Neutral Citation Number: [2023] EWHC 480 (Ch)

Case No: CH-2022-000087

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 6 March 2023

Before :

Sarah Worthington DBE KC(Hon)

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Between :

PRINCE MARWAHA	**Appellant**
- and -	
ENTERTAINMENT ONE LTD	**Respondent**

- -
- -

Mr Taylor (instructed by **Proximo Law**) for the **Appellant**
Mr Jones (instructed by **Mayer Brown International LLP**) for the **Respondent**

Hearing dates: 21 February 2023

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Approved Judgment

*Remote hand-down:*This judgment was handed down remotely at 10.30am on Monday 6 March 2023 by circulation to the parties or their representatives by email and release to the National Archives

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Sarah Worthington DBE KC(Hon) :

1. The Respondent, Entertainment One Ltd (EOL), is the assignee of a debt due under a loan agreement (the "Fortbeau Loan"), with the principal sum of £1,298,615.24 owed by the Appellant, Mr Marwaha (M). On 1 April 2021, EOL served a statutory demand on M for repayment of the debt. M applied to the County Court to have the statutory demand set aside. At that hearing, DDJ Smith dismissed that application, ordered M to pay costs of £29,000, and refused permission to appeal. M now appeals to this court, on four grounds, having been given permission to do so by Fancourt J.

The facts

2. Much of the background detail between the parties is irrelevant to the resolution of this appeal, but the broad context of the relationship between EOL and M and the origins of the loan agreement generating the assigned debt are essential to an understanding of the issues underlying M's application to set aside the statutory demand. These facts were all before DDJ Smith.

3. EOL is the parent company of a large international corporate group involved in all aspects of delivering entertainment content to the market. Until 2017, M was the Group's Treasury Manager. His responsibilities included managing the Group's dealings with foreign exchange brokers. In 2017 M's contract was terminated and, on 13 March 2019, EOL commenced proceedings (the "main proceedings") against M and one of these foreign exchange brokers (Monex Europe Ltd ("Monex")) claiming damages of c.£18million for losses suffered as a result of a number of losing trades placed by M which EOL asserted were unnecessary, duplicative and seriously loss-making, and which it claimed were likely to have been procured by undisclosed inducements offered by Monex to M. EOL's claims therefore also included personal and proprietary claims in respect of these alleged bribes and their traceable proceeds.

4. Disclosure by Monex revealed further facts, and additional parties (both claimants and defendants) were added to the claim and the particulars of claim amended accordingly. Importantly for present purposes, Monex disclosed that it had paid commissions, via "introducing broker agreements", to M's former deputy in the Group Treasury team and to two companies associated with him. It also disclosed the existence of a loan agreement, dated 29 September 2015, between one of those companies, Fortbeau Ventures Ltd ("F"), and M. The loan agreement recorded that F had lent the sum of £1,298,615.24 to M between January 2015 and November 2015, on terms that it be repaid by 30 August 2016 together with interest at 3.5% up to a total sum of £60,060.65 (the "Fortbeau Loan").

5. M resisted EOL's claims in the main proceedings, asserting in his Defence that the receipt of c.£1.3m was not by way of bribe or secret commission, but under this "loan arrangement" with F. M repaid the interest on this loan in July 2016, but the principal sum remains unpaid. Later, in the context of undertakings in lieu of freezing injunctions claimed by EOL in the main proceedings, M provided a sworn affidavit on 15 November 2019 affirming that he had received c.£1.3m by way of loan from F, had lost the money on spread betting, and was not in a position to repay the loan.

6. EOL and its related companies eventually settled with all the defendants in the main proceedings other than M. As part of EOL's settlement with F, EOL took an assignment of the Fortbeau Loan. It notified M of that assignment, with that notice specifically reserving to EOL the right to assert in the main proceedings that the loan agreement did not record a valid and/or genuine loan.

7. Eventually, in January 2021, EOL agreed with M to discontinue the main proceedings with each side carrying their own costs. That agreement was reached by means of a telephone conversation and two brief emails between Mr Graham, the solicitor acting for EOL, and M (at that stage a litigant in person), with the former requesting by email, "*Kindly confirm that you agree that the proceedings be discontinued on terms each side bears its own costs. Upon receipt of your confirmation we will lodge with the Court.*", and the latter replying, "*I confirm I agree that proceedings be discontinued on terms each side bears its own costs*".

8. Accordingly, on EOL's application to court, supported by the evidence of M's email to EOL, the court granted an order that EOL "*be permitted to discontinue the proceedings against [M]*", with no order as to costs, and the lifting of the undertaking given by M in lieu of the proposed court ordered freezing injunction.

9. Mr Graham has no file note of his telephone conversation with M, an omission which is surprising given the significance of the discussions to his client, EOL, and especially when discussions were being conducted directly with an opposing litigant in person.

10. Mr Graham, in his witness statement, says he does not recall the precise words used, but "*I was careful to be clear that I was talking about ending the Proceedings, and nothing else, partly because I knew that eOne [EOL] may wish to bring a claim under the Fortbeau Loan in due course.*" He also confirms that "*At no point in the conversation did I say, or indicate, that eOne would also give up any other claims that it may have against Mr Marwaha which were not brought in the Proceedings, including any claim to repayment under the Fortbeau Loan. I had no instructions to do so*", and, further, that M "*did not mention the Fortbeau Loan on our call, and he certainly did not ask eOne to give up its rights under the loan in addition to discontinuing the Proceedings*."

11. M, in his second witness statement, confirms that the Fortbeau Loan was not discussed. In his first witness statement he says that Mr Graham proposed that *"in order to avoid any further stress or expense we could both agree to end the whole thing by proceedings being discontinued with no order as to costs."* In his second witness statement the closing words are omitted, with the stress placed on the import of the words "*in order to avoid any further stress or expense we could both agree to end the whole thing*", and noting that "*had [Mr Graham] told me that his client still intended to proceed against me for other claims then I would not have agreed to the notice of discontinuance with no order as to costs*."

12. One of M's principal claims in relation to his application to set aside the statutory demand is that this agreement reached with Mr Graham on behalf of EOL also compromised the Fortbeau Loan.

Proceedings in the lower court

13. As already noted, M applied to the County Court to have the statutory demand set aside under the Insolvency Rules 2016 r.10.5(5)(b) (the debt is disputed on substantial grounds) and/or r.10.5(5)(d) (the court is satisfied, on other grounds, that the demand ought to be set aside), and on a further ground not relevant in this appeal.

14. In support of his application, M claimed that:

    i EOL's claim under the Fortbeau Loan was settled by agreement between Mr Graham and M during their telephone conversation; and/or

    ii EOL's claim to repayment under the statutory demand was an abuse of process under the rule in *Henderson v Henderson* (1843) 3 Hare 100 (the rule that prevents parties from bringing claims that could and should have been raised in earlier proceedings, but were not).

15. In relation to Insolvency Rules 2016 r.10.5(5)(b) (the debt is disputed on substantial grounds), DDJ Smith held that, on the evidence before him, the agreement between the parties covered only a discontinuation of the main proceedings, and there was no triable issue or substantial argument that the agreement also included a compromise of the Fortbeau Loan obligations.

16. The relevant law is not set out in his judgment, but the judge's findings were as follows:

> 10. Later in January 2021, the respondent and the applicant negotiated their own settlement, which, on the face of it, was quite straightforward. The respondent said, "We will discontinue, with no order, as long as you don't claim costs against us", and the applicant agreed.
>
> 11. What the applicant says is that is what the paper documents might show; a couple of emails and the consent order which followed, but in fact, there was a telephone conversation between the applicant and the respondent's solicitor, Mr Graeme[?], in which Mr Graeme is alleged to have said, "Why don't we settle the whole thing, and just discontinue, with no costs?".
>
> 12. Mr Graeme was, he says in his witness statement, was careful to allude to the Fortbeau loan, because he wished to protect his client's rights in that regard. Similarly, it has to be said that the point was not raised by the applicant.
>
> 13. The applicant does not say, in his evidence, that this matter was discussed, but I am asked to infer from the applicant's recollection of the phrase, "the whole thing", that this was an overall settlement of every matter arising between the applicant's and the respondent's business relationship, and any other issues which may have arisen since.

> 14. That, I find, very difficult to infer, either from the conversation, as recalled by the applicant, or by the contemporaneous documents that I have seen. Why was it not specifically mentioned in any written document? I accept there are procedures which had to be followed to get a consent order. However, it had been made very clear to the applicant on the notice of assignment that the right to enforce this loan was reserved, away from the existing proceedings.
>
> 15. Accordingly, I do not see how he could have thought that this was somehow covered at the same time. In addition, if it was, then what was to happen to the interest payments which he had already made, and remortgaged his home so to do?
>
> 16. There is no evidence I can see which would justify this going on to a full trial on the issues, where a claim issued under Part 7 of the Civil Procedure Rules, that would enjoy reasonable prospects of success, or a substantive chance of success.

17. In relation to Insolvency Rules 2016 r.10.5(5)(d) (the court is satisfied, on other grounds, that the demand ought to be set aside), DDJ Smith cited from *Henderson v Henderson* and from *Aldi Stores v WSP Group Plc* [2007] EWCA Civ 1260, before holding that the test set out in those cases had not been met. In particular, he could find no reason to hold that EOL's debt claim under the Fortbeau Loan should have been pursued in the main proceedings, nor that it was otherwise an abuse of process to wait until now to pursue it. His reasons were as follows:

> 19. The applicant's [M's] argument on this is that, when the respondent embarked on its substantial reamendment, the issue of the assigned loan, of which the respondent was now proprietor, could have been raised at that point.
>
> 20. The proceedings which were compromised between the applicant and the respondent, whilst the loan agreement was mentioned, primarily by the applicant, it was not an issue upon which the respondent sought any relief. This was a case primarily about conspiracy and bribery, and like matters. It would have involved a converse pleading by the respondent to say that an agreement over which they had cast doubt, they were now going to rely upon. It would have been a strange amendment, and one which I can well understand they did not seek to raise at that time.
>
> 21. At that time, they were heavily involved in this complex litigation, with a number of claimants and defendants, and were concentrating on defining, narrowing, and, in fact, settling those issues, before a pre-trial review on 29 January, and a four-week hearing listed for March.
>
> 22. This was an avenue which I find it understandable they did not go down. Perhaps they could have raised it. I do not find that they should have raised it and it certainly, in my view, does not involve the applicant in defending the same set of facts twice. This is a

> completely separate course of action on an assigned loan agreement. It can be pleaded, as respondent's counsel pointed out to me, in little more or under one page, as opposed to the complex proceedings which had preceded it.
>
> 23. Not only that, there is no defence to it. It is a loan agreement which the applicant has said on oath he is liable for. Accordingly, in my view, there is no oppression or vexatiousness in the respondents now serving a statutory demand in respect of that discrete claim.

18. The judge then considered M's third ground, not relevant here, before dismissing M's application to set aside the statutory demand.

This appeal

19. The questions for this appeal are whether the judge was wrong, or not entitled, to hold, first, that there was no genuinely triable issue as to whether the Fortbeau Loan had been compromised when EOL and M agreed to discontinue the main proceedings on terms; and, secondly, that EOL's issuing of a statutory demand in pursuit of its claim in debt after discontinuing its claims in the main proceedings was not an abuse under the *Henderson v Henderson* test as now understood.

20. I was referred to the well-known statements on the proper and limited function of an appeal court: see especially *Crossley-Cooke v Europanel (UK) Ltd* [2010] EWHC 124 (Ch), [2010] BPIR 561; the detailed consideration in *Stuart v Goldberg* [2008] EWCA Civ 2, [2008] 1 WLR 823, especially at [76] and [81]-[83]; and *Aldi Stores v WSP Group* [2007] ECCA Civ 1260, [2008] 1 WLR 748 at [16].

The relevant law in relation to Insolvency Rules 2016 r.10.5(5)(b) – the "substantial dispute" point

21. The relevant law was not disputed. The legal test that should be applied by a judge in the case of IR 2016 r 10.5(5)(b) applications – "the debt is disputed on grounds which appear to the court to be substantial" – is whether there was "a genuine triable issue" (*Crossley-Cooke v Europanel (UK) Ltd* [2010] EWHC 124 (Ch), [2010] BPIR 561, at [16]), with the applicant needing to show more than a merely arguable case, but one that has a "real prospect of success" (ie the summary judgment test applied under CPR 24): see *Collier v PJ Wright* [2008] 1 WLR 643 at [21] per Arden LJ indicating the tests were aligned.

22. As with summary judgment applications, the court should not conduct a mini-trial of the issues; on the other hand, the judge is likely to have to decide on the credibility of the factual assertions, and is entitled to "grasp the nettle" and determine short points of law or construction where "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"; and a case does not need to go to trial simply 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, at [12] and [14].

23. Paragraph [14] of the *ICI Chemicals* case is worth citing in full in the context of this appeal:

> "*Sometimes 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. In such a case 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*."

24. In deciding whether the agreement to discontinue the main proceedings also incorporated an agreement to compromise the Fortbeau Loan, both parties agreed that the judge had to ascertain the terms of the parties' settlement from the oral exchanges and conduct of the parties. In making that determination in relation to a contract which is entirely oral or partly oral, the judge is entitled to take into account evidence of things said and done after the contract was concluded to help decide what the parties had actually agreed: *BVM Management v Roger Yeomans* [2011] EWCA Civ 1254 at [23] per Aikens LJ. That same paragraph also contains a reminder that an appeal court should be slow to reverse a judge's evaluation of the facts unless the judge's conclusion is "obviously wrong, is an unreasonable finding on the evidence or … produces a result unsustainable in law."

Argument of the parties in relation to Insolvency Rules 2016 r.10.5(5)(b) – the "substantial dispute" point

25. M was given permission by Fancourt J to appeal on four grounds, the first three of which relate to DDJ Smith's finding that the debt had not been compromised by the settlement agreement, and therefore the claim that the debt was disputed on substantial grounds failed. The three grounds of appeal in relation to this finding are:

    i **Ground 1**: the judge was wrong in law to find that the debt was not disputed on substantial grounds.

    ii **Ground 2:** the judge wrongly considered that he was required to draw inferences of fact that the debt had been settled in circumstances where he had direct evidence from M that this was so.

    iii **Ground 3**: the judge was wrong to hold that the settlement agreement occurred by way of the emails between Mr Graham and M and not orally by way of the telephone conversation between them.

26. Mr Taylor, appearing for M, indicated that these three grounds could be considered together, but nevertheless helpfully dealt with each in turn.

27. As to **Ground 1**, he emphasised that the judge was required to construe the contract between the parties by objectively ascertaining what the parties intended by the words they used, having regard to all the background knowledge that was available to them at the time (citing *ICS v West Bromwich Building Society* [1998] 1 W.L.R. 896 per Lord Hoffman at 912F – 913). He noted (i) the background knowledge included the

following: both Mr Graham and M were aware of the Fortbeau Loan and its assignment to EOL; the loan was noted in the main proceedings in both the particulars of claim and the defence; and the main proceedings included a claim for recovery of the exact same sum of money from M as claimed under the loan, although on different legal grounds; (ii) it therefore followed that when Mr Graham suggested that "… *in order to avoid <u>any</u> further stress or expense we could both agree to end the <u>whole thing</u> by the proceedings being discontinued with no order as to costs*" (emphasis added), the phrase "*end the whole thing*", taken with the three underlined words, was apt, in an agreement made orally in a telephone conversation, to cover both the main proceedings and the loan; (iii) this was so despite there being no express reference to an agreement on the Fortbeau Loan, since the only matter that required formal action was discontinuance of the main proceedings; and further (iv) there was no express reservation in the telephone conversation or the emails that the agreement being made was without prejudice to EOL's rights under the Fortbeau Loan. For those reasons, the judge was wrong in law to find that there was not at least a "triable issue" with a "real prospect" of success, giving rise to a substantial dispute such that the statutory demand ought to be set aside. He noted that the issues as to M's recollection of the words used could only fairly be tested in cross-examination.

28. I deal with these points in the context of my consideration of DDJ Smith's judgment, below, except re point (iv). The parties may add such an exclusion for additional clarity and protection, but its omission has no probative value in this context; it does not of itself signify or imply inclusion of the non-excluded matter within the agreement.

29. As to **Ground 2**, Mr Taylor suggested that the judge did not need to draw inferences of fact that the debt had been settled (and find that he was unable to do so on the evidence), when he had direct evidence from M that this was how he understood the settlement agreement. He suggested that the handing of the evidence in this respect was plainly wrong.

30. Finally, as to **Ground 3**, Mr Taylor suggested that, if the judge decided that the settlement agreement was concluded by way of emails (the judgment is not entirely clear) rather than by way of the telephone conversation, then this was wrong, as the emails were on their face confirmatory, and to hold otherwise was to ignore – I imagine this is the inference – that the oral agreement may have been more expansive and include compromise of the Fortbeau Loan.

31. I deal with these points in relation to Grounds 2 and 3 in the context of my consideration of DDJ Smith's judgment, below.

32. By contrast, Mr Jones, who appeared for EOL, argued (contrary to M's **Ground 1**) that there was no error of law in the judge's finding that the debt was not disputed on substantial grounds. He too referred to the well-known construction rules in *ICS v West Bromwich Building Society* (noted earlier), but noted specifically the further impact of the *BVM Management* case where the contract is entirely or partly oral, as here (see above at para [24]).

33. He suggested that M would have no "real prospect of success" in establishing at trial that the Fortbeau Loan had been compromised at the same time as the agreement to discontinue the main proceedings, noting in particular that (i) the Fortbeau Loan was

not automatically captured by an agreement in relation to the parties' "proceedings", since EOL was not pursuing the debt in those proceedings, and it would therefore require something more in an agreement to capture it; (ii) the words used in all the contemporaneous documents (the emails and court order) referred only to "the proceedings"; (iii) even if the agreement was made entirely orally and simply recorded in the email exchange (as M claims), the obvious inference is that the emails set out a record of what was agreed, and M did not dissent or seek to vary at that stage (see *BVM Management*, above); (iv) M's reliance on Mr Graham's statement that "*we could both agree to end the whole thing*" as indicating that the Fortbeau Loan was included ignored the next phrase "*by the proceedings being discontinued*"; (v) there are no contemporaneous documents nor other objective evidence to support M's case, only M's assertion of a subjective belief that the arrangement captured the Fortbeau Loan, even though his own evidence is that the loan had not been discussed; (vi) M's case is inherently implausible, in that EOL had no reason to give up its valuable claim, and it is inconceivable that it would have done so without that being stated expressly in writing; (vii) M's argument that that there are issues as to M's recollection of the words used that can only be fairly tested in cross-examination ignores the fact that M's own evidence is that there was no express discussion of the Fortbeau Loan and M has identified no further material that might be available at trial that was not available to DDJ Smith (see *ICI Chemicals* case, cited above at para [23]); and (viii) DDJ Smith did not take into account irrelevant matters in referring to either the "without prejudice" clause in the notice to M of the assignment of the loan or the fact that M had previously paid interest on the loan; these were minor factors, merely reinforcing the judge's conclusion that M understood that the debt claim did not form part of the main proceedings, and contained aspects that the parties might have wanted to address specifically in a settlement.

34. As to M's **Ground 2**, Mr Jones, for EOL, simply noted that M's direct evidence was that this was how *he* understood the settlement agreement, which described his own subjective belief, whereas the judge was necessarily engaged in an exercise of determining objectively what the parties had agreed.

35. Finally, as to M's **Ground 3**, Mr Jones suggested that this repeated much of **Ground 1**, and that the judge's conclusions suggested he did not consider that M's case that the Fortbeau Loan had been compromised in the telephone discussion, along with the agreement to discontinue the main proceedings, had a real prospect of success for all the reasons considered in **Ground 1**.

Conclusions on appeal Grounds 1-3 in relation to Insolvency Rules 2016 r.10.5(5)(b) – the "substantial dispute" point

36. There is no dispute that EOL and M concluded an agreement to discontinue the main proceedings on terms. What is in dispute is whether that agreement also entailed a compromise by the parties of the Fortbeau Loan.

37. The judge did not set out the relevant law in his judgment, but the law is well known, both in relation to construing the terms of a disputed contract between the parties and determining, for the purpose of IR 2016 r 10.5(5)(b), whether that dispute gives rise to "a genuine triable issue" with a "real prospect of success". At para [16] of his judgment, the judge concluded in relation to this issue that there was no claim "*that*

would enjoy reasonable prospects of success, or a substantive chance of success". He was therefore alert to the appropriate threshold test.

38. In applying that law, the judge determined that the parties' agreement was restricted to discontinuing the main proceedings and did not capture the Fortbeau Loan, noting that, on their face, the email exchanges and court order suggested a straightforward agreement simply to discontinue the main proceedings on terms. Even accepting M's evidence that Mr Graham's offer was to "*settle the whole thing*", and to discontinue proceedings with no costs, he declined to infer from those words an intention or agreement to deliver an overall settlement of every matter arising between the EOL and M. He reached that position because the evidence of the parties was that the issue of compromise of the Fortbeau Loan was not expressly discussed in the telephone conversation; that it was not raised directly by M, and Mr Graham said he was careful to protect his client's rights; that the objective contemporaneous written evidence (emails and court order) all referred only to the main proceedings; that an absence of express reference or writing in respect of the alleged Fortbeau Loan compromise was difficult to understand given that M was aware from the notice of assignment that EOL had separate rights to pursue the Loan debt and to pursue EOL's claims under the main proceedings; and that "*[a]ccordingly, I do not see how [M] could have thought that this [compromise] was somehow covered at the same time*" (emphasis added). I read this as suggesting that, in the judge's view, and whatever M's subjective view of the scope of the parties' agreement, a reasonable person looking at the arrangement objectively would not have grounds for thinking that it compromised the Fortbeau Loan as well as dealing with discontinuation of the main proceedings, and (repeating his closing finding) there was no claim to the contrary "*that would enjoy reasonable prospects of success, or a substantive chance of success*".

39. In my view the judge was entitled, on the evidence before him, to conclude that the parties did agree to discontinue the main proceedings, on terms as to costs, and that that agreement did not also embrace the Fortbeau Loan.

40. His judgment was brief, but it is not wrong in law, and nor is it "plainly wrong" on the facts. The finding is consistent with all the contemporaneous written evidence there is, by way of emails and the court order confirming the agreed discontinuation, and is not contradicted by any evidence produced by M or by EOL. Even accepting that M's subjective view was that the telephone conversation embraced a compromise of the Fortbeau Loan agreement, as the judge appeared to do (with the inference then being that M's recollection as given in his witness statement evidence did not need to be further tested in cross-examination in order to aid the court in deciding whether to accept it), the judge held that the *objective* construction of the agreement, given the background known to both parties, was that only the main proceedings had been settled. Further, there is also nothing in the judgment, or in the facts, to indicate the judge's conclusion would have been different whether reached on the basis that the parties' agreement was made orally only, or partly orally and partly by email. There is also no indication in the judgment that the judge considered the agreement was made solely by way of the two emails, rather than by those emails confirming or recording an oral agreement.

41. In short, M's appeal on **Grounds 1-3** must be dismissed.

The relevant law in relation to Insolvency Rules 2016 r.10.5(5)(d) – the "abuse of process" point

42. The Insolvency Rules 2016 r.10.5(5)(d) is a deliberately widely-drafted provision, able to be invoked whenever the court is satisfied that it would be unjust to allow the creditor to proceed to presentation of a bankruptcy petition: *Mahon v FBN Bank (UK) Ltd* [2011] EWHC 1432 (Ch).

43. Counsel agreed that the essential principle underpinning the exercise of this jurisdiction is the rule in *Henderson v Henderson* (1843) 3 Hare 100, whereby the courts should not be used by claimants to oppress defendants through the bringing of successive claims on the same subject which should have been pursued in earlier proceedings, and there should be finality of litigation. The rule is therefore wider than res judicata, and does not strictly depend on the precise same claim or cause of action being raised twice.

44. The authoritative statement of the rule in *Henderson v Henderson* is contained in the speech of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31, usefully cited in *Aldi Stores v WSP Group* [2007] EWCA Civ 1260, [2008] 1 WLR 748 at [5]:

> "*The underlying public interest is… that there should be finality in litigation and that a party should not be twice vexed in the same matter…*
>
> *… The bringing of a claim … in later proceedings may, without more, amount to abuse if the court is satisfied … that the claim … should have been raised in the early proceedings if it was to be raised at all.*
>
> *…there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what in my opinion should be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*" (emphasis added)

45. In short, the courts apply a broad, merits-based approach (*Johnson v Gore Wood & Co* [2002] 2 AC 1, at [27]), with the key question being whether the later proceedings are oppressive, or an attempt to abuse the court's process.

46. It follows that a finding as to whether or not there has been an abuse of process, while not an exercise of a discretion, does involve an assessment and balancing of a number of factors by the first instance court with which the appeal court will be reluctant to interfere: see *Stuart v Goldberg Linde (a firm)* [2008] EWCA Civ 2, [2008] 1 WLR 823, at [76] and [81]-[82].

Argument of the parties in relation to Insolvency Rules 2016 r.10.5(5)(d) – the "abuse of process" point

47. Fancourt J permitted M to appeal against DDJ Smith's finding that EOL's issue of a statutory demand was not an abuse of process. In particular, M's **Ground 4** is that the judge was wrong in law to find that there was no real prospect of relying at trial upon a *Henderson v Henderson* defence that the statutory demand was an abuse of process.

48. In addressing this ground of the appeal, Mr Taylor, for M, advanced a number of points. First, and contrary to the judge's conclusions, (i) it would not have been a strange amendment to EOL's particulars of claim to add its alternative claim in debt once it took an assignment of the Fortbeau Loan; (ii) the main proceedings and the debt claim do involve M defending claims based on the same underlying facts, notwithstanding that the legal claims are of a different character; (iii) that they are of a different character is irrelevant because *Henderson v Henderson* type abuse is not the same as cause of action estoppel; (iv) a finding of abuse is not excused simply because the subsequent claim can be pleaded easily or that M has no defence to it (and, in any event, noting that M claims he *has* a defence, in that the Fortbeau Loan was compromised).

49. I pause here to note that that these first three points all amount to assertions that DDJ Smith reached precisely the wrong conclusion on the facts. Counsel developed these points in his skeleton and oral argument, suggesting a contrary conclusion on the facts was possible, but he did not take the further step of explaining why the judge's conclusions were "plainly wrong" (ie that no reasonable judge could have reached those conclusions on the evidence before him), or why the judge's analysis, to the extent that it involved legal characterisations, involved any error of law.

50. Secondly, Mr Taylor suggested the judge failed to attach any, or any proper, weight to the following matters: (i) EOL's admission that the entire purpose of taking the Fortbeau Loan was as a backup option; (ii) that EOL had all the information it needed to bring the debt claim earlier, within the main proceedings; (iii) that, instead, Mr Graham remained silent in the telephone negotiations in order to keep the debt claim "up his sleeve", and then bring it out later, in an abusive way (see *Stuart v Goldberg Linde* at [77]); (iv) that EOL had taken the loan assignment expressly without prejudice to EOL's position in the main proceedings, but was not similarly explicit when finalising the telephone compromise agreement; and (v) M's subjective belief that the loan agreement had been compromised.

51. I pause here too. The argument is that DDJ Smith did not properly consider relevant matters in reaching his conclusion that there was no abuse of process by EOL. The question of which matters are relevant and which are irrelevant to the exercise of a decision is a matter of law. In abuse of process claims, the issue is whether the bringing of the second claim is an abuse of the legal process which seeks finality in litigation and resists having claimants oppress defendants through the bringing of successive claims on the same subject which should have been pursued in earlier proceedings if at all. Plainly EOL would have to know it had a second claim before it could be held to be an abuse for it not to have advanced that claim earlier (see (ii)). But it is not relevant to the question of whether there *is* abuse that the second claim was one which arose out of the commercially motivated assignment of a debt claim (see (i)); nor that the second claim might have been, but was not, compromised when the first claim was (see (iii)); nor that EOL did not specifically alert M to this feature of the settlement (see (iv)).

52. It would be a relevant consideration that EOL had kept the debt claim "up its sleeve", in that it had failed to alert M (and perhaps even the court) to the existence of such a claim: see *Stuart v Goldberg Linde* at [77], as amplified at [92] and [96]. But that is not the case here: EOL had given M formal notice of the loan assignment; and the court in the main proceedings had all the relevant documentation before it.

53. Further, M's subjective belief that the loan agreement had been compromised (see (v)) is not a necessary consideration in the court's determination of whether it was an abuse of process for EOL to pursue the debt arising under that loan agreement. In this appeal there were various suggestions that the court below had failed to appreciate the significance of M's evidence that he would not have agreed to the settlement in relation to the main proceedings if he had realised the Fortbeau Loan agreement was not included, and that his subjective belief was that it was indeed included. These arguments come close to suggesting that M was misled in the settlement agreement discussions (as his first witness statement asserts), but a claim on those grounds was not in issue in the lower court, nor here, and M's subjective beliefs are not determinative in construing the terms of the parties' settlement nor in deciding whether EOL's issue of the statutory demand was an abuse of process.

54. Finally, Mr Taylor advanced further arguments relying on analogies with CPR 38.7 on the hypothetical basis that EOL was bringing a Part 7 claim rather than issuing a statutory demand. Fancourt J did not give permission for an appeal on M's **Ground 5**, which dealt directly with arguments based on CPR 38.7. These arguments by analogy largely repeat points already made, and to that extent are already in play. To the extent they do not, I consider they are outside the specific grounds of appeal for which permission has been granted.

55. Putting the contrary arguments, Mr Jones, for EOL, supported the judge's finding that there was no abuse of process in EOL serving the statutory demand, and that his decision should therefore be upheld. He noted that (i) if the claim under the Fortbeau Loan was not compromised (as the judge had found), then the debt was due and owing *and uncontested*, and in those circumstances EOL was not bringing a further claim at all (as it might be doing under a Part 7 claim in relation to a disputed debt), so the abuse of process argument falls away completely; (ii) M had repeatedly acknowledged and averred that he was liable to repay the debt; (iii) the judge had properly concluded that although EOL could have added the debt claim to the main proceedings it was not a case where it *should* have done so, given that it would have required EOL to plead the converse case to the one it was pleading in the main proceedings, and do so at a time where it was fully engaged in preparation for those main proceedings; (iv) the debt claim was, in any event, not a claim that would necessitate M being "twice vexed" in the same matter, since M would be required to *defend* the existence of the Fortbeau Loan in the main proceedings and, if disputed, *deny* it in the debt proceedings; (v) M's subjective belief that the Fortbeau Loan had been compromised was irrelevant to the question of whether it was an abuse of process for EOL to pursue a debt that had been held not compromised; (vi) although EOL had taken an assignment of the Fortbeau Loan as an alternative route to recovery against M, it was not abusively keeping that claim "up its sleeve", since M was formally on notice of the assignment and of the fact that the debt claim might be made separately from the main proceedings; and, finally, (vii) in agreeing to discontinue the main proceedings, it was not necessary for EOL to reserve specifically its rights to sue

on the Fortbeau Loan, nor an abuse of process for it to fail to do so, and that point had not, in any event, been raised before the judge below.

56. Further, as to M's suggestion that if EOL had issued proceedings to recover the Fortbeau Loan it would have been prevented from doing so by operation of CPR r.38.7, Mr Jones noted that, if the debt had not been compromised, then EOL need not proceed by this route but was entitled to issue a statutory demand. In any event, the debt claim did not arise out of the same or substantially the same facts, given that the main proceedings were based on a complex fact scenario of secret commissions and losing foreign exchange trades, with a suite of remedies claimed by EOL including damages and personal and proprietary claims for sums representing the secret commissions or their proceeds. By contrast, the debt claim was by way of straightforward recovery of a loan owed by M to F, with that debt now assigned to EOL.

Conclusions on appeal Ground 4 – in relation to Insolvency Rules 2016 r.10.5(5)(d) – the "abuse of process" point

57. The judge set out the relevant law on abuse of process in his judgment. In applying that law, he determined that the test set out in those authorities had not been met.

58. First, and in line with the approach in the cited authorities, he held that although EOL's debt claim under the Fortbeau Loan could have been pursued in the main proceedings, he could find no reason to hold that it should have been pursued then, such that it was an abuse of process not to do so. He reached that conclusion on the basis that EOL was not seeking to rely on the debt claim in the main proceedings, but, to the contrary, their submissions cast doubt on the loan agreement alleged by M, so it would have been "a strange amendment" to advance an alternative claim (even though they had one) whereby they would then seek to rely themselves on that same disputed agreement. EOL was, instead, fully invested in preparing for litigation in the main proceedings or settling those claims with defendants where it could.

59. Secondly, that conclusion was substantially bolstered by the judge's finding that the debt claim would not involve M in defending the same set of facts twice. The context was thus one where abuse of process protection was not needed. The judge reached this conclusion on the basis that the main proceedings were "primarily about conspiracy and bribery, and like matters" (ie claims where EOL sought damages and personal and proprietary disgorgement of the profits of M's secret commissions), where doubt would need to be cast on M's claims that the funds received were by way of loan, not secret commissions. By contrast, the debt claim arose by way of "an assigned loan agreement" (ie not by way of a further dispute between the parties, but by way of a debt assigned to EOL by a third party, F). Not only that, it was a debt which M "has said on oath he is liable for" (and, it might be added, is therefore on the face of it a claim which M knows EOL has acquired by way of assignment from F, and might advance – without surprise – against M).

60. Further, to deal with Mr Taylor's point, noted earlier at para [48](iv), that a finding of abuse is not excused simply because the subsequent claim can be pleaded easily or that M has no defence to it, I do not consider the judgment reveals DDJ Smith to be adopting this approach. In my view, he was merely using these features to support his view that the claims being made in the main proceedings and the debt claim were

distinct, and that the latter did not therefore involve M being "twice vexed" in the same issue.

61. The judge therefore concluded that "*Accordingly, in my view, there is no oppression or vexatiousness in the respondents now serving a statutory demand in respect of that discrete claim*."

62. In my view the judge was entitled, on the evidence before him, to reach that conclusion. It involved no error of law; it involved no consideration of matters which were irrelevant, nor any failure to consider matters which were relevant, to a proper application of the relevant legal test; and it is not plainly wrong.

63. It follows that M's appeal on **Ground 4** must be dismissed.

Additional comment

64. At the initial stages of this hearing I voiced some unease with the idea that a c.£1.3m debt due under a loan agreement which, in the main proceedings, M claimed (and indeed had sworn on oath) was valid but which EOL reserved the right to challenge as not a valid or genuine loan, was not, by virtue of those very facts, a debt disputed, presumably on substantial grounds.

65. However, Mr Taylor, for M, confirmed that in the application to set aside EOL's statutory demand, no argument had been advanced to suggest that the validity of the loan agreement itself was disputed on substantial grounds. Presumably M found that hurdle too much, given his own affidavit to the contrary. Instead, the only grounds advanced were that the Fortbeau Loan had been compromised at the same time as the main proceedings were settled, and/or that the subsequent issue of the statutory demand in pursuit of the debt claim was an abuse of process.

Conclusions

66. For the reasons given, M's appeal against DDJ Smith's dismissal of M's application to set aside the statutory demand in relation to the debt due to EOL under the Fortbeau Loan is dismissed on all four of the grounds of appeal advanced in this hearing.

67. I thank counsel for their careful assistance. I invite submissions on the precise form of the order to be made, and will hear counsel on any consequential matters (if those cannot be agreed in advance).