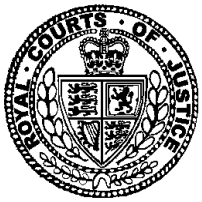

Neutral Citation Number: [2021] EWHC 1406 (Comm)

Case No: CL-2019-000411

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

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

Date: 26/05/2021

Before :

Mr Justice Butcher

- -

Between :

KREDITANSTALT FÜR WIEDERAUFBAU

Claimant

-and-

AZOV-DON SHIPPING COMPANY JSC

Defendants

- -

- -

Paul Toms (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Yash Kulkarni QC (instructed by **Lax & Co LLP**) for the **Defendant**

Hearing date: 17 May 2021

- -

Approved Judgment

.....

THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

1. This is an application by the Claimant for summary judgment on, or the strike out of the Defendant's ('ADSC's') Defence to, its claim for sums due under a Guarantee dated 30 January 1996 ('the Guarantee'). ADSC's defence is, in summary, that it was not a party to the Guarantee and is not bound by it. There are also for determination associated applications by ADSC for permission to adduce expert evidence as to Russian law and permission to amend its Defence.

2. It will be necessary, for reasons which will become apparent, to set out the procedural history of the action and of this application. Before doing that, I will set out the basic, and essentially undisputed, factual background.

Factual Summary

3. Under a loan agreement dated 30 January 1996 ('the Loan Facility Agreement'), the Claimant agreed to lend certain sums to Roststar Shipping Company Limited ('the Borrower') for the purchase and construction of a number of vessels. The Borrower's parent company, Volgo-Don Shipping Company ('VDSC') was a party to the Loan Facility Agreement as Guarantor. VDSC also issued the Guarantee, to indemnify the Claimant and to guarantee the obligations of the Borrower under the Loan Facility Agreement. The Guarantee was expressly governed by English law (clause 18.1). It was signed as a deed by Ivan Mostovoy, who was said to be VDSC's 'duly authorised President', and by Ivan Shapovalov, who was said to be VDSC's 'duly authorised attorney in fact'.

4. Monies were advanced by the Claimant to the Borrower under the Loan Facility Agreement. The Loan Facility Agreement was amended on a number of occasions. The Sixth Supplemental Agreement was concluded between the Claimant, the Borrower and VDSC on 11 July 2008. It included provisions as to what constituted an Event of Default, and also provided that if any of the Events of Default occurred, the Claimant might by notice declare the outstanding indebtedness immediately due and payable.

5. On 22 September 2010 representatives of the Claimant and the Borrower had a meeting to discuss the restructuring of the Loan Facility Agreement. At that meeting the Claimant was advised that it would receive 'written notice about merger [of VDSC] by [ADSC] upon registration of the merger in United State Register of Legal Entities'. It was suggested that the 'Guarantor's status is intended to be improved by guarantee of [ADSC] instead of guarantee of VDSC'.

6. VDSC ceased to exist on 12 November 2010. As appears below, the Claimant contends that on that date ADSC became automatically liable for VDSC's obligations including the Guarantee, through accession. This is not accepted by ADSC.

7. On 17 January 2011, the Borrower sent a letter to the Claimant, which, in part, said:

   'Please provide an application form that should be signed by [ADSC] in order to act as a new guarantor. I attach the available financial statements of [ADSC] to this letter. … The reasoning behind the change of the guarantor is the fact that [ADSC] is now the parent company of [the Borrower] as its initial parent ([VDSC]) was merged with [ADSC].'

8. On 30 May 2011, the Claimant emailed the Borrower, including in the addressees Y. Chernienko '@adship.ru', to say that it had obtained all necessary approvals for the change of guarantor, and attached a draft accession letter, which the Claimant asked should be printed on ADSC's letterhead, and be 'signed by an authorized representative of the new Guarantor'. The Claimant also attached a pdf of the Guarantee, and asked that the new Guarantor should 'initial each page and sign the Indemnity and Guarantee on the last page'.

9. On 7 November 2011 the Claimant wrote to the Borrower enclosing a draft of the 7th Supplemental Agreement which had been negotiated between the parties. The letter referred to the fact that the term of the loan was then due to expire on 31 December 2011 and that unless the 7th Supplemental Agreement was concluded, all outstanding amounts would become due and payable.

10. On 12 December 2011, Guseva Irina, the Financial Director of the Borrower, emailed the Claimant, saying that the 7th Supplemental Agreement had been signed by 'both [the Borrower's] and [ADSC] Directors', and then sent electronic copies of the 7th Supplemental Loan Agreement, an accession letter ('the Accession Letter'), and a copy of the final page of the original Guarantee. As to these:

(1) The 7th Supplemental Agreement was signed by Mr Mikhail Shvalev ('Mr Shvalev') as CEO of ADSC. ADSC was defined as the 'Guarantor', and in the recitals it was said that it had 'replaced the former guarantor [VDSC]'. By clause 4(a) it was a condition precedent of the agreement coming into effect that there should be confirmation that 'the Guarantor by an accession agreement has entered into all liabilities under the Guarantee and thereby replacing the original guarantor', and by clause 4(b) that the Lender should have received 'all documents evidencing any other necessary corporate actions of … the Guarantor with respect to … its accession into the Guarantee'.

(2) The Accession Letter was on the letterhead of ADSC, and was signed by Mr Shvalev, 'Title: General Director'. It stated, in part:

'This is to notify you that the Initial Guarantor [ie VDSC] has merged with ADSC and as a consequence the Initial Guarantor has ceased to exist.
Pursuant to {in accordance with Paragraph 2 Article 58 of Civil Code of Russian Federation} [ADSC] has become the legal successor of the Initial Guarantor and thereby has entered into all liabilities and obligations of the Initial Guarantor under the Guarantee and Indemnity.
By this letter we confirm this succession by operation of law and in addition declare that we, [ADSC] have, since the time when we became the legal successor of the Initial Guarantor, assumed all liabilities and obligations of the Initial Guarantor to [the Claimant] under the Guarantee and Indemnity as successor guarantor.
By signing the attached copy of the Guarantee and Indemnity on the last page and initialling all other pages of the Guarantee and Indemnity, we accept all terms and conditions set out therein.
This letter is governed by English law.'

(3) The final page of the original Guarantee was signed by Mr Shvalev under the signatures of the signatories to the original Guarantee.

11. On 15 December 2011 the 7th Supplemental Agreement was executed, having been signed on behalf of the Borrower, the Claimant, and ADSC. On 23 December 2011 the Claimant received a hard copy of the Original Guarantee, with Mr Shvalev's signature on the last page, a Russian translation of the original Guarantee, and the Accession Letter.

12. On 1 March 2012, a shareholder resolution was passed by the sole shareholder of ADSC, Galina Iosifovna Shvaleva (who is Mr Shvalev's mother), which was in the following terms:

'1. To approve the signing of **Addendum No. 7** by [ADSC] to Loan Agreement dated 30/01/1996 entered into between the Borrower … and the [Claimant] (as amended on [various dates]), acting as the Guarantor for the extension of the validity period of the aforesaid loan agreement.

2. To authorise [Mr Shvalev], General Director of [ADSC] to enter into and to sign on behalf of [ADSC] **Addendum No. 7** to Loan Agreement dated 30/01/1996 as amended on [various dates], acting as the Guarantor for the extension of the validity period of the aforesaid loan agreement.'

(Though the translation here uses the phrase 'Addendum No. 7 to Loan Agreement', it was common ground that this was a reference to the 7th Supplemental Agreement.)

13. By an opinion letter dated 3 April 2012 from Eberg, Stepanov & Partners addressed to the Claimant, Mr Eberg, who said that he was 'legal advisor to the Guarantor [ie ADSC]', opined, amongst other things, that:

'[Mr Shvalev] is duly authorized by the Statutes of [ADSC], Civil Code of the Russian Federation, Federal Law of the Russian Federation 'On Joint Stock Companies' to solely sign the [7th Supplemental Agreement] on behalf of [ADSC].

The agreement as signed by [Mr Shvalev] has been duly executed on behalf of [ADSC] and constitutes legally binding obligations of [ADSC] enforceable against it at law in accordance with its terms…
This legal opinion is limited to the laws of the Russian Federation.'

14. By March 2014 there were overdue amounts under the 7th Supplemental Agreement. In that month, the Claimant made a demand on ADSC under the Guarantee, 'in your capacity as legal successor of [VDSC]' in respect of these amounts.

15. On 27 May 2014 a meeting took place at the offices of ADSC. The Minutes record representatives of ADSC, namely Mr Shvalev as CEO, Mr Inyushev as CFO and Mr Chernienko as Director of Legal Affairs and Project Management, and representatives of Rosshipcom Marine Ltd, who were managers of the relevant vessels. The minutes state that ADSC was 'Guarantor in respect of the obligations of [the Borrower] to [the Claimant], and included the following:

'ADSC is highly concerned by the current situation with the overdue payment. It was always the guarantor's intention to facilitate the payment and due cover of the debt in full by the end of 2015. … It is further should be noted that [ADSC] acts as a guarantor not only for [the Borrower] under the Loan with [the Claimant], but also for other subsidiaries among Russian banks and other third parties. Such postponed obligations amounts in more than US Dollars 195 million. Thus, presently the company is not able to cover the overdue amounts as a Guarantor.'
A copy of these minutes was sent to the Claimant on 29 May 2014.

16. On 15 December 2014 an Addendum to the Guarantee ('the Addendum') was signed. It stated that ADSC was the Guarantor 'as legal successor of [VDSC]', and in the recitals said that VDSC 'has been merged with [ADSC] as surviving entity and that all rights and obligations of [VDSC], as a matter of Russian law have been transferred to and assumed by [ADSC]…' The Addendum provided for the deferral of ADSC's obligations under the Guarantee until two years from the date of the Addendum, if certain conditions precedent were met. The Addendum was executed as a deed by Mr Shvalev on behalf of ADSC, and his signature was witnessed by Mr Yury Chernienko, and bore what appears to be the corporate stamp of ADSC.

17. On 30 April 2015 the Claimant notified the Borrower, with a copy to ADSC, that because of non payment of overdue amounts, the Outstanding Indebtedness under the Loan Facility Agreement had been declared immediately due and payable. The Claimant subsequently made demands under the Guarantee. Payment was not forthcoming from the Borrower or ADSC.

The Current Proceedings

18. The Claimant commenced these proceedings against ADSC in 2019. Particulars of Claim were served on 3 July 2019. The Particulars of Claim, by paragraph 4, pleaded that 'by no later than 23 December 2011, the Original Guarantor [viz VDSC] had merged with the Defendant'; by paragraph 5 pleaded the Accession Letter; and by paragraph 6 pleaded that 'the Defendant became the legal successor of the Original Guarantor and assumed responsibility for all liabilities and obligations of the Original Guarantor under the Guarantee.'

19. In its Defence served on 2 September 2019, ADSC did not admit the effectiveness of the Guarantee as originally entered. It admitted paragraph 4, ie that there had been a merger of VDSC with ADSC by no later than 23 December 2011. As to the Accession Letter and the allegation that ADSC was bound by the Guarantee, ADSC pleaded:

    (1) That no Russian copy of the letter was prepared, and Mr Shvalev, 'who signed the letter … on behalf of ADSC', does not read or speak English;

    (2) That the Accession Letter was unsupported by consideration;

    (3) That it was not admitted that any authorised signatory of ADSC had signed the Guarantee;

    (4) That the Guarantee would not be binding without being amended to include ADSC's name.

20. On 29 October 2019 the Claimant served its Reply, in which each of the points raised by ADSC about its accession to the Guarantee was denied. It was also pleaded that 'the Claimant reserves the right to contend that the Defendant was liable on the Guarantee by operation of Russian law following its merger with the original guarantor, if (which is denied) the Guarantee had not otherwise become binding on the Defendant'.

The Application for Summary Judgment

21. On 16 October 2020 the Claimant issued the present application for summary judgment. It relied on statements of Thomas Richter and Ingolf Kaiser. These statements exhibited the main documentation, and gave answers to the various matters which had been raised in ADSC's Defence.

22. On 4 February 2021, ADSC put in its response to the Claimant's application. A witness statement of Mr Shvalev was served. Mr Shvalev's evidence was that he had not been given a Russian copy of the Accession Letter; and had not initialled all the pages of the Guarantee, though he had signed it on the last page. In addition, Mr Shvalev gave evidence of a decision of the Proletarskiy Court of Rostov-on-Don of 1 November 2019. That was a decision on a challenge made by Mr Konstantin Shvalev, to the validity of the Addendum, on the basis that in signing the Addendum Mr Shvalev had exceeded his 'labour authority', because a commitment to this transaction involved more than 28% of ADSC's assets, and as such required approval in a shareholders' meeting, which had not been obtained. Mr Shvalev gave further evidence that, while he had been advised to sign the Guarantee, Seventh Supplemental Agreement, and Addendum by Mr Inyushev, who was ADSC's Director for Economics and Finance, and Mr Dorofeev, who was ADSC's Deputy General Director for Legal Affairs, they had not checked the position in relation to the need for shareholder's approval. He gave evidence that it was thus now apparent to him that he had exceeded his authority.

23. Also on 4 February 2021, and as part of its response to the Claimant's application, ADSC issued an application for permission to adduce expert evidence on Russian law, namely a Legal Opinion of Mr Dmitry Zaytsev. Mr Zaytsev gave evidence that

'ADSC is not bound by the terms of the Guarantee', and gave a number of reasons, including that 'ADSC is not a party to the Guarantee: a person who signs an agreement to which he or his company is not a party does not, by his signature alone, create any obligations for that party or his company'. He also opined that because the obligations under the Guarantee would have exceeded 25% of the book value of ADSC's assets, pursuant to Article 79(2) of the Russian Law of Joint Stock Companies, any decision to assume them would have required prior shareholder's approval. A transaction made without authority 'may be recognized as null and void by the court and if so, to the extent possible, the parties' positions prior to that agreement should be restored.'

24. On 29 March 2021, the Claimant put in evidence in reply to that served by ADSC on 4 February 2021. This comprised a further statement from Mr Kaiser. This made the point that ADSC's proposed defence based on lack of authority by reason of an absence of a shareholder's resolution, which was supported by the Russian law evidence of Mr Zaytsev, was not pleaded; and that accordingly, in the ordinary way, the evidence of Mr Zaytsev should not be permitted. Mr Kaiser stated, however, that the Claimant was willing to agree to the adduction of Mr Zaytsev's evidence, but only on condition that the Claimant could rely on responsive Russian law evidence. That evidence, which was served with Mr Kaiser's second witness statement, was a Legal Opinion of Ms Inna Makarova dated 26 March 2021.

25. In her Opinion, Ms Makarova gave evidence as follows:

(1) That ADSC had succeeded to all VDSC's rights and obligations, by accession, on 12 November 2010. VDSC had ceased to exist, and ADSC was its universal successor. As she put it: 'Thus, when VDSC acceded to ADSC, all the rights and obligations of VDSC including rights and obligations under the Guarantee came to ADSC.' She said that this was in accordance with Article 58(2) of the Russian Civil Code, and with Article 17(5) of the Law of Joint Stock Companies. She also pointed to the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23 June 2015, which, she said, explained that all rights and obligations pass under universal succession regardless of the drafting of the transfer deed and, indeed, even if there is no transfer deed. No shareholder

approval of the transfer of any particular transaction is required because the shareholders would have already examined the transactions of the other company before deciding on accession. Accordingly ADSC was already bound by the Guarantee well before the Accession Letter.

(2) Putting the point about accession on one side, Ms Makarova agreed with Mr Zaytsev that if a company concludes a 'major transaction', namely one under which the obligations exceed 25% of the book value of the company, then shareholder approval is required. The determination of whether the transaction exceeds 25% of book value should have been determined by reference to the latest quarterly reports; in this case that should have been the third quarter 2011 report; and this had not been produced.

(3) A major transaction entered into without authority will not be considered invalid until such invalidity is established by a court decision. As Ms Makarova puts it: 'In other words, a major transaction concluded without the relevant authority is only voidable…' Here there is no evidence that any of the relevant documents have been determined to have been validly avoided, and the time limit for bringing a claim for invalidation is one year from the point at which the shareholders knew or should have known that the transaction was entered into in breach of the requirements for its execution. Further, it is assumed that a shareholder should have known about the transaction no later than the date of the annual shareholder's general meeting.

(4) Furthermore, a contract will not be held invalid by the court if the company or its shareholders have acted in bad faith, and in particular if the company's or shareholder's behaviour after the conclusion of the transaction gave grounds for the other party to rely on the validity of the transaction. Ms Makarova referred to the terms of Article 166 of the Russian Civil Code.

26. On 26 April 2021 ADSC issued an application seeking permission to amend its Defence. In the application it was said that the amendments fell into two categories. One category was amendments necessary to regularise its pleaded position so that it conformed with its evidential position, and in particular to plead a positive case that

Mr Shvalev had not had authority to sign or initial the Guarantee, or the Addendum. Secondly to correct what was said to have been an error in relation to the Defence as originally served, which had omitted some text which had been intended to be included.

The Issues which remain Live

27. At the hearing before me, it was clarified by Mr Kulkarni QC that the issues which remained live were the following: whether the Defendant had real prospects of establishing (1) that it did not become liable under the Guarantee by reason of accession under Article 58(2) of the Russian Civil Code ('the Accession Issue'); (2) that the Accession Letter and/or the 7th Supplemental Agreement and/or the Addendum would be invalidated because Mr Shvalev did not have actual authority to conclude those agreements without a shareholder's resolution ('the Actual Authority Issue'); (3) that Mr Shvalev did not have ostensible authority to conclude the Accession Letter and/or the 7th Supplemental Agreement and/or the Addendum ('the Ostensible Authority Issue'); (4) that there had not been ratification of Mr Shvalev's having signed those agreements ('the Ratification Issue'). The other points which had been pleaded or put in evidence by ADSC were not pursued.

28. As Mr Toms said, the issues which were still being pursued by ADSC were those which were raised by, or were the response to, the point as to lack of authority which had only been raised on 4 February 2021, and which had only been embodied in a draft pleading on 26 April 2021.

Legal Principles relevant to the Applications

29. The principles applicable on an application for summary judgment are of course well-known. The most cited summary of them, which is sufficient for present purposes, is that of Lewison J in Easy Air Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), at para. 15. The following points are of particular relevance in the present case:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman;*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion 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: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus 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 a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) …if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. …. 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: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

30. A similar test is applied in relation to an application to permit an amendment to a statement of case: the amendment must have a real prospect of success, for otherwise there would be no point in permitting it.

31. Mr Toms submitted that as the only defence which ADSC now maintained, was one based on the alleged lack of authority deriving from an absence of a shareholder's resolution, the fact that ADSC had already acceded to VDSC's rights and liabilities was a clear and simple answer to it.

The Accession Issue

32. Mr Toms pointed to the fact that Ms Makarova's evidence on the nature and effects of accession in Russian law was cogent, supported by reference to legislation, and was uncontradicted. It was entirely unsurprising evidence: English courts are very familiar with systems of law which recognise universal succession and have made clear that questions of the effect of universal succession on a company are ones for the law of incorporation of the company (see National Bank of Greece SA v Metliss [1958] AC 509, Adams v National Bank of Greece and Athens SA [1961] AC 255).

33. Further, Mr Toms submitted there was no dispute as to the facts. ADSC admitted that it had merged with VDSC in 2010. It was demonstrated by the Extracts from the Unified State Register of Legal Entities for VDSC and for ADSC. The Accession Letter had itself referred to the fact ADSC had succeeded to VDSC's obligations, and it had been signed by Mr Shvalev.

34. Mr Kulkarni submitted, by contrast, that the Accession Issue was not suitable for summary judgment. He said that Mr Zaytsev had not served a response to Ms Makarova's report, because ADSC had not been entitled to serve further evidence in rejoinder to the Claimant's evidence served on 29 March 2021. He further pointed out that neither the accession agreement nor the transfer deed had been put before the court. Without them, he said, it would be premature for the court to form a view on the consequences of what happened or did not happen on 12 November 2010.

35. In my judgment, ADSC has not established that it has a realistic prospect of showing that it was not liable under the Guarantee as a result of accession, and has therefore not shown that it has a realistic prospect of success of establishing that any absence of actual authority on the part of Mr Shvalev to sign the Accession Letter and/or 7th Supplemental Agreement and/or the Addendum meant that ADSC was not bound thereby.

36. In this regard, Ms Makarova's evidence is succinct and cogent, and is supported by the legal materials which she refers to. The contemporary documents, and in particular the Accession Letter, are also consistent with the position under Russian law being as Ms Makarova describes it. So indeed is the fact that shareholder approval was sought in relation to the 7th Supplemental Agreement and not in respect of the Accession Letter or the Guarantee. The obvious reason for that is the ADSC considered that it was already bound by the Guarantee.

37. I am unconvinced by the suggestion that it would be premature for the court to act on the basis of Ms Makarova's evidence and the documentation which has been produced. This is because:

    (1) In circumstances where ADSC sought to introduce a new and previously unpleaded defence relying on Russian law, as it did on 4 February 2021, and where that defence was only capable of being run if ADSC was not already bound by the Guarantee before the Accession Letter, I would have expected the issue of whether ADSC had already succeeded to all VDSC's rights and liabilities to have been considered in the Russian law expert evidence which was served by ADSC at that point. That ADSC had already succeeded to VDSC's obligations, by reason of Article 58(2) of the Russian Civil Code was stated in the Letter of Accession itself, and the fact that there had been a 'merger' was admitted by ADSC's Defence. If ADSC was to put forward a case, based on Russian law, that it was not bound by the Accession Letter or Guarantee by reason of lack of authority, it was in my view incumbent on it to deal with what, on Ms Makarova's evidence, was the obvious Russian law flaw in that argument.

(2) Furthermore, ADSC recognised its need to amend its Defence to plead the point about Mr Shvalev's lack of authority by reason of an absence of a shareholder's resolution. For this defence to have a realistic prospect of success, ADSC needed to demonstrate that it had some answer to the Claimant's reliance on an accession under Article 58(2) of the Russian Civil Code, which was a point which, by the time ADSC sought to amend had been squarely raised by the Claimant. ADSC could and should have served any Russian law evidence on which it wished to rely to suggest such an answer at the time of that application to amend.

(3) Even if I am wrong about those two points, ADSC could undoubtedly have sought consent or permission to put in Russian law evidence in response to Ms Makarova's Opinion, if it had wished to do so. At the very least, as Mr Toms said, it could have put in a witness statement from a solicitor indicating the nature of any Russian law answer that ADSC wished to contend that there might be to the Claimant's case on accession. It did not do so. While I was told by Mr Kulkarni, at the hearing, that Mr Zaytsev had been spoken to and he disagreed with Ms Makarova, there was even then no indication at all as to the respects in which he disagreed with her, or any reasons for his doing so.

(4) While ADSC points out that the accession agreement and the transfer deed are not before the court, that is because ADSC has not produced them and has not given any evidence as to what they say. There is no basis on which the court can assume that their production would be of assistance to ADSC. Ms Makarova's evidence by reference to the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23 June 2015 is that all rights and obligations pass under universal succession regardless of the drafting of the transfer deed and, indeed, even if there is no transfer deed. While ADSC suggests that the status of a resolution of the Plenum of the Supreme Court is not clear, Ms Makarova's evidence that it represents the position under Russian law is unchallenged. Furthermore, insofar as ADSC suggests or implies that the accession agreement or transfer deed might have transferred the obligation under the Guarantee elsewhere than to ADSC, it is very difficult to square that with how ADSC acted. ADSC engaged with the Claimant in relation to liability under the Guarantee, including by Mr Shvalev's signing the Accession Letter and the Guarantee, and referred to

itself (eg at the meeting on 27 May 2014) as being the guarantor of the Borrower's relevant obligations. Equally there are entries in ADSC's financial statements which are consistent with succession to VDSC's obligations.

38. In my judgment, therefore, the position is that the material before the court discloses no answer to the Claimant's case on accession. Further, while I have considered whether other material might become available at a trial which indicated such an answer, I have concluded that ADSC has not shown that such material is likely to exist and can be expected to be available.

Other Issues

39. The Claimant is, accordingly, entitled to succeed on its application for summary judgment on the basis of the Accession Issue. In light of this conclusion, it is not strictly necessary to consider the points which have been raised in relation to the Actual Authority Issue, the Ostensible Authority Issue or the Ratification Issue. I will nevertheless briefly express my conclusions on them.

40. I have concluded that, even assuming that ADSC was not already bound to the Guarantee by accession, it does not have a defence which has a realistic prospect of success that it was not bound because Mr Shvalev lacked authority to commit it to the Guarantee by the Accession Letter and signature of the Guarantee. In my judgment, there are at least two answers to ADSC's case in this respect which indicates that it does not provide an arguable defence to the claim.

The Actual Authority Issue

41. In the first place, Ms Makarova's evidence, which in this regard does not contradict and is not contradicted by anything said by Mr Zaytsev, is that even if a director does not have authority to enter into a major transaction because of an absence of a shareholder's resolution, the contract is not, as a matter of Russian law, considered invalid unless that invalidity is established by a court decision; and that there is no Russian Court decision which has decided that any of the relevant documents is invalid. The decision of the Proletarskiy Court of Rostov-on-Don is not such a

decision. It only relates to the Addendum, does not purport to invalidate the Addendum or any other documents, was not contested and did not involve the Claimant. As Ms Makarova further says, it seems that the limitation period for any claim for invalidation of the relevant transactions of one year from the moment that the shareholder knew or should have known that the transaction was made in violation of the requirements for its execution must by now have expired (paragraph 52).

42. Accordingly, even if Mr Shvalev had lacked authority to enter into the Accession Letter or sign the Guarantee, I do not consider that ADSC has an arguable defence that, on the facts of this case, that would mean that the Guarantee was not binding on ADSC.

The Ratification Issue

43. In the second place, I consider that the Claimant is correct to say that any want of authority on the part of Mr Shvalev in signing the Accession Letter and the Guarantee and purporting to commit to ADSC to the Guarantee was ratified by ADSC. The question of ratification is governed by the law applicable to the putative contract: Britannia SS Ins. Assn v Ausonia Assicurazioni SpA [1984] 2 Lloyd's Rep 98, 100; Merrill Lynch Capital Services Inc v Municipality of Piraeus [1997] CLC 1214, 1231; Dicey Morris and Collins, *The Conflict of Laws* (15th ed.), para. 33-438. In the present case that is English law, which was expressly chosen as the law governing the Guarantee and the Accession Letter.

44. By the Shareholder Resolution of 1 March 2012, the sole shareholder of ADSC approved and authorised Mr Shvalev's signing of the 7th Supplemental Agreement on behalf of ADSC 'acting as Guarantor for the extension of the validity period of the aforesaid loan agreement'. The 7th Supplemental Agreement not only defined ADSC as the Guarantor, but provided that it should not be effective unless there was an accession agreement under which ADSC had entered into all liabilities under the Guarantee. In my judgment the resolution was clear evidence that the sole shareholder of ADSC adopted or recognised the accession agreement whereby ADSC had accepted liability under the Guarantee. That agreement was embodied in the Accession Letter and Mr Shvalev's signature of the Guarantee.

45. Although unheralded beforehand, at the hearing Mr Kulkarni suggested that an answer to the Claimant's case on ratification was that there had not been full knowledge of all material facts at the time of the alleged ratification. I accept that there will only be found to have been ratification if the ratifier had knowledge of all material facts. Here, however, there is in my view no basis for considering that Ms Galina Shvaleva lacked any relevant knowledge at the time of the shareholder resolution of 1 March 2012. There is no evidence from her to that effect. Instead, it is clear that in 2010/2011 she was a director of ADSC. The shareholder's resolution authorised the signature of the 7th Supplemental Agreement which itself refers to the fact that there was an accession agreement under which ADSC had entered into 'all liabilities under the Guarantee and thereby [replaced] the original guarantor'. There are no grounds for considering that Ms Shavleva was not aware that major transactions required shareholder approval. ADSC had legal advisers, including apparently from both Mr Chernienko and the Mr Dorofeev referred to in Mr Shvalev's witness statement. That the requirement was known about is evidenced by the fact of the shareholder's resolution of 1 March 2012 itself. Ms Shvaleva must also have been aware that no specific shareholder's approval had been given for the signing of the Accession Letter or Guarantee, because she had not given it.

The Ostensible Authority Issue

46. Mr Toms also vigorously argued that it was clear that Mr Shvalev had at least ostensible authority to enter into the Accession Letter and sign the Guarantee. While not deciding that ADSC had a realistic prospect of defeating this argument, it nevertheless appeared to me that Mr Kulkarni had more to say on this aspect than on the points I have already referred to. As, on those grounds, I conclude that ADSC has no arguable defence, I do not need to reach any further conclusion in relation to the Ostensible Authority Issue.

The Addendum

47. As Mr Toms submitted, the Claimant would have been entitled to succeed on its application even had there been an arguable defence that the Addendum was not

binding on ADSC. The effect of the Addendum was to disentitle the Claimant from making a demand under the Guarantee until 15 December 2016 on certain conditions. If it had not been binding on ADSC, it would have meant that the Claimant's rights under the Guarantee were unaffected in that manner. The Claimant has abandoned its claim under clause 3.1(d) of the Addendum for interest in the sum of € 86,685.45.

48. In any event, I consider that ADSC had no answer to the Claimant's point that the Addendum would not have been invalidated by any want of authority on the part of Mr Shvalev to sign it, because, in accordance with paragraph 7 of the Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation No. 28 of 16 May 2014, 'a transaction that changes the terms of a previously approved transaction does not require approval if the corresponding change was clearly favourable for the company'. The Addendum appears clearly to have been favourable to ADSC, as Ms Makarova opines (paragraph 47).

Quantum

49. The evidence of Mr Dirda, which has not been contradicted, is that the sums due under the Guarantee, as of 17 May 2021, were: (1) Principal, € 5,541,603.59; (2) Hermes Fee, € 2,223,574.86; (3) Interest up to and including 30 April 2015, € 241,427.97; and (4) Default interest up to 17 May 2021, € 1,718,902.18. This amounts to € 9,742,663.46.

Disposal

50. For the reasons I have given, there will be summary judgment in favour of the Claimant for the sums set out in the previous paragraph. The Defendant's application to adduce Russian law evidence is allowed, but its application to amend its Defence is dismissed on the basis that the proposed amendments, and the Defence as a whole, disclose no defence with a realistic prospect of success.