Neutral Citation Number: [2023] EWHC 2666 (Comm)

Case No: CL-2022-000139

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 26/10/2023

Before :

MR JUSTICE JACOBS

- -

Between :

Shahraab Ahmad — **Claimant**

- and -

(1) Karim Ouajjou
(2) Yasmin Al Sahoud Perez — **Defendant**

- -
- -

Simon Davenport KC and Simon Goldstone (instructed by **RWK Goodman**) for the **Claimants**
James Pickering KC (instructed by **Colman Coyle**) for the **Defendants**

Hearing dates: 10th October 2023

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Approved Judgment

This judgment was handed down remotely at 9:00am by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

MR JUSTICE JACOBS:

A: Introduction: outline of the applications and the parties' arguments

1. The claimant in these proceedings ("Mr Ahmad") claims €25,022,932.08 and US$1,200,000 (plus contractual interest), being sums that, as he alleges, he loaned to the two defendants ("Mr Ouajjou" and "Ms Perez", and collectively "the defendants") under 8 agreements in 2020 and 2021. The relevant dealings between the parties started and continued during the Covid-19 pandemic. Mr Ahmad contends that the purpose of the loans was for use in the purchase of PPE (i.e. personal protective equipment) in order to facilitate the fulfilment of what Mr Ahmad understood to be lucrative contracts between a company or companies operated by the defendants and the Spanish government or Spanish regional governments.

2. There are now three applications before the court, and they were addressed by the parties in the following order albeit that the third application was chronologically first in time.

3. First, the defendants apply for permission to amend their defence, including to add a counterclaim. The proposed amendments are substantial and radically recast the defence which was pleaded in 2022. The amendments sought fall into three broad categories.

   (1) The defendants seek to change their factual case as to the events which happened, and to rely on oral agreements allegedly made.

   (2) Ms Perez seeks to deny that she was personally liable under the loan agreements which she admittedly signed (and indeed others which are alleged by Mr Ahmad to have been signed), on the basis that she was not acting in her personal capacity but was signing on behalf of the principal Spanish company which Mr Ouajjou operated, and of which she was an officer. The principal company was Axess Sp Sociedad Limitada. (Unless it is necessary to distinguish between them, I shall simply refer to "Axess" to refer to this company, as well as another company operated by the defendants called Axess Canarias Sociedad Limitada).

   (3) Mr Ouajjou seeks to add a counterclaim. This is principally a claim in respect of certain monies which were provided to Mr Ahmad for investment purposes. Mr Ouajjou seeks, in essence, an account in respect of the investments that were made, together with payment of their current value. The various iterations of the amended defence and counterclaim, including that most recently served, also included a counterclaim in respect of certain rights assigned to Mr Ouajjou by Mr Guillaume Rambourg, who is a significant player in the relevant events. However, in his oral submissions on behalf of the defendants, Mr Pickering KC made it clear that this aspect of the counterclaim is not pursued.

4. Mr Ahmad opposes the application to amend on a number of grounds. In summary, he contends that the significant changes to the defendants' factual case have no real prospect of success. On his behalf, Mr Davenport KC submits that – in the light of the very different case that was previously pleaded, the lateness with which this case has

emerged, the absence of any documentary support for the case, and its inconsistency with the contemporaneous documents which do exist – the new factual case does not carry the degree of conviction required in order to justify the court granting permission to amend. As far as concerns Ms Perez' new legal case, Mr Davenport's principal submission is that the proposed agency argument has no real prospect of success when the relevant documents are properly analysed. In relation to the counterclaim, his principal submission was that, in all the circumstances, Mr Ouajjou should pursue this case, if at all, in separate proceedings.

5. Secondly, the defendants apply, pursuant to CPR 14.1 (5), to withdraw admissions which were made in the original defence. This application has, as Mr Pickering explained, been made as a precautionary exercise, in order to meet Mr Ahmad's case that the proposed amendments necessitate such an application. The defendants do not therefore accept that there are any relevant admissions that are being withdrawn. Mr Pickering's principal argument, however, was that even if such permission were required, it was an appropriate case for the court to grant it, when considering all the circumstances identified in CPR 14PD.7. It is accepted that the defences now advanced, whether or not they contain admissions which the defendants need to withdraw, are not based on new evidence that has come to light and which was not available at the time when the case was originally pleaded. However, an explanation had been provided by the defendants, in a detailed statement from Ms Perez, as to how the original defence came to contain (if it did) relevant admissions, and to omit the key aspects of the defendants' defence which are now set out in the amended pleading. In summary, they contend that their legal advisers (an experienced solicitor and counsel) did not properly understand and set out their case, and that the defendants failed to point this out, and signed statements of truth, because of their unfamiliarity with English pleadings and the very tight timescale in which the defence was produced. On behalf of Mr Ahmad, Mr Davenport submits that the explanation provided is not satisfactory, and that the real reason for the changes is the collapse of the arguments advanced in the original defence.

6. Thirdly, summary judgment is sought by Mr Ahmad in respect of loans 2, 3, 4, 5, 6 and 8. There is no claim in respect of the first loan, loan 1, since it is now accepted by Mr Ahmad that this was repaid. There is also no claim in respect of loans 7 and 9. These two loans were, on the claimant's case, somewhat different to all the other loans. The former were, on the claimant's case, all part of back-to-back arrangements whereby Mr Rambourg loaned money to Mr Ahmad, and Mr Ahmad loaned identical sums to the defendants. Loans 7 and 9, however, did not involve a back-to-back arrangement, but only involved Mr Ahmad and the defendants. Mr Ahmad accepts that loans 7 and 9 are not amenable to summary judgment, and they therefore form no part of the application.

7. The outcome of the summary judgment application is, to a large extent, dependent on the outcome of the defendants' application to amend and withdraw admissions. Mr Pickering did not pursue any of the defences which had been advanced in the original defence, and thus accepted that the original pleading did not raise any defence with a real prospect of success. It is not necessary to explore the reasons for this approach. One reason, no doubt an important one, was that a principal line of defence was based upon an assignment which Mr Ouajjou had obtained from Mr Rambourg. In consequence of that assignment, Mr Ouajjou argued that he could defend Mr

Ahmad's claim under the loan agreements by relying on the assignment that he had received of Mr Rambourg's back-to-back rights against Mr Ahmad under his loan agreements. However, this line of argument had been undercut by Mr Rambourg's rescission of the agreement pursuant to which Mr Ouajjou had obtained his assignment.

8. Accordingly, the defendants needed to succeed on their amendment application if they were to be in a position to argue that they had a defence to the claims under the loans with a real prospect of success. However, Mr Pickering submitted that even if the court refused permission to amend, and concluded on the present materials that there was no defence to the claims under the loans with a real prospect of success, the court should nevertheless decline to grant summary judgment because there were (see CPR 24.2 (b)) other compelling reasons why the case should be disposed of at a trial. He relied in particular on the fact that, even if summary judgment were granted, there would be outstanding claims which could only be determined at a trial: the claims under loans 7 and 9, the pleaded claims for fraud, and (at least if permission to amend the counterclaim were granted) the claim in respect of the investments made by Mr Ahmad with the funds provided by Mr Ouajjou.

9. His overarching submission, across all applications, was that this was a highly unusual case. It was high in value yet short in terms of hard paperwork – millions of euros and dollars changed hands with an astonishing informality, no doubt due to the (then) closeness of the various protagonists. It involved significant and serious allegations of dishonesty and fraud. Further, there is the proposed counterclaim under which Mr Ouajjou would appear to be owed many millions of euros by Mr Ahmad. He said that on any basis, there is much more to this case than at first meets the eye.

10. On behalf of Mr Ahmad, Mr Davenport submitted that if there was no defence with a real prospect of success on the loans, summary judgment would be appropriate. The existence of other claims was not a reason to decline to grant summary judgment. If summary judgment were obtained, Mr Ahmad might well take the view that such claims were not worth pursuing – certainly if summary judgments for substantial sums were not met by the defendants, which appeared to be a realistic prospect.

11. In the light of the arguments advanced by the parties, it is necessary to describe in more detail the facts giving rise to the claims, and the disputed areas of evidence, as well as the course of the litigation.

B: The facts giving rise to the proceedings

The parties and principal players

12. Mr Ahmad has spent his career in investment banking and finance, and at one stage operated an apparently successful hedge fund. At the time of the relevant events, he was married to Majda Boutaleb Joutey ("Ms Joutey"). In his affidavit in support of his successful application for a freezing order, which I granted in March 2022, he describes the unhappy and turbulent state of his marriage, which was (at the time of the freezing order application) subject to divorce proceedings. Ms Joutey was at that time a defendant to the litigation. It was Mr Ahmad's evidence that, during the events which gave rise to the litigation, Ms Joutey had had affairs with both Mr Rambourg and Mr Ouajjou. The present proceedings are no longer continuing against Ms Joutey:

she appears to have reconciled with Mr Ahmad, and in any event the litigation has been settled as between the two of them. She has provided one short witness statement to Mr Ahmad for the purposes of the present applications.

13. Mr Ouajjou is a businessman who operates through two Spanish companies, Axess Sp Sociedad Limitada and Axess Canarias Sociedad Limitada. (As I have said, I will refer to these companies individually and collectively as "Axess" unless it is necessary to distinguish between them). Prior to the events giving rise to the litigation, the business was at least principally concerned with the import and export of electronic goods and equipment, particularly Apple products into Morocco.

14. Ms Perez is Mr Ouajjou's wife. The loan documents that she signed refer to her "acting on her own, in her capacity as Administrator of the commercial company AXESS CANARIAS S.L.U." She is therefore an officer of that company, although the precise role and work of an "Administrator" was not the subject of detailed evidence before me. Ms Perez' social media page (as exhibited to the Affidavit of Mr Ahmad in support of the freezing order) describes her as the Chief Operating Officer at Axess Group, and as an experienced Chief Executive Officer "with a demonstrated history of working in the investment management industry. Skilled in Corporate Law, Management, Mergers & Acquisitions". The page, which was accessed shortly before the freezing order, describes her as having been Chief Operating Officer at the Axess Group full time for 3 years and 3 months, since January 2019. Amongst the other information on the page is that she: was the managing partner of Axess since February 2019; had worked for Morgan Stanley; was the founding partner of a law firm (Al Sahoud Abogados); and had been the managing director of Malaga Football Club. Her education included the bar transfer test at the BPP Law School in 2011-2012. Her skills were corporate law, legal advice and due diligence. Her witness statement in these proceedings indicates, however, that this social media page rather overstated matters. In particular, she says that she did not actually complete the bar transfer test, and had not worked full time for Axess for the whole period, but rather had been concentrating on looking after her children and other matters.

15. Mr Guillaume Rambourg describes himself as a financier and professional investor. He is a retired hedge fund manager, and the evidence indicates that he has enjoyed a very successful career and is very wealthy. As he describes in his evidence, he had been friends with Ms Joutey since 2018, and was approached by her in 2020 to ask whether he would lend money to Mr Ouajjou to invest in a PPE project in Spain.

The loan documents and their background

16. Much of the broad background to the parties' dealings, and the shape of the arrangements which they made in 2020 and 2021, was not particularly controversial. The following description is taken from the defendants' defence served in June 2022, and bracketed numbers refer to the paragraphs of that defence.

17. In or about the late summer of 2020, Mr Ouajjou began considering how he might be able to assist with the supply of PPE to the Spanish government as part of its response to the Covid-19 pandemic [10]. He began to formulate a project for the supply of PPE to the Spanish government [11]. He discussed what was described as the "PPE Project" with Ms Joutey, and Ms Joutey said that she would be able to introduce Mr Ouajjou to an investor who may be interested in participating in the PPE Project by

making a financial investment [12]. She then introduced Mr Rambourg as a potential investor in the PPE Project [13]. Ms Joutey told Mr Ouajjou that Mr Rambourg wished to make loans to Mr Ouajjou "to deploy in furtherance of the PPE Project, as Mr Ouajjou considered appropriate" [15]. The loans would be repayable with an interest calculation designed to effectively provide Mr Rambourg with his share of the profits from the PPE Project. However, there were difficulties in Mr Rambourg transferring money directly to Mr Ouajjou or Ms Perez [16]. Ms Joutey then suggested that any loans could be made to her husband, Mr Ahmad, on a "back-to-back" basis [17] and [18].

18. The original defence described Mr Ahmad's role as being "a mere conduit for the monies to be invested by Mr Rambourg pursuant to the GR Investment" [19]. The "GR Investment" was earlier described by reference to the loans which were repayable with the interest calculation designed to provide Mr Rambourg "with his share of the profits from the PPE Project". The defence also alleged, as an aspect of the definition of GR Investment, that the repayments were not to be due before 31 December 2023.

19. The parties then proceeded to conclude a number of back-to-back loan agreements which, as paragraph [20] of the defence acknowledged, were "prepared and signed by the parties for the purposes of facilitating the GR Investment". Mr Ahmad's case, as set out in both Mr Ahmad's Affidavit in support of the freezing order application, and the Particulars of Claim, was that there were 7 such back-to-back agreements, together with two loans (loans 7 and 9) which were made by Mr Ahmad without a back-to-back agreement with Mr Rambourg. The following table, taken from Mr Ahmad's Affidavit, sets out the payments which were made in respect of each of the loans relied upon by Mr Ahmad.

Loan	**Date of Transfer**	**Advance by Guillaume Rambourg to Shahraab Ahmad (receipts in brackets)**	**Advance by Shahraab Ahmad to defendants (receipts in brackets)**	**Defendant recipient**
GR Loan 1	09 September 2020	€1,700,000		
Loan 1	11 September 2020		€1,700,000	Axess SP
	27 October 2020		€ (-1,835,993.39)	
	29 October 2020	€(-1,835,993.39)		

GR Loan 2	05 November 2020	€1,835,987.85		
Loan 2	06 November 2020		€1,658,750	Axess SP
GR Loan 3	09 November 2020	€2,200,000		
Loan 3	10 November 2020		€2,200,000	Axess SP
GR Loan 4	13 November 2020	€3,964,000		
Loan 4	17 November 2020		€3,964,000	Axess Sp
GR Loan 5	16 December 2020	€6,500,000		
Loan 5	22 December 2020		€6,300,000	Axess Canarias
Loan 5	29 December 2020		€199,967.10	Axess SP
GR Loan 6	22 March 2021	€5,300,000		
Loan 6	23 March 2021		€5,300,000	Axess Canarias
Loan 7	25 May 2021		$1,200,000.00	Karim Ouajjou
GR Loan 7	30 June 2021	€5,000,000		

Loan 8	01 July 2021		€5,000,000	Karim Ouajjou
Loan 9	13 September 2021		€600,000	Axess SP
	6 October 2021		$(230,531,84)	
	Balance	**€24,664,000**	**€25,222,717.10** **$969,468.16**	

20. Mr Ahmad was able to provide evidence, from his bank statements, to show that he received from Mr Rambourg, and paid over to the defendants or Axess, each of the payments set out in the above table. It remains common ground in these proceedings that all of these payments were indeed made to and by Mr Ahmad. However, for reasons which Mr Ahmad has sought to explain in his Affidavit, he is not in a position to provide documentation relating to all of the loan agreements which, he alleges, were concluded with the defendants. The current position is that Mr Ahmad has provided fully signed documents relating to loans 2 and 3, as well as loan 1 which is not in dispute. He has also been able to provide a loan agreement signed by Ms Perez, but not Mr Ouajjou, in respect of loan 4. He has not been able to provide any documentation, signed by the defendants, in respect of the other loans which are the subject of the summary judgment application; i.e. loans 5, 6 and 8. Mr Ahmad's evidence in his Affidavit, served at the time when divorce proceedings were underway, was that he believed that documentation relating to the other loans may have been deliberately destroyed by Ms Joutey.

21. The loan documentation which does exist confirms, as the original defence acknowledged, the essential back-to-back nature of the agreements which were concluded. The agreements are short and in similar form. It is sufficient to quote the full terms of one of them, loan 2 which was dated 9 November 2020.

> "Deed
>
> This Deed is Dated November 09th , 2020
>
> **Between:**

Mr. Shahraab Ahmad of 49 Cathcart Road, London SW10 9JE, UK ("The Lender")

Ms Yasmin Al Sahoud Perez Calle Valenzuela, 8 BAJO izquierda 28014 Madrid ("The Borrowers")

Mr Karim Ouajjou Calle Valenzuela, 8 BAJO izquierda 28014 Madrid ("The Borrowers")

(collectively known as the Parties)

Further information on the Parties:

Ms. YASMIN AL SAHOUD PEREZ, of legal age, citizen of Spain with DNI 74861645A acting on her own, in her capacity as Administrator of the commercial company AXESS CANARIAS, S.L.U, a Spanish company with registration- CIF number: B76812775, and having its registered office situated in Camino Santa Rosa de Lima n° 43, San Cristobal de La Laguna, 38330 Santa Cruz de Tenerife.

Mr. KARIM OUAJJOU, of legal age, citizen of Morocco, provided with Spanish N.I.E number Y3770719K with address at C/ Valenzuela n°8, Bajo izquierda, 28014, MADRID, acting on his own.

ARTICLE 1. PURPOSE OF THE CONTRACT

The purpose of this contract (the "Contract") is to formalize a loan agreement between the Borrowers and the Lender and to specify the conditions of repayment of the loan, The signing of this Agreement is formal recognition by the Borrowers that the funds were given to him by the Lender.

ARTICLE 2. PAYMENT AND REPAYMENT ARRANGEMENTS

The Lender will wire the Borrowers 1,836,000 Euros ("the Principal") immediately after signing this contract.

The Borrowers shall pay the Lender 8 percent interest on the Principal every 40 days, simple interest. This loan will automatically roll over unless terminated by either party. The termination conditions are stated in a separate clause below.

Every 40 days, The Borrowers will wire the Lender 146,880 Euros.

The Lender and Borrowers agree that this loan is for a specific PPE project. If the project does not go through in the first two weeks, the Borrowers have the right to return the principal to the Lender without any interest being incurred.

> For the purposes of clarity, each Borrower shall be responsible for the full repayment amount 1,836,000 Euros plus 8 percent of the Principal, if the other Borrower fails to pay. The Lender shall receive no more than the 1,836,000 Euroes plus 8 pct of the Principal if repaid in the 40 day period.
>
> If the 40 day period is breached, interest will continue to accrue at 8 percent every 40 days.
>
> If the 40 day period is breached, the Lender shall be within his rights to being [sic] legal proceedings. The Borrowers agrees to shoulder the cost of any legal proceedings borne by the Lender.
>
> **ARTICLE 3. TERMINATION**
>
> The Borrowers can serve notice of termination at any time and return the Principal and accrued interest within 5 business days of termination. Interest will accrue on a calendar day basis excluding the 5 business days used to serve notice.
>
> The Lender can serve a 40 day notice to terminate the contract.
>
> **ARTICLE 4. APPLICABLE RIGHTS**
>
> All disputes, disputes or matters arising or relating to this Loan Agreement shall be settled definitively in accordance with the laws of England and Wales and the parties agree to submit to the exclusive jurisdiction of the courts of England and Wales.
>
> Executed as a DEED by [Mr Ahmad, Mr Ouajjou and Ms Perez]"

22. This agreement is signed by all parties, and the signatures of Mr Ahmad and Ms Perez are (in the copy in the bundles) both witnessed.

23. In the original defence, as described in more detail below, the existence of back-to-back loan agreements in relation to each of loans 1- 6 and 8 was not in dispute. Thus, paragraph 22 of the original defence stated:

> "Between 9 September 2020 and 1 July 2021 Mr Rambourg paid monies to Mr Ahmad pursuant to the Loan Agreements between them and immediately thereafter Mr Ahmad paid monies to ACSL, and on 1 July 2021 to Mr Ouajjou, pursuant to Loan Agreements between them. In this way Mr Rambourg performed his part of the GR Investment"

24. This was confirmed in paragraph 33 of the defence (addressed in more detail below), which pleaded that "the dates for each of the Loan Agreements are correct" and that "the amounts for each of the Loans are correct".

25. It was also the defendants' case that the monies which had been sent down the chain from Mr Rambourg had been used for the intended investment in PPE. Thus, paragraph 23 pleads:

> "On receipt of the monies pleaded in paragraph 22 above Mr Ouajjou deployed them for the purposes of the PPE Project and GR Investment".

26. It is common ground that, leaving aside the payment that was made in respect of loan 1, there has been no repayment from the defendants to Mr Ahmad, or from Mr Ahmad to Mr Rambourg, under any of the back-to-back agreements relied upon by Mr Ahmad in these proceedings.

The developments now alleged by the defendants

27. It is convenient at this stage to describe a number of changes in the relationship which Mr Ouajjou and Ms Perez now contend took place. They allege that there were three significant changes which took place during the course of dealing between the parties. The first two of these changes have a bearing on the defence which the defendants wish to advance. Mr Pickering accepts that these two changes represent a departure from the case pleaded in the original defence, and he was unable to refer me to any contemporaneous documentation where the present case has been articulated or foreshadowed prior to the amended pleading.

28. The first alleged change took place, as the defendants contend, in late 2020 when Mr Ouajjou raised concerns with Ms Joutey that while any profits were to be shared between Axess/Mr Ouajjou, on the one hand and, on the other hand, Ms Joutey, it was only Axess/Mr Ouajjou which were taking any risk (in the form of the loan agreements). For this reason, according to Mr Ouajjou, he said that he would not be entering into any further loan agreements. According to Mr Ouajjou, Ms Joutey accepted this and (presumably because she wanted the project to continue) it was agreed that going forward there would be no further written loan agreements. Any monies advanced after then would just be "simple advances", with her managing the relationship with her close friend, Mr Rambourg. Indeed, it is for this reason (according to Mr Ouajjou but disputed by Mr Ahmad) that from around this time no further written loan agreements were produced, let alone entered into. This aspect of the change in the relationship now appears in paragraph 20C of the draft Amended Defence.

29. The second alleged significant change in the relationship took place in about February 2021. At around that time, Mr Ahmad and Ms Joutey moved to Marbella following which Mr Ahmad and Mr Ouajjou (who already lived in Spain) became friends, not having known each other previously. According to Mr Ouajjou, shortly after, Mr Ouajjou told Mr Ahmad that he was uncomfortable with Axess receiving significant sums while, despite his best efforts, not having obtained any PPE contracts (save for one which, for various reasons, could not be fulfilled). Mr Ouajjou therefore suggested returning all monies; Mr Ahmad, however, told him that there was no need to do so as there were other profitable investments which could be made using the monies from Mr Rambourg; and further that, rather than return the monies, all loan agreements to date would be "cancelled". On this basis, Mr Ouajjou agreed not to return the monies and instead, while still continuing looking for PPE opportunities,

the monies from Mr Rambourg would be used to invest in certain special purpose acquisition companies (SPACs) which Mr Ahmad would identify, with any profits or losses (after accounting to Mr Rambourg) being shared equally between them. This aspect of the change in the relationship now appears in paragraphs 33R to 33X of the draft Amended Defence.

30. Both of these alleged changes are denied by Mr Ahmad.

31. The third alleged change is less controversial, factually, and it is not specifically related to the loan agreements. It is said that in about March 2021, Mr Ahmad proposed that Mr Ouajjou should send monies to Mr Ahmad for making certain personal investments. Following the above, Mr Ouajjou did indeed send monies to Mr Ahmad for such investments. Mr Ouajjou says that, as far as he is aware, those investments were highly successful although Mr Ahmad has not been forthcoming with information about those investments and has not accounted to Mr Ouajjou for what are believed to be highly significant sums.

32. This point was not pleaded in the original defence, but it now appears in paragraphs 33AD to 33AJ of the Amended Defence, as well as paragraphs 89 to 90 of the draft Counterclaim.

33. The underlying facts were in fact set out in a response dated 1 December 2022 to a request for further information which had been served on Mr Ahmad's behalf. It is not therefore a new point. Indeed, in 2023, prior to the application for permission to amend, Mr Ouajjou's solicitors corresponded with Mr Ahmad's solicitors, without success, seeking information about the investments which were made. Furthermore, Mr Ahmad's affidavit (served right at the start of the proceedings) refers specifically to the sum of US$ 1,949,835 having been transferred to him by Mr Ouajjou for the purposes of investment, and he produced a bank statement showing the receipt of the relevant funds.

34. The dispute in relation to these monies is therefore more limited. There is an argument as to whether any claim in respect of these investments could be made by Mr Ouajjou personally, in circumstances where the monies were sent by Axess. There is an argument as to how much this cross-claim is worth: Mr Ouajjou contends that the investments might be worth as much as US$ 70 million. He refers in that connection to an e-mail sent by Ms Joutey on 23 April 2022, in which she said that she had tried to make an estimate of the current value of the investments. She produced a table indicating that their cost was US$ 1.975 million, their current value was US$ 7.425 million and the "Best Case Upside" was US$ 70.450 million.

35. In order to assist in my understanding the position, I directed Mr Ahmad (with his agreement) to provide some further information as to what he alleges to be the current value. Mr Ahmad's solicitors duly provided some figures. Perhaps unsurprisingly, they are substantially below the figures previously given by Ms Joutey, and their accuracy was challenged by the defendants' solicitors in correspondence.

36. The upshot is that there is no dispute that a substantial sum was provided to Mr Ahmad for investment purposes, but uncertainty as to how much the investments are now worth. It seemed to be me to be difficult for Mr Ahmad to contend that there was no accounting obligation owed either to Mr Ouajjou or (as Mr Ahmad argued) Axess

in respect of the monies received. There is in my view a sufficiently arguable case that the accounting obligation is owed to Mr Ouajjou, notwithstanding that the funds were paid by Axess, and I am not in a position to decide, on the present materials, that only Axess is in a position to claim in respect of these investments. Apart from the dispute as to the value of the investments (as to which I can again make no findings), Mr Davenport's principal argument was that this aspect of the case should not prevent summary judgment from being given in Mr Ahmad's favour. Mr Ouajjou should advance any claim in separate proceedings, rather than by way of a counterclaim.

37. In describing the subsequent events, it is not necessary to focus on this aspect of the case, but instead I will concentrate on the materials which have a bearing on the other two significant changes described above. In so doing, I will consider in particular some of the contemporaneous documents exchanged at various times between the parties, and indeed some of the documents that do not appear to have been exchanged.

2021

38. There is no dispute that Mr Ahmad and Ms Joutey moved to Spain in early 2021, and that there were various discussions and dealings between the parties during the course of 2021. It would not be appropriate, on interlocutory applications such as the present, to attempt to give a chronological account of the documents during this period. Instead, I shall identify a number of features which, in reaching my overall conclusions, are of significance.

39. First, a number of loans were alleged to have been made during this period: loans 6 – 9. In addition, the express terms of the prior loans required the payment of interest on a regular basis. There is, however, no document prior to 25 October 2021 which contains any clear demand by Mr Ahmad for payment under any of the loan agreements. On that day, Mr Ahmad e-mailed Mr Ouajjou, telling the latter to "take this as an official notice of demand for payment". Curiously, the e-mail contained a demand for payment under loan 1, which had (as is common ground) in fact been repaid. Prior to this time, there were some WhatsApp exchanges between 15 and 22 October, and these do indicate that Mr Ahmad was asking for monies. It is not clear, however, exactly what he is asking for. In the exchanges, he asks for "the funds owed to me" to be returned. This may possibly be a reference to the loan agreements, but it seems a somewhat unusual way to ask for payment of principal and interest. In addition to the absence of any demand for payment, there are no accounting documents sent by Mr Ahmad to Mr Ouajjou in which the financial position under the various agreements is set out. In fact, the first document which is in the nature of a statement of account was sent by Mr Ouajjou to Mr Ahmad on 7 October 2021, and this contains no reference to monies owed under the loan agreements.

40. Secondly, there are various documents which indicate that the Axess PPE business was up and running and in fact doing well. In his affidavit, Mr Ahmad referred to a short presentation document which, he says, was prepared by Mr Ouajjou in March 2021. This is on Axess Group headed paper, and in broad terms it describes the success of the PPE business that was then being conducted. Also within this category of documents is a spreadsheet which was sent by Ms Joutey to Mr Rambourg on 13 May 2021. This contained a business plan which, amongst other things, contained historic figures for the business for 2020 and 2021. This showed a very successful business both historically and prospectively. These spreadsheets are relevant to the

state of knowledge of all the parties to the present proceedings, because the documents indicate (and indeed Mr Ahmad's Affidavit accepts) that they were worked on by Mr Ahmad as well as Mr Ouajjou and (it would seem) Ms Joutey. I return to the significance of these spreadsheets in Section F below.

41. Thirdly, there are other documents which show that Mr Ahmad's wife, Ms Joutey, had a substantial role in the Axess PPE business, and that Mr Ahmad too was involved in the preparation of documents relating to that business. Mr Ahmad's evidence is that Ms Joutey had an Axess e-mail address. On 29 June 2021, Ms Joutey sent both Mr Ahmad and Mr Ouajjou the proposed text for a set of slides which described the business. There was at this stage, according to Mr Ahmad's evidence, the possibility of attracting outside investors. The e-mail indicated that all of the parties (i.e. including Mr Ahmad) would work on the slides: there would be a zoom call later that day "to finalise this so we can work on the aesthetics". A "more professional powerpoint presentation" (as Mr Ahmad described it) was then prepared and I infer (because Mr Ahmad exhibited them) were sent to Mr Ahmad. The slides referred to both Mr Ouajjou and Ms Joutey as successful entrepreneurs and bankers. The slides as a whole present a picture of a successful (as stated in one of the slides) "Up & Running existing business". The spreadsheets are an earlier example of Mr Ahmad's involvement in documents relating to the business.

42. Fourth, there are various documents in 2021 which indicate that the dealings between Mr Ouajjou and Mr Ahmad were not confined to the loan agreements. Mr Ouajjou exhibited a large bundle of documents which contained various commission agreements. These appear to indicate that Mr Ahmad would potentially be paid large commissions in connection with contracts concerned with the PPE business. There is also some documentation relating to investments by Mr Ouajjou, or Axess, in various special purpose acquisition vehicles, or "SPACs". These were investment vehicles inwhich (on Mr Ouajjou's case) Mr Ahmad had recommended investment. These "SPAC" investments are distinct from the investments which form the basis of the proposed counterclaim, as described above.

43. Fifth, as previously described, there are no documents which record or specifically refer to the two changes to the relationship which form the basis of the defence which Mr Ouajjou now wishes to advance. Nor were these changes referred to in letters from the defendants' then solicitors, Keystone Law, who had been instructed by early December 2021.

The commencement and course of the litigation

44. Following Mr Ahmad's written demand for payment under the three loan agreements in October 2021, Goodman Derrick LLP gave notice of potential legal action on 3 November 2021. Following responses from Keystone Law which were considered unsatisfactory, Mr Ahmad applied without notice for a freezing order against the defendants on 18 March 2022. That application was successful, and there has been no application by either of the defendants to discharge it, notwithstanding some indications in the documents of an intention so to apply. The Claim Form supported by Particulars of Claim was issued on 22 March 2022. The Particulars of Claim include causes of action, for example a claim in fraud, additional to the claim in debt for payment under the various loan agreements.

45. At that stage, Ms Joutey was one of the defendants to the litigation, with an allegation of fraud made against her, albeit that no freezing order was sought against her. She did not serve any defence, and the proceedings against her were stayed under a Tomlin Order dated 7 September 2022 pursuant to a settlement agreement made earlier that month. I have not seen the terms of that agreement.

46. Mr Ouajjou and Ms Perez were, however, required to serve a defence, and they were late in doing so. The date for service was 5 May 2022, but the defence was only served on 17 June 2022. There was then a contested application concerning whether they should be granted a retrospective extension of time. The application was heard by a deputy High Court judge, Mr David Edwards KC, on 28 October 2022. Mr Ouajjou was represented at that hearing by Mr Paul Burton, the experienced barrister who had drafted the defence.

47. One aspect of Mr Ahmad's argument, in opposing the extension of time, was that the defence had insufficient merit. The judge accepted that the merits of the defence could be taken into account, but noted the danger of allowing applications for an extension of time to become an application to strike out. The judge applied the *Denton* principles, and said that it would be most unjust if, on the basis of a 6-week delay in service at the start of the case, the defendants were to be unable to defend themselves against a € 40 million claim that involved allegations of fraud. The judge also considered that the arguments advanced in the defence had sufficient merit to overcome Mr Ahmad's argument that the extension of time should be refused on the basis of lack of merit.

48. At that time, one of the defences advanced (but not the only one) was a defence based upon the "Acknowledgment of Debt" agreed between Mr Ouajjou and Mr Rambourg. By that agreement, Mr Ouajjou had obtained an assignment of Mr Rambourg's rights against Mr Ahmad, and this gave rise to a pleading based on circuity of action. The essential point was that a successful claim by Mr Ahmad under the loans could be met by an equivalent claim, pursuant to the assignment, by Mr Ouajjou against Mr Ahmad. This defence is no longer pursued, however, following Mr Rambourg's rescission of the Acknowledgment of Debt. Mr Rambourg has provided a witness statement in which he describes the background to this document, as well as his ultimately fruitless attempts to get Mr Ouajjou to meet his obligation under that agreement, which was to pay € 45 million by 30 September 2022. Mr Rambourg's letter of rescission was sent on 23 December 2022.

49. Shortly thereafter, in January 2023, the defendants changed solicitors: Keystone Law was replaced by Colman Coyle. In March 2023, Colman Coyle indicated their intention to amend their defence. In April 2023, Colman Coyle advised RWK Goodman that they were working with counsel on an amended defence. They also said that their clients disputed having entered into loan agreements where signed documentation did not exist, and they requested copies of a number of loan agreements.

50. Prior to any amended defence being served, Mr Ahmad applied for summary judgment on 27 April 2023. On 3 July 2023, an application for permission to serve the amended defence was made by the defendants. There was a hearing before deputy High Court judge Adrian Beltrami KC on 21 July 2023, when he ordered that both applications should be heard together. In view of the point taken on admissions, the

defendants issued their (as they would say) precautionary application to withdraw admissions on 19 September 2023. The various applications then came on for hearing before me on 10 October 2023.

51. By that time, there were various witness statements or Affidavits which had been served by the parties in relation to the various applications. (It is not necessary to describe which statements were served in connection with which application.) The principal witness statements relevant to the applications are:

(1) Mr Ahmad's original Affidavit in support of the freezing order application, together with its exhibit.

(2) The first witness statement of Mr Ouajjou in response to the summary judgment application. This is dated 20 June 2023, and contains Mr Ouajjou's factual case. There is a substantial exhibit.

(3) The first witness statement of Ms Perez dated 20 June 2023. This is relatively short and describes the circumstances in which she signed the loan documentation, as well as her limited involvement in the business of Axess.

(4) The third witness statement of Ms Perez, dated 11 August 2023, in which she describes the circumstances in which the original defence was served, and why permission to amend should be given. Her account is supported in a shorter 4th witness statement of Mr Ouajjou also dated 11 August 2023.

(5) A very short witness statement of Mr Ahmad, dated 8 September 2023, which declines to engage with the factual allegations raised by the defendants either in their proposed amended defence or in their witness statement. He maintains the case put before the court in his Particulars of Claim, and states that he does not believe that at this stage he should incur the costs of addressing disputed matters of fact.

(6) A very short witness statement of Ms Joutey, also dated 8 September 2023. This describes her involvement in certain settlement discussions in 2022. She says that she (as well as Mr Rambourg) mistakenly believed at that time that the PPE business was a legitimate and profitable business. The statement does not address the factual allegations in the amended defence or the defendants' evidence, although she does express surprise that they were now seeking to deny having entered into any of the loan agreements.

52. A number of other witness statements were also served, including from Mr Rambourg as described above.

D: Legal Principles

53. The relevant principles relating to permission to amend are conveniently summarised in paragraphs [40] – [42] of the judgment of the Court of Appeal in *Elite Properties Ltd v Barclays Bank PLC* [2019] EWCA Civ 204:

> 40. There was no dispute about the test to be applied in the circumstances of this case. The dispute was whether the Judge had applied it properly or whether he had fallen into error by

> conducting a mini trial. In any event, it is important to bear in mind that the overriding objective applies and the question of whether permission to amend should be given must be considered in the light of the need to conduct litigation fairly and justly and at proportionate cost.
>
> 41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472* . A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3) [2003] 2 AC 1* .
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon.

54. Applications to amend always involve the court striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the amendment is allowed: see *White Book* paragraph 17.3.5.

55. When an application to amend involves the withdrawal of admissions, CPR 14.1 is engaged, and the court must consider the matters set out in 14PD.7. This is further discussed in Section F below.

56. The principles relating to summary judgment applications are summarised in the judgment of Picken J in *ArcelorMittal North America Holdings LLC v Ravi Ruia et al* [2022] EWHC 1378 at [26]-[28]:

> "[26] The principles in relation to a defendant's summary judgment application were set out in *Easyair Ltd v Opal Telecom Limited [2009] EWHC 339 (Ch) at [15]*. Those principles have been recited in many subsequent cases, including perhaps most recently by me in *JJH Holdings Ltd v Microsoft [2022] EWHC 929 (Comm) at [11]*:
>
> "(i) the Court must consider whether the claimant has a 'realistic' (as opposed to a 'fanciful') prospect of success; (ii) a 'realistic' claim is one that carries some degree of conviction, which means a claim that is more than merely arguable; (iii) in

> reaching its conclusion the Court must not conduct a 'mini-trial', albeit this does not mean that the Court must take at face value and without analysis everything that a claimant says in statements before the court; and (iv) the Court may have regard not only to the evidence before it, but also the evidence that can reasonably be expected to be available at trial. Furthermore, where a summary judgment application turns on a point of law and the Court has, to the extent necessary, before it 'all the evidence necessary for the proper determination of the question,' it 'should grasp the nettle and decide it' since the ends of justice are not served by allowing a case that is bad in law to proceed to trial."
>
> [27] As to (iv), the Court will "be cautious" in concluding, on the evidence, that there is no real prospect of success; it will bear in mind the potential for other evidence to be available at trial which is likely to bear on the issues and it will avoid conducting a mini-trial: *King v Stiefel [2021] EWHC 1045 (Comm) at [21]* (per Cockerill J).
>
> [28] Furthermore, as Fraser J also recently put it in *The Football Association Premier League Limited v PPLive Sports International Ltd [2022] EWHC 38 (Comm) at [25]* , on a summary judgment application the Court must "always be astute, and on its guard" to an applicant maintaining that particular issues are very straightforward and simple, and a respondent attempting to dress up a simple issue as very complicated and requiring a trial.

57. Accordingly, where (as here) the principal contention is that an actual or proposed defence carries no degree of conviction, the resolution of that issue will be critical to the outcome of both an application to amend to plead that defence, and also an application for summary judgment.

E: The parties' arguments

The argument for Mr Ahmad

58. On behalf of Mr Ahmad, Mr Davenport submits that the defendants' applications are opportunistic and unjustified. The amended case is a volte-face when compared to the original defence. The defendants have changed their position because their original case has been exposed as legally unsustainable. He drew attention to the way in which the defendants' case had evolved from the time that the first claim letter had been sent by Goodman Derrick, including evolution through various versions of the amended defence itself. There were many documents, including correspondence with Mr Rambourg in early 2022, when Mr Ouajjou was maintaining the pretence that there were existing PPE contracts, whereas now he wishes to contend that the business had not got off the ground and that Mr Ahmad knew it. He submitted that the new case was entirely unsupported by documentary evidence, and should not be entertained.

59. Mr Davenport pointed to other aspects of the way in which Mr Ouajjou's case had developed. Thus, he had denied that Loan 3 had been executed, but it later transpired that there was an executed copy of the relevant agreement. Mr Ouajjou was a litigant who would actively persist in a lie until it is clearly demonstrated that he is being dishonest. Overall, the new case could not be accepted at face value: in the absence of any supporting evidence, there is no evidence to get the defendants over the "real prospects" test.

60. He submitted that the account now given was wildly improbable. The case also involved the proposition that there was a grave act of dishonesty towards Mr Rambourg. He would be encouraged to believe that the money was being advanced for the purpose of the PPE business, whereas it was now said that Mr Ahmad had agreed that it would be used for various other investments.

61. It was clear, on the documents, that Mr Ouajjou had been lying about the PPE business. That explains the defendants' unwillingness to answer (in response to a Request for Further Information) a straightforward question which asked for the PPE contracts to be disclosed. There were numerous areas where it was clear that Mr Ouajjou had been lying.

62. As far as concerns Ms Perez, he submitted that the agreements were made with her, not with an Axess company. She was named as a party in the first part of the agreements, and her signature was unqualified.

63. In relation to the withdrawal of admissions, Mr Davenport went through the "checklist" in CPR 14PD.7 and submitted that this was not an appropriate case to grant permission for withdrawal. He submitted that the defendants had not given a full and frank explanation as to how the case came to be pleaded, originally, on a different basis. No new evidence had come to light. The application was, he submitted, not put forward in good faith. The defendants were intelligent and experienced, and must have understood the case that was being advanced. The need for haste was not a satisfactory explanation, particularly bearing in mind that there was plenty of time to review the pleading between the time of service (June 2022) and the determination of the application to extend time some months later.

64. In summary, Mr Davenport submitted that there were clear admissions in the original defence, and there were now delayed and drastic amendments. The proposed amended defence, and indeed the counterclaim, were hopeless. There was no proper explanation for the defendants' change of position. For all these reasons, the amendments (including the withdrawal of admissions) should be refused. This led inevitably to the grant of summary judgment.

The argument for the defendants

65. Mr Pickering submitted that this was a clear and obvious case where permission to amend should be granted. Ms Perez had explained the circumstances in which the original defence had been served, and how the defendants thereafter appreciated that this did not represent their true position. The amended case pleaded a legally coherent case. The court could not now decide to reject this factual case on the basis that it represented a change from the case originally set out. That was a matter to be tested at trial. The court should be very slow to go behind the detailed explanation that Ms

Perez had given, and could not realistically do so in the absence of a waiver of privilege.

66. The new pleaded case was credible, given the close relationship between the parties, and indeed had the ring of truth about it. The first significant change in the parties' dealings was commercially plausible, since the original arrangement between the parties had been lopsided, with Mr Ouajjou having to share profits with Ms Joutey, but taking all the risk. It made sense that they would want to change the relationship, and it is supported by the absence of later signed agreements. Mr Ahmad's case that Ms Joutey destroyed later signed documents beggars belief, and in any event has not been supported by any evidence from Ms Joutey herself, notwithstanding that they are now reconciled and that she has provided a witness statement in the proceedings.

67. The second significant change in the relationship also made sense. If monies were coming in, but there were no PPE deals coming in, it would be understandable that Mr Ouajjou would be concerned and would raise the matter with Mr Ahmad and would not want to hold on to the monies. It was uncontroversial that monies were used for various non-PPE investments, and it was credible that the idea of doing this was Mr Ahmad's.

68. Mr Ouajjou's account was supported by various features of the documents. There was no demand for payment of interest, and there were (on Mr Ahmad's case) serious defaults. Yet Mr Ahmad continued to provide funds to Mr Ouajjou. The credible explanation was that there was no default, because the original obligations had been cancelled and Mr Ahmad and Mr Ouajjou were now working together.

69. If the amendments were allowed, no real prejudice would be suffered. Apart from the need for an amended reply, the amendment would have little or no material impact on the litigation in circumstances where the case was at a very early stage, and the first CMC had not taken place. The need to deal with an amended statement of case is, in itself, rarely a reason to refuse consent or permission to amend. By contrast, if the amendments were refused, the defendants would suffer irremediable prejudice. They would be stuck with their original case and would be effectively prevented from arguing what they say to be the true position. Allowing the amendments would have little or no impact on the court system or other court users. There would be nothing to prevent Mr Ouajjou bringing new and separate proceedings in relation to the counterclaim, but this would far better be done in the context of the existing proceedings where the dealings between the parties are to be examined. This is not a late amendment, and the trial date is not put at risk.

70. In relation to the withdrawal of the admissions, there was a lack of clarity in Mr Ahmad's case as to which were the relevant admissions, and it was far from clear that admissions were being withdrawn. But in any event, the discretionary factors which favoured the grant of the amendment also favoured the grant of permission to withdraw any admissions, if that was required.

71. This was also an obvious case where summary judgment should be refused. There were substantial disputes of fact which could only properly be determined following disclosure, witness statements and cross-examination at trial. The new case had every prospect of success. There were also, in any event, compelling reasons why the case should go to trial.

F: Discussion

72. There are in my view a large number of unusual features of this case which make it inappropriate for summary determination or for proposed amendment to be refused on the basis that the amended case lacks the necessary degree of conviction. I reach this conclusion, even taking into the account the doubts that must exist as to the credibility of the defendants, in particular Mr Ouajjou, and the fact that the amended pleading contains significant changes of that factual case. Having reviewed the relatively limited documentary evidence which has been hitherto exhibited by Mr Ahmad in the original exhibit to his Affidavit, and then by Mr Ouajjou to his responsive witness statement, it seems to me that this is a case which really cries out for disclosure of the documentary record and for cross-examination of the witnesses. I cannot see that the court can realistically come to any firm conclusion as to the credibility of the account of either the claimant or the defendants on the limited materials which are available and without the benefit of hearing from the witnesses. I do not consider that I have any safe basis, on the present materials, for reaching the conclusion that the defendants' factual case has no real prospect of success, and any such conclusion on the present would in my view lead to potentially serious injustice to the defendants. For largely the same reason, I consider it appropriate to give the defendants permission to withdraw such admissions as may be contained within the existing defence.

73. I identify below a number of matters which illustrate why I have reached these conclusions, although I do not of course attempt a full review of the evidence. I also acknowledge at the outset that, as foreshadowed in Mr Davenport's submissions, Mr Ouajjou will have some difficult questions to answer at the trial, and that (on the present materials) there are obvious question-marks as to his credibility. However, it does not follow that I can, on the documents, reject his account, and accept the account of Mr Ahmad. It is by no means unusual for the Commercial Court to have to deal with cases in which there are question-marks as to the credibility of, and account given by, both the claimant and the defendant. The fact that one party may lack credibility does not mean that the account of the other party is to be accepted. This is the case even where there has been a trial. At trial, it seems to me that Mr Ahmad will also have some difficult questions to answer.

74. First, the applications, if successful, would result in the court giving judgment for very significant sums under loan documentation which has not been produced. The present position is that fully signed contractual documents only exist for loans 1 – 3. There is a document signed by Ms Perez, but not Mr Ouajjou, for loan 4 (giving rise to a claim of just under € 4,000,000 plus interest). There are no signed documents available for loan 5 (claim of € 6,500,000 plus interest) loan 6 (claim of € 5,300,000 plus interest), and loan 8 (claim of € 5,000,000 plus interest). It would, to say the least, be unusual for court to give judgment for such sums without sight of the documents on which the claim is based.

75. The absence of this documentation gives rise to the obvious question: why does the loan documentation not exist? Contracts signed as deeds are valuable instruments, and one would ordinarily expect a lender to retain such documents carefully and to be able to produce them. The question of why the documents do not exist here is a question which cannot be resolved without a trial. Mr Ahmad's evidence is that he was focused on other business matters, and did not pay sufficient attention to ensuring that

documents were kept in good order. Whilst the evidence at trial may prove that this is so, it is nevertheless somewhat surprising that a person of Mr Ahmad's business experience should be so lax with important documents. Mr Ahmad's evidence also suggests that his wife, Ms Joutey, may have accessed his office at some point and taken steps to remove or destroy documents. However, as Mr Pickering pointed out, there is no evidence from Ms Joutey to this effect, notwithstanding that (contrary to the position when Mr Ahmad's affidavit was sworn) Mr Ahmad and Ms Joutey have apparently reconciled and Ms Joutey is no longer a defendant to the present litigation. Indeed, Ms Joutey has provided a very short witness statement in the context of the present applications.

76. Given the absence of fully signed documentation for most of the loans which are sued upon, it seems to me that there must be a plausible case (i.e. with a realistic prospect of success) that there was indeed some change in the relationship between the parties, and the documents that Mr Ouajjou was willing to sign, as contended for in the amended pleading in Mr Ouajjou's evidence.

77. Secondly, there is in my view a remarkable absence of the documentation that one would expect to see in circumstances where there were ongoing defaults under the various loan agreements, if the relationship between the parties was simply lender and defaulting borrower. Indeed, one sees the parties behaving in a way which one would not expect to see in circumstances where the borrower is in default. The point can be illustrated by reference to loan 2. The signed loan document is dated 8 November 2020, and is in the sum of € 1,836,000. It provided for the payment of 8% interest every 40 days. The first interest payment was therefore due on 18 December 2020, and further payments would be due each 40 days thereafter. Interest payable at 8% every 40 days is a very large sum: € 146,880. By around mid June 2021, a further 4 instalments would have been payable, amounting to a further € 587,520. It is common ground that none of this money was paid. Yet there is no documentation which shows any demand by Mr Ahmad for the outstanding interest, despite what (on his case) were defaults. Nor, on the present materials, did Mr Ahmad prepare and send to Mr Ouajjou any accounting documents recording the amounts owed.

78. The first time when, on the documents, there was any written demand at all by Mr Ahmad was on 25 October 2021, by which time further interest payments would have accrued. There is in fact something odd about this demand as well: it includes a demand for payment under loan 1, and an allegation that no payment had been received, whereas it is now common ground that loan 1 had been repaid.

79. Furthermore, notwithstanding the defaults in payment of interest under loan 2, Mr Ahmad (on his case) continued to lend substantial sums of money to the defendants; much of it, but not all, emanating from Mr Rambourg. Thus, the loan documentation for loan 3 is dated 10 November 2020. The sum loaned is € 2,200,000 and the interest payment, again payable every 40 days, is € 176,000. Again, no interest was paid on the first due date (20 December 2020), or at any subsequent dates. Again, there was no demand for payment, despite the default. Again, the first written demand for payment was 25 October 2021, despite a large number of defaults in the intervening 11 months since the agreement was first signed. And again, in the intervening period, Mr Ahmad had (on his case) been advancing even larger sums, including his own money, to Mr Ouajjou. For example, under loan 7 (which is not the subject of the present summary judgment proceedings), Mr Ahmad advanced US$ 1,200,000 on 25

May 2021. By that time, there would (assuming all the loans now relied upon to have been made) have been many defaults in payment of interest under loans 2, 3, 4, 5 and 6.

80. This course of events is obviously a long way from ordinary commercial behaviour. It may perhaps be explicable, as Mr Ahmad's affidavit evidence suggests, by the fact (also strange commercial behaviour) that Mr Rambourg was not putting any pressure on Mr Ahmad for repayment. However, it is also plausible that it is explicable by the factual case now advanced by the defendants in the amended defence. At all events, it is an area of the case where disclosure and cross-examination is essential if the court is to be in a position to come to a just and proper conclusion.

81. Thirdly, I have sought to understand the spreadsheets prepared in early May 2021, and where a final version – showing a very successful existing business in sales of PPE – was sent to Mr Rambourg on 13 May 2021 by Ms Joutey. These spreadsheets, or at least some of them, were addressed in Mr Ahmad's Affidavit (paragraph 58) and Mr Ouajjou's main (first) witness statement (paragraphs 49 – 51). They are also relied upon in support of the allegations of fraud pleaded in the Particulars of Claim against the original defendants, including Ms Joutey: in relation to Ms Joutey, fraud is pleaded in paragraph 74 and the 13 May 2021 spreadsheet in paragraph 74 (3) of the Particulars of Claim.

82. The exhibited materials do not appear to include all versions of the spreadsheets, and I was not taken to any of these documents at the hearing of the applications. However, when I granted the original freezing injunction, I was shown at least one of the spreadsheets on the without notice application. It was in my view necessary to consider these documents, in the context of the present applications, because there are relatively few documents in the exhibited materials which pass directly between Mr Ouajjou and Mr Ahmad, and also because they are relevant to the state of the business as understood by both of them at that time.

83. A number of matters emerge from the documents which have been exhibited. The first version of the spreadsheets was sent by Mr Ouajjou to Mr Ahmad on 6 May 2021. These versions do not appear to purport to show historic actual results of the business. They appear to be a business plan for the future, based upon certain hypotheses which are identified in the spreadsheets. It is also clear, as Mr Ahmad's affidavit accepts, that he carried out some work on those spreadsheets, together with (so the documents suggest) Ms Joutey as well as Mr Ouajjou. The end result of the work were spreadsheets which were sent to Mr Rambourg by Ms Joutey on 13 May 2021. These spreadsheets were in a rather different form to those which Mr Ouajjou had sent to Mr Ahmad a week earlier. In particular, they purport to present historic as well as projected future results of the PPE business, including specific historic figures starting in November 2020.

84. In his witness statement, Mr Ouajjou makes a number of points about these documents. In particular, he says that the exhibits to Mr Ahmad's original Affidavit did not include one of the spreadsheets which "shows that he was the one who made changes to the business plan and included historical data". As far as I can tell, the spreadsheet with figures starting in November 2020 does indeed appear to have originated with Mr Ahmad rather than with Mr Ouajjou. Mr Ouajjou also makes the point that he believed that Mr Ahmad "leveraged this business plan to convince

Guillaume [Rambourg] to increase his investment and extend the payment time line to June 2023". I cannot of course form a concluded view on this, but it suffices to say that this is, on the basis of these documents in the context of the documentation as a whole, a plausible point.

85. Mr Ahmad did serve a brief witness statement responsive to Mr Ouajjou's statement, but this consisted of a broad denial of the facts set out by Mr Ouajjou and it did not engage with the details of the spreadsheet preparation in May 2021, or indeed any of the detail of Mr Ouajjou's evidence.

86. If it is indeed the case that, as the documents presently tend to suggest, Mr Ahmad was making relevant revisions to the spreadsheets so as to present a rather different picture to the spreadsheets originally provided to him, it lends credibility to the overall case advanced by Mr Ouajjou in his amended defence, and conversely gives rise to issues with which Mr Ahmad will need to deal at trial. Questions will arise as to how and why Mr Ahmad considered it appropriate to participate in changes to spreadsheets which originally showed projections but then were changed to show historic information. What was the source of the figures for November and December 2020 which appear to have originated with Mr Ahmad?

87. These and similar questions will be important because the substance of the defendants' case is that Mr Ahmad was well aware that the Axess PPE business was not in fact flourishing in mid-2021. Thus, Mr Ouajjou's case concerning cancellation of the loans, and how the parties agreed to move forward (as set out in paragraphs 33R – 33X of the amended defence) involves a case that Mr Ahmad was told that "the Axess Group was yet to secure and/or fulfil contracts for the supply of PPE (save for the Gipuzkoa tender, which could not be fulfilled)". The fact (as I read the documents) that the spreadsheets originally received by Mr Ahmad from Mr Ouajjou in May 2021 did not purport to show historic results, and that they may subsequently have been "improved" by Mr Ahmad in order to show positive historic results, does in my view lend a sufficient degree of plausibility to the defendants' case as to the dealings between the parties after Mr Ahmad and Ms Joutey had moved to Marbella. Furthermore, this aspect of the defence is lent some further plausibility by the other aspects of the evidence described in this section of the judgment, including the absence of any demands for payment of interest as previously described.

88. Fourth, the events concerning the spreadsheets are one facet of a more general point concerning a relationship between the parties which is unconventional and far from an ordinary commercial relationship between lender and borrower. Mr Ahmad was, at the time, married to Ms Joutey and they were living together in Marbella at least until relatively shortly before the October 2021 demand for payment. Ms Joutey was working closely with Mr Ouajjou. The evidence indicates that she was the person with access to Mr Rambourg, and she was given an Axess e-mail address (albeit that she apparently no longer has access to it). The overall picture which emerges from Mr Ahmad's Affidavit, and which is illustrated by the spreadsheet events, is one where all 3 parties (Mr Ahmad, Ms Joutey and Mr Ouajjou) were essentially working together in order to raise money, in particular from Mr Rambourg, and to make the Axess business a success. That picture is further evidenced by the "commission" agreements referred to below, which appear to show that Mr Ahmad stood to gain significant sums of money from agreements involving Axess. Furthermore, it is apparent from Mr Ahmad's Affidavit that his wife was spending a great deal of

money in Spain in 2021, and essentially enjoying the high life, and that this was something which – at least indirectly – benefitted Mr Ahmad himself.

89. Against this background, and in circumstances where (as Mr Ouajjou's witness statement indicates) Mr Ouajjou and Mr Ahmad were in frequent contact in Marbella, and where Mr Ahmad was still married and living with Ms Joutey, it is plausible that Mr Ahmad knew a great deal about the state of the Axess PPE business, and how matters were going to move forward, as the amended defence posits; i.e. far more than the somewhat limited understanding which is set out in Mr Ahmad's Affidavit. I of course reach no conclusions adverse to Mr Ahmad on this: the essential point is that these are all matters for trial.

90. Fifth, and related to the previous point, the Particulars of Claim, signed by Mr Ahmad's statement of truth, allege that Ms Joutey was herself party to a fraud, at least from mid-2021 onwards. The allegation in substance is that she knew that the monies advanced, at least from July 2021, would not be used for the PPE business. Ms Joutey's evidence, in her brief witness statement, is that she believed that the PPE business was legitimate and profitable. However, Mr Ouajjou's case, in the amended defence, is that the PPE business never really got off the ground. That too is the substance of Mr Ahmad's case. If this was indeed the factual position, then it seems to me to be plausible that Ms Joutey, who was working closely with Mr Ouajjou and had an Axess e-mail address, would have known this – as indeed the fraud allegation against her posits, at least in relation to the period after July 2021. There is on any view an important question as to whether Ms Joutey did know what was happening in relation to the PPE business which Axess was seeking to carry out. If the position is that she did in fact know what was really happening, that gives rise to obvious questions as to whether her husband Mr Ahmad, with whom she was living and who was assisting on at least some of the documents, also knew the true position.

91. Sixth, and again related to the previous points, Mr Ouajjou's evidence is that Mr Ahmad was "personally involved in several commission agreements concerning the sale of PPE supplies in 2020". A number of contracts, signed by Mr Ahmad, were exhibited to his witness statements. One of those contracts would potentially earn Mr Ahmad an estimated commission of US$ 11.1 million. Mr Ahmad's evidence does not refer to or explain these documents. In my view, they are relevant to Mr Ahmad's knowledge and involvement in the business which Axess was seeking to conduct, and are part of the picture which gives plausibility to Mr Ouajjou's case concerning the discussions between them.

92. Seventh, I have already drawn attention to the absence of any demand for payment in the period prior to the end of October 2021. Prior to that time, however, there is one document which does refer to accounting between the parties. This, however, is a document which was sent by Mr Ouajjou to Mr Ahmad, with an accompanying spreadsheet. It was sent on 8 October 2021, and referred to various payments which Mr Ouajjou had made to "help you out while being in Spain". The document refers to a sum of £ 30,000 which Mr Ouajjou had received by way of a bank transfer and which he acknowledged as part of the balance of account, although there were some larger payments the other way. This document provides some support for Mr Ouajjou's case that he did not understand that he owed very substantial sums of money to Mr Ahmad.

93. The document also referred to "Trading loss – check the exel below". The attachment was a spreadsheet containing figures for losses on shares in five companies or businesses, with the total loss being around € 709,000. In his witness statement, Mr Ouajjou explains that the spreadsheet set out the investments made through the two Axess companies and how they had performed. An earlier section of his witness statements describes the parties' dealings in relation to the "Spacs investment", a "SPAC" being a special purpose acquisition vehicle. Mr Ouajjou says that one aspect of his agreement with Mr Ahmad was that the money paid to Axess would be used for investments decided by Mr Ahmad. This document does provide some corroboration of the existence of these dealings between the parties. These dealings between the parties are not explained in Mr Ahmad's evidence, and it seems to me that – as with for example the commission agreements – they are part of an overall picture which can only be understood and fairly decided upon after disclosure and a trial.

94. Accordingly, and subject to the question of withdrawal of admissions, with which I deal separately below, this is not a case where I can conclude that the defendants' factual case lacks a sufficient degree of conviction to warrant either refusal of the application for permission to amend or summary judgment. On the contrary, I consider that there are substantial factual issues which should be explored at trial. It is a case where, if justice is to be done, the court should have the benefit of disclosure and evidence at trial.

95. It is apparent from *Elite Properties* that, in considering an application to amend, I must also take into account the need for litigation to be conducted fairly and justly and at proportionate cost. I do not consider that this provides a reason for refusing the amendment. These proceedings are still at a very early stage: there has been no CMC, and this is not an amendment which disrupts a hearing date which has been fixed. This is in my view a case where the facts should be investigated, and judgment for the very significant sums claimed should not simply be given without a trial and on the basis of refusing an amendment application and thereby opening the door to summary judgment.

96. I also conclude below that this is a case where, considering the relevant factors under CPR PD 14, permission should (to the extent required) be given to withdraw admissions. The considerations that apply to withdrawal of admissions are not directly applicable where there is an ordinary amendment application (i.e. which does not involve the withdrawal of admissions). Nevertheless, my conclusion that this is a case where permission should be given to withdraw admissions means that this is also a case where a permission to amend should be given.

97. I therefore grant permission to amend, and refuse the application for summary judgment.

98. I do not consider it necessary or appropriate to address, separately, the question of whether Ms Perez is or is not personally liable on the loans which she signed, or the loans are (as far as she is concerned) with the company referred to in the body of the agreements. I can see the force of Mr Ahmad's argument on this point, were he to succeed in overcoming the other defences advanced by both defendants. However, as Mr Davenport recognised, there is indeed some language in the loans which points away from personal liability. This issue should in my view be resolved at trial, in the

context of all the other issues, when the court will have the benefit of full argument and a better appreciation of the relevant factual matrix.

99. Since the court will, in relation to the claim and defence, be considering the full factual circumstances of the dealings between the parties, it is appropriate for all aspects of the counterclaim – which relate to those dealings – should be considered as well. There is no basis for refusing permission to amend to plead a counterclaim, and to require Mr Ouajjou to pursue this in separate proceedings. That would very obviously be contrary to the overriding objective.

Withdrawal of admissions

100. This leaves the question of whether permission should be given to withdraw admissions in the original defence. Both parties recognised that this was very much interlinked with the question of whether there was a case with a sufficient degree of conviction to justify permission to amend.

101. The initial question is whether this is in fact a case where the defendants are seeking to withdraw admissions. It is certainly a case where the defendants are seeking to make substantial changes to their existing case. However, as discussed in the judgment of Popplewell J in *Bayerische Landesbank Anstalt des Offentlichen Rechts v Constantin Medien AG* [2017] EWHC 131, a change in case which does not involve the withdrawal of admissions is governed by the usual principles concerning permission to amend, and I have addressed this above.

102. In *Bayerische Landesbank Anstalt,* Popplewell J identified that two different circumstances where a party seeks to withdraw a plea, and that different considerations arise depending on whether what is to be withdrawn is an admission or an averment. He said:

> "[22] When considering withdrawal of a plea, different considerations arise depending on whether what is to be withdrawn is an admission or an averment. In relation to an averment which a party wishes to pursue, the party is concerned not merely with whether the averment is true, but also whether and how it can be proved. On the other hand, in relation to an admission in response to an averment by the opposite party, what the party is concerned with is simply whether what is alleged against it is true. No question arises of it being able to prove or disprove the allegation evidentially distinct from the question as to whether the allegation is or is not true.
>
> [23] It seems to me, therefore, that the first and important question in this case is to identify what aspect of the proposed amendments are properly characterised as withdrawals of admissions and what aspects are merely withdrawals of averments."

103. The question of whether the defendants are in fact seeking to withdraw admissions is not altogether straightforward. Mr Davenport's written and oral arguments referred to

a number of paragraphs in the defence, but his submissions did not address the distinction which was drawn by Popplewell J. Ultimately, however, I have been persuaded that the defendants are now seeking to withdraw an admission made in paragraph 33 of their defence.

104. Paragraph 33, which appears immediately under the heading "Loans 2 to 9 (PoC [15] – [49])" was in the following terms:

> "Paragraphs 15 to 48 are not admitted, save that:
>
> a) Pending a contrary position being revealed in disclosure from Mr Ahmad the dates for each of the Loan Agreements are correct;
>
> b) It is noted the PoC rehearse in part some of the written terms of the Loan Agreements;
>
> c) To the extent required the Defendants will rely on a proper interpretation of the terms of the Loan Agreements at trial, which is not as pleases in the PoC;
>
> d) No basis is pleaded for the implication of the terms alleged, or any terms;
>
> e) Pending a contrary position being revealed in disclosure from Mr Ahmad the amounts for each of the Loans are correct; and
>
> f) Paragraphs 5 to 29 and 30(a)-(f) are repeated"

105. This paragraph was therefore responding to Mr Ahmad's allegations in paragraphs 15 – 48 of the Particulars of Claim. Those paragraphs set out the dates and relevant terms of each of the loan agreements (numbers 2 – 9) which Mr Ahmad alleged to have been made both between himself and the defendants, and between himself and Mr Rambourg, and also the amounts paid in respect of these "back to back" agreements. Thus, by way of illustration, paragraph 15 pleaded as follows in relation to the Loan 2

> "On 9 November 2020 Mr Ahmad as 'Lender' and Mr Ouajjou and Ms Perez as "Borrowers" entered into a loan agreement under deed in the terms as attached at Appendix 2 (the **'Loan 2 Agreement'**). The said loan was 'back-to-back' with a loan made by Mr Rambourg to Mr Ahmad on 5 November 2020 pursuant to an agreement dated 30 October 2020 (**'Back-to-Back Agreement 2'**)."

106. Paragraph 16 of the Particulars of Claim then pleaded certain express terms of Loan 2. Paragraph 18 pleaded that, pursuant to Mr Ahmad's obligations under the Loan 2 agreement, he wired € 1,658,750 to the defendants' nominated account. A copy of the agreement between Mr Ahmad and the defendants was attached to the pleading.

107. Similarly, and again by way of example, paragraphs 27 – 30 of the Particulars of Claim dealt with loan 5. Mr Ahmad pleaded back-to-back agreements between himself and the defendants dated 22 December, and himself and Mr Rambourg dated 9 December. The amount was € 6,500,000 which was then remitted in two tranches (in total just under that figure). Paragraph 31 pleaded that Mr Ahmad "no longer has a copy of Loan Agreement 5".

108. The responsive pleading to those paragraphs in paragraph 33 starts by a non-admission, but this is then qualified by a number of matters which are clearly admitted.

109. Thus, paragraph 33 (a) accepts, pending a contrary position being revealed in disclosure from Mr Ahmad, that "the dates for each of the Loan Agreements are correct". This must be read with the description of "Loan Agreement" in paragraph 2:

> "A reference to a Loan Agreement is a reference to the Loan Agreements between Mr Rambourg and Mr Ahmad, as pleaded in the PoC, or to the Loan Agreements between Mr Ahmad and the Defendants, as pleaded in the PoC, or to both as the context requires".

110. Accordingly, the defendants were admitting that all of the "Loan Agreements" as defined and pleaded in the Particulars of Claim were indeed dated as alleged by Mr Ahmad. In my view, this is an admission that the back-to-back loan agreements relied upon by Mr Ahmad were indeed concluded between the parties.

111. That conclusion is then reinforced by the pleas in the following sub-paragraphs. Sub-paragraphs (b) and (c) refer to the fact that the Particulars of Claim rehearse in part some of the written terms of the Loan Agreements, and that the defendants intended to "rely on a proper interpretation of the terms of the Loan Agreements at trial". These pleas indicate that the defendants accept that there were written terms of the Loan Agreements, and that they intended to make arguments about the effect of those terms at trial.

112. Sub-paragraph (e) acknowledges the correctness of "the amounts for each of the Loans". This must refer both to the amounts stated in the various loan agreements and the amounts then remitted.

113. Sub-paragraph (f) then repeats many earlier paragraphs of the defence. Those paragraphs make it clear that there is no dispute that back-to-back loan agreements were indeed concluded by the parties as alleged by Mr Ahmad, and that monies were then remitted in consequence of those agreements. The essential point taken was not that the agreements had not been concluded on the dates and with the terms alleged, but rather that Mr Ahmad was simply a "conduit" for Mr Rambourg's investment, and that the relevant agreement as to repayment date was not as set out in the documents. Thus, paragraphs 19 and following plead as follows:

> "19. On 10 November 2020 Mr Ahmad as 'Lender' and Mr Ouajjou and Ms Perez as 'Borrowers' entered into a loan agreement under deed in the terms as attached at Appendix 3 (the **'Loan 3 Agreement'**) The said loan was 'Back-to-back'

> with a loan made by M Rambourg to Mr Ahmad on 9 November 2020 pursuant to an agreement concluded on or shortly before that date (**'Back-to-Back Agreement 3'**)"
>
> 20. The express terms of the Loan 3 Agreement included, insofar as material, identical express terms to those of the Loan 2 Agreement, save that the Principal sum was €2,200,000 and the 8% interest (payable every 40 days) on the same was €176,000, the first payment of which fell due on 20 December 2020.
>
> 22. Pursuant to his obligations under the Loan 3 Agreement on 10 November 2020 Mr Ahmad as Lender wired the sum of €2,200,000 to the Borrowers' nominated account (the **'Loan 3 Sum'**).
>
> **C.4 Loan #4**
>
> 23. On 13 November 2020 Mr Ahmad as 'Lender' and Mr Ouajjou and Ms Perez as 'Borrowers' entered into a loan agreement under deed in the terms as attached at Appendix 4 (the 'Loan 4 Agreement'). The said loan was 'back-to-back' with a loan made by M Rambourg to Mr Ahmad in three tranches on 13 November 2020 pursuant to an agreement dated 12 November 2020 ('Back-toBack Agreement 4')."

114. Accordingly, when paragraph 33 (a) is read both on its own, and in the context of the following sub-paragraphs, there is indeed an admission that each of the back-to-back "Loan Agreements" pleaded by Mr Ahmad was concluded as alleged.

115. I am not, however, persuaded that there is any admission elsewhere which the defendants are seeking to withdraw, as distinct from averments which are made. I shall therefore concentrate on that admission. Even if, however, there are wider admissions, my conclusion below, that permission to withdraw should be granted, would still be the same.

116. CPR 14PD.7 requires the court to consider a variety of factors as follows:

> "7.1 An admission made under Part 14 may be withdrawn with the court's permission.
>
> 7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;

> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
>
> (g) the interests of the administration of justice."

117. It is clear from the authorities discussed in *Bayerische* that the various matters should be considered as a whole. Whilst, in a particular case, factor (a) may be regarded as particularly important, there is no rule that it is always the most important factor.

118. Factor (a) concerns "the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time that the admission was made".

119. The defendants' evidence is that they did not in fact understand that they were admitting that there were in fact back-to-back loan agreements in relation to each of loans 1-6 and 8. They say, in substance, that they understood that they were admitting the flow of funds which was set out in the Particulars of Claim; i.e. from Mr Rambourg to Mr Ahmad and then on to the defendants. They still accept that the pleaded flow of funds took place. However, they now do not accept that there was back-to-back loan documentation which supported the flow of funds, although they do accept that such documents existed in relation to loans 1, 2 and (after an initial denial in earlier versions of the amended defence) 3. They also refer to their unfamiliarity with English pleadings, and the fact that the defence was approved by them in some haste.

120. In the present case, I do not regard factor (a) as particularly significant. I have reached the conclusion that there was a relevant admission in paragraph 33 (a) as a result of construing that paragraph by reference to a definition earlier in the pleading. It would not be surprising if the defendants had not analysed the pleading in this way, and may have thought (in so far as they thought about it at the time) that they were admitting the flow of funds, rather than the existence of specific documents. I also cannot know what instructions were given to the defendants' solicitors and counsel on this issue, and (another point made in *Bayerische*) I must be careful in this area because privilege has not been waived and because it is not permissible to draw adverse inferences from the absence of waiver. It also appears to be the case that, at the time that the defence was pleaded, a full set of loan agreements was not actually available. Mr Ahmad had made it clear from an early stage he had not retained copies, and this was also made clear in the Particulars of Claim. It would also appear that counsel, who drafted the pleading, did not have a full set of documents either.

121. Mr Ahmad argues that the defendants admitted the existence of all the documents because they had not yet alighted upon the defence based upon the alleged conversations concerning the way that business was going to move forward. Ultimately, however, this is essentially an argument based upon the absence of sufficient merits of the amended defence; an argument which, as set out above, I have resolved in favour of the defendants.

122. I have also considered whether this would be a more significant factor in the event that the defendants' admissions, which need to be withdrawn, are rather wider than paragraph 33 (a) and extend more generally to other aspects of the case set out in the original defence. In the context of the present case, I do not consider that it would be more significant. I do have doubts as to the explanation provided by Ms Perez as to why the amended case was not originally pleaded, but I recognise that without a waiver of privilege it is not possible to come to a firm conclusion. These doubts stem from the fact that the defendants were being advised by an experienced solicitor and counsel. The defence does seem to have been carefully drafted, and I have also seen counsel's skeleton argument for the application for an extension of time, and a note of the argument before the deputy judge, David Edwards KC. These certainly give the impression of counsel who was on top of the materials and who understood his clients' case. Furthermore, Ms Perez herself has a legal background, and has other professional experience, and one might expect her to notice if significant aspects of the defendants' defence were not contained in the document. Even if there was some urgency in terms of approving the pleading when it was first served, Mr Davenport made the fair point that there was plenty of time for it to be reviewed in the period of some months before the contested application for an extension of time was determined by the deputy judge.

123. It seems to me that a more plausible reason for the change of case is that the defendants were not, at the time when the original defence was served, willing to admit (as the amended defence now accepts) that there were no significant underlying PPE contracts which had in fact been concluded and performed. To do so would obviously give rise to serious questions, to say the least, as to whether Mr Rambourg was misled into advancing funds. The unwillingness to make this admission can also be seen in the refusal by the defendants to answer straightforward questions, concerning the existence of any PPE contracts and a request for production, in the request for further information served by Mr Ahmad. Furthermore, a number of emails were sent by the defendants' then solicitor, Mr Hennessy-Gibbs, in the context of Mr Rambourg's demands for payment under the Acknowledgment of Debt. These suggest that Mr Hennessy-Gibbs' understanding, and instructions, at that stage was that PPE contracts did indeed exist.

124. However, even if I were to assume that the reason for the withdrawal of admissions is that the defendants consider that they can no longer maintain their original stance, I would still not consider this to be a powerful factor against granting permission to withdraw admissions and thereby enabling the defendants to change their case. There are, for the reasons already given, serious questions which arise in the present case as to whether Mr Rambourg was indeed being misled as to the existence of PPE contracts, in particular in May 2021 when the spreadsheets were being worked on by Mr Ahmad, Ms Joutey and Mr Ouajjou; and if he was being misled, whether Mr Ahmad was aware of and indeed involved in that. I would regard it as very

unsatisfactory for the existence of admissions in the original defence, when the defendants were not willing to "come clean", to limit the factual enquiry which would otherwise have to be carried out at trial in order to reach a just and fair result in these proceedings.

125. Factor (b) concerns the conduct of the parties, including any conduct which led the party making the admission to do so. There is of course no criticism of Mr Ahmad's conduct. Mr Davenport submits, however, that the conduct which led to the admission was their instructions that the allegations were well made. I think that this is essentially the same point as made under factor (a), and for the reasons given I do not think that it is a particularly significant factor here, bearing in mind my conclusion that the amended case has sufficient merit to justify permission to amend.

126. Factor (c) concerns the prejudice that may be caused to any person if the admission is withdrawn. Mr Ahmad identifies a variety of matters: there will be a significant delay in bringing the dispute to trial; complexity will arise from the fact that Axess, which holds material documents, is now in insolvency; disclosure will depend upon the defendants performing their disclosure obligations in a thorough and proper manner, and they cannot be trusted to do so.

127. I do not consider any of these points to be powerful. The relevant admission being withdrawn is in my view limited: it concerns the existence of the loan documentation which is currently unavailable. On that point, if the documentation remains unavailable at the time of trial, Mr Ahmad will still be able to rely upon the fact that the defendants originally made this admission, and can invite the court to conclude that the loan documentation did originally exist. He will also be able to put forward arguments as to the unreliability of the defendants in terms of document production. (The court could not possibly conclude, at the present stage, that the defendants cannot be trusted to perform their disclosure obligations.)

128. Furthermore, even if the admission were to remain, so that the existence of the loan documentation is to be taken as established, there would still need to be a trial in order to resolve the defence concerning the agreement on cancellation and how matters were going to move forward. Accordingly, Mr Ahmad would still need to establish his case and defeat the defendants' defences.

129. Mr Ahmad also contends that delay will add to his liability to pay contractual interest to Mr Rambourg. That may be so, but that is a consequence of his liability to Mr Rambourg on agreements which Mr Ahmad does not deny. Whether or not he is entitled to recover such interest from the defendants will depend on whether Mr Ahmad's claim succeeds. As discussed in the previous paragraph, the claim would still need to be resolved at trial even if the admission were withdrawn.

130. Mr Ahmad also contends that there is prejudice if Ms Perez is permitted to defend the claim on the basis that Axess, not Ms Perez, was the borrower. Mr Ahmad says that he will have missed the chance to sue a solvent company; alternatively, if the insolvency is to be challenged, he will have to serve proceedings out of the jurisdiction on a formerly insolvent company.

131. I am not persuaded that there is a specific admission by Ms Perez of an allegation that she was party to each of the loan agreements: the paragraphs of the original pleading

referred to in Mr Davenport's skeleton seem to me to be averments or definitions as opposed to specific admissions. Even if this conclusion were wrong, however, I do not consider that there is any real prejudice here. Axess' insolvency happened some time ago, and I cannot see how Mr Ahmad would have been in any better position, vis a vis Axess, if Ms Perez had raised this point earlier.

132. Factor (d) concerns the prejudice that may be caused to any person if the admission is withdrawn. Mr Davenport submits that the defendants will not be prejudiced because they are seeking to run an adventitious case which has no evidential basis. Mr Pickering submits that the defendants would suffer great and irremediable prejudice. They would be stuck with their original case and would be effectively prevented from arguing what they say to be the true position in the context of a complex and unusual case worth tens of millions of pounds.

133. I take the view that, in consideration of the various factors, this is the most significant factor which affects the exercise of my discretion to allow the withdrawal of the admission. I have taken the view that the relevant admission which needs to be withdrawn is in fact a narrow one, and that the case would still go to trial even if the existence of all the loan agreements were to be taken as established. Given that there will be a trial in any event, it would seem to me to be unduly prejudicial to the defendants effectively to remove one aspect of their factual case, in circumstances where the court will be investigating the full circumstances of these transactions in any event, and indeed will be considering Mr Ouajjou's counterclaim concerning the monies given to Mr Ahmad for investment. It would also produce a very artificial trial and result, and (looking at factor (g)) would be contrary to the interests of the administration of justice.

134. Even if I were wrong in concluding that the relevant admission is a narrow one, and that there are a broader range of admissions that need to be withdrawn, I agree with Mr Pickering's submission that it would not be just to hold the defendants to admissions in circumstances where (as I consider to be the case) the proposed amended defence has a realistic prospect of success. For reasons already given, I consider that a just and fair result can only be reached in this case by the court investigating the facts properly.

135. Factor (e) concerns the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial. The position here is that the proceedings are still at an early stage. There has been no CMC, no disclosure and no trial date. It is true, as Mr Ahmad points out, that these proceedings have been delayed, and that 18 months have passed since the claim was issued. However, I do not consider that all of this delay can be attributed to the defendants. There was some delay (not particularly long) in serving the original defence. However, a material delay followed because Mr Ahmad opposed the extension of time. The court's timetable meant that the contested application could not be heard for some months, and permission to extend time was then granted (i.e. Mr Ahmad lost).

136. A reply was then served in December 2022. Prior to that time, RWK Goodman had taken some steps to arrange a case management conference, and efforts to do so continued thereafter. In March 2023, this was fixed for October 2023. The next relevant development was Mr Ahmad's application for summary judgment which was made in April 2023. By that time, the defendants had intimated an intention to amend

their defence, albeit that no amended defence was served. The application to amend was made in July 2023. The summary judgment hearing was originally scheduled for July, but then was adjourned by the deputy judge to October so that it could be heard together with the amendment application. I can see that some of this delay could be attributed to the defendants, since it could be said that the amended defence should have been pleaded earlier. However, I do not consider that any of this is a material factor in deciding whether or not the defendants should be permitted to withdraw their admissions, in circumstances where the proceedings are still at an early stage.

137. Factors (f) and (g) do not seem to me to raise any matters separate to those which I have already considered.

138. Ultimately, I consider that the most significant factor is (d), and that there is nothing in the other factors which outweighs it. I will therefore grant permission to withdraw the admissions, whether those are confined to the admission in paragraph 33 (a) or are wider.

CONCLUSION

139. I grant permission to amend and to withdraw admissions. I refuse the application for summary judgment.