Neutral Citation Number: [2022] EWHC 2988 (Comm)

Case No: CL-2021-000089

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2022

Before :

Peter MacDonald Eggers KC
(sitting as a Deputy Judge of the High Court)

- -

Between :

JINXIN INC	**Claimant**
- and -	
(1) ASER MEDIA PTE LIMITED	
(2) MEDIA PARTNERS AND SILVA, LLC	
(3) SU HYEON CHO	
(4) LARA VANJAK	
(5) MARCO AULETTA	
(6) RICCARDO SILVA HOLDING DESIGNATED ACTIVITY COMPANY	
(7) ROBERTO DALMIGLIO	
(8) FONG LEE YUH	
(9) RICCARDO SILVA	
(10) ANDREA RADRIZZANI	**Defendants**

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Adrian Beltrami KC, Anne Jeavons and Nathaniel Bird (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Ruth den Besten and Nicholas Goodfellow (instructed by **Kingsley Napley LLP**) for the **Second Defendant**

Hearing date: 22nd September 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
PETER MACDONALD EGGERS KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 25 November 2022 at 10:30am.

Peter MacDonald Eggers KC :

Introduction

1. In this action, the Claimant ("**Jinxin**") makes a claim in deceit, and a related claim for unlawful means conspiracy, against the First, Second, Fifth, Sixth, Ninth and Tenth Defendants ("**the Tort Defendants**") arising in respect of alleged misrepresentations fraudulently made which are said to have induced Jinxin to enter into a share purchase agreement dated 8th March 2016 (the "**SPA**").

2. In September 2022, I heard a three-day case management conference. A number of applications were heard and disposed of during the CMC. There was however one application which was heard and on which I reserved judgment. That was the application made by the Second Defendant ("**MPS LLC**") to strike out the claim made by Jinxin against MPS LLC; there is an alternative application for summary judgment dismissing the claim. This judgment is concerned with these applications.

Jinxin's claims

3. Jinxin is a joint venture owned by two Chinese enterprises, Baofeng and Everbright.

4. Jinxin entered into the SPA for the acquisition of 65% of the shares in MPS, the holding company of the MPS Group, from the First to Eighth Defendants for the price of US$661,375,034. The sale was completed on 24th May 2016.

5. MPS LLC is a company incorporated in Florida, the majority of shares in which are owned by Mr Carlo Pozzali.

6. MPS LLC had acted as a company selling media rights in the Americas including rights in relation to Serie A, the premier Italian football league. From 2012, this function was taken over by MP & Silva Miami LLC ("**MPS Miami**"), following which MPS LLC acted only as a holding company. MPS LLC was a minority shareholder, as to 35%, in MPS Miami. The majority stake of 65% was held by MPS London.

7. MPS Miami represented the interests of the MPS Group in the Americas, where it acquired rights for various sports in the region such as basketball, soccer and tennis, and was involved in the onward sale of rights for Serie A. Neither MPS LLC nor MPS Miami were involved in the acquisition of Serie A rights or FIFA rights (at least it is not alleged that they were: paragraph 84(c) of the Re-Amended Particulars of Claim).

8. Under the SPA, MPS LLC was the vendor of 4,875 shares in MPS. However, MPS LLC became a shareholder in MPS only after the SPA had been executed pursuant to the "*Reorganisation Plan*" defined in the SPA and prior to its completion (paragraph 9 of the witness statement dated 29th July 2022 of Mr Richard Clayman of Kingsley Napley LLP, MPS LLC's solicitors). This was evident from two group structures exhibited to Mr Clayman's witness statement, the first being as at October 2015 and the second being the "*New group structure (before closing of equity investment)*". There was a note at the bottom of the October 2015 group structure that "*Carlo Pozzali will exchange its 35% ownership in [MPS Miami] for a 7.5% stake in MP and Silva Holding SA (Luxembourg) (see next page for envisaged group structure before closing of the equity stake investment in [MPS])*".

9. Prior to completion of the SPA, 7,500 class B shares in MPS were transferred to MPS LLC in exchange for its 35% interest in MPS Miami, which was transferred to MPS. Of the shares it received, MPS LLC sold 4,875 shares to Jinxin, with MPS LLC retaining 2,625 class B shares in MPS.

10. Therefore, as submitted by Ms Ruth den Besten, who appeared with Mr Nicholas Goodfellow on behalf of MPS LLC, MPS LLC's involvement in the share sale to Jinxin was as a prospective vendor of shares acquired after exchange and by way of a share swap. This was accepted by Mr Adrian Beltrami KC (who appeared with Ms Anne Jeavons and Mr Nathaniel Bird on behalf of Jinxin) but Mr Beltrami KC added that MPS LLC received some US$49 million in exchange for its sale of 65% of its shares in MPS.

11. After the acquisition, MPS Miami was voluntarily dissolved and wound up following a resolution of its shareholders on 30th August 2017.

12. Following Jinxin's acquisition of the MPS Group, the financial condition of the MPS Group deteriorated and the MPS Group eventually became insolvent.

13. Jinxin claims in deceit, contending that the Tort Defendants were guilty of fraudulent misrepresentations made to Jinxin which induced it to enter into the SPA. The alleged misrepresentations are said to have been made in writing, and were made expressly or by implication by the contents of certain "**Sale Documents**" (also described as "**Vendor documents**") prepared by professional advisors in connection with and prior to the conclusion of the SPA. It is not alleged that any oral representations were made.

14. The Tort Defendants defend the claim by contending that the MPS Group's financial condition was the result of mismanagement by Jinxin.

15. The alleged representations have been broadly summarised in the agreed List of Issues as follows:

    (1) **The Business Practice Representations** concerning the honesty, legality and lawfulness of the conduct of the MPS Group business, including as to the absence of bribery, corruption or similar misconduct.

    (2) The **Serie A Representations** that the MPS Group had won the Serie A rights as a result of its long-standing and legitimate relationship with the Italian League and that the MPS Group's Management were confident that the rights would be renewed in 2017 and beyond.

    (3) The **Investigation Representations** as to the limited nature of a criminal investigation then being conducted in respect of the Ninth Defendant (Mr Riccardo Silva) and its irrelevance to the business of the MPS Group.

    (4) The **EBITDA Representations** concerning the truth, material accuracy and completeness of the financial information, including EBITDA forecasts, provided to Baofeng, Everbright and Jinxin.

16. Jinxin alleges that these representations were false in that these broadcasting and media rights were obtained by, and the MPS Group relied for their continuation and retention upon, bribes and other secret financial accommodations given to relevant decision-

makers combined with a series of unlawful and anti-competitive arrangements designed to avoid proper competition in the allocation process. It is also alleged that the EBITDA Representations were false based on contemporaneous forecasts contained in an email dated 1st February 2016.

17. Jinxin further alleges that the Tort Defendants had acted fraudulently in that they were aware that the representations were false, and intended the recipients of the Sale Documents, including Baofeng and Everbright, and Jinxin to rely on them and Jinxin did rely on those representations in that it would not have concluded the SPA but for the alleged representations. Jinxin seeks the rescission of the SPA or damages.

18. Jinxin also brings a claim against the Tort Defendants on the basis that the Tort Defendants conspired to injure Jinxin by unlawful means through the making of the alleged representations. The claim in conspiracy is therefore closely allied to the claim in deceit.

19. The Tort Defendants, including MPS LLC, defend the claims in full.

The allegations made by Jinxin against MPS LLC

20. According to paragraphs 12-16 of the second witness statement dated 19th August 2022 of Mr Julian Copeman of Herbert Smith Freehills LLP, Jinxin's solicitors, and I did not understand this to be in dispute, Mr Carlo Pozzali - who owns the majority of shares in MPS LLC - and Mr Riccardo Silva (the Ninth Defendant) and Mr Andrea Radrizzani (the Tenth Defendant) were the co-founders of the MPS Group. Mr Copeman also stated that Mr Pozzali formed part of MPS Management and was involved in the business and its development and that Mr Pozzali was "*closely involved in the business of the MPS Group as a whole*" (paragraph 16).

21. However, Mr Pozzali is not a named defendant to the action instituted by Jinxin and is not included amongst the Tort Defendants. I understand that Jinxin had named Mr Pozzali as a defendant on the claim form and initially pleaded its claim in deceit against Mr Pozzali personally, but Jinxin chose not to serve the proceedings on Mr Pozzali, and has now, following MPS LLC's request by email on 6th July 2022 and by consent, removed him as a defendant to these proceedings.

22. This is a striking feature of the case in that the person who is alleged to have the guilty knowledge in respect of the allegations of deceit and conspiracy on behalf of MPS LLC is Mr Pozzali, and yet no claim is made against Mr Pozzali personally, even though such claims are made personally against the other two co-founders, the Ninth and Tenth Defendants. That said, I do not know the reason for the decision not to proceed with the suit against Mr Pozzali, although Ms den Besten invited me to infer that "*it was because there was no faith ultimately in the claim being properly made against Mr Pozzali*". However, I do not consider that is a necessarily sure inference in circumstances where Jinxin is pursuing a claim against MPS LLC based on the alleged fraudulent knowledge of Mr Pozzali.

23. In its Re-Amended Particulars of Claim, Jinxin pleads that:

(1) Mr Pozzali's knowledge is to be attributed to MPS LLC (paragraph 7). For the purposes of the present application, I have been asked to assume that that is the case, although such attribution might be in issue at trial.

(2) The business and operations of the MPS Group were managed principally by Mr Silva, Mr Radrizzani, Mr Auletta and Mr Pozzali. As regards Mr Pozzali, it is alleged that the MPS Group was managed by Mr Pozzali as "*a founding member of the Group, as (through MPS LLC) a shareholder in MPS and as a director of MPS Miami*", and that in a Management Presentation provided on 29th January 2016 to DealGlobe Ltd (who had been retained to provide advice on behalf of the purchasing consortium) it was said that Mr Pozzali "*oversees group sales, acquisition and development strategy across the Americas, covering the USA, Canada, Latin America and the Caribbean*" (paragraph 12).

(3) The Vendor documents were prepared and provided for the purpose of facilitating the sale of the Sale Shares with the knowledge and with the actual, implied or ostensible authority and approval of at least MPS LLC and Mr Pozzali (paragraphs 15-16).

(4) Each of the Tort Defendants - including MPS LLC - made the various alleged express and implied representations (paragraphs 20-40).

(5) The Business Practices Representations and Serie A Representations were false (paragraphs 41-86). It is not suggested that MPS LLC or Mr Pozzali were personally involved in the obtaining of Serie A rights unlawfully or wrongfully. At paragraphs 84-85, Jinxin pleads as follows (referring to Mr Silva as "*RS*", Mr Radrizzani as "*AR*", Mr Pozzali as "*CP*", Mr Marco Auletta, the Fifth Defendant, as "*MA*", and Daniele Cappelletti, a member of Group management, Group Head of M&A, Deputy Managing Director, Asia, as "*DC*"):

> "*84. By reason of both the pervasive nature of the conduct described above and the overwhelming significance of the Serie A business to the Group, Jinxin infers that each of the tort Defendants and CP, being shareholders and/or persons in senior Management roles, must have been aware of it. Further, and without prejudice to the foregoing …*
>
> *c. CP: he was a co-founding partner of the Group, with a broad managerial role as described at paragraph 12(c) above. He was involved in the rights-out sale of the Serie A business in the United States and Latin America. He, together with MA, was copied in on an email exchange between RS and AR, on 8 September 2014, concerning rumours about the closeness between the Group and Infront Italy. Jinxin infers that he (and hence MPS LLC) must have been similarly aware of the true nature of the arrangements concerning the Serie A business …*
>
> *85. Further, given the reliance upon unlawful arrangements in order to secure the Serie A rights, RS, RSHL, AR, Aser, CP, MPS LLC and MA can have had no genuine belief in the asserted confidence of renewal of the Serie A rights in the future. The unlawful nature of the basis on which the Group won the Serie A rights meant that it was at all times susceptible to*

public exposure, whether by law enforcement agencies and/or private parties. This was even more acute at the time of the Acquisition, in view of the Milan investigation that was then ongoing. In addition to the matters pleaded above, Jinxin relies upon, inter alia, an email chain between, inter alios, Mr Marinelli of UBS and RS, AR, CP, MA, and DC dated 30-31 January 2016, concerning a call with one of the other bidders, referred to as 'S', to discuss S's concerns about the potential loss by the Group of Serie A. Mr Marinelli advised that the 'commercial team' should "stress our belief in the ability to retain Serie A" and "clarify that the discussions is on the commercial issues around Serie A and we WIL NOT (sic) discuss the investigation." It is clear from this email chain that the parties to it were aware of the potential impact of the Milan investigation upon the Group's ability to win the Serie A rights in the future."

(6) The Investigation Representations were false (paragraphs 87-90). However, it is not specifically alleged that MPS LLC or Mr Pozzali were aware that the Investigation Representations were false.

(7) The Business Practices Representations were false (paragraphs 91-106). No allegation is made that MPS LLC or Mr Pozzali was involved in the unlawful or wrongful acquisition of the FIFA Rights. At paragraph 107, Jinxin goes on to plead that:

"*107. By reason of the pervasive nature of the conduct described above (including as described in relation to Serie A) and the significance of the FIFA business to the Group, Jinxin infers that each of the tort Defendants and CP, being shareholders and/or persons in senior Management roles, must have been aware of it. Further, and without prejudice to the foregoing …*

b. … Jinxin further relies upon the following which indicate both a specific awareness of the FIFA business and the fact that this was something which was openly discussed between and understood by (at least) RS and AR …

vii. An email from Mr Marinelli to RS, AR, CP, and MA dated 22 January 2016 providing an update on different bidders, in which a bidder identified as 'S' was noted to have made an indicative bid offer but with "3 major DD topics (Sirona agreements, Milan channel, entity holding Serie A rights)" which "have been discussed during a call yesterday."

c. CP: he was a co-founding partner of the Group, with a broad managerial role as described at paragraph 12(c) above. He was involved in the rights-out sale of the Serie A business in the United States and Latin America. He, together with MA, was copied in on the email exchange with Mr Marinelli on 22 January 2016 described at paragraph 107 (b)(vii) above. Jinxin infers that he (and hence MPS LLC) must have been

similarly aware of the true nature of the arrangements concerning the FIFA rights."

(8) The EBITDA Representations were false (paragraphs 110-113). At paragraphs 110-111, Jinxin pleads the following:

"*110. In an email dated 1 February 2016 from DC to MA, DC identified "some commercial and operating issues that might have a significant impact on corporate profit in relation to the estimates in the current Business Plan." Whereas the current business plan estimated an EBITDA for 2015-16 of approximately US$81,000,000, there were the following issues [there followed a description of those issues, including issues with Euro 2016 Hong Kong, the Football Association of Malaysia, the FA Cup Hong Kong, the Football League in Thailand, and Opex] …*

f. An overall worst case scenario that would reduce the 2015-16 EBITDA from US$81,000,000 to US$53,000,000.

111. MA subsequently amended DC's email to remove reference to the Opex issue and to amend the impact of the remaining issues, concluding that the worst case scenario was a reduction in EBITDA to US$58,000,000 but that a more realistic scenario could result in US$72,000,000. MA sent his version of the email to RS, AR, CP and DC. In the subsequent email chain:

a. CP said, "I can't believe what I'm reading. Either we are crazy or something isn't working and I would like to know what."

(9) Jinxin was induced by and relied on the alleged representations and is entitled to rescission of the SPA or damages, including the sum paid for the acquired shares in MPS of US$661,375,034 (paragraphs 114-132).

24. MPS LLC denies the claim and the allegations made against it. It is specifically denied by MPS LLC that the critical element of a claim in fraudulent misrepresentation, namely that MPS LLC made the alleged representations knowing the same to be false or otherwise recklessly, is or can be established.

The test for striking out a statement of case and for summary judgment

25. MPS LLC's application is for an order:

(1) Striking out the claim in deceit and unlawful means conspiracy against MPS LLC pursuant to CPR rule 3.4.

(2) Alternatively, granting summary judgment dismissing Jinxin's claim against MPS LLC pursuant to CPR rule 24.2.

Striking out a statement of case

26. CPR rule 3.4 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;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

27. In *Arcelormittal USA LLC v Ruia* [2022] EWHC 1378 (Comm), Picken, J summarised the position in respect of a strike-out application at para. 29 as follows:

"*As to strike-out applications, under CPR 3.4(2)(a), the Court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing the claim. When considering an application to strike out, the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible (King at [27]; and Allsop v Banner Jones Limited [2021] EWCA Civ 7 at [7]); consideration of the application will be "confined to the coherence and validity of the claim as pleaded" (Josiya v British American Tobacco plc [2021] EWHC 1743 (QB)).*"

28. However, I am conscious that, in the present case, the application is not only based on there being no reasonable grounds for bringing the claim, but also on an alleged failure to comply with a rule or practice direction in failing to particularise an adequate basis for alleging fraud.

29. Thus, CPR PD16, para 8.2 requires that a "*claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim: (1) any allegation of fraud … (3) details of any misrepresentation … (5) notice or knowledge of a fact …*".

30. Similarly, the Commercial Court Guide at para. C1.3(c) provides that "*(i) Full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality; and (ii) where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out*".

31. These rules exist because an allegation of guilty knowledge - meaning knowledge that the representations intended to be relied on by the representor were untrue or that the representor was recklessly indifferent to its untruth - is a critical criterion of a claim in deceit. Of course, it is not the proof of guilty or fraudulent knowledge which is relevant in considering an application for a strike-out of a plea of fraud, but the question solely is whether the plea is properly made and particularised.

32. In *Portland Stone Firms Limited v Barclays Bank plc* [2018] EWHC 2341 (QB), at para. 31, Stuart-Smith, J said having regard to the CPR Part 16 Practice Direction and the Queen's Bench Guide that:

"*Where statements of case do not comply with these basic principles, the Court may require the Claimant to achieve compliance by striking out the offending*

document and requiring service of a compliant one: see Tchenquiz v Grant Thornton [2015] EWHC 405(Comm) and Brown v AB [2018] EWHC 623 (QB). It has always been within the power of the Court to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious."

33. In the present case, there is plainly a plea of deceit (fraudulent misrepresentation) against MPS LLC and Mr Pozzali, but no particulars of fraudulent knowledge against MPS LLC are pleaded other than by way of inference (see paragraphs 84 and 107 of the Re-Amended Particulars of Claim), except possibly in one instance (paragraph 111(a) of the Re-Amended Particulars of Claim).

34. In *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16; [2003] 2 AC 1, Lord Millett discussed the role of pleading particulars in connection with an inference of fraud and said at para. 184-189:

"*184. It is well established that fraud or dishonesty … must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence … This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.*

185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal …

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved …

189. It is not, therefore, correct to say that if there is no specific allegation of dishonesty it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud …"

35. At para. 55, Lord Hope said:

> "*… As the Earl of Halsbury LC said in Bullivant v Attorney General for Victoria [1901] AC 196, 202, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in Armitage v Nurse [1998] Ch 241, 256g, it is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal: Belmont Finance Corpn Ltd v Williams Furniture Ltd [1979] Ch 250, 268 per Buckley LJ. In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence*."

36. It might have been thought from reading Lord Millett's judgment that the pleading of primary facts which are consistent with honest or non-fraudulent conduct is not sufficient for the purposes of a plea of fraud to be inferred from those primary facts. However, para. 189 of Lord Millett's judgment indicates that a plea of fraud can be justified by way of an inference based on primary facts, which taken together demonstrate that fraud may be inferred, even if the primary facts are consistent with honesty as well as dishonesty. That said, if the primary facts which are pleaded taken together are consistent only with honest or non-fraudulent conduct, the plea may not be justified; but if an inference of fraud may be drawn from the primary facts pleaded, the plea should not be regarded as demurrable.

37. In *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), Flaux, J explained Lord Millett's judgment at para. 20:

> "*I agree with Mr Gourgey QC that this overstates what is required for a valid plea of fraud. The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty". At the interlocutory stage, when the court is considering whether the plea of fraud is a proper one or whether to strike it out, the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is*

> *a matter for the trial judge. This is made absolutely clear in the passage from Lord Hope's speech at [55]-[56] which I quoted above*."

38. This would suggest that, in order to justify a plea of fraud, the inference of dishonesty or fraud must be more likely than not having regard to the primary facts pleaded (see also *Raja v McMillan* [2020] EWHC 951 (Ch), para. 21-22).

39. That all said, there remains some flexibility in allowing an element of freedom to a claimant alleging fraud to plead its case with the evidence and information then available, given that there might be concerns that the evidence against the defendant will not be readily available, at least possibly until disclosure and the exchange of evidence.

40. Thus, in *Portland Stone Firms Limited v Barclays Bank plc* [2018] EWHC 2341 (QB), Stuart-Smith, J said at para. 27-29:

> "*27. One of the features of claims involving fraud or deceit is the prospect that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy. This has routinely been addressed in cases involving allegations that a defendant has engaged in anti-competitive arrangements. In such cases, the Court adopts what is called a generous approach to pleadings. The approach was summarised by Flaux J in Bord Na Mona Horticultural Ltd & Anr v British Polythene Industries Plc [2012] EWHC 3346 (Comm) at [29] ff. Flaux J set out the principles in play as described by Sales J in Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 (Ch) at [62]-[67], which included the existence of a tension between (a) the impulse to ensure that claims are fully and clearly pleaded, and (b) the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial but may be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim. Sales J indicated that this tension was to be resolved by "allowing a measure of generosity in favour of a claimant."*
> …
>
> *28. These are salutary warnings and necessary protections for the Claimants, which I bear in mind. It is, however, to be remembered that the Court's concern in these passages was in large measure based upon a lack of knowledge on the part of the Claimant before disclosure had been given. In the present case, the Defendants have given disclosure based upon wide-ranging search terms relating to multiple custodians. Although the Claimants submit that the Defendants' disclosure is not complete, they have not identified any specific omissions or areas of default that would justify the Court in treating the Claimants as if they were still materially excluded from access to relevant disclosure for present purposes.*
>
> *29. In any event, if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a Defendant's state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends. This is clear from numerous authorities: see Three Rivers District Council v The Governor and Company of Barclays of*

England (No 3) [2003] 2 AC 1 at [55] per Lord Hope and [186] per Lord Millett. I endorse and adopt the statement of Flaux J in JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20] …"

41. Based on these decisions, the determination of an application for striking out a plea of fraud must take into account the following considerations:

(1) It is incumbent on a party alleging fraud to plead sufficient particulars of knowledge that the alleged representation was untrue.

(2) The particulars may be of direct knowledge, for example a written communication demonstrating that the representor had the requisite guilty knowledge.

(3) In the absence of particulars of direct knowledge, the party pleading fraud may have to resort to an inference to be drawn from a primary fact or a number of primary facts. All such primary facts upon which an inference of fraud is to be drawn must be pleaded.

(4) Whether the allegation of fraud can be justified by reference to an inference of fraudulent knowledge based on primary facts depends on the Court being able to conclude that the inference of fraud is itself justified, assuming those facts are true and can be proved. Flaux, J said that an inference of fraud must be more likely than an inference of honest conduct; the primary fact(s) must "*tilt the balance*" and justify an inference of fraud. It is simply a question of whether, if established, the primary facts properly justify the inference of fraud, as opposed to innocent conduct. During his oral argument, I think Mr Beltrami KC suggested one should not be drawn into assessing probabilities and ask simply whether the inference of fraud is justified. I agree that is the ultimate question to be considered when determining the adequacy of the plea of fraud. In considering the primary facts from which the inference of fraud is said to be drawn, one must consider whether those facts, each taken alone or collectively, are not only capable of giving rise to an inference of fraud but also whether any inference of innocent conduct may be drawn and, if so, the Court must then have regard to the comparative strength of each of those competing inferences.

(5) In considering whether or not to strike out an allegation because it discloses no reasonable grounds for bringing the claim or because it contains insufficient particulars (and so in failing to comply with the requirements of the CPR Part 16 Practice Direction or the Commercial Court Guide), the Court should assume that the facts as pleaded are true.

(6) Further, the Court should adopt a generous approach to the party alleging fraud in the pleading of fraud and the particulars in support of that plea having regard to the fact that that party may not have access to all of the information and documents which pertain to the allegation. However, such generosity should not circumvent the requirements of pleading fraud and supportive particulars, but should be exercised, for example, where the issue whether the plea of fraud is justified is evenly balanced.

42. These considerations apply equally to a claim for unlawful means conspiracy where the unlawful means are the alleged fraudulent misrepresentations (Grant and Mumford (ed.), *Civil Fraud - Law, Practice and Procedure*, (1st ed., 2018), para. 2-138).

Summary judgment

43. CPR rule 24.2 provides that:

> "*The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –*
>
> *(a) it considers that –*
>
> *(i) that claimant has no real prospect of succeeding on the claim or issue …*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial*."

44. The approach the Court should take in considering an application for summary judgment is clear and was well summarised by Picken, J in *Arcelormittal USA LLC v Ruia* [2022] EWHC 1378 (Comm), at para. 25-28:

> "*25. Accordingly, under CPR 24.2, the Court may give summary judgment against a claimant on the whole or part of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at trial.*
>
> *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*."

45. With that approach in mind, I also note that if a claim in deceit is properly pleaded, it would be an unusual case for the Court to dismiss the claim by way of summary judgment, given the justification of any inference of fraudulent knowledge must be tested against the evidence, both documentary and oral evidence, at a trial.

46. Thus, in *JD Wetherspoon plc v Harris* [2013] EWHC 1088 (Ch); [2013] 1 WLR 3296, Sir Terence Etherton, C was concerned with an application for summary judgment after the exchange of witness statements and a trial to take place later that year, on the basis of a very substantial number of documents then available. The Chancellor said at para. 14:

> "*I do not consider that the summary judgment applications are, in principle, appropriate. They are based on a particular interpretation of facts which are in dispute and, not unusually in the case of allegations of fraud and dishonesty, on the inferences to be drawn from established facts. Mr Wardell accepted, and indeed asserted, that the alleged inferences which the claimant seeks to draw must be assessed in the light of all the documents. In the light of the substantial factual and documentary evidence in the present case and the matters which are in dispute, this is, to my mind, precisely the type of mini-trial of disputed facts on the documents for which the summary judgment procedure is inappropriate*."

47. That said, there may well be cases where, though the plea of fraud is properly particularised, it is clear that the allegation of fraud cannot be sustained in any circumstances so as to justify its dismissal summarily.

MPS LLC's application

48. The essence of MPS LLC's application to strike out or for summary judgment dismissing Jinxin's claim against MPS LLC is that Jinxin's case against MPS LLC relies on three matters in support of the inference of fraud:

    (1) The supposed "*pervasive nature of the conduct [described earlier in the Re-Amended Particulars of Claim] and the overwhelming significance*" of the Serie A and FIFA business to the MPS Group was such that MPS LLC must have been aware of such alleged conduct (paragraphs 84 and 107 of the Re-Amended Particulars of Claim).

(2) Mr Pozzali's role - being a shareholder and a person in senior management - was such that he "*must have been aware of*" the allegedly unlawful conduct (paragraphs 84 and 107 of the Re-Amended Particulars of Claim).

(3) A number of emails each of which are said by Jinxin to evidence dishonesty, namely:

b. Mr Pozzali was copied in on an email exchange between Mr Silva and Mr Radrizzani on 8th September 2014 concerning rumours about the closeness between the MPS Group and Infront Italy Srl (a consultant to La Lega) (paragraph 84(c) of the Re-Amended Particulars of Claim). In two emails, Mr Silva stated that:

> "*Also, I just saw Francini, who told me that Andrea had informed him that he wants to merge MP&Silva with Infront, news that he took very seriously. Keep in mind that these rumours can harm us in the Serie A tender, particularly if used by the competition (such as IMG or others) to demonstrate to the teams or to Lega [Calcio] that a conflict of interest in the assignment of rights might exist, even just theoretical or based on rumours. Let's not make any more statements, even privately, that could damage us, thank you!! …*
>
> *Keep in mind that the Serie A tender is delayed by a few weeks (probably to October, but we don't know) because they still need to close the domestic rights (the archive) with Sky before they move on to the foreign rights and, at the present time, we don't know how long they will take.*
>
> *Let's think about what might be written by certain newspapers that were already pointing a finger at the "closeness" between MPS and Infront, if they now wrote that the two companies are even thinking of merging! I believe that we must not harm our opportunity to obtain the assigned rights*."

c. An email chain dated 30th-31st January 2016 between a number of persons, including Mr Marinelli of UBS and Mr Silva, Mr Radrizzani, Mr Pozzali, concerning a call with one of the other bidders for the MPS Group (referred to as "*S*"), to discuss S's concerns about the potential loss by the MPS Group of Serie A. Mr Marinelli advised that the "*commercial team*" should "*stress our belief in the ability to retain Serie A*" and "*clarify that the discussions is on the commercial issues around Serie A and we WIL NOT (sic) discuss the investigation*" (paragraph 85 of the Re-Amended Particulars of Claim).

d. An email from Mr Marinelli to Mr Silva, Mr Radrizzani, Mr Pozzali, and Mr Auletta dated 22nd January 2016 providing an update on different bidders, in which a bidder (S) was noted to have made an indicative bid offer but with "*3 major DD topics (Sirona agreements, Milan channel, entity holding Serie A rights)*" which "*have been*

discussed during a call yesterday" (paragraphs 107(b)(viii) and 107(c) of the Re-Amended Particulars of Claim).

e. An email dated 1st February 2016 from Mr Cappelletti to Mr Auletta, in which Mr Cappelletti identified "*some commercial and operating issues that might have a significant impact on corporate profit in relation to the estimates in the current Business Plan*", resulting in a reduced EBITDA of US$53,000,000, contrary to the business plan which estimated an EBITDA for 2015-16 of approximately US$81,000,000 (paragraph 110 of the Re-Amended Particulars of Claim).

f. An email chain following Mr Auletta having subsequently amended Mr Cappelletti's email to remove reference to the Opex issue and to amend the impact of the remaining issues, concluding that the worst case scenario was a reduction in EBITDA to US$58,000,000 but that a more realistic scenario could result in an EBITDA of US$72,000,000. In a subsequent email chain, Mr Pozzali said "*I can't believe what I'm reading. Either we are crazy or something isn't working and I would like to know what*" (paragraphs 111 and 111(a) of the Re-Amended Particulars of Claim).

49. Mr Beltrami KC on behalf of Jinxin pointed out that, having regard to paragraph 22 of Mr Clayman's witness statement, MPS LLC is targeting its applications towards the plea as to MPS LLC's knowledge of the falsity of the alleged representations and takes no issue - for the purposes of the strike-out and summary judgment applications - as to the making of the alleged representations, the alleged pervasiveness of the illegal and corrupt arrangements underpinning the Serie A and FIFA rights, the problems with the EBITDA figures presented to Jinxin, or the falsity of the alleged representations.

50. Mr Beltrami KC further submitted that, taking these three matters together, Jinxin has a sufficiently arguable case to go forward to trial that: (i) bribery and corruption pervaded (at least) the Serie A and FIFA assets, to such an extent that; (ii) it is a perfectly proper inference that those with knowledge of those assets must have been aware of it; and (iii) that Mr Pozzali's position exposed him to such knowledge and awareness. Hence, it is argued, the allegation of dishonesty is properly advanced. Whether the evidence ultimately supports the inferred allegations of knowledge and dishonesty are matters for the trial judge.

51. I propose to address the applications having regard to the three matters on which Jinxin has based its pleading of fraudulent knowledge, as the parties' submissions have focussed on these three matters, namely:

(1) The pervasive nature of alleged illegal conduct in procuring the Serie A and FIFA rights and the significance of such rights to the MPS Group's business.

(2) Mr Pozzali's role being such that he "*must have been aware of*" the allegedly unlawful conduct.

(3) The emails referred to above.

52. For this purpose, as the knowledge of MPS LLC is in issue, the individual whose knowledge is to be attributed to MPS LLC is that of Mr Pozzali. As mentioned above, I have been asked to assume such attribution can be made, although such attribution might be in issue if the matter were to progress to trial.

(1) The pervasive nature of the illegal conduct / significance of the Serie A and FIFA rights

53. Jinxin pleads that the pervasive nature of the alleged illegal conduct in procuring the Serie A and FIFA rights as well as the significance of such rights to the MPS Group's business were such that Mr Pozzali (and therefore MPS LLC) must have been aware of it. Accordingly, Jinxin relies on the pervasive nature of the alleged illegal conduct and the importance of these rights to the MPS Group's business as a basis for inferring MPS LLC's guilty knowledge.

54. Ms den Besten on behalf of MPS LLC submitted that:

(1) The fact that the Serie A and FIFA Rights were of significance to the MPS Group's business is of no import to whether MPS LLC knew the alleged representations to have been false. This is no indicator of dishonesty, and is equally consistent with MPS LLC having made the alleged representations (if it did so) innocently or negligently.

(2) The remaining foundation of Jinxin's claim in deceit is, therefore, simply a generalised allegation that because of the "*pervasive nature of the conduct*" pursuant to which the Serie A and FIFA rights are alleged to have been acquired, MPS LLC "*must have*" known of the conduct alleged. This is a bare plea without proper basis.

(3) Jinxin does not plead a case that Mr Pozzali, MPS LLC and/or MPS Miami had any involvement in the acquisition of the Serie A or FIFA rights, on which Jinxin relies; no mention at all is made of MPS LLC or Mr Pozzali or MPS Miami in paragraphs 41-83 or 91-106 of the Re-Amended Particulars of Claim. Accordingly, if such rights were acquired unlawfully, it is not said that MPS LLC participated in that process, and its knowledge of the alleged unlawfulness needs to be identified as having been acquired in another way (but is not).

(4) It is common ground that MPS LLC was simply involved in the onward sale (via Mr Pozzali) of Serie A rights in the US and Latin America. It does not follow from its role in the onward sale of rights (from 2012 conducted by MPS Miami), that MPS LLC would have known how such rights were acquired.

(5) The inference that MPS LLC would have known how the rights were acquired is particularly difficult to understand when MPS LLC sat outside the MPS Group prior to the SPA.

(6) It is not alleged that the business of MPS LLC was always specifically aligned with the MPS Group. MPS LLC's separation is also apparent from certain Sale Documents.

(7) In any event, Jinxin is trying to have its cake and eat it. On the one hand, it advances a case that the alleged unlawfulness was "secret"; on the other hand,

it suggests that the conduct was so widespread that by being within the group (which MPS LLC was not) CP and so MPS LLC "*must have*" been aware of it. In fact, it is not at all apparent from the pleaded facts that MPS LLC "*must have*" known the pervasiveness of the unlawful conduct alleged.

55. Mr Beltrami KC on behalf of Jinxin submitted that:

(1) Jinxin pleads and relies upon the sheer scale of the illegal business practices concerned. The scale of this alleged activity was breath-taking.

(2) Although there were efforts to diversify, this was a Group which was built upon the Serie A business (contributing on average 68% of its rights in/out gross profit).

(3) Following the introduction of the Melandri-Gentiloni Law in 2008, MPS acquired the Serie A rights in various stages for seven seasons, from 2010/11 to 2017/18.

(4) In fact, on Jinxin's case, this was a fundamentally corrupt business because MPS acquired these rights:

b. By paying bribes, totalling at least US$54 million, which were shuffled through offshore companies for non-existent services, many of which were fronts for persons who advised the Italian football league (and, on Jinxin's case, controlled the allocation).

c. By entering into secret anti-competitive agreements with potential rivals in order to suppress the price.

d. There was a similar story in the means by which MPS acquired Italian rights to the FIFA World Cup for the years 2018 and 2022 (and sought to obtain the rights for the 2026 and 2030 World Cup tournaments). In respect of the 2018 and 2022 World Cups, there is direct evidence of secret payments by MPS to an intermediary, through another offshore company, with consequent payment on by the intermediary to a senior FIFA official (and it appears that similar payments were made in respect of the 2026 and 2030 World Cups, only to be superseded by the breaking of the FIFA scandal).

e. The pleaded case, accordingly, is one of brazen and pervasive corruption within MPS, over a lengthy period of time, and in respect of its most significant business. MPS LLC does not seek to challenge any of these pleaded facts for the purpose of the Application, and rightly so.

f. Jinxin has further identified similarly dubious looking "*consultancy agreements*" in respect of Coppa Italia, Super Coppa and Copa America, indicating that such business practices appear to have been even more widespread.

56. In my view, the significance of the Serie A and FIFA rights to MPS's business is a relevant background consideration, but of itself it cannot justify an inference of fraudulent knowledge. Plainly, MPS LLC would have understood the importance of

such rights, as MPS LLC was involved in selling such rights in the Americas. Jinxin alleges that the illegal conduct which resulted in the acquisition of these rights was "*pervasive*"; on the other hand, the alleged fraudulent conduct was said by Jinxin to be "*secretive and opaque*"; it follows that Mr Pozzali would have had no opportunity to be aware of such conduct - given that there is no allegation that he was guilty of such conduct - unless his position within the organisation was such as to make him actually aware of the allegedly illegal conduct. This gives rise to consideration of Mr Pozzali's role within the MPS Group.

(2) Mr Pozzali's role

57. Jinxin pleads that Mr Pozzali's role, as a shareholder in MPS and a person in senior management in the MPS Group, was such that he "*must have been aware of*" the allegedly unlawful conduct.

58. Ms den Besten on behalf of MPS LLC submitted that:

(1) Jinxin fails to set out any case (let alone a case meeting the stringent requirements of pleadings in deceit and unlawful means conspiracy) to support the contention that Mr Pozzali's role would have given him this knowledge; Jinxin's pleading is entirely lacking in any specific content as to what Mr Pozzali is alleged to have learned by carrying out his role, when and how.

(2) In its Re-Amended Particulars of Claim, Jinxin relies on Mr Pozzali's role as (i) a founding member of the MPS Group; (ii) a shareholder in MPS (through MPS LLC); (iii) a "*director*" of MPS Miami; and (iv) having a "*broad managerial role*". As to this:

b. It is admitted that Mr Pozzali was one of the founders of the "*MP & Silva*" business in generic terms. The designation appears to have arisen because, from 2005 onwards, Mr Pozzali started selling a package of the Serie A rights in the Americas using the MP & Silva name. Mr Pozzali invoiced MPS Dublin for commission via dedicated service companies, before MPS LLC was incorporated in 2008. However, it is unclear how this founding role, which took place substantially before any of the unlawful acts alleged, supports Jinxin's case; Jinxin does not plead any case as to why the role of Mr Pozzali as a founding partner/member means that he "*must have*" been aware of how the Serie A and/or FIFA Rights were acquired many years later, where Mr Pozzali is not alleged otherwise to have been involved in this.

c. Mr Pozzali in fact became a shareholder via MPS LLC only following execution of the SPA, so his capacity as a shareholder has no relevance in this context.

d. Whilst the description of Mr Pozzali as a "*director*" of MPS Miami is disputed, it appears to be common ground that Mr Pozzali was not appointed to any formal position within the MPS Companies. In any case, simply being a director of a company is not enough to sustain a case in fraud: what matters is what was done or known as such (see *Arcelormittal USA LLC v Ruia* [2020] EWHC 3349 (Comm), para. 29-

31). In any event, however, Mr Pozzali did not sit on any boards within the MPS Group, was not present at or provided with minutes of any meeting in which matters pertaining to the commission of alleged wrongdoing occurred, and did not negotiate any of the contracts which Jinxin alleges were fraudulent, and Jinxin does not allege otherwise.

e. The allegation of a broad managerial role is made in the context of Mr Pozzali overseeing "*group sales, acquisition and development strategy across the Americas, covering the USA, Canada, Latin America and the Caribbean*" (paragraph 12(c) of the Re-Amended Particulars of Claim), and his being involved in the rights-out sale of the Serie A business in the United States and Latin America. No case is pleaded as to why this management role, however broad, would have led Mr Pozzali to know how the Serie A and/or FIFA Rights were acquired in Europe (without his participation) or from whom.

f. Jinxin now attempts to repair the deficiencies in its pleaded case by referring to Copa America rights, and suggests in its skeleton argument (para. 124) that Mr Pozzali is "*keen to avoid any further scrutiny of arrangements which fall squarely within his own territory*", yet it ignores that it has pleaded no case that Mr Pozzali was involved in any wrongdoing in respect of Copa America (see paragraph 109 of the Re-Amended Particulars of Claim).

(3) In its submissions, based on documents adduced for the purpose of resisting the strike-out application, Jinxin places weight on the description of Mr Pozzali as a "*Member of the Board*" and it criticises MPS LLC for not commenting on Mr Pozzali's "*overt role*" as a member of the Board. However, once again, Jinxin has failed to pay close attention to the manner in which it has pleaded its own case:

b. The Re-Amended Particulars of Claim do not make any reference to Mr Pozzali being a member of the Board or seek to attach any particular significance to that description.

c. MPS LLC's Defence positively asserts that save for the responsibilities he assumed within MPS Miami, he was not "*subsequently appointed to any formal position within the MPS Companies*" (paragraph 9.3.3 of MPS LLC's Defence).

d. In its Reply, whilst Jinxin seeks to challenge what MPS LLC says about Mr Pozzali's role within MPS Miami it does not advance a positive case contrary to MPS LLC's contention that Mr Pozzali did not hold any other formal roles (paragraph 16.3 of MPS LLC's Defence; paragraph 6 of Jinxin's Reply)

(4) In response to the strike-out application, Jinxin now seeks to advance a case via paragraphs 36-37 of Mr Copeman's second witness statement that "*the documentation shows that CP had a more central role in respect of the strategic management of the Group as a whole*" and that Mr Pozzali had "*oversight of the Group's rights-in contract negotiations*". However:

b. Even if Mr Pozzali had the roles identified in the UBS presentation and Allen & Overy LLP Legal Vendor Due Diligence Report dated 18th November 2015 (which MPS LLC contends in paragraph 2.6 of its Defence were not prepared on its instructions and which are contradicted by the Ernst & Young LLP Vendor Due Diligence Reports) what Jinxin needs to show is that in this capacity Mr Pozzali acquired some relevant knowledge that is attributable to MPS LLC. Jinxin has not done so.

c. Jinxin also relies, in support, on a board resolution of MPS Lux dated 9th September 2014, which postdates most of the contracts which Jinxin alleges are tainted by fraud. The resolution is no part of Jinxin's pleaded case and the resolution does not appear to be mirrored by like resolutions passed by other MPS companies. Indeed, Jinxin has not sought to rely on any minutes of other board meetings from any other MPS companies as evidence of CP/MPS LLC's knowledge of falsity, despite having access to and the ability to review such documents. The inference is clear: either Mr Pozzali did not attend any relevant board meetings or, if he did, no conduct was discussed at those meetings upon which Jinxin can now rely in support of its claims against MPS LLC.

(5) Certain further hopeless points are also made by Jinxin to try and salvage its case, including that Mr Pozzali identifies himself as an MPS "*partner from 2005 to 2018*" on his LinkedIn page (in fact created in 2021), and is "*closely connected*" with Mr Silva, because he is married to his cousin. These points only serve to demonstrate that Jinxin's claims in respect of Mr Pozzali's knowledge of falsity are at best speculative and tenuous.

(6) Jinxin's submissions seek to place weight on the level of sale consideration received by MPS LLC. That does not form part of Jinxin's pleaded case.

59. Mr Beltrami KC on behalf of Jinxin submitted that:

(1) Given the extensive corruption alleged by Jinxin, it is (at the lowest) a fair inference that MPS LLC and Mr Pozzali would have been aware of it. Put another way, it is inherently unlikely that MPS LLC and Mr Pozzali would have been incurious and left in the dark as to the fundamental basis on which the major part of the business was conducted over the course of a decade.

(2) In order to draw this inference, Jinxin relies in particular upon the central role of Mr Pozzali within the business of the MPS Group. The documentary evidence currently available to Jinxin reveals the following:

b. Mr Pozzali was a "*founding partner*" of the business, alongside Mr Silva and Mr Radrizzani, as described in the UBS presentation. The acquisition was structured such that MPS LLC and Mr Pozzali obtained US$49 million from the sale as the third largest shareholder.

c. Mr Pozzali had a broad and senior managerial role within the MPS Group. Reference may be made to (a) the UBS presentation, in which he is described under the heading "*entrepreneurial management team*" as a "*Member of the Board*", with 11 years of experience "*with the*

> *Company*", and his profile stated that he is "*part of the Board of Directors of the Group*" who "*also*" overseas sales in the Americas; and (b) the Allen & Overy LLP Vendor Due Diligence Report, in which it was reported that "*As at 12 November 2015, the Group has 111 employees … plus four board members (consisting of Marco Auletta, Riccardo Silva, Andrea Radrizzani and Carlo Pozzali)*."

(3) The full detail, scope and responsibilities of Mr Pozzali as a member of the Board of the "*Group*" are not known, nor is it clear whether this is a reference to a corporate entity or a more generic executive body operating above formal structures. However, there is direct evidence of the significance and apparent role of this body in the Board Resolution of MPS Holding SA (Luxembourg) (the holding company) dated 9th September 2014 which provided that, in respect of all "*Acquisition Contracts*" (and so including Serie A and FIFA), "*The correct negotiations of each Acquisition Contract shall be overseen and be under responsibility of the relevant Top Commercial Manager. The Directors of the Group Riccardo Silva, Andrea Radrizzani, Carlo Pozzali and Marco Auletta shall be kept at all times duly informed by the top management as to the main aspects and developments of the negotiations of each investment and shall give their availability to regularly receive information and discuss such issues*".

(4) In addition, Mr Pozzali was also a director of MPS Miami, whose role as such included "*group sales, acquisition and development strategy across the Americas, covering the USA, Canada, Latin America and the Caribbean*". This meant being involved in the rights-out sale of the Serie A business in the United States and Latin America.

(5) The actual extent of Mr Pozzali's involvement in and knowledge of MPS's business will need further enquiry.

(6) MPS LLC does not explain Mr Pozzali's role as a member of the Board of the MPS Group.

60. Paragraph 12(c) of Jinxin's Re-Amended Particulars of Claim pleads that

> "*The business and operations of the MPS Group were managed principally by the individual tort Defendants and CP, namely by:*
>
> …
>
> *c. CP as a founding member of the Group, as (through MPS LLC) a shareholder in MPS and as a director of MPS Miami. The same MPS Management Presentation said that CP "oversees group sales, acquisition and development strategy across the Americas, covering the USA, Canada, Latin America and the Caribbean*"

61. This involves a general plea that Mr Pozzali was involved in the management of the business and operations of the MPS Group, but then this general plea is explained and narrowed by the plea of three specific roles on the part of Mr Pozzali, namely as a

founding member of the MPS Group, a shareholder in MPS LLC (which in turn was a minority shareholder in MPS Miami) and as a director of MPS Miami.

62. In my judgment, none of these roles, without more, necessarily or probably afforded Mr Pozzali the means of acquiring actual knowledge of the alleged illegal conduct which led to the acquisition of the Serie A and FIFA rights. Given that such conduct would have been "*opaque and secretive*", there is no reason why these roles would have made Mr Pozzali aware of such conduct in that:

    (1) Mr Pozzali's identity as a founder of the MPS Group was one which was apparently designated in 2005, a decade before the allegedly fraudulent conduct in question.

    (2) MPS LLC's shareholding in MPS was acquired only after the execution of the SPA, which was allegedly induced by the fraudulent misrepresentations.

    (3) Mr Pozzali's directorship of MPS Miami was concerned with the sale of rights in the Americas, and not the acquisition of the Serie A or FIFA rights. Indeed, there is no allegation that Mr Pozzali himself was guilty of the illegal conduct leading to the acquisition of those rights.

63. The reference in paragraph 107 of the Re-Amended Particulars of Claim that Mr Pozzali had a "*broad managerial role*" merely cross-refers to paragraph 12(c) and adds nothing to what is pleaded in paragraph 107.

64. Jinxin also refers to other matters which are not pleaded. I do not consider that it is legitimate to consider such evidence in disposing of an application to strike out a statement of case, given the Court's power to strike out is concerned with the adequacy of the statement of case and not with extraneous material unless referred to in the statements of case. Such evidence might well be material, however, to the application for summary judgment.

65. The additional material - the UBS presentation and the Allen & Overy LLP Vendor Due Diligence Report - indicates that Mr Pozzali was "*part of the Board of Directors of the Group*". However, these documents do not identify any precise role which would have provided Mr Pozzali with the means of acquiring knowledge of the circumstances in which the Serie A and FIFA rights were acquired.

66. Jinxin also relies on the MPS Luxembourg Board Resolution dated 9th September 2014 which identified Mr Pozzali as a director of the MPS Group and that they "*shall be kept at all times duly informed by the top management as to the main aspects and developments of the negotiations of each investment and shall give their availability to regularly receive information and discuss such issues*". There is no suggestion that the "*top management*" informed Mr Pozzali of the illegal conduct involved in acquiring the Serie A and FIFA rights.

67. Accordingly, even if it were legitimate for me to consider these unpleaded matters in disposing of the application for strike-out, I do not consider that they justify an inference of fraud. Indeed, as I think Mr Beltrami KC acknowledged, there was no evidence as to the status and responsibility of this "*Board of Directors*"; Mr Beltrami KC speculated it was "*some form of overarching executive body*" (and noted that there

is no evidence from Mr Pozzali that such a body did not exist) and submitted that it is improbable that Mr Pozzali with such a role within the MPS Group was "*incurious and indeed deliberately kept in the dark by his fellow board members as to the Group's fundamental business model*". However, given that the nature of such illegal conduct is furtive, and as the only pleaded role occupied by Mr Pozzali chiefly or only related to the sale of these rights in the Americas, not their acquisition in Europe, I do not consider that there is any such inherent improbability.

68. However, there is yet another platform of Jinxin's case based on an inference of fraud, namely the pleaded emails, to which I now turn.

(3) The emails

69. Jinxin has pleaded reference to a number of emails in support of its case that MPS LLC had the requisite fraudulent knowledge, although it is accepted by Jinxin that none of these emails expressly demonstrate actual fraudulent knowledge.

70. Ms den Besten on behalf of MPS LLC submitted that:

(1) Jinxin relies on an email between Mr Silva and Mr Radrizzani to which Mr Pozzali was copied on 8th September 2014 (a year and a half before the SPA) "*concerning rumours about the closeness between the Group and Infront Italy*", from which Jinxin infers that Mr Pozzali and hence MPS LLC must have been similarly aware of the true nature of the arrangements concerning the Serie A business. Whilst this email does refer to "*rumours*" of a close connection between MPS and Infront Italy, that is in the context of Mr Silva having been told that Mr Radrizzani had proposed a merger between these entities (which Mr Radrizzani denied). Further, the email evidences a concern to put to bed the rumours of closeness simply so as not to harm the interest of MPS in Serie A. There is nothing in the email which supports any actually improper relationship between MPS and Infront Italy, or from which an inference of knowledge - not merely as to the relationship between MPS and Infront Italy but boldly as to the entirety of the "*true nature of the arrangements concerning the Serie A business*" - can be drawn.

(2) Jinxin relies on the email chain dated 30th-31st January 2016 which, it claims, means that Mr Pozzali and MPS LLC can have had no genuine belief in the asserted confidence or renewal of Serie A rights. As to this:

b. No wrongdoing or knowledge of wrongdoing is alleged against Mr Marinelli of UBS who wrote the email concerning a discussion with potential bidders about commercial strategy and, in particular, what the MPS Group might do by way of other commercial opportunities, if the Serie A rights were to be lost.

c. Although the email refers to the Milan investigation (which concerned Mr Silva and not MPS LLC), it does not detail the investigation, and far less does it address its substance, merits, prospective outcome or likely effect.

d. Similarly, the email chain does not set out information that would have led Mr Pozzali to comprehend the "*true position*" as opposed to the existence of the investigation, or fix Mr Pozzali with any knowledge of wrongdoing material to the alleged representations, and which would have led him and MPS LLC to have known these to be false.

(3) Jinxin relies on a copy of the email dated 22nd January 2016 from Mr Marinelli of UBS to Mr Silva, Mr Radrizzani, Mr Pozzali and Mr Auletta setting out in some detail four potential bids and key points relating thereto, and providing under "*S*" a list of "*3 major DD topics (Sirona agreements, Milan channel, entity holding Serie A rights) have been discussed during a call yesterday*". As to the alleged inference which Jinxin pleads can be drawn from this email:

b. The email is again sent by Mr Marinelli, against whom no wrongdoing or knowledge of wrongdoing is alleged.

c. The email refers to the Sirona Agreements as having been discussed with a potential bidder by way of due diligence. This does support knowledge that the Sirona Agreements existed and were shared with UBS and bidder "*S*", but not the broad inference as to dishonesty drawn by Jinxin.

d. There is nothing further in the email which suggests any unlawful conduct, or which would or can be inferred to have given CP or MPS knowledge of the same.

(4) The explanation for the pleading of these emails now given is that they evidence Mr Pozzali's involvement in the business so that it can be inferred that he knew about the allegedly pervasive (but secret, hidden and obscure) conduct so that MPS LLC made the representations falsely. But if there is nothing in the emails that evidences dishonesty, then Jinxin's plea is reduced to saying that (i) since Mr Pozzali was in some way, however peripherally, involved in the MPS Group's business and (ii) since there was unlawful conduct within the MPS Group, Mr Pozzali and therefore MPS LLC must have known this. Indeed, if these emails are the high point of Jinxin's case that Mr Pozzali was involved in the business of the MPS Group, one can ask rhetorically where is the reasonably credible material which establishes an arguable case in fraud.

(5) As regards the EBITDA Representation, Jinxin seeks to rely on only one specific email dated 1st February 2016 to allege that MPS LLC made the alleged representation falsely. The email does not show that Mr Pozzali knew the EBITDA Representations to have been false, or provide any proper basis for inferring dishonesty. Mr Pozzali's response to the various scenarios - "*I can't believe what I'm reading. Either we are crazy or something isn't working and I would like to know what*" - suggests only that the figures surprised him.

(6) Mr Pozzali is not claimed to have had any particular accountancy expertise, or to be an expert in forecasting EBITDA. Nor was he (and nor is he alleged to have been) responsible for signing off financial statements or accounts for the wider MPS Group.

(7) Jinxin has had access to a wealth of documentation, including a back-up of Mr Pozzali's mailbox, held by the MPS Group, which it either has or could have reviewed (see Mr Clayman's second witness statement, para. 18).

71. Mr Beltrami KC on behalf of Jinxin submitted that:

(1) The emails which have been pleaded are consistent with the inference that MPS LLC and Mr Pozzali were aware of the true manner in which MPS conducted its business. These emails indicate that Mr Pozzali was neither isolated from, nor uninformed about, the Serie A and FIFA rights-in side of the business. Whilst they do not, in and of themselves, demonstrate actual knowledge of dishonesty, they further undermine the already improbable premise that he was (for some unexplained reason) excluded from the business (and provide good reason to believe there will be much more when Mr Pozzali's emails are disclosed).

(2) Jinxin's case is that: (a) bribery and corruption was so rife in respect of (at least) Serie A and FIFA that it is to be inferred that anyone who had any knowledge of those assets must have been aware of it; and (b) that Mr Pozzali's senior management role within the MPS Group was such that it is to be inferred that he would have necessarily had an understanding and interest in the MPS Group's two major assets, and therefore it is to be inferred that he would have been aware of the true nature of the arrangements concerning those assets.

(3) The emails pleaded go to the second of these points. They support the contention that Mr Pozzali's importance, position and role within the MPS Group's business was broader than he is admitting and in particular that he did not sit in the USA in splendid isolation from his peers, excluded from any and all discussions pertaining to and knowledge of Serie A and FIFA.

(4) The email chain dated 8th September 2014 concerns apparent rumours of a merger between MPS and Infront Italy (the adviser to the League), shortly before a Serie A tender. Mr Silva expressly told Mr Radrizzani and Mr Pozzali not to mention or say anything about the "*closeness*" between MPS and Infront Italy. That Mr Pozzali was brought into this evidently important conversation is fully consistent with his roles as a co-founding partner and Board member of the MPS Group and is indicative of an intimate involvement in MPS's core business. If Mr Pozzali had no involvement or interest in the rights-in side of the business, was not kept informed of such matters, and had no knowledge of the Serie A business, this email being sent to him is baffling (and unexplained).

(5) The email chain dated 30th-31st January 2016 concerns the bidding process for the sale of the MPS shares, and shows Mr Pozzali being held out to purchasers as knowledgeable about, and involved in, the rights-in side of the business. Indeed, the specific topic in focus is the stability of the Serie A rights.

(6) The email chain dated 22nd January 2016, again concerning the acquisition process, shows the "*Sirona agreements*" being flagged as a "*major DD topic*" by one of the potential purchasers that had been discussed, the Sirona Agreement being the agreement through which the bribe was allegedly paid for the FIFA rights. It is unclear whether Mr Pozzali was present during the

discussion about Sirona referred to, but he was an addressee of the email and was plainly involved in the process. It is a fair inference that Mr Pozzali either knew about the Sirona Agreement or found out about it after this email, given its apparent importance to the sale.

(7) With respect to Jinxin's case in respect of the falsity of the EBITDA Representations:

b. The Sale Documents forecast that the MPS Group's EBITDA for the year ending 2016 would be approximately US$81 million.

c. The email chain dated 1st February 2016 directly evidences that Mr Auletta, Mr Radrizzani, Mr Silva and Mr Pozzali were alerted to serious issues that could have a significant impact on the EBITDA figures contained in the Sale Documents; reacting to and discussing what to do about it amongst themselves; and appreciating that deviating so significantly from the business plan at this stage could "*significantly increase the risk of not receiving bids or blowing the deal, even though negotiations are at an advanced stage*".

d. The EBITDA figure was not revised in the Sale Documents.

e. The EBITDA figure was consequently falsely inflated.

f. Jinxin infers that Mr Auletta, Mr Radrizzani, Mr Silva and Mr Pozzali took a deliberate decision not to revise the figure, lest it interfered adversely with the sale process.

(8) Since the claim was pleaded, it has become apparent that a number of significant sources of further evidence exist, importantly (a) Mr Pozzali's emails; and (b) copies of Mr Silva's and Mr Radrizzani's email inboxes that contain their emails for the relevant period (Mr Copeman's second witness statement, para. 52-55). In particular:

b. It has recently been identified that hard drives held by BDO contain back up email data from the MPS mailboxes used by Mr Silva, Mr Radrizzani and Mr Pozzali. Jinxin has not yet reviewed any of those documents because Mr Silva, Mr Radrizzani and MPS LLC (a) have each objected on the basis of their purported entitlement to assert privilege over the contents of their company email accounts; and (b) have raised GDPR objections (Mr Copeman's second witness statement, para. 52-54).

c. Mr Silva and Mr Auletta have each revealed that they took a copy of their MPS mailboxes before they departed from MPS. These copies appear to have been taken before any mailbox content was deleted (Mr Copeman's second witness statement, para. 52).

d. Mr Silva has recently revealed that his criminal lawyer is holding four MPS laptops (Mr Copeman's second witness statement, para. 52).

e. It is therefore known that there are significant further repositories of evidence, covering the relevant period, and which are yet to be reviewed.

72. I shall deal with each of these emails in turn.

73. The email dated 8th September 2014 reveals only that there was a concern about rumours of a possible merger between MPS and Infront Italy and its "*closeness*" between them because of such a mooted merger. Jinxin submitted that this email indicates that Mr Pozzali had an involvement or interest in the rights-in side of the MPS Group's business, was kept informed of such matters, and had knowledge of the Serie A business. There is no allegation in paragraph 12(c) or any other part of the Re-Amended Particulars of Claim that Mr Pozzali had any involvement in the acquisition of the Serie A rights. The only pleaded involvement of Mr Pozzali in the business was that he was (a) one of the founders, although there is no explanation in the statement of case, how this translated into Mr Pozzali's involvement (if any) in the acquisition of the Serie A rights, (b) he was a shareholder of MPS LLC who in turn was a shareholder in MPS, but the acquisition of this shareholding occurred only after the execution of the SPA in March 2016 (after the date of the email), and (c) he was a director of MPS Miami, but this company was involved only in the sale of Serie A rights in the Americas, not in their acquisition.

74. The email chain dated 30th-31st January 2016 sent by Mr Marinelli of UBS stated MPS's belief in its ability to retain Serie A rights, but that provides no indication why Mr Pozzali might be aware of the circumstances in which the Serie A rights were acquired. If this email chain were indicative of wrongful conduct by Mr Pozzali, it should similarly reveal such wrongful conduct on the part of Mr Marinelli, but there is no allegation of such misconduct. The reference to the Milan investigation which is the subject of the Investigation Representations adds nothing to Mr Pozzali's alleged involvement in the alleged illegal conduct in the acquisition of the Serie A rights; this is especially so as Mr Pozzali is not implicated in the Investigation Representations in the Re-Amended Particulars of Claim.

75. The email dated 22nd January 2016 refers only to Mr Marinelli providing an update on different bidders, in which a bidder (S) was noted to have made an indicative bid offer but with "*3 major DD topics (Sirona agreements, Milan channel, entity holding Serie A rights)*" which "*have been discussed during a call yesterday*". At paragraph 99 of the Re-Amended Particulars of Claim, it is alleged by Jinxin that the Sirona Agreement was a means of transferring covert, corrupt and unlawful payments to and for the benefit of two individuals (Mr Dinos Deris and Mr Jérôme Valcke) and in order to enable MPS to secure sales rights to the FIFA World Cups. Although this email demonstrates an awareness on the part of Mr Pozzali of the Sirona agreement, it does not reveal or even hint at any knowledge on the part of Mr Pozzali of any wrongful conduct in the acquisition of such rights.

76. The email chain following the email dated 1st February 2016 from Mr Cappelletti to Mr Auletta which indicates that the EBITDA Representations were then thought to be untrue in that there was a reduced EBITDA of US$53,000,000, contrary to the business plan estimated an EBITDA for 2015-16 of approximately US$81,000,000. Mr Pozzali's reaction was one of surprise or shock, and indicates an awareness that the EBITDA Representations were untrue or might have been untrue. I consider that this email represents evidence of Mr Pozzali's direct knowledge of the truth value of the EBITDA Representations. Accordingly, in my judgment, there is a justified plea of fraud against MPS LLC in connection with the EBITDA Representations. The question then arises whether the claim based on the EBITDA Representations against MPS LLC should be

summarily dismissed. Mr Clayman at paragraph 38(d) of his first witness statement provides an explanation for the contents of this email, namely that the email represents only "*worst case*" scenarios (see paragraph 43 of Mr Copeman's second witness statement in response). That explanation provided by Mr Clayman may be or may not be correct, but it seems to me that its significance is a matter for trial and not for a summary determination of the claim.

The adequacy of Jinxin's pleas of fraud against MPS LLC

77. Having considered each of the bases of Jinxin's pleas of fraud against MPS LLC separately, I will now draw together my conclusions on the assessment of the entirety of allegations of fraud made by Jinxin against MPS LLC.

78. Jinxin has pleaded a case of fraud against MPS LLC. There are two distinct allegations.

79. The first allegation concerns the Business Practices Representations and the Serie A Representations. Jinxin's pleaded case is that MPS LLC, via Mr Pozzali, was aware that these alleged representations were untrue. Jinxin pleads at paragraphs 84, 85 and 107 of the Re-Amended Particulars of Claim that such knowledge is to be inferred based on (a) the significance of the Serie A and FIFA rights to MPS's business and the pervasive nature of the alleged illegal conduct engaged in to acquire such rights, (b) Mr Pozzali's role as a co-founder of the MPS Group, a shareholder of MPS through MPS LLC and a director of MPS Miami, and (c) the emails/email chains dated 8th September 2014, 22nd January 2016 and 30th-31st January 2016.

80. The role of Mr Pozzali, albeit described as a "*broad managerial role*", was alleged to extend to the sale of the Serie A rights in the Americas. There is no express allegation in the Re-Amended Particulars of Claim that Mr Pozzali was involved in the acquisition of the Serie A and FIFA rights (see also paragraph 10(a)(4) of Mr Clayman's second witness statement dated 2nd September 2022). No doubt Mr Pozzali was aware of the importance of these rights to MPS's business, but this really does not advance the allegation of fraud against MPS LLC. There is no indication as to how Mr Pozzali's role as a co-founder of the MPS Group demonstrated his knowledge of the falsity of the alleged representations. Further, MPS LLC's shareholding in MPS was arranged only after the execution of the SPA. None of this suggests why Mr Pozzali and MPS LLC should have been aware of the alleged illegal conduct which resulted in the acquisition of the Serie A and FIFA rights by reason of his role within the MPS Group; there are no particular circumstances in addition to these roles occupied by Mr Pozzali which would elevate Mr Pozzali's knowledge so as to justify a plea of fraud (*ED&F Man Sugar Ltd v T&L Sugars Ltd* [2016] EWHC 272 (Comm), para. 35; *Arcelormittal USA LLC v Ruia* [2020] EWHC 3349 (Comm), para 29-31; *Arcelormittal USA LLC v Ruia* [2022] EWHC 1378 (Comm), para. 59). Although the illegal conduct as alleged was pleaded to be pervasive, that does not mean that Mr Pozzali was privy to the knowledge of the illegal conduct especially as Mr Pozzali's alleged role was alleged to relate to the sale of the rights in the Americas (as represented by his pleaded directorship of MPS Miami). Therefore, the pervasive nature of the alleged illegal conduct and Mr Pozzali's pleaded role in the MPS Group of themselves do not justify the inference that Mr Pozzali, and MPS LLC, knew the circumstances in which the rights were acquired.

81. Further, the emails relied on by Jinxin do not on their own, or when read in connection with the alleged pervasive nature of the illegal conduct and Mr Pozzali's pleaded role

within the MPS Group, reveal any reason to infer Mr Pozzali's knowledge that the alleged representations were untrue.

82. Although Jinxin sought in argument to associate Mr Pozzali with the acquisition of such rights by reason of a supposed supervisory role within the MPS Group generally, the particulars relied on by Jinxin in the Re-Amended Particulars of Claim do not justify that inference. To this end, Jinxin relied on the UBS presentation, the Allen & Overy LLP Vendor Due Diligence Report and the MPS Luxembourg Board Resolution dated 9th September 2014 to bolster the inference of fraud. However, none of these documents justify such an inference. In any event, as these documents or their contents are not pleaded as part of the particulars of Jinxin's case of fraud against MPS LLC, they cannot be relied upon by the Court in assessing the adequacy of the plea of fraud.

83. Therefore, I am not satisfied that an inference of fraud in respect of the first allegation (*i.e.* the pleas in paragraphs 84, 85, 107, 125 and 126 of the Re-Amended Particulars of Claim) can be justified by the above-mentioned primary facts pleaded by Jinxin, not least because they are likely to be more consistent with Mr Pozzali's honesty, rather than with any fraudulent conduct. This is so when one takes into account each of the considerations referred to above alone or collectively.

84. In reaching this conclusion, I have also considered whether some indulgence should be extended to Jinxin in allowing its plea of fraud in circumstances where there might be further evidence becoming available during the course of the proceedings which justifies such a plea (there is a dispute on the evidence as to whether this was in effect a legitimate concern). However, in my judgment, any flexibility in this regard cannot overcome the inadequacy of the particulars of fraud pleaded in this case. The position might have been different had the balance not been tilted away from the plea of fraud, but had been evenly poised. In the present case, the balance is tilted against a case of fraud.

85. The second allegation made against MPS LLC relates to the EBITDA Representations and falls into a different category from the first allegation. The relevant particulars relied upon in support of MPS LLC, via Mr Pozzali, being aware of the falsity of the alleged representation is the email dated 1st February 2016. In that email, the EBITDA Representations were suggested, at least on one reading, to have been untrue, and Mr Pozzali was not only a party to the email, but also commented on the information about the reduced EBITDA of US$53,000,000 being at odds with the estimated EBITDA of US$81,000,000 (paragraphs 110-111 of the Re-Amended Particulars of Claim). In my judgment, this is plainly sufficient as a basis for the plea of fraud against MPS LLC.

86. This consideration also indicates that Jinxin has a real prospect of succeeding in its claim in respect of the EBITDA Representations. Ms den Besten sought to explain Mr Pozzali's comments based on the figures being only a "*worst case*" scenario and his innocence of any allegation of fraud. That is a matter which may be upheld at trial, but it is not sufficient to permit the striking out of the plea or granting summary judgment dismissing the claim at this stage.

Conclusion

87. For the reasons explained above,

(1) I allow MPS LLC's application to strike out Jinxin's pleas of fraud against MPS LLC in respect of the Business Practices Representations and the Serie A Representations in paragraphs 84, 85, 107, 125 and 126 of the Re-Amended Particulars of Claim.

(2) I dismiss MPS LLC's application to strike out Jinxin's plea of fraud against MPS LLC in respect of the EBITDA Representations in paragraph 110-111 of the Re-Amended Particulars of Claim. Further, given the basis of the plea of fraud in these paragraphs, in my judgment, Jinxin has a real prospect of succeeding in its claim against MPS LLC. I accordingly dismiss the application for summary judgment in respect of the EBITDA Representations.

88. I am grateful to the parties' counsel for their very helpful submissions and shall hear them as to the appropriate orders to be made.