Neutral Citation Number: [2022] EWHC 2431 (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: 30/09/2022

Before:

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

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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**
Andrew Hunter KC and Shane Sibbel (instructed by **Bird & Bird LLP**) for the **First and Tenth Defendants**
Ruth den Besten and Nicholas Goodfellow (instructed by **Kingsley Napley LLP**) for the **Second Defendant**
Hugh Norbury KC and Tim Benham-Mirando (instructed by **Fladgate LLP**) for the **Fifth Defendant**
Laurence Rabinowitz KC, Simon Colton KC and Sophie Weber (instructed by **Allen & Overy LLP**) for the **Sixth and Ninth Defendants**

Hearing date: 20th, 21st and 22nd September 2022

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JUDGMENT

Peter MacDonald Eggers KC:

Introduction

1. This action concerns claims made by the Claimant ("**Jinxin**") in deceit, and a related claim in conspiracy, brought 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. During a three-day case management conference, two applications were made by the Sixth and Ninth Defendants (supported by some or all of the other Tort Defendants), namely:

   (1) An application for a split trial, with each of the three trials envisaged dealing with specified issues ("**the split trial application**").

   (2) An application for the striking out of certain parts of Jinxin's Particulars of Claim on the grounds that they plead reliance on the decisions of a Swiss Court and an Italian tribunal which are inadmissible pursuant to the rule in *Hollington v Hewthorn* [1943] KB 587 ("**the *Hollington v Hewthorn* application**").

3. During the case management conference, I dismissed the split trial application and I allowed the *Hollington v Hewthorn* application. This judgment sets out my reasons for those decisions.

Jinxin's claims

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

5. Jinxin entered into the SPA for the acquisition of 65% 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.

6. The MPS Group was a media sports rights agency. The MPS Group dealt *inter alia* in the acquisition and sale and licensing of broadcasting and media rights for various football tournaments, including the premier Italian football league, Serie A, the FIFA World Cup, Coppa Italia, Super Coppa, and Copa America.

7. Following Jinxin's acquisition of the MPS Group, the financial condition of the MPS Group deteriorated and the MPS Group eventually became insolvent. Jinxin contends 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, not orally, and were contained in certain "**Sale Documents**" prepared by professional advisors in connection with and prior to the conclusion of the SPA.

8. The Tort Defendants contend that the MPS Group's financial condition was the result of mismanagement by Jinxin.

9. 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 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 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.

10. The representations alleged by Jinxin are both express representations made in the Sale Documents and implied representations, the implied representations emerging from the Sale Documents. It is not alleged that any oral representations were made.

11. As Mr Adrian Beltrami KC, who appeared on behalf of Jinxin with Ms Anne Jeavons and Mr Nathaniel Bird, made clear, the full nature of the alleged representations, and the issues arising from the alleged representations, are identified in the parties' statements of case.

12. 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. Jinxin further alleges that the Tort Defendants 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.

13. 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.

14. The Tort Defendants defend the claims in full.

The split trial application

<u>The application</u>

15. The Sixth and Ninth Defendants applied for an order that the trial of the deceit claim brought by Jinxin be split into three stages. This application is supported by each of the other Tort Defendants and is resisted by Jinxin.

16. The three stages of trial proposed by the Tort Defendants are:

(1) The "**first trial**" would deal with the identification of the representations made, their meaning, Jinxin's awareness of the representations, and Jinxin's reliance

on the representations. In particular, the following issues were proposed to be determined at the first trial:

(a) What representations were made in the Sale Documents and/or by the provision of the Sale Documents and what were the terms of those representations? (Paragraph 17 of the agreed List of Issues).

(b) Are the alleged representations inconsistent with the terms of the warranties contained in the SPA? (Paragraph 18 of the agreed List of Issues).

(c) If any of the representations were made, (i) were they made to Jinxin or to a class of persons to which Jinxin belonged, (ii) were the representations continuing representations which were repeated and continued until completion of the transaction, and (iii) could Jinxin rely and was it reasonable for Jinxin to rely on the alleged representations allegedly made in or by the provision of the Sale Documents, (iv) what is the effect of certain letters (including duty of care and non-reliance letters), and (v) did the Sale Documents contain disclaimers and other terms preventing reliance on the representations and, if so, were such terms unenforceable pursuant to section 3 of the Misrepresentation Act 1967? (Paragraph 19 of the agreed List of Issues).

(d) Did Jinxin waive any claim it might have in relation to the falsity of the EBITDA representations and/or is Jinxin contractually estopped from asserting that the alleged EBITDA representations were false by reason of the SPA and the Deed of Variation? (Paragraph 30.5 of the agreed List of Issues).

(e) If any of the alleged representations were made, did Jinxin rely on those representations and did the alleged representations induce Jinxin to enter into the SPA and/or proceed to completion? In particular, (i) which individuals (if any) were aware of the alleged representations and how did the said individuals understand the alleged representations, (ii) which individuals relied on the representations and did such reliance constitute reliance by Jinxin, (iii) can Jinxin rely on the presumption of inducement, (iv) is Jinxin contractually estopped from contending that it relied on the alleged representations by clause 19.2(a) of the SPA, (v) would Jinxin have proceeded with the acquisition in the absence of or regardless of the truth or falsity of the alleged representations because it was instead motivated by Chinese investment policy and/or a desire to complete the transaction expeditiously, and (vi) was Jinxin aware or did Jinxin suspect prior to signing the SPA and/or completion that some or all of the alleged representations were false and/or did Jinxin accept the risk that the alleged representations may be false? (Paragraph 32 of the agreed List of Issues).

(2) The "**second trial**" would deal with, amongst other issues, the questions of the falsity of the alleged representations, the knowledge and intention of the Tort Defendants, and the Tort Defendants' responsibility for the representations. (Paragraphs 15, 16, 21, 22, 23, 25, 26, 27, 28, 29, 30.1-30.4, 31, 34.1, 34.2 and 34.3 of the agreed List of Issues).

(3) The "**third trial**" would deal with remedies and quantum (paragraph 33, 34, 34.4, 35, 36, 37 and 38 of the agreed List of Issues).

17. Mr Laurence Rabinowitz KC, who appeared with Mr Simon Colton KC and Ms Sophie Weber on behalf of the Sixth and Ninth Defendants, stated that the issues to be determined at the first trial would be based on the Court making assumptions in substance that:

(1) The alleged representations were false.

(2) The Tort Defendants fraudulently intended the alleged representations to be relied on.

(3) The Tort Defendants were aware that the alleged representations were false.

The Court's discretion to order separate trials for separate issues

18. CPR rules 3.1(2)(i) and (j) provide that the Court may direct a separate trial of any issue and may decide the order in which issues are to be tried. Paragraph J1.5 of the Commercial Court Guide provides that "*Particularly in long trials, it may be advantageous to exercise these powers so as to hear the evidence relevant to some issues, and also to decide those issues, before moving on to hear evidence relevant to others*".

19. In *McLoughlin v Jones* [2001] EWCA Civ 1743; [2002] QB 1312, on an appeal from a decision on a trial of a preliminary issue, David Steel, J sitting in the Court of Appeal criticised the fact that the order for the preliminary trial in that case had not identified the factual premises on which the trial was to take place or even identified the preliminary issues of law prior to the trial. At para. 65-66, the learned judge said:

> "*65. The ambiguities of this order are only too obvious. No attempt was made to distinguish between the factual investigation required for the purposes of the limitation plea as opposed to the issue of foreseeability. It was wholly impractical for there to have been a full trial of the factual issues pertinent to foreseeability. It was an issue that should have been presented on agreed or assumed facts. If this was not a practical proposition, the issue of foreseeability should never have been taken separately.*
>
> *66. In my judgment, the right approach to preliminary issues should be as follows. (a) Only issues which are decisive or potentially decisive should be identified. (b) The questions should usually be questions of law. (c) They should be decided on the basis of a schedule of agreed or assumed facts. (d) They should be triable without significant delay, making full allowance for the implications of a possible appeal. (e) Any order should be made by the court following a case management conference*."

20. The Court in *McLoughlin v Jones* was concerned with a trial of a preliminary issue, rather than a split trial. On some occasions, split trials and trials of preliminary issues are terms which are used interchangeably. This is for good reason: because they often amount to the same thing. However, the archetypical preliminary issues trial is one which requires the determination of one or a few issues (often, but not always, an issue of law) whose resolution depends on the Court drawing certain assumptions, which generally occupies the Court for a short period of time, and whose outcome has the real

potential to save the parties and the Court of the need for a substantially longer trial. By comparison, a split trial may involve all of the issues being determined at two or more separate hearings, each concerned with a substantial number of issues both of law and fact, and yet the first hearing has again the real potential to avoid the need for a subsequent hearing or subsequent hearings. Very often, where trials are split, the first trial need not make any assumptions of fact. This may be where the distinction between split trials and preliminary issues trials resides. In any case, it is the potential to save the Court and the parties from having to deal, at a subsequent hearing, with issues which become irrelevant depending on the decision reached by the Court at the first trial which is common to both preliminary issues trials and split trials.

21. In the present case, Mr Rabinowitz KC indicated that although there are shades of meaning between split trials and trials of preliminary issues, if it is relevant, the Sixth and Ninth Defendants' application is not for a preliminary issue trial, but a split trial.

22. In *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch), at para. 5-7, Hildyard, J said that the Court should adopt an "*essentially pragmatic balancing exercise in assessing how the case is likely to unfold according to whether there is or is not a split*". The judge identified the relevant considerations to be taken into account amongst all of the facts of the case which guide the Court's discretion in this respect (see also *Daimler AG v Walleniusrederierna Aktiebolog* [2020] EWHC 525 (Comm), at para. 25-32). The considerations identified by the learned judge, which I have adapted, include:

    (1) Whether the prospective advantage of saving the costs of an investigation of the issues to be determined at a second trial if the determination of the first trial renders it unnecessary to determine such issues outweighs the likelihood of increased aggregate costs if a further trial is necessary.

    (2) What are likely to be the advantages and disadvantages in terms of trial preparation and management?

    (3) Whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials.

    (4) Whether a single trial to deal with all issues will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case.

    (5) Whether a split may cause particular prejudice to one or more of the parties (for example by delaying any ultimate award of compensation or damages).

    (6) Whether there are difficulties of defining an appropriate split or whether a clean split is possible.

    (7) What weight is to be given to the risk of duplication, delay and the disadvantage of a bifurcated appellate process?

    (8) Generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible?

    (9) Whether a split trial would assist or discourage mediation and/or settlement.

23. The fact remains that the decision to split what would otherwise be a single trial into more than one trial each dealing with defined issues is a step out of the norm, where in

most cases there will be a single trial determining all of the issues arising in an action. Accordingly, there must be a real and substantial advantage if a split trial were ordered to take place. In *Bindel v PinkNews Media Group Ltd* [2021] EWHC 1868 (QB); [2021] 1 WLR 5497, Nicklin, J said at para. 33:

> "*a case in which the court directs determination of a preliminary issue that will require resolution of disputed issues of fact, including disclosure, witness statements and cross-examination, must be regarded as an exception to the general rule, and one that requires careful consideration by the court and very clear justification.*"

24. It is also salutary to recall the warning of Lord Neuberger, MR in *Rosetti Marketing Ltd v Diamond Sofa Company Ltd* [2012] EWCA Civ 1021; [2013] 1 All ER (Comm) 308, at para. 1 in connection with the proposal for trials of preliminary issues:

> "*… It represents yet another cautionary tale about the dangers of preliminary issues. In particular, it demonstrates that (i) while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, (ii) if there are none the less to be preliminary issues, it is vital that the issues themselves, and the agreed facts or assumptions on which they are based, are simply, clearly and precisely formulated, and (iii) once formulated, the issues should be answered in a clear and precise way.*"

25. Although the present application was not for a trial of preliminary issues, at least nominally, the Master of the Rolls' warning remains relevant where a party applies for specific issues to be determined separately from the majority of issues arising in the action, based on limited evidence and specified assumptions to be made.

26. Unless a split trial can be justified as a means of resolving the disputed issues in action in accordance with the overriding objective with clear benefits over and above those of a single trial, the peril exists that a split trial will add considerably to the parties' costs burden, will delay the conclusion of the action (with an unappealing drain on the Court's resources) and/or will lead to unanticipated difficulties.

<u>The Tort Defendants' submissions</u>

27. The Sixth and Ninth Defendants made the application for a split trial. The First and Tenth Defendants (represented by Mr Andrew Hunter KC and Mr Shane Sibbel), the Second Defendant (represented by Ms Ruth den Besten and Mr Nicholas Goodfellow) and the Fifth Defendant (represented by Mr Hugh Norbury KC and Mr Tim Benham-Mirando) each supported the application for a split trial.

28. Taken together, the Tort Defendants submitted as follows:

    (1) Given the likely length and burden of dealing with a single trial, it is unlikely to be reasonable or appropriate to have a single trial of all issues in these proceedings. The number of parties, the wide-ranging scope of the allegations, and the multitude of issues, as well as the need for complex expert evidence required to address some of those issues, make it inappropriate to seek to determine all issues in a single trial. The disclosure required for a single trial will be extensive; there will be a large number of factual witnesses and experts drawing on eight separate disciplines.

(2) The burdensome nature of the disclosure and evidence, and the consequent time at trial, will relate mainly to the question of the falsity of the representations and the Tort Defendants' responsibility for any misrepresentation, and also the issues of remedies and quantum. These issues will need to be determined at the second and third trials only if the more limited inquiry into Jinxin's reliance and inducement does not dispose of the action.

(3) Counsel for the Sixth and Ninth Defendants currently estimate that a single trial of all issues would take 21 weeks and the cost estimate for those defendants alone is almost £25 million. Jinxin has not provided any costs estimates although there is little doubt that Jinxin's costs would be enormous and substantially in excess of those that will be incurred by the Sixth and Ninth Defendants. Jinxin has acknowledged that its disclosure alone would cost in the region of £3.9 million to £6.6 million, given that the disclosure would relate to documents created over an extended period (2004-2016). The First and Tenth Defendants estimate their costs of a single trial to be £12.6 million. The Fifth Defendant estimates his costs of a single trial to be £7.5 million. The Second Defendant estimates its costs of a single trial to be £7.1 million.

(4) The first trial is concerned only with the interpretation of the representations, which were made only in writing, although some of these representations are said to have been implied, and only with the factual question whether Jinxin relied on the alleged representations. The first of these issues - the meaning of the representations - would require no evidence and limited disclosure. The second of these issues - that of Jinxin's alleged reliance - would require factual evidence, at least that adduced by Jinxin. The Tort Defendants observe that Jinxin is unable to identify the individuals who read and were aware of the representations on behalf of Jinxin. The Tort Defendants indicated that if a split trial is ordered, they would not be adducing factual evidence at the first trial.

(5) In addition, Jinxin relies on the "*presumption of inducement*". Mr Hunter KC on behalf of the First and Tenth Defendants submitted that the presumption can be engaged only if the representation is shown to have been read or heard and understood by the representee in its deceptive sense and/or the representee would have entered into the contract even if the misrepresentation had not been made; if the representation did not influence its mind, or if the representee understood it in some different sense and it was by reference to that different meaning that it acted, the presumption does not arise (see *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch), para. 515(7)).

(6) During his submissions, Mr Rabinowitz KC described Jinxin's case on reliance and inducement as "*tenuously constructed*" (for example because the Sale Documents were prepared before Jinxin was incorporated and because Jinxin has not identified all of the individuals who were allegedly induced by the representations) and submitted that one purpose of the first trial is to test the mettle of the allegation; if it is found wanting, the Tort Defendants will be saved considerable expense of a second trial. Mr Rabinowitz KC questioned whether Jinxin could prove their allegations of reliance or inducement by reason of Baofeng and Everbright being the controlling mind. Further, Mr Hunter KC submitted that it would be unfair for the Tort Defendants to undergo the expense of a single trial, if the claims were to fail at the first hurdle, being Jinxin's case on inducement and reliance.

(7) Even if the first trial were not determinative, it may at the very least serve a very useful definitional function by defining the representations that were made, or by filtering out those alleged representations that were not made out in the Sale Documents or were not relied upon. This would mean that the second trial would have a narrower ambit and be more focused, concerned only with the parts of the claim (if any) that survive, avoiding the need to produce disclosure, witness statements and expert evidence covering eight separate disciplines, or spend time during a hearing, on topics that are irrelevant.

(8) If all of the issues were dealt with at a single trial, it would be unmanageable. If the trials were split, the first trial would reduce the burden on the Court and the parties at the second trial. Even if Jinxin were wholly successful at the first trial, the Court will uphold Jinxin's primary case, and not any alternative case.

(9) The second trial would only be necessary if the Court were satisfied that there was at least one alleged representation both (i) made in or by the provision of the Sale Documents and (ii) understood as such and reasonably relied upon by Jinxin. In that event, the issues for determination at the second trial would relate to the truth and falsity of, and each Defendant's individual responsibility for and state of mind regarding, any such representation.

(10) The third trial, if required, would deal with remedies including whether Jinxin is entitled to rescission or damages. This would require consideration of Jinxin's post-acquisition conduct and what (if any) loss may have been caused by any proven misrepresentation or conspiracy.

(11) The proposed split is clean in that the demarcation of the issues for each of the three trials, and the first trial in particular, is neat. However, both Mr Rabinowitz KC on behalf of the Sixth and Ninth Defendants and Mr Hunter KC on behalf of the First and Tenth Defendants recognised that the split may not be perfectly clean, but the Court can manage any such division of issues by adopting a pragmatic approach.

(12) Not only does the first trial have the benefit of being potentially dispositive or at least definitional, comparatively limited work or expense will be needed in its preparation. There would be limited disclosure and evidence. The Sixth and Ninth Defendants estimate that it would take 12 days to complete the first trial and that the first trial would cost them £3.5 million. The First and Tenth Defendants estimate their costs for the first trial to be £2.2 million. The Fifth Defendant estimates his costs of the first trial to be £1.1 million. The Second Defendant estimates its costs of the first trial to be £1.3 million.

(13) The first trial is likely to be heard by January 2024, assuming that the parties are ready for the trial by the summer of 2023. By comparison, a single trial would not be ready to take place until January 2025.

(14) The split trial has the possible benefit of promoting settlement both prior to and after the first trial and/or the second trial, thus maximising the chances of a negotiated resolution.

(15) The Tort Defendants took issue with Jinxin's submissions as to the degree to which the issues arising in each trial overlap or are interlocking (which I set out below). For example, it is said that the representors' intention in making the

alleged representations is not relevant to the reasonableness of Jinxin's reliance on the representations. Further, the meaning of the representations is not related to the intention of the representors.

(16) The Tort Defendants oppose the proposal for alternative split trials advanced by Jinxin (as explained below), because it has all the disadvantages of a single trial without any of the benefits or advantages of the split trial proposed by the Tort Defendants.

Jinxin's submissions

29. Jinxin resisted the order for a split trial for the following reasons:

(1) The first trial - which is to deal with the meaning of the representations made and the issue of Jinxin's inducement - is broader in scope and more evidentially complicated than the application contemplates. Jinxin contemplates that the first trial will involve three or four witnesses.

(2) The issues to be determined at the first and second trials overlap and are interlocking in that the meaning and effect of the representations must be assessed in their overall context, including having regard to the Tort Defendants' responsibility for the alleged misrepresentations, for example:

(a) The identification and meaning of the representations made cannot be divorced from the representors' intention (*European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), para. 342, 347). At paragraphs 15 and 20 of the Particulars of Claim, Jinxin pleads that the Sale Documents were prepared for the purpose of facilitating the sale of the shares in the MPS Group and did in the event facilitate the SPA and the acquisition of the MPS Group, and that it is to be inferred that the Sale Documents were prepared and provided with the knowledge and with the express, alternatively with the implied, authority and approval of the Tort Defendants. These pleas are put in issue by the First and Tenth Defendants at paragraph 34 of their Defence, by the Fifth Defendant at paragraphs 69 and 74(1) of his Defence, and at least in part by the Sixth and Ninth Defendants at paragraph 28.1 of their Defence.

(b) The identification of the persons to whom the representations were made is bound up with the question of the representors' intention (*European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), para. 366; *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch), para. 496). There was therefore an equivalence between issue no. 19.1 of the agreed List of Issues (which the Tort Defendants propose for the first trial) and issue no. 26 (which the Tort Defendants say should be determined at the second trial).

(c) The reasonableness of Jinxin's reliance on the representations raises issues as to the representors' intention. Mr Beltrami KC on behalf of Jinxin pointed to the fact that at paragraphs 28.5 and 28.6 of the Sixth and Ninth Defendants' Defence, it is alleged that it was not reasonable for Jinxin to rely on the alleged representations made in the Sale Documents prepared months before the SPA and that the Tort Defendants could not be reasonably understood to have so intended.

Jinxin itself pleads at paragraph 11.1 of the Reply that it was intended by all concerned (including the Tort Defendants) that Jinxin would be entitled to rely on certain representations contained in certain reports.

(d) There are issues relating to the effect of the alleged disclaimers and the impact of section 3 of the Misrepresentation Act 1967. This will give rise to questions as to the scope of the relevant disclaimers and considerations of reasonableness under the Unfair Contract Terms Act 1977.

(e) The presumption of inducement is dependent on the materiality of the representation and on any findings of intentional deceit (*Zurich Insurance Co plc v Hayward* [2016] UKSC 48; [2017] AC 142, para. 34-35; *European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), para. 369; *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch), para. 515(2), 515(7)).

(f) The issue of inducement must be judged by reference to the meaning and alleged falsity of the representations. For this purpose, it is legitimate to consider what the representee would have done had the truth been known (*European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), para. 373).

(3) The assumptions to be made are likely to be insufficient or meaningless for the purpose of properly determining the issues at the first trial.

(4) It is unlikely that the first trial will be dispositive of the issues sufficient to forestall a second trial. This is because there are numerous representations alleged to give rise to the claim in deceit. Accordingly, if any one of the representations are established, and Jinxin's reliance on that representation is proved, a second trial will be necessary.

(5) The issues for the first trial are insufficiently defined and an agreed statement of facts is unlikely to be feasible.

(6) An appeal from one or more issues arising for decision at the first trial is likely and if there were such an appeal it will further delay the proceedings.

(7) It is likely that the witnesses who are to be called at one trial will also have to give evidence at a later trial (*Lexi Holdings plc v Pannone & Partners* [2009] EWHC 3507 (Ch), para. 10). That said, Mr Beltrami KC did not develop this submission to any substantial extent in oral argument.

(8) Splitting the trial of the action into three trials will vastly increase the costs, involving multiple disclosure exercises, rounds of witness statements, brief fees, and extended time for interlocutory disputes. Jinxin's estimate for the first trial is 3-4 weeks, for the second trial is 8-9 weeks, and for the third trial is 3 weeks. By comparison, a single trial is estimated to take 12-14 weeks.

(9) As an alternative, if the Court were minded to order a split trial, there should be two trials either of liability and quantum or two trials dealing with a larger number of issues at the first trial and leaving the second trial to address reliance and inducement, causation, remedies and quantum.

Discussion

30. Jinxin's claim against the Tort Defendants is one in deceit or fraudulent misrepresentation (as well as a related claim in conspiracy), by reference to a number of pleaded representations. The issues which arise in respect of such a claim in deceit are as follows (see *European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), para. 340-341):

    (1) Did the defendant make an alleged representation and, if so, what did it mean to a reasonable representee?

    (2) Was the representation untrue?

    (3) Did the defendant know that the representation was untrue?

    (4) Did the defendant intend the claimant to rely on the representation in the sense that it was false?

    (5) Did the claimant rely on the representation in the belief that it was true?

31. The split trial application is based on there being a separate trial for the determination of the first and fifth of these issues (the first trial) and a separate trial, if necessary, for the determination of the second, third and fourth of these issues (the second trial). The application also contemplates a third trial which will, if necessary, deal with the question of remedies, namely rescission or damages.

32. It is, in my experience at least, unusual for causes of action in deceit, or indeed many causes of action, to be tried by separate trials dealing with only some of the constituent elements of each cause of action, except obviously when separate trials take place in respect of liability and quantum. That consideration of itself does not pose a barrier to the application for split trials to be allowed. Nonetheless, such split trials may have unintended or unanticipated consequences, and therefore the Court must be astute before ordering such separate trials to take place.

33. There is, however, at least superficially a certain order to the proposed split of issues, with the first trial focussing on the representations themselves in an objective sense - both as to their existence and meaning - and Jinxin's reaction to those representations, if any. By contrast, the second trial is concerned with the Tort Defendants' responsibility for any misrepresentations, having regard to their knowledge and intention and the truth or falsity of the alleged representations. The third trial would deal with the consequences of Jinxin's conclusion of the SPA and remedies.

34. The application is motivated by a clear sense that there are potentially very substantial savings to be made in respect of costs and time. Indeed, the figures speak for themselves. A potentially dispositive first trial will cost the Tort Defendants approximately £8 million where a single trial will cost the Tort Defendants collectively more than £50 million. The Tort Defendants estimate that the first trial will take 3 weeks to complete and a single trial will take 21 weeks. A single trial, when also considering Jinxin's own costs, could well impose a considerable and challenging demand on the Court's and parties' resources. Indeed, this is a powerful consideration in favour of the Court acceding to the application for a split trial. I must admit that I was tempted to do so at various points during the oral argument in respect of the application.

35. That all said, and although I have wavered in reaching my conclusion, I have decided that the application should be dismissed for the following reasons.

36. First, there are numerous representations which form the basis of Jinxin's claim and unless the Tort Defendants succeed in their case that there has been no inducement in respect of any of the representations, a further trial is a very real possibility, albeit depending on the outcome of the first trial, the second trial might be considerably narrower in scope.

37. Second, I consider that there is substance in Jinxin's concern that a number of the issues which arise at the first trial are interconnected with issues arising at the second trial or possibly the third trial, such that it would be more just if all issues were determined at one trial to enable the Court fairly to decide issues on a holistic basis. Allowing these connected issues to be tried in part at the first trial could well give rise to complications at the second trial where the Court makes assumptions at the first trial which prove to be unfounded and do not cater for the complexities of the issues and the permutations of the findings which might be made at the second trial. I think Mr Rabinowitz KC recognised that there might be a scenario which would result in the Court having to revisit the issue of reliance and inducement - which should have been resolved at the first trial - at the second trial. This would be an undesirable outcome.

38. There are two main categories of issues which have been put forward for determination at the first trial, namely the meaning of the alleged representations and the question of Jinxin's reliance and inducement.

39. As far as the meaning of the alleged representations were concerned, there is much to be said for a separate trial determining these issues, given that the representations are wholly in writing or arise by implication from the Sale Documents and therefore these give rise to issues of construction of those written documents; this is or is largely an objective exercise (*cf.* in respect of defamation actions *Bindel v PinkNews Media Group Ltd* [2021] EWHC 1868 (QB); [2021] 1 WLR 5497, para. 27).

40. However, I did not understand the application to be based on the first trial being limited to this issue of the meaning of the representations. There may have been good reason for this, in particular it may not have disposed of the issues for determination in the action, although it might have narrowed the scope of those issues. As explained below, the First and Tenth Defendants put forward an alternative application by which the first trial would be concerned with the meaning of the representations, the effect of certain alleged disclaimers, and the additional question of "*reliance in belief*", as Mr Hunter KC put it (paragraph 32.1 of the agreed List of Issues).

41. My concern about the division of issues whether within the question of reliance and inducement or by segregating that question from other issues concerning the making of the alleged misrepresentations is that they are connected or interlocked. This becomes clear when one considers that the inquiry into the meaning of a representation becomes blurred when one considers that there are three different perspectives to be considered in an action for deceit, namely the meaning of the representation as understood by the representee (which relates to reliance and inducement), the meaning of the representation as understood and intended by the representor (to determine the issue of dishonesty) and the objective meaning of the representation to determine its truth or falsity.

42. As examples of the interconnectedness of these issues, I note the following:

(1) The alleged inducement of Jinxin is to be tested by determining what Jinxin would or might have done had the representations not been made. Nevertheless, it is or may be material to consider in applying this test what Jinxin would or may have done had it known the truth (although I recognise that this may be a matter for argument at trial). In *European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), Miles, J said at para. 373:

> "*Further, if the making of the representation in fact influenced the claimant, it is not open to the defendant to argue that the claimant might have acted in the same way had the claimant been told the truth. However, the claimant can adduce evidence as to what they would have done if they had been told the truth in order to establish inducement: Parabola Investments Ltd v Browallia Cal Ltd [2009] EWHC 901 (Comm), at [105]-[106], where Flaux J said that Hobhouse LJ in Downs v Chappell [1997] 1 W.L.R. 426 was seeking "to protect the victim of the fraud from the argument by the fraudster that the fraud had not induced the victim, because he would have done the same thing even without the fraud. Hobhouse LJ was in effect saying the fraudster cannot be heard to say, even if I had told you the truth, you would still have acted as you did. What he was not saying was that, if the claimant demonstrates, by cogent evidence, that it would not have acted as it did if it had known the true position, that evidence cannot be relied upon by the claimant as demonstrating inducement by the fraudulent misrepresentations".*"

See also *Leni Gas & Oil Investments v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm), para. 17-20. As the truth or falsity of the alleged representations is not to be determined until the second trial, if the application for a split trial were allowed, it is difficult to see how the Court could satisfactorily and finally determine the issue of reliance and inducement at the first trial. Indeed, as mentioned above, I think Mr Rabinowitz KC acknowledged that there was a real risk that the issue of reliance and inducement might have to be revisited at the second trial. If I misunderstood Mr Rabinowitz KC, I certainly think there is a real risk that the issue of reliance and inducement could not be fully resolved at the first trial.

(2) This issue will not be alleviated by the mere device of the Court drawing assumptions at the first trial that all of the alleged representations were false because the true position was as pleaded by Jinxin. That is because the result of the second trial may be that some of the representations were untrue and some were true, and any such findings would come too late for the judge presiding at the first trial and would run counter to the assumption made at the first trial that all of the representations were untrue. Indeed, the permutation of the possible different findings which might be made at the second trial might well undermine the utility of the assumptions made at the first trial.

(3) The falsity of any representations when made, which would be an issue for the second trial, would affect the issue of inducement insofar as it concerns Jinxin's knowledge of the same, which would be an issue for the first trial (paragraphs 32.5 and 32.6 of the agreed List of Issues), and would also affect the issues to be determined at the third trial (see paragraph 35.1 of the agreed List of Issues).

(4) As to the reasonableness of Jinxin's reliance on the representations, I see the force of the Tort Defendants' submission that the reasonableness of Jinxin's reliance could be determined without consideration of the issues at the second trial. However, insofar as this is a relevant issue (about which I express no views), I can see that the nature and degree of any falsity of an alleged representation might be said to influence the representee's reliance on the representation and therefore the reasonableness of such reliance.

(5) The identification of the persons to whom the representations were made is connected with the question of the representors' intention (*European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), para. 366; *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch), para. 496). There is therefore an equivalence between issue no. 19.1 of the agreed List of Issues to be determined at the first trial) and issue no. 26 (to be determined at the second trial). That said, Mr Rabinowitz KC on behalf of the Sixth and Ninth Defendants suggested that this could be resolved by confining issue no. 26 to the second trial insofar as it bore on the issue at paragraph 19.1.

43. There were some other connections, suggested by Mr Beltrami KC on behalf of Jinxin, between the issues arising at the first and second trials about which I was less convinced, because I thought that the proposed assumptions for the first trial might hold true in respect of these issues; nevertheless, there is an argument that even such issues may be interconnected. For example, the strength of any inference or presumption of inducement might be dependent on the materiality of the representation and on any findings of intentional deceit (*Zurich Insurance Co plc v Hayward* [2016] UKSC 48; [2017] AC 142, para. 34-35; *European Real Estate Debt Fund (Cayman) Ltd v Treon* [2021] EWHC 2866 (Ch), para. 369; *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch), para. 515(2), 515(7)).

44. Nevertheless, there remain a number of interconnected issues between the first and second trials as indicated above.

45. Third, and following on from the above considerations, the witnesses who will be called on behalf of Jinxin at the first trial will no doubt be asked to give evidence at the later trials if the first trial is not properly determinative of the issue of reliance and inducement. Given that the scope of such evidence is connected, there would be a duplication of such evidence and there would be difficult-to-draw boundaries as to what evidence these witnesses might give at each trial. That may be unfair to the witnesses especially if they are called to give evidence twice about the same issues with some distance of time in between.

46. Fourth, the splitting of trials will not necessarily save the Court or the parties from a complex trial. If Jinxin were to succeed in whole or in a substantial part at the first trial, the issues to be determined at the second trial will be just as or almost as complex and demanding as the issues to be determined at a single trial. I understood Mr Hunter KC's submission on behalf of the First and Tenth Defendants that at the very least the first trial would remove the primary or alternative submissions put forward by Jinxin. Even so, I am not convinced that this would necessarily save the parties from a complex trial at some point.

47. Fifth, if the first trial is not entirely dispositive, that will have the effect of delaying the second and third trials to a much later date than the date currently envisaged for a single trial which is expected to commence not before January 2025. The delay will be

exacerbated if there were appeals from the decisions made in the earlier trials. Indeed, the parties recognised that there might be difficult issues of law which arise for determination at the first trial and which might well occasion an appeal (for example, the so-called "Awareness Condition" as discussed in *Crossley v Volkswagen Aktiengesellschaft* [2021] EWHC 3444 (Comm)). Although I understand and sympathise with the Tort Defendants' submission that it would be better for the issue to be determined even on appeal at an earlier stage, the countervailing consideration is the delay which may be caused to the disposal of the action as a whole. Mr Beltrami KC on behalf of Jinxin indicated that the proceedings might not be resolved until 2027 if the earlier trials did not dispose of the action.

48. Sixth, given that the ordering of a splitting of trials, with the complications which this case involves, may create more difficulties than can be anticipated and given the difficulties already identified, I am not satisfied that there is a clear justification for ordering split trials along the lines proposed by the Tort Defendants. There is plainly a potential advantage to that proposal given the expense and time of a single trial which might be saved if there were a first trial of limited issues which disposed of the action, but to my mind that is the single, obvious advantage which the split trial application has, but it is no more than a possibility depending on the first trial disposing of the entire action (without considering the merits of the parties' respective cases). However, in my judgment, the concerns I have expressed above outweigh that advantage sufficiently to convince me not to accede to the split trial application.

49. I would add that there were submissions made about the relative strength or merits of Jinxin's case on reliance and inducement. I do not propose to repeat those submissions here. However, in circumstances where those merits or lack of merits are not obvious to the Court during a case management conference, I have not been influenced by that consideration either way in disposing of the application.

50. Therefore, for these reasons, I dismiss the split trial application.

<u>The alternatives proposed to the main application</u>

51. Jinxin proposed an alternative split trial if the Court were minded to order a split trial, namely that the issue of reliance and inducement be dealt with at a second trial along with remedies and quantum and that all other issues - which largely correlate to the issues the Tort Defendants suggest be heard at their proposed second trial - be determined at a first trial.

52. For the reasons given above in dismissing the application for a split trial, I would not have been minded to allow such a split trial to take place.

53. For similar reasons, I do not accept that there should be separate trials along the lines suggested by the First and Tenth Defendants - namely that the "*reliance in belief*" issue (paragraph 32.1 of the agreed List of Issues) be determined at a first trial along with the issue of the meaning of the representations (paragraphs 17-19 of the agreed List of Issues, with issue no. 26 to be heard at the second trial). It is that issue of "*reliance in belief*" - being limited to the question of whether the relevant individuals were aware and understood the alleged representations in the terms alleged - which I found difficult to divorce from the other issues relating to reliance and inducement, which all concern the way in which the individual representees reacted to the representations. This would also involve the same witnesses being required to give evidence at two separate trials on closely related matters.

54. The one split trial which I did not understand any of the parties actively to propose was the traditional liability and quantum split trials, although Jinxin alighted or touched on this possibility in its written and oral submissions. Indeed, the parties in their oral arguments were more focussed on the division of issues between the first and second trials and not the issues to be allocated to the third trial. There was one issue - paragraph 35.1 of the agreed List of Issues - which was earmarked for the third trial on the Tort Defendants' application but which would have been determined at the second trial. As far as I could tell, the division of issues between the first and second trials as proposed by the Tort Defendants on the one hand and the third trial on the other hand would be relatively easy to circumscribe. I have invited the parties to consider whether this would be an acceptable way forward.

The *Hollington v Hewthorn* application

The application

55. The Sixth and Ninth Defendants apply for an order striking out certain pleas made in Jinxin's Particulars of Claim, in particular:

    (1) Para. 79-81 and the first sentence of para. 82, which record findings made by the Italian Anti-Trust Authority ("**the IAA**") that MPS Dublin had colluded with two other media rights agencies, B4 and IMG, to coordinate their bid submissions in tenders for the international broadcasting rights to certain Italian football matches, including those for Serie A. The IAA held that such conduct restricted competition for the rights, in violation of Article 101 of the Treaty on the Functioning of the European Union (Art 101 TFEU), and imposed fines on MPS and the other media rights agencies. It should be noted that MPS Dublin, B4 and IMG are not parties to the present proceedings.

    (2) The reference to "*the conclusions of the Bellinzona Court*" in the fifth sentence of paragraph 94, paragraph 95(d), paragraphs 96 to 97, the second sentence of paragraph 98(b) and paragraph 101 of the Particulars of Claim. These pleas refer to the findings of the Federal Criminal Court of Switzerland, established in Bellinzona, following a trial in September 2020 of charges brought by the Office of the Attorney General of Switzerland against (amongst others) Mr Jérôme Valcke, a former senior FIFA official, and an intermediary engaged by MPS London. The Bellinzona Court found that Mr Valcke was instrumental in enabling MPS to enter into negotiations with FIFA to conclude a sales representation agreement and that the intermediary had paid Mr Valcke €500,000 using funds originating from MPS in return for him doing everything in his power to ensure that MPS London secured the sales representation agreement in respect of the Italian rights for the FIFA 2018 and 2022 World Cups. The Bellinzona Court further held that Mr Valcke had thereby solicited an undue advantage and abused his position, in breach of his duties to FIFA and contrary to Article 321 of the Swiss Code of Obligations.

56. The application to strike out these passages is based on the fact that a decision of a (foreign) court or tribunal is as a matter of law inadmissible before the English Courts as evidence of the truth of those findings: this is the principle in *Hollington v Hewthorn* [1943] KB 587. The principle rests essentially on the basis of "*relevance*" (though note the discussion of Leggatt, J in *Rogers v Hoyle* [2013] EWHC 1409 (QB); [2015] QB 265, para. 91-93). To admit in evidence the decision of another tribunal is essentially to take account of an opinion based on the facts of the case and submissions made,

which facts and submissions may not be known to the Court, and to allow the Court potentially to be influenced by a decision-making process which the Court itself must undertake. In *Rogers v Hoyle* [2014] EWCA Civ 257; [2015] QB 265, the Court of Appeal said at para. 39-40:

> "*39. As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.*
>
> *40. In essence, as the judge rightly said, the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone*."

57. There are exceptions to the rule in *Hollington v Hewthorn* (notably, the admission of expert opinion and the admission of convictions before a UK court in civil proceedings pursuant to section 11 of the Civil Evidence Act 1968). One such exception arises for consideration in this case.

58. Before considering that exception, it should be noted that the Sixth and Ninth Defendants however accept that any evidence adduced before the IAA and the Bellinzona Court are not on that ground inadmissible. Nor is it suggested that Jinxin's claim is itself affected by the striking out of these passages.

59. The power to strike out a statement of case, or a part of it, is set out in CPR rule 3.4(2) which 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*."

60. This jurisdiction to strike out a statement of case is accompanied by an inherent jurisdiction to strike out at least in cases of abuse of process (White Book, vol. I, para. 3.4.20).

61. I did not understand Jinxin to quarrel with the notion that the Court could strike out the relevant passages of Jinxin's Particulars of Claim as identified by the Sixth and Ninth Defendants if Jinxin's arguments set out below were not accepted by the Court.

62. At the very least, given that the relevant passages involve the pleading of evidence - a matter which should not be pleaded (paragraph C1.1(e) of the Commercial Court Guide; *Rogers v Hoyle* [2013] EWHC 1409 (QB); [2015] QB 265, para. 127) - this would permit the Court to strike out the relevant passages if satisfied the pleas were of inadmissible evidential material and/or there was no other proper basis for including the plea. I did wonder about the utility of striking out these passages if satisfied that they should be struck out. The only palpable effect might be to affect either the substance or sequence of certain expert evidence, but the precise effect was not clear to me.

The Competition Act 1998

63. I should start by noting that Jinxin accepted that the decision of the Bellinzona Court is inadmissible, but contends that the decision of the IAA is admissible by reason of paragraph 35 of Part 7, Schedule 8A to the Competition Act 1998 ("**paragraph 35**").

64. Prior to 31st December 2020 (*i.e.* IP completion day), Schedule 8A to the Competition Act 1998 provided as follows:

> "***PART 1***
>
> ***INTERPRETATION***
>
> *1. This Part of this Schedule contains definitions and other provisions about interpretation which apply for the purposes of this Schedule.*
>
> ***Competition law, etc***
>
> *2. (1) "**Competition law**" means—*
>
> *...*
>
> *(c) the prohibition in Article 101(1) ...*
>
> *(2) "**Competition claim**" means a claim in respect of loss or damage arising from an infringement of competition law (whatever the legal basis of the claim) which is made by or on behalf of—*
>
> *(a) the person who suffered the loss or damage, or*
>
> *(b) a person who has acquired that person's right to make the claim (whether by operation of law or otherwise) ...*
>
> *(4) "**Competition proceedings**" means proceedings before a court or the Tribunal to the extent that they relate to a competition claim.*
>
> *(5) Where the context requires, references to an infringement of competition law and to loss or damage (however expressed) include an alleged infringement and alleged loss or damage.*
>
> *Competition authority etc*

*(5) A decision of a member State competition authority becomes "**final**"—*

(a) when the time for appealing against it expires without an appeal having been brought, or

(b) where an appeal has been brought against the decision, when—

(i) the appeal and any further appeal in relation to the decision has been decided or has otherwise ended, and

(ii) the time for appealing against the result of the appeal or further appeal has expired without another appeal having been brought.

PART 7

USE OF EVIDENCE

Decisions of member State competition authorities

35. (1) For the purposes of competition proceedings, a final decision of a member State competition authority or review court that there has been an infringement of Article 101(1) or Article 102 by an undertaking is prima facie evidence of the infringement.

*(2) "**Review court**" means a court of a member State other than the United Kingdom which—*

(a) hears appeals in connection with a decision of a competition authority of the member State that there has been an infringement of Article 101(1) or Article 102, or

(b) reviews judgments made by another court of the member State in connection with such decisions,

and paragraph 3(5) (when a decision becomes final) applies in relation to a decision of a review court as it applies in relation to a decision of a member State competition authority …"

65. Schedule 8A to the Competition Act 1998 was introduced to give effect to the Damages Directive (Directive 2014/104/EU of 26th November 2014) ("**the Damages Directive**") by means of The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385) (see also the Explanatory Memorandum to those Regulations at para. 2.1).

66. The Damages Directive contained the following provisions:

"***Article 1***

Subject matter and scope

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

...

(4) 'action for damages' means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;

(5) 'claim for damages' means a claim for compensation for harm caused by an infringement of competition law;

(6) 'injured party' means a person that has suffered harm caused by an infringement of competition law ...

Article 3

Right to full compensation

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest ...

Article 9

Effect of national decisions

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court

is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties …"

The parties' submissions

67. Jinxin submitted that by reason of the Competition Act 1998, a final decision of an EU Member State competition authority would be *prima facie* evidence of the infringement of Art 101 TFEU in any claim before the English Courts, on whatever legal basis, in respect of loss or damage arising from that infringement made by a person who suffered such loss or damage.

68. The position after IP completion day is the same even though paragraph 35 was repealed by The Competition (Amendment etc.) (EU Exit) Regulations 2019, because Part 6 of Schedule 4 contains saving and transitional provisions which preserve the right of any person to make a claim in relation to an infringement of (amongst other things) Art 101 TFEU which occurred before IP completion day. The infringement in this case is said to have occurred prior to IP completion day. It is expected that the decision of the IAA will become final before the trial of this action. I do not understand the Sixth and Ninth Defendants to have taken issue with the application of the Competition Act 1998 provisions on the ground that the relevant decision of the IAA was not final.

69. The point of difference between the parties in respect of the strike out application is (a) whether the claim brought in the action is a "*competition claim*" as defined in paragraph 2(2) of Schedule 8A to the Competition Act 1998 (quoted above), and (b) whether paragraph 35 is of any effect insofar as the relevant decision was not addressed to any of the Tort Defendants.

70. The Sixth and Ninth Defendants (and the Fifth Defendant) dispute that the IAA decision is admissible pursuant to the Competition Act 1998 because:

(1) Jinxin's claim in the current action is not a competition claim, because it is not in respect of loss or damage arising from an infringement of competition law. It is a claim for deceit and conspiracy. It is not alleged that any of the defendants infringed competition law, nor that Jinxin suffered loss as a result of any infringement of competition law.

(2) To the extent it is necessary to have regard to the provisions of the Damages Directive to assist on this point, Article 1 provides that the Directive "*sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association*". The IAA investigation and decision related to MPS Dublin, and other agencies and related companies, not any of the Tort Defendants (paragraph 77 of the Particulars of Claim).

(3) The true nature of competition law claims is described in chapter 19 of the Chancery Guide. The present proceedings do not fall within that description.

(4) Even if these were competition proceedings, the statutory exception which renders decisions of competition authorities admissible before the English Courts, applies only in respect of addressees of those decisions.

(5) The rationale for the rule in *Hollington v Hewthorn* consists in the obvious injustice of a person being affected by findings which he did not have an opportunity to defend in whatever manner he thought fit. Moreover, unless the Court goes into the facts for itself, it cannot actually assess what weight it should properly attach to the previous decision.

(6) It would be unfair if a defendant to a civil claim who had no involvement in an earlier investigation by a competition authority, nor the opportunity to challenge or appeal any decision resulting, was nonetheless subject to such decision. The Tort Defendants are not addressees of the IAA decision. They have not had the opportunity to defend the allegations leading to the IAA decision, nor to challenge nor appeal it. The statutory exception therefore does not apply to them. See *Emerson Electric Co v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, [2013] Bus LR 342.

71. Jinxin submitted that the claim is a competition claim as defined, because:

(1) The infringement of competition law need not form the legal basis of a claim for it to be a competition claim. This is made clear in the definition, which requires only that the claim is *"in respect of loss or damage arising from an infringement of competition law* ***(whatever the legal basis of the claim)****…"* (emphasis added). Thus, the fact that Jinxin's claims are brought in deceit and unlawful means conspiracy does not mean that they cannot be competition claims.

(2) The words *"in respect of loss or damage arising from an infringement of competition law"* must be construed in accordance with the policy of the Damages Directive to give full effectiveness to Art 101 TFEU by ensuring that anyone who has suffered harm caused by an infringement of competition law can effectively exercise their right to full compensation. The Court should not adopt an unduly restrictive approach by interpreting these words to require that the infringement must be the legally direct or only cause of the claimant's loss. Any causal connection between the infringement and the loss is, and should, given that the legal basis of the claim is expressly said to be irrelevant, be sufficient to engage the provision.

(3) Jinxin's claim is brought in respect of loss and damage which has been caused by infringements of competition law in that the infringements of competition law occurring at MPS prior to the acquisition are (at least) a factual cause of Jinxin's loss and insolvency. Jinxin's case is that the MPS Group's business model relied on and could not succeed without the system of bribery and anti-competitive arrangements which Jinxin alleges to have existed before the acquisition (paragraph 42 of the Particulars of Claim and paragraph 52.2.2 of the Reply).

(4) On Jinxin's case, the infringements of competition law are therefore causative of its loss in at least two ways: (a) the infringements caused Jinxin to enter into the acquisition, since but for those anti-competitive practices the MPS Group would not have had a viable or seemingly successful business model and would not have been an attractive target to Jinxin or any other bidder. In the absence of the infringing conduct, Jinxin would not have suffered loss because it would not have entered into the SPA, and (b) Jinxin suffered additional loss and damage after the acquisition arising from the insolvent failure of the MPS Group.

(5) There is no requirement in paragraph 35 that the relevant decision of the IAA must be addressed to the Tort Defendants.

72. Jinxin also submitted that it was proper for it to have pleaded at length the findings and conclusions of the IAA and the Bellinzona Court, because whether or not it is pleadable is not dependent on the admissibility in evidence of the matters pleaded:

(1) The admissibility of evidence is a matter to be determined at trial, not an earlier stage (*Rogers v Hoyle* [2014] EWCA Civ 257; [2015] QB 265, para. 39-40).

(2) When pleading a factual case, it is open to counsel to rely on inadmissible material (*Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120, para. 21-22, 79).

(3) It is legitimate to plead a finding of a foreign court in order to justify an allegation of fraud or dishonesty as required by the Commercial Court Guide, para. C1.3(c). In *Crypto Open Patent Alliance v Wright* [2021] EWHC 3440 (Ch), in connection with the similar pleading requirements of the Chancery Guide, where the statement of case relied on a finding made in US proceedings that a document had been backdated to justify an allegation of forgery, HHJ Paul Matthews (sitting as a judge of the High Court) said at para. 60-61 that (the emphasis is the judge's):

> "*In other words, part of the basis upon which the claimant claims to be justified in pleading the serious allegation of forgery is that the US judge so found. But the decision of the judge will not be admissible at trial to prove the allegation. That proof must be achieved, if at all, by other admissible evidence. In the circumstances, there is no justification for striking out the second part of the sentence*."

73. The Sixth and Ninth Defendants (and the Fifth Defendant) reply to these submissions by contending that:

(1) The decision in *Medcalf v Mardell* is concerned with the material on which counsel, before pleading fraud, may rely in the discharge of their duty to have a credible basis for such a plea. That decision is not about, and did not address, whether a party is entitled to include any such inadmissible material in the statement of case. Nor did the case concern itself as to what useful purpose (if any) could be served by allowing a party to plead inadmissible material if it cannot rely on such material at trial.

(2) In *Crypto Open Patent Alliance v Wright*, the Court allowed the pleading of 24 words upon which the claimant's counsel relied for the express purpose of

meeting the requirements of the Chancery Guide. Jinxin's argument confuses, on the one hand, the material that can be used in order to justify compliance with one's professional obligations when drafting a serious plea, and on the other hand, the plea itself. The pleader can take all of the facts from a foreign judgment and plead them. That, however, is not a basis for pleading the foreign judgment itself, which is inadmissible and adds nothing. Whilst a pleader may take comfort from this judgment in view of his own obligations, it has no place in the pleading itself.

Discussion

74. In my judgment, the Sixth and Ninth Defendants are entitled to succeed in their application for a strike out of the passages in the Particulars of Claim which refer to the decisions of the IAA and the Bellinzona Court. I should make it clear that this does not extend to any plea which refers to the evidence before the IAA or the Bellinzona Court nor did the Sixth and Ninth Defendants object to those pleas.

75. My reasons for allowing the strike out application are as follows.

76. First, for the purposes of paragraph 35, there must be competition proceedings, which are defined by the Competition Act 1998 to mean "*proceedings before a court or the Tribunal to the extent that they relate to a competition claim*" and a "*competition claim*" is defined to mean "*a claim in respect of loss or damage arising from an infringement of competition law (whatever the legal basis of the claim) which is made by or on behalf of … the person who suffered the loss or damage …*".

77. Mr Beltrami KC on behalf of Jinxin states that Jinxin has suffered loss and damage by reason of such an infringement in that the infringement rendered certain alleged representations untrue and by reason of such misrepresentations Jinxin entered into the SPA with its consequent losses.

78. I consider that a natural reading of this provision is that the cause of action - and there is no limit to the legal basis for that cause of action - must arise by reason of the infringement of competition law. In the present case, the claim is one in deceit and conspiracy arising by reason of allegedly fraudulent misrepresentations made to Jinxin, not by reason of infringement of competition law. If Jinxin's claim were upheld, any remedies available would arise not because of the infringement of competition law of itself giving rise to a cause of action, but by reason of the alleged fraudulent misrepresentations giving rise to the cause of action.

79. Closely allied to this is that paragraph 35 further contemplates that the relevant competition proceedings in which the relevant decision may be admissible in evidence must be proceedings brought against the person who has committed the infringement of competition law as found by the decision of the relevant tribunal. This seems to me to follow from the fact that the tribunal's decision that there has been an infringement of competition law is *prima facie* evidence that that infringement took place.

80. Indeed, other provisions of Schedule 8A to the Competition Act 1998 seem also to contemplate this (such as paragraph 12). If Jinxin's submission were correct and its claim were a competition claim, it would be subject to different limitation provisions catered for in Part 5 of Schedule 8A. That seems unlikely.

81. In my judgment, the clear purport of paragraph 35 was to apply in respect of competition claims where the claim is made by the person suffering damage for damages against the person who has been found to have committed the infringement of competition law which was found by the relevant tribunal to have occurred.

82. Mr Beltrami KC is right to submit that there is no such limitation expressly stipulated in paragraph 35.

83. However, Article 1 of the Damages Directive - to which paragraph 35 was intended to give effect - provides (with emphasis added) that:

> "*This Directive sets out certain rules necessary to ensure that* ***anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.*** *It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm*."

84. The Damages Directive is therefore concerned with the competition claim being made against the person who was guilty of the infringement. In this case, the finding of the IAA was that there was an infringement of competition law by MPS Dublin, B4 and IMG; no finding was made against the Tort Defendants and no claim is made in the present action against MPS Dublin, B4 and IMG for damages arising from the infringement of competition law found by the IAA.

85. Accordingly, although paragraph 35 is an exception to the rule in *Hollington v Hewthorn*, it is not applicable to the decision of the IAA which is sought to be admitted in evidence in these proceedings.

86. I note that a consequence of adopting Jinxin's interpretation of paragraph 35 would have been to allow the Court to have regard to the IAA decision by way of evidence, with the possible result that it would reverse the burden of proof, in circumstances where none of the Tort Defendants were a party to the proceedings before the IAA. In this respect, I note the decision in *Emerson Electric Co v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, [2013] Bus LR 342, at para. 66, 78-83, to which I was referred by Mr Rabinowitz KC, but I also note as Mr Beltrami KC stated that that decision was not concerned with paragraph 35 and in fact preceded the enactment of the Damages Directive. Accordingly, I have not had regard to this consideration in my construing paragraph 35. If I had, it would have reassured me in my conclusion.

87. Second, the decision in *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120, para. 21-22, 79 was not concerned with what inadmissible evidence is or is not appropriate to plead. Instead, it was concerned with the separate question of what the pleader may legitimately take into account in deciding whether to plead a case of fraud or dishonesty; such a pleader may justify the pleading of a serious allegation of fraud or dishonesty by reference to inadmissible evidence. That does not mean however that such inadmissible evidence can be pleaded for any purpose, including the purpose of demonstrating to the Court or the parties to the action that the case of fraud or dishonesty is properly pleaded.

88. In this respect, I have had regard to the decision of *Crypto Open Patent Alliance v Wright* [2021] EWHC 3440 (Ch) relied on by Mr Beltrami KC, where the Court

considered the Chancery Guide equivalent to the Commercial Court Guide at para. C1.3(c), which 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*."

89. With respect to the learned judge in *Crypto v Wright*, I do not read Commercial Court Guide, para. C1.3(c) as permitting a party to plead inadmissible evidence to establish that it has properly pleaded a case of fraud or dishonesty. Instead, I consider that para. C1.3(c)(ii) of the Commercial Court Guide - to which the judge in *Crypto v Wright* directed himself - is concerned with the pleading of facts and matters on the basis of which the Court is being invited to infer that fraud or dishonesty has taken place. Any such facts and matters must be proved by way of admissible evidence and/or must themselves be admissible evidence; if the relevant evidence is inadmissible, it is difficult to see how the Court could draw the inference in question.

90. Therefore, I allow the Sixth and Ninth Defendants' strike out application.

Conclusion

91. For the reasons explained above:

(1) I dismiss the Sixth and Ninth Defendants' split trial application and the alternative application put forward by the First and Tenth Defendants. However, I have invited the parties to consider an alternative form of split trials, essentially based on liability and quantum.

(2) I allow the Sixth and Ninth Defendants' *Hollington v Hewthorn* application to strike out references in Jinxin's Particulars of Claim to the decisions of the IAA and the Bellinzona Court.

92. I am very grateful to all counsel for their very helpful submissions.