Neutral Citation Number: [2024] EWHC 3095 (Comm)

Case No: CL-2023-000806

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

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

Date: 2 December 2024

Before :

STEPHEN HOFMEYR KC
(Sitting as a Deputy High Court Judge)

- -

BETWEEN

YAMADA LIMITED **Claimant**

- and -

(1) SETARA HOLDINGS INC
(2) SETARA GROUP INC.
(3) LYNK DO BRASIL SERVICOS FINANCEIROS LTDA
(4) BP TOKEN PRODUCTS DIGITAIS LTDA
(5) ENRICO CRASSO
(6) TARIQ NAJAM
(7) STEFANO CASTAGNOLA
(8) SOHAIL NAJAM **Defendants**

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Mark Wassouf (instructed by DLA Piper UK LLP) for the Claimant
Maria Mulla (instructed by **Withers LLP**) for the 1st – 4th and 6th – 8th Defendants
Kendya Goodman (instructed by Buckles Solicitors LLP) for the 5th Defendant

Hearing dates: 22 and 23 October 2024
Draft judgment circulated to parties: 27 November 2024

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APPROVED JUDGMENT

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STEPHEN HOFMEYR KC:

Introduction

1. There are three applications before the Court, two made by the Defendants and one made by the Claimant.

2. The Defendants have applied, first, for permission pursuant to CPR 19.2(2)(a) to join (1) Optimum Complexity Limited and (2) Pietro Andrea Calandruccio as new parties namely the Third Party/Part 20 Defendant and the Fourth Party/Part 20 Defendant and, second, for permission pursuant to CPR 17.1 (2) (a), or (b) and CPR 20.7(3)(b) to amend the Defence and Counterclaim and to include the Part 20 claim against the Third and Fourth Party as reflected in the draft attached to the Application Notice.

3. The Defendants' two applications are not opposed and I will ask counsel to draw up an appropriate minute of order. I do not address these two applications further in this judgment.

4. The third application is opposed. The Claimants have applied under Part 24 CPR for summary judgment or, in the alternative, pursuant to CPR 3.4(2), for an order striking out of the Defendants' defences and counterclaims. The Claimant believes that the Defendants have no real prospect of succeeding on the defences and the counterclaims.

The legal principles

5. The parties were largely agreed as to the applicable legal principles.

6. By CPR 24.3, the court may give summary judgment against a party on the whole of a claim or on an issue if (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. In essence, the courts are looking for some realistic prospect of success, by which they mean a defence that as a matter of legal analysis and as a matter of fact, to the extent that it depends on the proof of facts, has more than a fanciful prospect of success.

7. The summary of applicable principles set out by Lewison J in ***Easyair v Opal Telecom*** [2009] EWHC 339 (Ch) at paragraph [15] has been referred to and relied upon in numerous subsequent cases and approved by the Court of Appeal. It provides:

i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: ***Swain v Hillman*** *[2001] 1 All ER 91;*

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

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

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

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust v Hammond (No 5)*** *[2001] EWCA Civ 550;*

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** *[2007] FSR 63;*

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral

> *evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction:* ***ICI Chemicals & Polymers Ltd v TTE Training Ltd*** *[2007] EWCA Civ 725."*

8. These principles were recently summarised in condensed form in ***Lex Foundation v Citibank*** [2022] EWHC 1649 (Comm) at paragraph [31].

9. Particularly where the matter before the court is construction of a contract, the Commercial Court is robust in granting summary judgment because of the waste of time and money caused by unnecessary trials: ***Khouj v Acropolis Capital Partners Ltd*** [2015] EWHC 224 (Comm) per HHJ Mackie QC at [37].

10. The legal principles applicable to strikeout are equally well-established. CPR 3.4(2)(a) provides that "*The court may strike out a statement of case if it appears to the court - (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim*". This rule enables the court to strike out a statement of case in whole or in part.

11. The court's power applies to all statements of case, including defences. A statement of defence may be struck out if the defence raised in it would not be legally valid even if the facts pleaded in the statement of defence turned out at trial to be true: ***Price Meats Limited v Barclays Bank Plc*** [2000] 2 All E.R. (Comm) 346, per Arden J at [12].

12. The court should strike out parts of a pleading only in clear and obvious cases. An application to strike out should not be granted unless the court is certain that the claim is bound to fail: ***Richards v Hughes*** [2004] EWCA Civ 266, per Peter Gibson LJ at [22], citing ***Barrett v Enfield London Borough Council*** [2001] 2 AC 550, per Lord Browne-Wilkinson at page 557.

13. An application under CPR 3.4(2)(a) is not evidence-based. Whether some or all of the pleading is to be struck out should generally be decided by reference to what is pleaded in the pleading under challenge and not by reference to evidence. The application falls to be determined on the assumption that the pleaded facts in the Particulars of Claim are true: ***Andrew Bridgen MP v Matthew Hancock MP*** [2024] EWHC 623 (KB), per Steyn J at [24]. As with summary judgment applications, the court should not conduct

a mini trial even if evidence has been served in support of or in answer to the application.

14. Where a statement of case is found to be defective, the court should consider whether the defect might be cured by amendment and, if it might be, the court should refrain from striking out without first giving the party concerned an opportunity to amend. In ***Kim v Park*** [2011] EWHC 1781 (QB), Tugendhat J put it in this way:

> "*However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right. ...*"

Background

15. The Claimant ("**Lender**"), the First Defendant ("**Borrower**") and each of the Second to Eighth Defendants ("**Guarantors**") executed a loan and guarantee agreement dated July 7, 2022 ("**Loan Agreement**"), in the original aggregate principal amount of two million US Dollar (USD 2,000,000) ("**Term Loan**"). The indebtedness evidenced by the Term Loan was secured by the guarantees and indemnities provided by each Guarantor as per the terms of section 4 of the Loan Agreement.

16. Under the terms of section 2.3(b) of the Loan Agreement, the Borrower agreed to repay to the Lender the outstanding principal amount of the Term Loan, on the Term Loan Maturity Date (7 October 2022), plus accrued and unpaid interest. In commercial terms, it was a short-term loan sometimes referred to as a bridging loan.

17. An Event of Default occurred on October 7, 2022, when the Borrower failed to repay the Term Loan together with accrued and unpaid interest at the Applicable Rate.

18. By notice dated October 14, 2022 the Lender declared an Event of Default to the Borrower and the Guarantors and requested the payment of the outstanding principal plus accrued interest for an aggregated amount of two million one hundred thousand US Dollars (USD 2,100,000) such amount to be received by the Lender no later than October 28, 2022 ("**Debt**").

19. By email dated 14 October 2022 the Borrower acknowledged the legal notice and affirmed its intention and ability to pay the Debt. It stated that it would require an extension on the term of the loan and in exchange would increase the value to be repaid by US$300,000. It proposed scheduling the repayment as follows: US$400,000 to be

paid on 28 October 2022 and US$2,000,000 to be paid on 2 December 2022. The Borrower did not suggest that it was not liable to pay the Debt.

20. On October 28, 2022, the Borrower, Lender and each of the Guarantors executed a Settlement Agreement and General Release ("**Settlement Agreement**").

    (1) According to Section 2.1 of the Settlement Agreement the Borrower undertook to pay in cash by means of a wire transfer of immediately available funds to the Lender (a) four hundred thousand US Dollars (USD 400,000) on 11 November 2022 ("**Initial Payment**") and thereafter (b) two million US Dollars (USD 2,000,000) on the 16th of December 2022 (the "**Last Instalment Payment**").

    (2) According to Section 3.1 of the Settlement Agreement the Guarantors irrevocably and unconditionally agreed (a) that their obligations under the Loan Agreement (i) would remain in full force and effect until full settlement of the Debt and (ii) would not be affected by the entering into and execution of the Settlement Agreement and (b) that the guarantees provided under the Loan Agreement would be extended to cover the aggregate of the Initial Payment and the Last Instalment Payment.

    (3) Recital B to the Settlement Agreement acknowledged that an Event of Default had occurred on 7 October 2022 when the Borrower "*failed to repay the Term Loan together with accrued and unpaid interests ...*".

    (4) Recital D of the Settlement Agreement recorded that the Borrower had informed the Lender of its intention to settle, compromise, and finally resolve, upon the terms and conditions set forth in the Settlement Agreement, all of the disputes and potential disputes between them in connection with the Debt and the Loan Agreement (the "**Disputes**").

21. The Borrower paid the Initial Payment of US$400,000 on or about 10 November 2022, but failed to make the Last Instalment Payment which was due on 16 December 2022.

22. On 19 December, 2022 the Borrower wrote to the Lender requesting to further re-negotiate the payments' terms of the Term Loan as set forth under the Settlement Agreement and in particular to re-schedule the terms of the Last Instalment Payment. The Borrower did not suggest that it was not liable to pay the Last Instalment Payment.

23. On 16 January 2023 the Lender, the Borrower and the Guarantors entered into an Amendment Agreement (the "**Amendment Agreement**") which had the effect of amending the Settlement Agreement. The Borrower undertook to pay the Lender US$2m in weekly instalments of US$125,000 starting on 17 February 2023, with the last weekly instalment being payable on 2 June 2023. Recital B to the Amendment Agreement acknowledged that the Borrower had "*failed to repay the Term Loan together with accrued and unpaid interests*" and Recital F acknowledged that the Borrower had then "*failed to make the Last Instalment Payment*" and had requested "*to further re-negotiate the payment terms*". There was no suggestion that the Borrower was not (or might not be) liable to pay the Last Instalment Payment.

24. The Loan Agreement, the Settlement Agreement and the Amendment Agreement are referred to collectively as the "**Agreements**". For ease of reference, and to avoid the need for lengthy quotations, the Agreements are appended to this Judgment as Annexure A.

25. On 22 February 2023 the Borrower paid the first Weekly Instalment Payment under the Amendment Agreement. The payment had been due on 17 February 2023.

26. The second Weekly Instalment Payment was due on 24 February 2023 but has never been paid. Nor has any subsequent Weekly Instalment Payment been made.

27. On 18 May 2023 the Lender gave notice to the Borrower and each of the Guarantors that the Borrower was in breach of the Settlement Agreement and that the Lender intended to enforce its rights against the Borrower. The Lender also called upon the Guarantors to "*now pay the outstanding principal amount of US$1,875,000*" pursuant to their obligations under the Loan Agreement. None of the Guarantors has paid the outstanding amount (or any amount) to the Lender.

28. On 14 July 2023 the Lender sent a letter before action to the Lender and each of the Guarantors.

29. The Lender issued a Claim Form in this action and Particulars of Claim on 15 November 2023.

30. On 16 February 2024 the First-Fourth and Sixth-Eighth Defendants filed a Defence and Counterclaim and the Fifth Defendant filed a materially identical document.

31. The Lender filed a Reply and Defence to Counterclaim on 1 March 2024. On the same day, the Lender issued the application (a) for summary judgment under CPR Part 24 or, in the alternative, (b) that the Defences and Counterclaims be struck out pursuant to CPR 2.4(2) (the "**Application**").

32. On 22 March 2024 Butcher J ordered that the Application be heard together with applications intimated by the Defendants (i) to join third parties and (ii) to seek security for costs, with a time estimate of 1 ½ days, plus a ½ day pre-reading.

33. On 19 June 2024 the Defendants made the applications referred to at paragraph 2 above, together with an application that the Lender give security for the Defendants' costs in the amount of £250,000. The security for costs application was subsequently withdrawn by the Defendants; and the other two applications are not opposed.

The Application

34. The substantive application before me is therefore the Lender's application pursuant to CPR 24.2 for summary judgment on its claims. In the alternative it applies to strike out the defences pursuant to CPR 3.4. It does so on the basis that the legal arguments underpinning the Amended Defence and Counterclaim have no realistic prospect of succeeding. It submits that the repayment obligations are unconditional.

35. It is common ground that the Application falls to be determined by reference to the (draft) Amended Defence and Counterclaim filed by the First-Fourth and Sixth-Eighth Defendants. The Fifth Defendant has adopted as its own the Amended Defence and Counterclaim filed by the other Defendants. He has also adopted the submissions made by Counsel on behalf of the other Defendants.

Common ground

36. There is no dispute between the parties as to the payment obligations imposed on the Borrower by each of the Loan Agreement, the Settlement Agreement and the Amendment Agreement: see paragraphs 8-19 and 23 of the Particulars of Claim and paragraphs 45-48 and 52 of the Amended Defence and Counterclaim.

37. It is also common ground that the Borrower failed to make the Second or any subsequent Weekly Instalment Payment: see paragraph 25 of the Particulars of Claim and paragraph 54 of the Amended Defence and Counterclaim.

38. Thus, the Borrower's and Guarantors' payment obligations are admitted; and the Borrower and the Guarantors also admit that payment was not made in accordance with the payment obligations. Each therefore has *prima facie* liability for the sums claimed by the Lender.

39. The Defendants do not even deny that they are in breach of the Loan Agreement, the Settlement Agreement and the Amendment Agreement. They "*note*" the allegations of breach and state that they "*were obstructed from paying the sums due to the non-compliance with the terms of the* [Letter of Intent]", a document to which I will return below: see paragraph 27 of the Particulars of Claim and paragraph 55 of the Amended Defence and Counterclaim.

The defences

40. The Borrower and each of the Guarantors seek to avoid the *prima facie* liability on various grounds. In order to put these grounds into context, some further background is necessary.

41. The following assertions of fact are taken from the Amended Defence and Counterclaim and, for the purposes of the strike out application, are assumed to be true.

    (1) The Borrower operates in Brazil and the United States specialising in the provision of global merchant account solutions and payment gateways for ecommerce. It runs a brand known as "*BP Wallet*" which processes payments on behalf of merchants on an online platform.

    (2) It is required by Brazilian guidelines to hold a minimum amount of guarantees (known as "*rolling reserve*") against its business in Brazil. Whilst for the most part the Borrower had historically used internal funding, as its business expanded it needed to increase its rolling reserve in Brazil.

    (3) In around March 2022, the Borrower wished to expand its business into Europe where it hoped to "onboard" high calibre merchants that it was unable to "onboard" in Brazil. In this context it was in discussions with Optimum Complexity Limited ("**Optimum**") who wished to enter into "*a joint venture*" with the Borrower. The individuals with whom the Borrower dealt were Mr Federico Cirulli ("**Cirulli**") and Mr Pietro Andrea Calandruccio ("**Calandruccio**").

(4) Optimum wished to incorporate a joint venture vehicle with the Borrower which would be used to establish and operate a European business. This would allow the Borrower significantly to expand its volume of business.

(5) The joint venture "*was crystallised*" in a Letter of Intent dated 26 May 2022 between Optimum and the Borrower (the "**LOI**").

42. The Defendants assert that the Agreements cannot be understood in isolation from the joint venture.

43. The LOI is in the form of a letter from Optimum to the Borrower marked strictly private and confidential. The letter is signed on behalf of Optimum and accepted and agreed on behalf of the Borrower. As it is so central to the Defendants' defences, the terms of the LOI are set out in full:

> This binding letter of intent ("*Letter*") will confirm our prior discussions regarding the terms and conditions pursuant to which JV Partner 1, or any of its affiliates, subsidiaries, successors or assignees, will enter into a business combination ("*Proposed Transaction*") with JV Partner 2 in relation to the incorporation and operation of a joint venture vehicle for the purpose of operating a fully integrated acquiring and payment facilitation business ("*JV Vehicle*"). This Letter is intended to create binding legal and contractual obligations of the Parties (as below defined) with respect to matters set forth herein, and upon the breach by a Party of its obligations in any material respect, the injured Party shall have such rights and remedies with respect thereto as are available to it under applicable law. The JV Partner 1 and the JV Partner 2 may individually be referred to herein as a "*Party*" or collectively as the "*Parties*".
>
> 1. **Definitive Agreement; Binding Effect**. The Parties have engaged in negotiations and reached agreement in principle to enter into one or more agreements (the "Definitive Agreement") to reflect the Proposed Transaction. The terms and conditions attached hereto as Exhibit A sets forth the agreement of the Parties in principle with respect to the Proposed Transaction, and will form the basis of the Definitive Agreement. The Definitive Agreement will contain mutually agreeable terms and conditions consistent with this Letter.
> 2. **Negotiation of Amendment**. The Parties shall use commercially reasonable efforts to complete negotiations and execute the Definitive Agreement as quickly as reasonably possible following the execution for acceptance of this Letter and in any case within one (1) month as from said acceptance. Until the Definitive Agreement is executed, the Parties agree that the provisions of this Letter (including the attached Exhibit A) shall govern their relationship. Upon execution and delivery of the Definitive Agreement, this Letter shall be superseded thereby and the rights and obligations of the Parties with respect to the Proposed Transaction shall thereafter be governed by the Definitive Agreement.

3. **Good Faith**. The Parties shall act in good faith to carry out the Proposed Transaction, shall not interfere with the business of the other Party, shall not neglect or materially alter their respective current businesses, and shall cooperate fully and completely to carry out the intent of the Proposed Transaction.

4. **Confidentiality.** This Letter is being delivered with the understanding that the Parties, together with their respective officers, directors, managers, members, representatives, agents, owners and employees, each agree to use their best efforts to keep the existence of this Letter and its contents confidential. Any information, including but not limited to data and business information, written or otherwise, ("Information"), furnished or disclosed by one Party to the other for the purpose of the contemplated transaction herein, will remain the disclosing Party's property until the closing of the Proposed Transaction. All copies of such Information in written, graphic or other tangible form must be returned to the disclosing Party immediately upon written request if the transaction contemplated herein is not consummated. Unless such Information was previously known to receiving Party free of any obligation to keep it confidential, or has been or is subsequently made public by the disclosing party or a third party, it must be kept confidential by the receiving party, will be used only in performing due diligence for the Proposed Transaction, and may not be used for other purposes except upon such terms as may be agreed upon between the Parties in writing.

5. **Expenses**. Each Party shall be responsible for their own fees and expenses incurred as part of the Proposed Transaction and the transactions contemplated under this Letter, including but not limited to, legal fees, accounting fees, investment banking fees and related expenses.

6. **Announcements**. No announcement shall be made regarding a pending or completed transaction or agreement between the Parties without the prior written consent of both Parties.

7. **Governing Law Dispute Resolution and Jurisdiction**. This Letter shall be governed by and construed in accordance with the laws of England. All disputes, controversies or claims ("Disputes") arising out of or relating to this Letter shall in the first instance be the subject of a meeting between a representative of each Party who has decision making authority with respect to the matter in question. Should the meeting either not take place or not result in a resolution of the dispute within fifteen (15) business days following notice of the Dispute to the other Party, then the dispute shall be resolved in a proceeding to be held before the English competent courts.

8. **Multiple Counterparts**. This Letter may be executed in multiple counterparts, each of which may be deemed an original. It shall not be necessary that each Party executes each counterpart, or that any one counterpart be executed by more than one Party so long as each Party executes at least one counterpart.

9. **Expiration**. This LOI shall expire if not accepted by the JV Partner 2 by 12:00 p.m. CET on 26th May 2022.

If the terms and conditions of this Letter are acceptable, kindly execute a copy hereof where indicated below and return it to us or before 12:00 p.m. CET on 26th May 2022.

44. Exhibit A to the LOI, headed "***Basic Principles for the Definitive Agreement***", was in the following terms:

> **1. Parties**
>
> Optimum Complexity Ltd. or any of its affiliates, subsidiaries, successors or assignees; and Setara Holdings Inc.
>
> **2. Scope of the Agreement**
>
> Incorporation, operation and management of a joint venture vehicle ("JV Vehicle") for the purpose of operating a fully integrated acquiring, payment facilitation and advance business ("Business").
>
> **3. Equity and Financing**
>
> As from the incorporation date the shares capital of the JV Vehicle shall be allocated as follows:
>
> JV Partner 1 20%
>
> JV Partner 2 80%
>
> All shares for the time being unissued in the JV Vehicle shall, before they are issued, be offered for subscription to all the holders of shares (i.e. JV Partner 1 and JV Partner 2 in proportion (as nearly as may be) to the nominal amount of their existing holdings of shares).
>
> **4. JV Vehicle governance and other Business-related matters**
>
> The Definitive Agreement will contain customary undertakings in relation to the governance of the JV Vehicle and the operation of the Business customary for a transaction of this size and nature including without limitation, mutual exclusivity, capital and further finance, tag-along and drag-along rights, defined process for disposal and purchase of shares including without limitation transfer restrictions, formation of board, appointment of officers, board and shareholders reserved matters, right of information, managers of the subsidiaries of the JV Vehicle (if any), responsibility matrix, compensation for officers, confidentiality, events of default, escalation procedures, non-circumvention and no-solicitation, remedies and penalties for breaches, exit strategy and minority protection rights, compensation for the introduction of the pre-existing business
>
> **5. Representations and Warranties; Covenants; Conditions**
>
> The Definitive Agreement will contain such representations and warranties, covenants and conditions of the Parties as are customary for a transaction of this size and nature. Certain representations and warranties may apply only to one Party, but not the other. Reasonable additional representations and warranties or covenants may be requested by either Party as a consequence of its due diligence, investigation or otherwise.
>
> **6. Indemnification; Remedies**
>
> The Definitive Agreement will include usual and customary mutual, limited indemnification for breaches of representations and warranties, covenants and other undertakings, with a survival period. No officer, director, employee or stockholder of any of the Parties will be liable under the indemnification

provisions of the Definitive Agreement. No claim for indemnification will be payable unless and until all such claims, in the aggregate, exceed USD 10,000, in which case all claims shall be paid without regard to that minimum.

7. Undertaking and responsibility of JV Partner 1

JV Partner 1 shall make available to the JV Vehicle its relationships and expertise in the financial sector, including its experience in establishing and managing regulated entities, for the purpose of establishing and operating the mutually desired Business.

JV Partner 1 will be in particular responsible for:

A. Sourcing an acquirer that meets the following requirements, within 6 months:

i. High Risk processing

ii. Rate to be sub 2.2%

iii. Payment D+1

iv. Payments may be made, at a later stage, back through the wallet

v. Scalable to US$ 1 billion per month

vi. Processing in: EUR, GBP, USD

vii. Standard reporting dashboard; and

viii. Required API: Reporting, Subscription, Authorization, Charging, Refunds, Chargeback reports

B. Providing expertise in the banking and financing transaction with regards to structuring the JV Vehicle together with any associated/affiliated vehicles to become an acquirer in its own right within 12 months, subject to regulatory approval.

C. Providing access to funding to allow the expansion of the Business as needed and mutually agreed between the Parities, which shall include but not limited to:

i. Development Staff

ii. Management Staff

iii. Customer Support

iv. Licensing

v. Compliance

D. Subsequent access to banking solution development that will allow the JV Vehicle to become a holistic solution provider through direct bank-to-bank, instant deposits in the US, European Union, UK and Asia.

8. Undertaking and responsibility of JV Partner 2

A. Within 50 business days as from the incorporation of the JV Vehicle, JV Partner 2 shall contribute all the existing companies, technology and expertise (including all IP and relevant licenses/certifications) related to the Business.

B. In addition, JV Partner 2 shall be responsible for:

i. PCI compliance for all processing and storage of customer data and payment information

ii. Secure on-boarding process to comply with personal data sovereignty laws

iii. Onboarding of merchants for the mutual business

iv. Upgrading wallet interface for customer ease of use

v. Facilitating integration of wallet for APM's

vi. Development of a more responsive UI/UX system for merchants and clients

vii. Provision of required information and KYC to enable establishment of a PayFac level operation

viii. Develop tech for further mitigation of AML

ix. Plug-in, client side hosted, software to mitigate AML and friendly fraud

x. Managing Fraud through transaction laundering

xi. Technical oversight of the integration of new acquiring and payment platforms with the existing JV Partner 2 core system

xii. Development of a merchant dashboard for detailed report generation and access to a unified reporting process

xiii. Delivery of processing volumes in excess of EUR 100 MM per month, no later than 6 months following the establishment of the new acquiring relationship.

9. Timing

a) **Signing**. The Parties will use their best efforts to sign the Definitive Agreement within one (1) month as from the execution and acceptance of the Letter unless otherwise agreed in writing between the Parties.

b) **Closing**. Subject to the execution of the Definitive Agreement, the Parties will use their best efforts to close the Proposed Transaction and incorporate the JV Vehicle as soon as reasonably possible following the execution of the Definitive Agreement and in any case not later than one (1) month as from such execution date unless otherwise agreed between the Parties ("Closing"). On the Closing date the Parties will execute any document, notice, form, letter, deed or agreement which may be necessary, incidental or ancillary to the incorporation of the JV Vehicle and completion of the Proposed Transaction contemplated therein

45. As already noted, the Loan Agreement was concluded on 7 July 2022. The individuals with whom the Borrower dealt in negotiating the Loan Agreement were once again Messrs Cirulli and Calandruccio. The Defendants contend that when Cirulli and Calandruccio were asked about the identity of the Lender, they were told it was a "*holding company*" of Optimum. The Defendants also contend that it was in reliance on the LOI that the Borrower executed the Loan Agreement.

46. The first defence asserted by the Borrower is that it was "*was unable to continue making payments* [under the Loan Agreement] *due to the failure of the Claimant and Optimum to fulfil their obligations in accordance with the LOI*" (paragraph 54 of the

Amended Defence and Counterclaim). The same defence is also asserted by the Guarantors: "*the Defendants were obstructed from paying the sums due to non-compliance with the terms of the LOI*" (paragraph 55 of the Amended Defence and Counterclaim). The defence is also repeated at paragraph 59 of the Amended Defence and Counterclaim: "*Due to the breach of the LOI by the* [Lender] *and Optimum it is denied that the* [Lender] *is entitled to the sums due*".

47. This defence is premised on the correctness of the allegation in the Amended Defence and Counterclaim that the Borrower is a party to the LOI. The Defendants allege that the Borrower is a party to the LOI because the Borrower and Optimum "*are companies in common control*" (paragraphs 22, 30 and 31 of the Amended Defence and Counterclaim) and that, accordingly, the Borrower is one of Optimum's "*affiliates, subsidiaries, successors, or assigns*" within the meaning of the phrase in the LOI and, as such, a party to the LOI (paragraphs 17, 44.2, 44.3, 44.5 of the Amended Defence and Counterclaim). The defence is further premised on the correctness of the allegation that the Loan Agreement contained an implied term that "*the parties would comply (or cause their agents to comply) with their obligations pursuant to the LOI*" (paragraph 44.13 of the Amended Defence and Counterclaim). The implied term is necessary in order to link performance of the LOI to performance of the Loan Agreement.

48. The Guarantors also assert two additional defences.

    (1) Secondly, they contend that clause 4 of the Loan Agreement is governed by section 3 of the Unfair Contract Terms Act 1977 ("**UCTA**") and fails to satisfy the reasonableness test pursuant to section 11(1) of UCTA (paragraph 56.1 of the Amended Defence and Counterclaim).

    (2) Thirdly, the Guarantors contend that they are entitled to rescind the Loan Agreement on the ground that it was induced by a pre-contractual misrepresentation (paragraph 56.2 of the Amended Defence and Counterclaim). Despite the long list of representations asserted at paragraph 75 of the Amended Defence and Counterclaim, Counsel for the Defendants clarified at the hearing that the only representation relied upon by the Defendants is the statement made by Mr Calandruccio, set out at paragraph 75.4 of the Amended Defence and Counterclaim, that "*one of our holding company will act as lender*".

49. All of the Defendants also assert that they have a defence of set off (paragraph 62 of the Amended Defence and Counterclaim). They assert that they are entitled to eliminate

entirely their liability to the Lender by taking into account the monies which are the subject of the counterclaim, monies which they contend are owed by the Lender. In order to side-step the terms of clause 2.6 of the Loan Agreement – "*all payments to be made by the Borrower under any Loan Document … shall be made in immediately available funds in Dollars, without setoff, recoupment or counterclaim*" – they assert that the clause does not "*preclude an equitable set-off in the event of the parties having a counterclaim*" and that, in any event, the clause does not satisfy the requirement of reasonableness pursuant to section 11(1) of UCTA.

50. In the Counterclaim, the Defendants assert that they are entitled to rescind (or have rescinded) the Agreements for pre-contractual misrepresentation. There is no allegation anywhere that the representation relied upon was false, nor are the consequences of the alleged rescission (or right to rescind) spelled out.

51. The Borrower also contends in the Amended Counterclaim that, with Optimum, it was a party to the LOI, that the Lender acted in breach of Exhibit A to the LOI and that, as a result of the Lender's breaches, it (the Borrower) has suffered loss and damage in excess of the Defendants' liability to the Lender (paragraphs 79-102 of the Amended Counterclaim). Just as with the first defence, this counterclaim is premised on the correctness of the allegations identified at paragraph 47 above. Despite indications in the Amended Counterclaim to the contrary, Counsel for the Defendants confirmed at the hearing that this counterclaim is relied upon solely by the Borrower.

The Lender's response

52. The Lender's primary response to the defences raised by the Defendants is to assert that, even if the Defendants are correct about the facts pleaded, those facts would not found an arguable defence in law. The Lender submits that there is no legal or textual connection between the LOI and the Agreements that would subordinate the Defendants' repayment obligations under the latter to the performance of the Lender's alleged obligations under the former. It points to the fact that neither the LOI nor the Agreements make reference to the other; and, in particular, none of the Agreements, although concluded after the LOI, makes any reference to any obligations of the Lender pursuant to the LOI. It also points to the fact that the two sets of documents relate to two different business ventures – the LOI concerns business in Europe whereas the Agreements concern "*rolling reserve*" required to expand business in Brazil.

53. Until the Guarantors abandoned their counterclaim for breach of the LOI, the Lender also submitted that the Guarantors had no standing to bring the claim. The were not parties to the LOI and cannot have suffered any loss as a consequence of any breach of the LOI. As the counterclaim was abandoned during the hearing it is not dealt with further in this Judgment.

54. Further, the Lender submits that the Borrower has no realistic prospect of showing that it has a right to claim set-off or delayed payment because the terms of the Agreements preclude it from doing so. As regards the remaining Defendants, the abandonment by the Guarantors of their claim for breach of the LOI has the additional consequence that any defence of set-off advanced by them is destroyed.

55. The Lender also submits that the Defendants have no realistic prospect of showing that the Lender was a party to the LOI, and that this is fatal to the defences and counterclaims because the defences and counterclaims are all premised on the Lender having some obligation under the LOI. In addition, the Lender submits that the Defendants have no realistic prospect of succeeding in showing that the Loan Agreement contained the alleged implied term.

56. As regards the Defendants' defence (and counterclaim) based on an alleged pre-contractual misrepresentation, the Lender submits that extra-contractual misrepresentations are excluded by clause 12.7 of the Loan Agreement ("*The Loan Documents represent the entire agreement about this subject matter and supersede prior negotiations or agreements. All prior agreements, understandings, representations, warranties, and negotiations among the parties about the subject matter of the Loan Documents merge into the Loan Documents*") and may not be relied upon. The Lender also relies upon provisions to similar effect in the Settlement Agreement and the Amendment Agreement. In addition, the Lender submits that the Defendants have no realistic prospect of succeeding in showing that Mr Calandruccio's representation ("*One of our holding company which will act as lender*") could reasonably be understood to be attributable to the Lender.

57. In addition, the Lender asserts that there is no other compelling reason why the case should be disposed of at a trial.

The LOI

58. Given its central relevance to the issues which arise on the Application, any analysis must necessarily begin with the LOI and its express terms. The following points are pertinent.

(1) The document is described as a "*letter of intent*". It outlines the intention of the two parties to the letter of intent (Optimum and the Borrower) to enter into "*a business combination*", defined as a "*Proposed Transaction*". Self-evidently, the LOI is the precursor to a future transaction which will involve "*the incorporation and operation of a joint venture vehicle*" – the "JV Vehicle" – "*for the purpose of operating a fully integrated acquiring and payment facilitation business*".

(2) The nature of the LOI as a precursor to a future transaction is confirmed by the words of clause 1:

(a) "*the Parties* [i.e. Optimum and the Borrower] *have engaged in negotiations and reached agreement in principle* ***to enter*** *into one or more agreements (the 'Definitive Agreement') to reflect the Proposed Transaction"* (emphasis added).

(b) Exhibit A contains the agreement of Optimum and the Borrower in principle with respect to the terms and conditions of a future transaction (the "*Proposed Transaction*").

(c) The terms and conditions at Exhibit A "*will*" form the basis of the future *"Definitive Agreement"*.

(d) The Definitive Agreement "*will*" contain mutually agreeable terms and conditions consistent with the LOI.

(3) The nature of the LOI as a precursor to a future transaction is also confirmed by the words of clause 2. Optimum and the Borrower are each obliged to use commercially reasonable efforts to "*complete*" negotiations and "*execute*" the Definitive Agreement as quickly as reasonably possible "*following*" the execution for acceptance of the LOI. Until the execution of the Definitive Agreement, the

LOI (including Exhibit A) would govern the relationship between Optimum and the Borrower. Upon execution and delivery of the Definitive Agreement, the LOI would be superseded.

(4) The language in which the LOI is framed excludes any possible argument to the effect that the LOI doubles as the "*Proposed Transaction*" or the "*Definitive Agreement*".

(5) On its face the LOI is an agreement between Optimum and the Borrower. It comes from Optimum, which is identified as "*JV Partner 1*", and is addressed to the Borrower, which is identified as "*JV Partner 2*". It is signed on behalf of Optimum and signed as "*accepted and agreed*" on behalf of the Borrower. It states expressly that the LOI is "*intended to create binding legal and contractual obligations of the Parties (as below defined)*", where "*the JV Partner 1 and the JV Partner 2 may individually be referred to herein as a 'Party' or collectively as the 'Parties'*."

(6) There is nothing in the LOI which might suggest that the LOI is an agreement to which an entity other than Optimum and the Borrower is a party. On the contrary, the LOI does anticipate that the future transaction to which the LOI is a precursor may not be made between the Borrower and Optimum, but between the Borrower and "*any of* [Optimum's] *affiliates, subsidiaries, successors or assignees*". See the opening paragraph of the LOI and clause 1 of Exhibit A. The fact that the Lender and Optimum were companies in common control (if it be a fact) is therefore irrelevant when it comes to determining the parties to the LOI and does not assist the Defendants.

59. The above analysis is consistent with evidence provided by the Sixth Defendant, Mr Tariq Najam, that he "*had never heard of Yamada*" (the Lender) prior to 4 July 2022, more than a month after the LOI was concluded.

60. Neither the Lender nor the Defendants have pleaded reliance on any evidence as to the background knowledge which would reasonably have been available to Optimum and the Borrower in the situation in which they found themselves on 26 May 2022, at the

time of the agreement of the LOI, which might have had a bearing on the true meaning and effect of the LOI. Nor have they asserted any such facts in oral argument. In the circumstances, the meaning and legal effect of the LOI are to be determined objectively based on its terms: what meaning would the document convey to a reasonable person?

61. In these circumstances I have reached the view that the Defendants have no realistic prospect of establishing that the Lender was a party to the LOI.

62. It follows logically, and I also find, that the Defendants have no realistic prospect of establishing (i) that the Lender acted in breach of the LOI, (ii) that the Borrower was unable to continue to make payments under the Agreements due to a failure on the part of the Lender to fulfil its obligations under the LOI, (iii) that the Defendants were obstructed from paying the sums due under the Agreements due to the Lender's non-compliance with the terms of the LOI or (iv) that the Lender is not entitled to the sums due under the Agreements due to its breaches of the LOI.

63. Even if I were wrong in my conclusions that the Defendants have no realistic prospect of establishing that the Lender was a party to the LOI or that the Lender acted in breach of the LOI, I would have reached the conclusion that the Defendants have no realistic prospect of showing that any breach of the LOI excused their failure to pay the sums due under the Agreements. The LOI and the Agreements relate to two different business ventures: the LOI concerns a proposed joint venture in Europe, whereas the Agreements relate to "*rolling reserves*" required by the Lender for existing business in Brazil. Further, neither agreement makes reference to the other. The background to each of the Agreements is set out in some detail in the recitals, but no reference is made in the recitals either to the LOI or to obligations undertaken pursuant to the LOI. If it had been the intention of the parties to the Loan Agreement that the Loan Agreement was (or was to be treated as) an agreement entered into in accordance with and giving effect to the LOI – in the words of the LOI, "*to reflect the Proposed Transaction*" – they will have stated the position expressly. The absence of any reference to the LOI in the recitals to the LOI is telling. Yet further, at the time the Agreements were concluded it was the expressly recorded understanding of all of the parties that the loan repayments were due. See clauses 2.1 and 4.1 of the Loan Agreement, clauses 2.1 and 3.1 of the Settlement Agreement and clauses 1.1 and 4.1 of the Amendment Agreement.

Implied terms of the Loan Agreement

64. Had it been necessary for me to do so, I would also have reached the conclusion that the Defendants have no realistic prospect of establishing the existence of the implied terms asserted in the Amended Defence and Counterclaim. The Defendants assert that terms "*derived from the LOI and/or the representations pleaded at 35.3(e), 35.3(i), 35.3(u), 35.3(n), 35.3(p), (q), 35.3(w) and 36.5 are implied into the Loan Agreement*" (Amended Defence and Counterclaim paragraph 44.13). They also plead additional implied terms at paragraphs 44.14 and 44.15 of the Amended Defence and Counterclaim. I would have reached the conclusion that the Defendants have no realistic prospect of establishing the existence of the implied terms for three reasons. First, the proposed implied terms are inconsistent with the express terms of the Loan Agreement: see, for example, clause 12.7 of the Loan Agreement, clause 5.1 of the Settlement Agreement and clause 7.10 of the Amendment Agreement. Second, the proposed implied terms are not necessary to give the express terms of the Loan Agreement business efficacy, nor are they so obvious as to go without saying. Third, there is no foundation for any assertion that the LOI had any implications for the Loan Agreement. See, further, paragraph 63 above. Given that it is unnecessary for me to decide this issue, I will not further elaborate these reasons.

65. Further, even if the Defendants were right about the existence in the Loan Agreement of the implied term that "*the parties would comply (or cause their agents to comply) with their obligations pursuant to the LOI*" (paragraph 44.13 of the Amended Defence and Counterclaim), the Defendants advance no case as to its effect on the unconditional repayment obligations on the Borrower or on the autonomous obligations on the Guarantors in the Loan Agreement.

"On demand" guarantees

66. As an additional string to its bow, the Lender asserts that the guarantees given by the Guarantors by clause 4 of the Loan Agreement are to be construed as "*on demand*" guarantees. Particular reliance is placed by the Lender on the Guarantors' undertaking at clause 4.1(c) of the Loan Agreement that "*if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify the Lender immediately on demand against any cost, loss or liability it incurs as a result of the Borrower not paying any amount which would, but*

for such unenforceability, invalidity or illegality, have been payable by it under any Loan Document on the date when it would have been due". The Lender contends that the Guarantor's obligations under the Loan Agreement are autonomous and are not affected by disputes between the Lender and the Borrower, and the Guarantors must therefore honour the demand made by the Lender. Had it been necessary for me to reach a conclusion on this issue I would have formed the view that the Guarantors had more than a fanciful prospect of succeeding on the issue.

Enforceability of clause 4 of the Loan Agreement

67. As an additional defence to the claim asserted against them by the Lender, the Guarantors contend that "*Clause 4 to the Loan Agreement is governed by s. 3 UCTA 77. ... Clause 4 fails to satisfy the reasonableness test pursuant to s. 11(1) UCTA 1977*" (paragraph 56.1 of the Amended Defence). There are a number of deficiencies with this pleaded defence:

(1) It is not explained in the Amended Defence and Counterclaim why the Defendants allege that section 3 of the Unfair Contract Terms Act 1977 applies.

(2) Nor is it explained on what basis it is asserted that clause 4 of the Loan Agreement fails the reasonableness test.

(3) It is not suggested that the allegation goes to only a part or parts of Clause 4 and, accordingly, it must be treated as going to the whole of Clause 4.

(4) Nor is there any allegation in the Amended Defence and Counterclaim as to the consequences which would follow a finding of unreasonableness.

Nevertheless, the thrust of the allegation is tolerably clear.

68. Clause 4 of the Loan Agreement provides:

> 4**. GUARANTEE AND INDEMNITY**
>
> **4.1 Guarantee and indemnity**.
>
> Each Guarantor irrevocably and unconditionally jointly and severally:

(a) guarantees to the Lender punctual performance by the Borrower and the other Guarantor of all that Loan Party's obligations under the Loan Documents;

(b) undertakes with the Lender that whenever the Borrower does not pay any amount when due under or in connection with any Loan Document, it and the other Guarantor shall immediately on demand pay that amount as if it was the Borrower; and

(c) agrees with the Lender that if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify the Lender immediately on demand against any cost, loss or liability it incurs as a result of the Borrower not paying any amount which would, but for such unenforceability, invalidity or illegality, have been payable by it under any Loan Document on the date when it would have been due. The amount payable by a Guarantor under this indemnity will not exceed the amount it would have had to pay under this clause if the amount claimed had been recoverable on the basis of a guarantee.

4.2 Continuing guarantee. This guarantee is a continuing guarantee and will extend to the ultimate balance of sums payable by the Borrower under the Loan Documents, regardless of any intermediate payment or discharge in whole or in part.

4.3 Reinstatement. If any payment by the Borrower or any discharge given by the Lender is avoided or reduced as a result of insolvency or any similar event:

(a) the liability of the Borrower shall continue as if the payment, discharge, avoidance or reduction had not occurred; and

(b) The Lender shall be entitled to recover the value or amount of that security or payment from the Obligor, as if the payment, discharge, avoidance or reduction had not occurred.

4.4 Waiver of defences. The obligations of each Guarantor under this clause 4 will not be affected by an act, omission, matter or thing which, but for this clause 4.4, would reduce, release or prejudice any of its obligations under this clause 4 (without limitation and whether or not known to it or the Lender) including:

(a) any time, waiver or consent granted to, or composition with, the Borrower;

(b) the release of the Borrower or any other person under the terms of any composition or arrangement with any creditor of any member of the group to which it belongs;

(c) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, the Borrower or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;

(d) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of the Borrower or any other person;

(e) any amendment, novation, supplement, extension restatement (however fundamental and whether or not more onerous) or replacement of a Loan Document or any other document or security including, without limitation, any change in the purpose of, any extension of or increase in any facility or the addition of any new facility under any Loan Document or other document or security;

(f) any unenforceability, illegality or invalidity of any obligation of any person under any Loan Document or any other document or security;

(g) any insolvency or similar proceedings; or

(h) this Agreement or any other Loan Document not being executed by, or binding against, any person.

4.5 Guarantor intent. Without prejudice to the generality of Clause 4.4 (Waiver of defences), each Guarantor expressly confirms that it intends that this guarantee shall extend from time to time to any (however fundamental) variation, increase, extension or addition of or to any of the Loan Documents and/or any facility or amount made available under any of the Loan Documents.

4.6 Immediate Recourse. Each Guarantor waives any right it may have of first requiring the Lender (or any trustee or agent on its behalf) to proceed against or enforce any other rights or security or claim payment from any person before claiming from that Guarantor under this Clause 4.6. This waiver applies irrespective of any law or any provision of a Loan Document to the contrary.

4.7 Appropriations. Until all amounts which may be or become payable by the Borrower under or in connection with the Loan Documents have been irrevocably paid in full, the Lender (or any trustee or agent on its behalf) may:

(a) refrain from applying or enforcing any other monies, security or rights held or received by the Lender (or any trustee or agent on its behalf) in respect of those amounts, or apply and enforce the same in such manner and order as it sees fit (whether against those amounts or otherwise) and no Guarantor shall be entitled to the benefit of the same; and

(b) hold in an interest-bearing suspense Account any monies received from any Guarantor or on Account of any Guarantor's liability under this Clause 4.7.

4.8 Deferral of Guarantors' rights. Until all amounts which may be or become payable by the Borrower under or in connection with the Loan Documents have been irrevocably paid in full, no Guarantor will exercise any rights which it may have by reason of performance by it of its obligations under the Loan Documents or by reason of any amount being payable, or liability arising, under this Clause 4:

(a) to be indemnified by the Borrower;

(b) to take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of the Lender under the Loan Documents or of any other guarantee or security taken pursuant to, or in connection with, the Loan Documents by the Lender;

(d) to bring legal or other proceedings for an order requiring the Borrower to make any payment, or perform any obligation, in respect of which any Guarantor has given a guarantee, undertaking or indemnity under this Clause 4;

(e) to exercise any right of set-off against the Borrower; and/or

(f) to claim or prove as a creditor of the Borrower in competition with the Lender.

If a Guarantor receives any benefit, payment or distribution in relation to such rights it shall hold that benefit, payment or distribution to the extent necessary to enable all amounts which may be or become payable to the Lender by the Borrower under or in connection with the Loan Documents to be repaid in full on trust (with the intent that

this shall not constitute a charge and to the extent it is able to do so in accordance with any law applicable to it) for the Lender and shall promptly pay or transfer the Lender or as the Lender may direct.

4.9 Release of Guarantor. A Guarantor shall be automatically released without any action on the part of the Lender from its obligations under this Section if all the Obligation have been repaid in full.

4.10 Merger, Consolidation and Sale of Assets of a Guarantor.

A Guarantor may not sell or otherwise dispose of all or substantially of its assets to, or consolidate with or merge with or into (whether or not such Guarantor is the surviving Person), another Person, other than the Borrower or another Guarantor.

69. In my view the defence based on the Unfair Contract Terms Act 1977 has no real prospects of success. The Defendants have no real prospects of establishing that the Loan Agreement was on the Lender's standard terms of business. In his evidence the Sixth Defendant acknowledges that the Loan Agreement was negotiated. Nor do the Defendants have real prospects of establishing that clause 4 of the Loan Agreement (or any part of it) is not a fair and reasonable term to be included having regard the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the Loan Agreement was concluded. Clause 4 is a carefully drafted provision which forms part of a complex commercial contract between sophisticated corporate entities based in Florida, Brazil and England, and individuals based in Italy, the United States of America and the United Kingdom, all of whom have regular access to legal advice and assistance. It has not been suggested that the relative bargaining position of the parties was unequal. Nor has it been suggested that the clause was not achieving a commercially reasonable objective. The Lender had a legitimate commercial interest in receiving payment under the Loan Agreement when due and there was nothing unfair or unreasonable in requiring the Guarantors to pay the sums which were due under the Loan Agreement.

Alleged misrepresentation

70. All of the Defendants (in the Amended Counterclaim), but just the Guarantors (in the Amended Defence), allege that they are entitled to rescind (or have rescinded) the Loan Agreement on the ground that it was induced by a pre-contractual representation (paragraph 56.2 of the Amended Defence and paragraph 78 of the Amended Counterclaim). There is no allegation in the Amended Defence and Counterclaim as to when the rescission is alleged to have taken place.

71. The Amended Counterclaim contained a long list of alleged pre-contractual representations: see paragraph 75. During oral submissions counsel for the Defendants informed the court that only one allegation is maintained. The only representation now relied upon by the Defendants as inducing the Loan Agreement is that, in answer to the question, "*Who is Yamada Limited?*", Mr Calandruccio replied: "*One of our holding company which will act as lender*".

72. At the conclusion of the hearing, I undertook to re-read the contemporaneous correspondence between the individuals representing the parties. I have now done so. The relevant exchange which contains the words relied upon by the Defendants is to be found in a WhatsApp chat called "*Optimum Admin*", the members of which were the Sixth Defendant ("**TN**"), Mr Calandruccio ("**AC**") and Mr Cirulli ("**FC**"). The emphasis has been added.

FC	4 July 2022 at 6:06am	Let me send u the email with the execution version And we talk later
TN	4 July 2022 at 6:06am	Ok Sounds good
TN	4 July 2022 at 10:34pm	IMG-20220704-WA0019.jpg (file attached) Who is Yamada Limited?
AC	4 July 2022 at 10:36pm	**One of our holding company, which will act as lender**. Chat tomorrow.
TN	4 July 2022 at 10:40pm	Alright. Assumed it was Optimum as haven't heard another name yet. No visibility of who is involved in Yamada. Hoping this doesn't raise questions on our side now but yeah we'll see tomorrow. Thanks for sending. I'm reviewing the proposals from Nick as well. I don't believe we have the information for Yamada on any of the letters for the purpose of this loan So please provide that before I have them finalized tomorrow as well. Can't afford another delay at this stage
TN	5 July 2022 at 5:28pm	As said already, we've advanced funds to fill in the gap and keep business moving, which were supposed to be filled in by this loan amount. So part of this needs to pay back those amounts, as the function was fulfilled as a stop gap I want to be clear on that point as I don't want to be in breach based on accounting

		The point is still "technically" valid, but I'm trying to be concise

73. Despite the Lender's protestations, I am prepared to assume for the purposes of the Application that it is arguable that the statements made by Mr Calandruccio could reasonably have been understood as being attributable to the Lender. Nevertheless, I am of the view that the defence based on misrepresentation has no real prospects of success for three reasons.

    (1) First, in concluding the Loan Agreement the parties agreed expressly that pre-contractual statements not included as express terms of the Loan Agreement could not be relied upon. Clause 12.7 of the Loan Agreement provides that "*The Loan Documents represent the entire agreement about this subject matter and supersede prior negotiations or agreements. All prior agreements, understandings, representations, warranties, and negotiations among the parties about the subject matter of the Loan Documents merge into the Loan Documents.*" There are terms to similar effect in the Settlement Agreement (clause 5.1) and the Amendment Agreement (clause 7.10).

    (2) Second, I am of the view that the Defendants would have entered into the Loan Agreement even if the representation had not been made and that it is fanciful to suggest the contrary. The identity of the Lender was not of material significance to the Defendants. It was a source of loan money to fund the need for increased "*rolling reserve*" which was of importance to them.

    (3) Third, if, in reliance on the representation, the Sixth Defendant came to the conclusion that the Lender was a party to the LOI, his reliance on the representation would have been unreasonable. The representation was irrelevant to the terms of the Loan Agreement.

74. The only relief claimed by the Defendants in the Amended Counterclaim for pre-contractual misrepresentation is rescission. No claim in damages is advanced. Where this leaves the Defendants is not explained in the Amended Counterclaim, nor was it

explained in oral submissions. If the Borrower had validly rescinded the Loan Agreement, the loan would have had to be repaid.

Set-off

75. The final defence raised by the Defendants with which I must deal is set-off. All of the Defendants assert that they have a defence of set-off (paragraphs 62-63 of the Amended Defence). They assert that they "*are entitled to set off in respect of matters set out in the Defendants (sic) counterclaim below, which counterclaim far exceeds the value of the Claimant's claim*"; and that they "*are entitled to set off such sums as they may be awarded by way of counterclaim herein against any sum found to be due to the Claimant*".

76. A formidable obstacle in the way of any reliance by the Defendants on the defence of set-off is clause 2.6 of the Loan Agreement. Clause 2.6 provides: "*all payments to be made by the Borrower under any Loan Document ... shall be made in immediately available funds in Dollars, without setoff, recoupment or counterclaim*". To this the Defendants respond asserting that clause 2.6 does not "*preclude an equitable set-off in the event of the parties having a counterclaim*". The Defendants also respond by asserting that Clause 2.6 engages section 3 of UCTA and does not satisfy the requirement of reasonableness pursuant to section 11 of UCTA.

77. In my view, the defence of set-off does not provide the Defendants with a realistic (as opposed to a fanciful) prospect of success for the following reasons:

    (1) First, as I have already concluded, the Defendants do not have a prospect of success on their counterclaim. In the circumstances, they have nothing against which to set-off the Lender's claims.

    (2) Second, the Defendants have not even attempted to formulate a claim to equitable set-off. Nowhere have they sought to explain why their counterclaim, assuming it to have merit, would impeach the Lender's demand so as to give rise to an equitable set-off defence. This is unsurprising in circumstances where there would be no realistic prospect of formulating a convincing case.

(3) Third, the Defendants appear to concede that, in the absence of a claim to equitable set-off, clause 2.6 would engage and defeat any defence of set-off.

(4) Fourth, the Defendants' reliance on UCTA is misconceived. Section 3 of UCTA is not engaged for the reasons stated at paragraph 69 above; and, even if it were engaged, the Defendants do not have real prospects of establishing that clause 2.6 of the Loan Agreement is not a fair and reasonable term to have included in the Loan Agreement having regard the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when the Loan Agreement was concluded. Clause 2.6 is a carefully drafted provision which forms part of a complex commercial contract between sophisticated corporate entities based in Florida, Brazil and England, and individuals based in Italy, the United States of America and the United Kingdom, all of whom have regular access to legal advice and assistance. It has not been suggested that the relative bargaining position of the parties was unequal. Nor has it been suggested that the clause was not achieving a commercially reasonable objective. The Lender had a legitimate commercial interest in receiving payment under the Loan Agreement promptly when due and there was nothing unfair or unreasonable in requiring payment to be made without set-off. An anti- set-off provision is fairly standard in international commercial loan agreements.

Conclusion

78. For all these reasons, the Application for summary judgment succeeds. The Defendants have no realistic (as opposed to fanciful) prospect of succeeding in any of their defences or counterclaims in this action. Further, I am not persuaded that there is any other compelling reason why the case or issue should be disposed of at a trial and none has been suggested.

79. It follows that the alternative strike-out application does not arise and I do not need to decide it.

80. I will invite Counsel to draw up an appropriate order which captures the outcome and hear submissions, if necessary, on costs.