



Neutral Citation Number: [2024] EWHC 481 (Comm)

Case No: CL-2020-000869

**IN THE HIGH COURT OF JUSTICE**  
**OF ENGLAND AND WALES**  
**KING'S BENCH DIVISION**  
**COMMERCIAL COURT**

Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Tuesday 5 March 2024

**Before:**

**MRS JUSTICE COCKERILL DBE**

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**Between:**

**(1) G. I. GLOBINVESTMENT LIMITED**  
**(2) MATTEO CORDERO DI MONTEZEMOLO**  
**(3) LUCA CORDERO DI MONTEZEMOLO**

**Claimants/Respondents**

**- and -**

**(8) FEDERICO FALESCHINI**  
**(9) LEADER LOGIC HOLDING AG**  
**(10) LEADER LOGIC AG**

**Defendants/Applicants**

- (1) XY ERS UK LIMITED
- (2) SKEW BASE INVESTMENTS SCA RAIF
- (3) SKEW BASE S.A.R.L.
- (4) VP FUND SOLUTIONS (LUXEMBOURG)  
S.A.
- (5) VP FUND SOLUTIONS (LIECHTENSTEIN)  
A.G.
- (6) TWINKLE CAPITAL S.A.
- (7) DANIELE MIGANI

Defendants

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**Daniel Saoul KC and Gayatri Sarathy** (instructed by **Milberg London LLP**) for the **Claimants**  
**Philip Ahlquist** (instructed by **Enyo Law LLP**) for the **Eighth Defendant**  
**Adam Cloherty KC** (instructed by **Bird & Bird LLP**) for the **Ninth and Tenth Defendants**

Hearing dates: 31 January 2024, 1 February 2024

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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.**

**This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 5 March 2024 at 10:30am**

**Mrs Justice Cockerill:**

**INTRODUCTION**

1. The Claimants in these proceedings claim that they have been the victims of a very substantial financial investment fraud. The Second Claimant, Matteo Cordero di Montezemolo, (“MDM”) and the Third Claimant, Luca Codero di Montezemolo (“LDM”), son and father respectively, are well known Italian businessmen. The First Claimant, GI Globinvestment Limited (“GIG”) is one of the di Montezemolo family investment vehicles, owned by family discretionary trusts and in practice run by MDM in conjunction with their trustees and advisers.
2. The claims arise out of substantial investments made by GIG and MDM in the Skew Base Fund (the Second Defendant). The Claimants allege that the investments were made on the advice of XY UK (the First Defendant), an English company authorised by the Financial Conduct Authority (“FCA”) to carry out regulated activities. XY UK is owned by Mr Migani (the Seventh Defendant). Its company secretary is the Eighth Defendant, Mr Faleschini.
3. GIG and MDM say that they engaged XY UK as a financial adviser because they were told by XY UK, Mr Migani and Mr Faleschini that it was an independent and conflict-free adviser. They also say that on XY UK’s recommendation and on the understanding that XY UK was wholly independent from the Skew Base Fund, GIG and MDM invested very substantial sums in the Skew Base Fund.
4. However, it has transpired that at all material times, the Skew Base Fund was not independent from XY UK. The Claimants allege that XY UK and Mr Migani, were involved in creating it and that they were involved in its operation thereafter.
5. These allegations give rise to claims in deceit and conspiracy. There will be a trial of these claims starting in October of this year.
6. Mr Faleschini and the Leader Logic Defendants (the Ninth and Tenth Defendants, the “LL Defendants”) say that whatever may be said against the other defendants, there is no realistic case against them<sup>1</sup>. They have therefore brought applications for strike out and/or reverse summary judgment. These have been argued with great focus and skill across two days of court time.
7. For the reasons which I will give below those applications fail. The case against these defendants is not fanciful and should be considered at a full trial.

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<sup>1</sup> It is common ground that as a matter of law the critical test is whether the case has “realistic” or “not fanciful” prospects of success.

**THE FACTS**

8. XY UK is a company incorporated in England and Wales which is authorised by the FCA to carry out certain regulated activities. It is a financial technology business, specialising in data technology and strategy consulting services for the high-end wealth management industry. At all material times, Mr Migani was the CEO and a director of XY UK and Mr Faleschini was the company secretary of XY UK and CFO of XY SA, a Swiss company in the same group.
9. Between 2016 and 2020, the Claimants engaged XY UK to provide certain services regarding their portfolio of investments. There is a dispute, to be dealt with at trial, as to whether XY UK was engaged to provide advisory services or not. So too is the importance of XY UK's independence. For present purposes it suffices to say that the Claimants say that XY's claim to independence was a driving factor behind XY UK's appointment: in its pitch to the Claimants, it emphasised its independence, and that – unlike the financial institutions with whom the Claimants were currently dealing – it did not recommend investments in products in which it had a financial interest, thereby preserving the impartial nature of its advice and reducing costs.
10. As noted above, XY UK is owned by Mr Migani and its company secretary is Mr Faleschini. Mr Faleschini is also the CFO of XY SA, XY UK's parent company, and the XY Group. He is also a director of a company connected to Mr Migani, called Twinkle Capital SA ("Twinkle") (a Swiss company and the Sixth Defendant), which was involved in the events in question.
11. It is alleged that on 12 May 2016, Mr Faleschini attended a meeting with a Mr Nuzzo who acted as representative of GIG and LDM. It is alleged that at that meeting, he made representations as to the independence of XY UK when giving financial advice. The Claimants' case is that GIG and MDM (and LDM) engaged XY UK as a financial adviser because they were told by XY UK, Mr Migani and Mr Faleschini that it was an independent and conflict-free adviser. They say that on XY UK's recommendation and on the understanding that XY UK was wholly independent, the Claimants later made investments in the Skew Base Fund. This include investments in compartments investing in "HFPO" (High Frequency Price Opportunity) notes, i.e. market instruments that are close to their maturity, as well as investment in "MIN" (Market Insurance Notes) and other very similar investments.
12. The essence of the complaint is that it has transpired that at all material times, the Skew Base Fund was not independent from XY UK. Rather, it is said:
  - i) The Skew Base Fund was created with involvement on the part of XY UK and Mr Migani, who were involved in its operation thereafter. That company was a new company, with no track record, no infrastructure, and no public presence;
  - ii) XY UK recommended to its clients that they invest in the Skew Base Fund, and for present purposes it is accepted that all investors were directed to the fund by XY UK except for Twinkle, which was a connected company;

- iii) Twinkle, a Swiss company owned by Mr Migani and incorporated specifically to establish and run the Skew Base Fund, and of which Mr Faleschini is sole director, received significant sums deriving from investments in the fund, purportedly for a significant (and the Claimants allege, concealed) role in operating the Skew Base Fund;
  - iv) The LL Defendants, companies owned by Mr Migani, also received substantial sums deriving from investments in the fund – again on the supposed basis of providing services to the fund, although there is no trace, in the documents, of any services of substance having been so provided;
  - v) In addition to his roles at XY UK and Twinkle, Mr Faleschini is married to Ms Viviana Gaveni, who is Twinkle’s administration, finance and control manager and one of three directors of the General Partner of the Skew Base Fund (the third Defendant) (“SB GP”);
  - vi) There were undisclosed services agreements with the LL Defendants, also companies owned by Mr Migani.
13. It must be assumed for the purposes of the strike out applications that none of these matters were disclosed to the Claimants. The key issue overall is the allegation that all of the Defendants knew this. It is said that the representations which were made to the Claimants were false and fraudulent, given the Defendants’ knowledge of the connections between the entities involved.
14. While many of the investments performed ahead of market initially they suffered substantial losses in March 2020, when the onset of Covid-19 pandemic brought about extreme market turbulence. At that time, the relevant compartments of the Skew Base Fund were liquidated. GIG and MDM lost substantial sums – possibly in the region of €50 million - as a result of the collapse in the value of those investments.
15. The Claimants say that had the true facts been known to them these losses would have been avoided, either because they would have taken independent advice before making the investments and would have not made them, or (had the true position been revealed subsequently) after having done so but before the investments collapsed, when they could have and would have been redeemed for their full value.
16. The same losses are also sought as damages for unlawful means conspiracy. The conspiracy in outline is that:
- i) It is to be inferred that the Defendants combined together and/or acted in concert pursuant to an agreement or common understanding, with an intention to maintain the façade that the Skew Base Fund was independent of XY UK and managed by VP Luxembourg without any connection to or involvement from XY UK or related persons;
  - ii) The unlawful means used included deceit, breach of fiduciary duty and dishonest assistance;

- iii) The fraud involved substantial sums, derived from investments in the Skew Base Fund, being paid to undisclosed corporate vehicles owned by Mr Migani.
17. The case against the First to Seventh Defendants will, as noted above, proceed to trial later this year. There have been attempts by some of those Defendants to strike out the case against them. One challenge (by the VP Defendants – a jurisdictional challenge with a merits element) did not succeed. Others were withdrawn. These applications therefore proceed on the basis that there is an arguable case in fraudulent misrepresentation and unlawful means conspiracy against the First to Seventh Defendants.
18. The question is whether there is any realistic case against these Defendants. The LL Defendants say that they are late arrivers against whom no joined up case in fraud can be alleged. The Claimants’ case is that the LL Defendants were brought into the scheme for the purpose of assisting in the extraction of profits from the fraudulent arrangements, for the ultimate benefit of Mr Migani, who owned the LL Defendants as well as XY UK and Twinkle. They say that it is unrealistic to separate these entities out, noting that Twinkle remained the de facto servicer and on the Defendants’ own case the LL Defendants slotted in for no reason and no disclosure has emerged which shows any services being provided by them.
19. Mr Faleschini says that the claim which is realistic against the other Defendants cannot succeed against him because the facts he is alleged to have known did not exist, there is no realistic basis for a case of continuing representations persisting to the point when he did have the relevant knowledge and that the case in conspiracy against him is exiguous to vanishing point. The Claimants’ case is that Mr Faleschini’s attempts to position himself on the outskirts of the fraud are unrealistic and that there is ample material to make for a case which passes the “fanciful” mark.
20. The structure of the companies involved is not straightforward, but can be summarised thus:
- i) The Skew Base Fund (the Second Defendant) is a partnership incorporated under Luxembourg Law, operating as an alternative investment fund. It was managed by its general partner, SB GP (the Third Defendant);
  - ii) Pursuant to agreements with SB GP, VP Luxembourg (the Fourth Defendant) was the Alternative Investment Fund Manager of the Skew Base Fund, and VP Liechtenstein (the Fifth Defendant) had day-to-day responsibility for managing its investments;
  - iii) SB GP was owned by Twinkle (the Sixth Defendant);
  - iv) Leader Logic was owned by Leader Logic Holding (also Swiss companies);
  - v) Both Twinkle and Leader Logic Holding were owned by Mr Migani.
21. Pursuant to agreements (or purported agreements) dated 9 February 2017, Twinkle provided services to the VP Defendants and to SB GP. There is a dispute as to whether those agreements were genuine or not.

22. The investments in the Skew Base Fund were made between June 2017 and October 2019.

**Chronology**

23. This is a case where there is a good deal of focus on chronology. The main events, by reference to the Claimants' pleaded case and the submissions made to me, are as follows.
24. On 12 May 2016, Mr Faleschini is alleged to have made the Independence Representation to Mr Nuzzo on behalf of GIG and LDM at a meeting. This covers the investments which would be recommended and lack of connection to them. It is said that he acted fraudulently in not disclosing the connections between Skew Base and XY UK and participating in deceit to maintain a façade of independence.
25. On 9 June 2016 Mr Faleschini attended a further meeting. It is not alleged by the Claimants that he made any representation at this meeting. On the Claimants' case it was also attended by MDM as well as Mr Nuzzo.
26. On 18 July 2016 the First Advisory Agreement between XY UK and GIG was signed. XY UK was to carry out an "analysis of the financial assets of [GIG] outlining the strategic and operational guidelines to create added value". It is said that this exercise led to representations that the portfolio was being run inefficiently and recommendations to invest in MINs.
27. On 21 September 2016 the Second Advisory Agreement between XY UK and GIG was signed. Pursuant to this agreement, GIG engaged XY UK to advise on investment strategy, including recommending suitable investments. This is said by the Defendants to mark the end of any continuing representation and thereafter any reliance is on the contractual obligation.
28. On 21 September 2016 the XY SA Agreement was signed providing for day-to-day data management and reporting services.
29. On 28 October 2016 Twinkle was incorporated under the name of Ziusudra SA.
30. On 9 February 2017:
- i) Twinkle's Service and Technological Agreement with the VP Defendants was signed on Twinkle's behalf by Mr Grasso (not Mr Faleschini who was not yet a director of Twinkle).
  - ii) Twinkle's Support Services Agreement with SB GP was signed on Twinkle's behalf by Mr Grasso.

There is an issue as to whether these agreements are shams but that is not a relevant issue for the purposes of this application.

31. On 2 March 2017 MDM signed a "Commitment Letter" to subscribe €10 million in the HFPO compartment of the Skew Base Fund. Later in March MDM was first advised to invest

in Skew Base Fund. As a result, on 26 April 2017 the Subscription Agreement was concluded, with monies being transferred on 7 June 2017. That was the first of the Claimants' investments in the Skew Base Fund.

32. On 15 December 2017 Mr Faleschini was appointed director of Twinkle.
33. On 18 February 2018 MDM invested €3 million in the Tangible Credit compartment of Skew Base Fund.
34. On 1 July 2018:
  - i) The Third GIG/Advisory Agreement was signed.
  - ii) The XY EOS Ticino SA/GIG reporting agreement was signed.
  - iii) The LDM Advisory Agreement was signed.
  - iv) The XY EOS Ticino SA/LDM reporting agreement was signed.
35. On 23 October 2018 GIG invested €27 million in the Skew Base HFPO compartment.
36. On 30 October 2018 GIG invested €27 million in the Skew Base MIN (EUR) compartment.
37. On 15 November 2018 GIG invested €4,999,999.99 in the Tangible Credit compartment.
38. On 30 November 2018:
  - i) GIG invested €3,999,999.99 in the Tangible Credit compartment.
  - ii) GIG invested €10 million in the Real Estate compartment.
39. On or around 4 December 2018 GIG invested €5 million in the Skew Base HFPO compartment.
40. On or around 7 December 2018 GIG invested €5 million in the Skew Base MIN (EUR) compartment.
41. On 1 January 2019:
  - i) The MDM Advisory Agreement was signed.
  - ii) The EOS Ticino SA/MDM planning agreement was signed.
42. On 24 September 2019 Mr Migani acquired shares in Leader Logic Holding AG.
43. On 1 October 2019 the Support Service Agreement between SB GP and Leader Logic Holding AG was signed.



44. On 4 October 2019 MDM invested US\$1,499,990 in the Skew Base MIN (USD) compartment.
45. On 18 December 2019 Leader Logic AG was incorporated.
46. On 16 January 2020 the Support Service Agreement between SB GP and Leader Logic was signed. The LL Defendants assumed responsibility for the services that, previously, Twinkle was responsible for providing to SB GP – the services were no different, and the fee structure simply replicated that in the pre-existing agreement with Twinkle. In fact, Twinkle continued to provide services to SB GP as subcontractor to Leader Logic Holding and subsequently Leader Logic.
47. On 13 March 2020 a Notice to shareholders was issued stating that SB Fund was suspending NAV calculations.
48. On 25 March 2020 Notices to shareholders were issued in respect of SB HFPO, SB MIN and SB MIN USD compartments setting out decisions to liquidate the compartments.
49. The Claim was issued on 30 December 2020. The Claimants did not serve the proceedings at that time. The proceedings were not fully served on all the Defendants until September 2021.
50. The LL Defendants were joined to the proceedings by an Order dated 18 January 2022. At the same time the Claimants obtained permission to amend the Particulars of Claim in their present form.
51. The proceedings paused pending the VP Defendants’ (unsuccessful) challenge to the Court’s jurisdiction. The judge concluded that the case in deceit is arguable against those Defendants despite arguments as to absence of direct evidence of knowledge, as follows ([42]-[43]):

“Although I accept that there is no direct evidence of knowledge by VP Liecht of these matters I do not consider that I can say that there is no real prospect of the trial judge inferring such knowledge. The facts prayed in aid at this stage by Cs are essentially the same as those they rely on in relation to the existence of the combination. I stress that I accept that it is perfectly possible that the VP Defendants had no knowledge, nor even any suspicion, that Mr Migani and XY might have been presenting the Skew Base Fund as independent when in fact it was not; but I do not consider that I can be so confident that those allegations will fail that I can say that there is no serious issue to be tried.

It seems to me that if this case proceeds to trial the judge may or may not draw the inferences against the VP Defendants upon which the Claimant seek to rely. Whether he or she does so will depend on what has happened on disclosure and on what evidence the VP Defendants chose to call. But it seems to me there is amply sufficient material pleaded against the VP Liecht at this stage for me to be able to say that as things stand there is a serious issue to be tried as to whether or not VP Liecht was party to a

combination to use the unlawful means alleged, and as to VP Liecht's knowledge of the facts constituting those unlawful means."

52. The First CMC took place on 30 January 2023, which was followed by a few further procedural hearings to finalise directions (particularly for disclosure).
53. On 1 November 2023 all parties gave Extended Disclosure in accordance with the DRD / List of Issue for Disclosure. The matter is listed for a 7-week trial commencing on 7 October 2024. There will be a PTR on 18 July 2024.

## **THE LL DEFENDANTS' STRIKE OUT APPLICATION**

### **The pleaded claim and the attack on it**

54. The Claimants only advance a conspiracy case against the LL Defendants. The pleaded case against the LL Defendants is as follows:
  - i) The LL Defendants are (directly or indirectly) owned by Mr Migani (which he admits) and his knowledge and intent is to be attributed to those entities;
  - ii) The LL Defendants entered into "Support Service Agreements" dated 1 October 2019 and 16 January 2020 with SB GP (the "LL Agreements").
  - iii) The involvement of the LL Defendants, Mr Migani's vehicles, in the Skew Base arrangements, and the existence of the LL Agreements (as well as other agreements between certain Defendants) for the purported provision of services relating to the Skew Base Fund, were not disclosed to the Claimants before they invested in the Skew Base Fund nor at any time prior to the issue of the Claim (referred to as the "Undisclosed Agreements"). This allegation is not denied, though there is a vibrant issue about the date of the LL Defendant's incorporation and its implications (see further below);
  - iv) The LL Defendants received very substantial payments from SB GP which were not disclosed to the Claimants before they invested in the Skew Base Fund nor at any time thereafter (referred to as the "Undisclosed Payments"). This is again not disputed, subject to the timing point. The Undisclosed Payments are understood to be in the range of at least €5,000,000;
  - v) The Undisclosed Agreements were not genuine and were entered into to provide a pretext for the making of the Undisclosed Payments. In their Amended Particulars of Claim, the Claimants referred to the following matters in support of that case:
    - a) It is inherently unlikely that SB GP would have paid the LL Defendants such substantial sums for mere "support services";

- b) Leader Logic Holding had been incorporated for just 4 months before the 2019 LL Agreement was entered into and had no website, infrastructure or employees of which the Claimants are aware to deliver any such services;
  - c) A substantial payment of €2,000,040 was made to Leader Logic Holding just 15 days after the 2019 LL Agreement was entered into;
  - d) A further substantial payment of €3,034,529 was made to Leader Logic less than a month after the 2020 LL Agreement was entered into.
- vi) The arrangement and/or combination between the Defendants, supporting the conspiracy claim, is to be inferred from (amongst other things) the Undisclosed Payments and Undisclosed Agreements including the fact that they were not disclosed; that the Defendants had a financial interest in encouraging more investors to invest in the Skew Base Fund, because of fees, commissions or other receipts that would result; and that Mr Migani was the ultimate beneficiary of the proceeds of the fraud through a complex web of transactions which were also not disclosed;
  - vii) Pursuant to that agreement the LL Defendants received substantial proceeds of the fraud (i.e. the Undisclosed Payments) for the ultimate benefit of Mr Migani. The LL Defendants were, in effect, vehicles for the extraction of substantial proceeds of the conspiracy;
  - viii) Further, the alleged conspiracy was ongoing and subsisted for the duration of the relationship between XY UK, GIG and MDM, which continued well after the LL Defendants' involvement in the scheme.
55. The law on conspiracy was not in issue. Both parties referred to the summary I gave in *FM Capital Partners v Marino* [2018] EWHC 1768 (Comm) at [94]:

“The elements of the cause of action are as follows:

i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: *Kuwait Oil Tanker* at [111].

ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: *Kuwait Oil Tanker* at [108]. Moreover:

a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see *Kuwait Oil Tanker* at [120-121], citing *Bourgoin SA v Minister of Agriculture* [1986] 1 QB: “[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not

‘intend’ the consequences or that the act was not ‘aimed’ at the person who, it is known, will suffer them”.

b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: *Lonrho Plc v Fayed* [1992] 1 AC 448, 465-466; see also *OBG v Allan* [2008] 1 AC 1 at [164-165].

c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: *OBG* at [166].

iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in *OBG v Allan*, referring to cases where:

“The defendant’s gain and the claimant’s loss are, to the defendant’s knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort.”

iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath at [7.57].

v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: *Revenue and Customs Commissioners v Total Network* [2008] 1 AC 1174 at [104].

vi) Loss being caused to the target of the conspiracy.”

56. The LL Defendants’ position is that the claim against them fails at each level of that analysis in that they cannot possibly:

- i) Have formed the alleged combination with the other Defendants;
- ii) Have intended to cause the Alleged Damage, not least because if the Alleged Damage were caused it would already have been caused;
- iii) Have agreed to the employment of the alleged unlawful means, because if any of those means had been used they must all – on this hypothesis – have already occurred; and
- iv) Have caused GIG or MDM any loss, because if any loss were caused GIG and MDM had already sustained it.

57. The challenge resolves into two main points. The first is one about chronology. The LL Defendants say that their late manifestation means that they cannot be part of the

combination or intent or employment of unlawful means. The second is about the loss alleged.

58. The first basis for the LL Defendants' strike out application is that "*there was no temporal cross-over between [the Ninth and Tenth Defendants'] ownership by [the Seventh Defendant] and [the Claimants'] investments in the Skew Base Fund*". In summary, they claim that: (i) Mr Migani acquired Leader Logic Holding on 24 September 2019 and Leader Logic AG was incorporated on 18 December 2019; (ii) GIG's last investment in the Skew Base Fund completed on 7 December 2018; and (iii) MDM's last inquiry into investing in the Skew Base Fund took place no later than 30 July 2019 and his final application form for the purchase of shares in the Skew Base Fund was submitted on 2 September 2019. They claim that neither LL Defendant can be liable as a co-conspirator because their involvement post-dated the last decision of GIG and/or MDM to invest in the Skew Base Fund.
59. The LL Defendants say that although in *Kuwait Oil Tanker v Al Bader (No. 3)* [2000] 2 All ER (Comm) 271 the Court of Appeal accepted (at [111]) that "*it is not necessary for the conspirators all to join the conspiracy at the same time*" they nonetheless went on to point out that "*the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the [unlawful] acts complained of*".
60. They submit that a defendant cannot be liable for a conspiracy where she is said to have joined the combination after its purpose was complete and after the alleged unlawful means had been deployed. As Clerk & Lindsell (and some of the cases) put it: the defendant must have been aware of the alleged plan and then "*joined in the execution of it*".
61. In this regard, the LL Defendants drew attention to the judgment of the Privy Council in *Bird v O'Neal* [1960] AC 907 (at 920 – 921). That indicates that the court must:
- “examine[] the position of each individual [defendant] in order to determine whether and, if so, how he had become party to the unlawful conspiracy... ie. by looking to see what part, if any, each [defendant] had played in connection with each specific incident [of alleged unlawful means]... and then considering whether such part necessarily compelled the inference that the particular [defendant] was party to a conspiracy to use unlawful means to further the object of [the alleged conspiracy]”.
62. The LL Defendants' second point is to focus on loss, submitting that a defendant's liability for “participation” in a conspiracy cannot extend to damage that had already been suffered by the victim prior to the date on which the defendant is alleged to have ‘joined’ the conspiracy. They point to *Bank of Tokyo Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AC* [2009] EWHC 1276 (Ch) at [949]: “*It is well settled that liability for participation in an unlawful means conspiracy does not extend to losses suffered by the victim prior to the date on which the relevant defendant ‘joined’ (in that sense) the conspiracy*”.
63. The LL Defendants say that standing back, the chronology does not work at this level also. Self-evidently, the alleged deprivation of independent investment advice came prior to the

last decision to invest (30 July 2019 and by 2 September 2019 at the latest) and therefore undoubtedly occurred before either LL Defendant was on the scene:

- i) Mr Migani did not acquire ownership of Leader Logic Holding until 24 September 2019, and Leader Logic Holding did not enter into its Support Service Agreement until 1 October 2019; and
- ii) Leader Logic did not even exist until 18 December 2019 and did not enter into its Support Service Agreement until 16 January 2020.
- iii) So far as GIG is concerned, there is no dispute that its last investment occurred by 7 December 2018.
- iv) So far as MDM is concerned, he had actually made his decision around 30 July 2019; and in any event that he submitted his request to purchase shares in that Compartment – which was the last step he did or could take in respect of the investment – on 2 September 2019. Again, therefore, as a matter of timing if nothing else, it is impossible to see how the LL Defendants can have been implicated in the alleged conspiracy against MDM.

### The “chronology” case

64. As for the first challenge this requires consideration of (i) the law as regards late joiners to a conspiracy and (ii) what the conspiracy alleged is.
65. On the first point, it was essentially common ground that a late joiner can perfectly well be a conspirator. That is established in *Kuwait Oil Tanker Co SAK v Al-Bader* (No.3) [2000] 2 All ER (Comm) 271 at, [133]. Upholding the finding of the first instance judge Nourse LJ the Court of Appeal held:

“Of course, as in any case of this kind, it is necessary to examine the evidence with care to see whether each defendant was involved in each fraudulent transaction, but once one reaches the conclusion that the Defendants combined to steal from their employer by whatever means might present themselves, the question in relation to any particular scheme or enterprise in which only one or some of them can be shown to have directly participated is whether that enterprise fell within the overall scope of their common design. If several people agree to enable each other to steal from their employer, lending their support in different ways at different times and taking different shares of the proceeds (or even each retaining for himself what he takes), each of them is party to the agreement pursuant to which all the thefts take place.”

66. The only difference between the parties on this point of law was that the Defendants would of course emphasise the need to establish that each defendant was aware of “the plan” and – at whatever point - joined in that plan.

67. I therefore accept the Claimants' submission that – depending on how one defines the conspiracy - the tort does not necessarily require there be any “temporal crossover” between the LL Defendants' ownership by Mr Migani and the Claimants' investments in the Skew Base Fund.
68. But the issue then becomes the nature of the conspiracy, because that conclusion would not assist the Claimants if the case they pursued was limited to the decision to invest – because that did occur before the LL Defendants were on the scene. That is what the LL Defendants say the case is. However, that is not a submission I accept. On analysis the Claimants' case (though certainly pleaded to cover this point) actually goes rather wider than this.
69. It is the Claimants' case that the LL Defendants' role in the alleged conspiracy was to cause the Undisclosed Payments to be extracted from the Skew Base Fund structure for the ultimate benefit of Mr Migani. That is a plan in which they perfectly well could join and in which they could participate. The Claimants likened this to participation as the driver of a getaway vehicle. As the Claimants put it in their skeleton: “*if a taxi driver willingly agreed to assist a bank robber escape the scene with the spoils of the robbery, is it correct that the taxi driver cannot be liable as a conspirator, because the money has already been stolen from the bank? The answer is plainly “no”*”. There is no reason on the authorities why such involvement is not sufficient to found liability in unlawful means conspiracy.
70. The real issue was whether the complaint by the Claimants that this was a combination to deprive them of the benefit of independent investment advice “*at any time prior to March 2020*” (as opposed to a conspiracy to steal fees) is sufficient both as a matter of law and in the sense that the requirements of conspiracy can be established against the LL Defendants.
71. It was the LL Defendants' case that there is a mismatch between this pleaded conspiracy and kinds of cases where a late joiner to a conspiracy has been found liable – the classic “getaway driver” cases. They submit that this is not a case of conspiracy to steal, that the kind of conspiracy alleged cannot permit of a passive late joiner's liability. However, the basis for this distinction was not one to be found in the authorities, but rather reached back to the argument that the unlawful means was spent.
72. The LL Defendants say that it is fanciful to suggest that they knew and participated in a conspiracy consisting of a combination to deprive the Claimants of investment advice because they were not there at the beginning and when they did manifest they had no role in relation to advice, but only in relation to servicing. Indeed the LL Defendants positively assert that that “*the Leader Logic Defendants obviously had nothing whatever to do with the Claimants.*” As a result they castigate the conspiracy case against them as incoherent. They also point to their marginal position and submit that Mr Migani's intent should not be equated with theirs.
73. However as the argument progressed, any lack of clarity about the Claimants' case against the LL Defendants dispersed. They submit that the continuum to March is vitally important and that at no time before the investments were doomed did they know that the advice they received was not independent. They say that the date of investment is not the *terminus ad*

*quem* for loss because at any point until March 2020 they could, if they had been told the truth, have acted to divest themselves of the investments.

74. So, revisiting the conspiracy claim on this basis, the analysis can be broken down thus.
75. Intent can be cleared away quickly. The reality is that whatever the LL Defendants' role was, they were creatures of Mr Migani. He owned and controlled them. It does follow that his knowledge and intent (which must be assumed for present purposes) is attributable to them. The LL Defendants' reliance on *Digicel (St Lucia) v Cable & Wireless* [2010] EWHC 774 (Ch) [74] is misplaced. Morgan J there drew a distinction (which Bryan J has subsequently characterized as one between bystanders and others) thus:

“... before a court can determine whether a defendant has been a party to a combination, it is necessary to identify what the combination is said to be and what part the defendant played in that combination. I can see that if a defendant is in a position of authority over other persons and those other persons want to feel that they have the defendant's authority to proceed before they do proceed, then the defendant's omission to stop their activity might be regarded as a sufficient signal to them that they have the defendant's backing in what they are doing. Such a defendant could be held to be participating in the combination. However, I do not think that ... every person who knows unlawful acts are being committed and who does nothing to stop those acts, is a party to a combination to carry out those acts.”

76. The point does not really go to attribution, but to the issue, to which I will come shortly, about active and passive participation.
77. On the basis of the case as clarified neither combination nor intent nor loss is completed at the stage of investment; the concealment (intent and combination) continued throughout the entire period up to collapse (loss). This is why the Claimants' case on the counterfactual is so important; if, as they say, they would have redeemed their investments early if the truth had been revealed after the investment was made, then the intent and the combination remain throughout the period, and an argument to loss is clear.
78. There was an attempt to suggest that this aspect of the case was not pleaded, but I am satisfied that it was; albeit (i) explicitly as causation rather than as part of intent or combination and (ii) by reference to the causation case on breach of fiduciary duty. I do accept that in the result the pleading (which, in the drafter's defence, has to deal with the different involvements of a range of defendants) is not entirely easy to follow through. Nor is it easy to discern from reading it why the deprivation of the benefit of investment advice after the investment decision is made involves the LL Defendants. However, the case is on analysis there<sup>2</sup>, and this element of it is one which has a realistic prospect of success.

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<sup>2</sup> Though it would benefit from some tidying to drop the portions which are chronologically incoherent and join up the elements of the real case more explicitly.



79. The argument that the unlawful means was spent therefore founders on the analysis of the conspiracy which involves not simply procuring investment but keeping silent lest the investments be exited. Accordingly, there is no reason of principle or logic why the late joiner analysis cannot apply here.
80. Nor is it an answer to say, as the LL Defendants do, that “*the LL Defendants were not and would not have been a necessary means of “extracting” funds out of the Skew Base Fund*” since the funds were held by SB GP, which was controlled by Mr Migani. There is no requirement that a party’s role must be “necessary” for the unlawful scheme to operate. A conspiracy need not be confined to the minimum participants needed. Whether or not a party’s participation was “necessary” is not the question: the question is whether they participated at all, whether out of necessity or otherwise. A supernumerary conspirator is just as much a conspirator if they were willingly and knowingly involved.
81. The final point was whether if the LL Defendants were as marginal and passive as they say, this defeats the case against them. Again I conclude that the case against the LL Defendants is not fanciful, given the state of the authorities. There is plainly an arguable case against other defendants. The extent to which participation can be passive is one which is open to debate. As matters stand the fact that they did not actually themselves use unlawful means would not assist:
- i) There is no requirement that all of the conspirators will use unlawful means: *Lakatamia Shipping Company Ltd v Nobu Su* [2021] EWHC 1907 (Comm) at [83].
  - ii) Further, “*a party can be party to a conspiracy to use unlawful means even if he does not himself commit some or all of the relevant unlawful acts*”: *Erste Group Bank AG (London) v JSC VMZ Red October* [2013] EWHC 2926 (Comm) at [103].
82. There is a debate as to whether purely passive participation is enough. My own judgment in *FMCP v Marino* is said to suggest it is not. But more recently Bryan J has taken a different view. As Bryan J noted in *Lakatamia* at [96] following consideration of *Digicel*:
- “What is clear from the authorities is that it is necessary to look at all the particular facts of the case to establish whether there was a combination and whether someone participated, actively or passively in the conspiracy – being aware that someone was committing a potentially unlawful act, but (simply) not taking steps to stop it, may not suffice to demonstrate a combination, but it all depends on the circumstances, and in particular the position of the individual concerned.”
83. That lack of clarity on the authorities is enough to take the argument beyond fanciful and into triable. Taking the *Digicel/Lakatamia* approach, the LL Defendants are not bystanders to the conspiracy alleged.
84. It may of course be that on the full facts of the case a judge is persuaded that the case against the LL Defendants falls on the wrong side of the active/passive participation line. But with the precise drawing of that line (i) uncertain on the cases and (ii) being likely to be fact dependent, this is a question for trial.

85. Equally as was noted by the judge in the jurisdictional challenge brought by the VP Defendants, at trial it may be that the evidence does not sustain one or more elements of the conspiracy case. But that is a matter for trial.
86. The conclusion which I have reached above aligns with at least some of the evidence. The Claimants drew attention to the fact that, despite the LL Defendants' case on their marginal role, the documentary evidence in fact shows some evidence of involvement by the LL Defendants. For example there is an email chain between Mr Migani and Ms Gaveni, the purpose of which is to discuss how to structure the "repatriation" of funds from the LL Defendants to Mr Migani. The email from Mr Migani to Ms Gaveni on 2 February 2020 (at 14:52) stated:

“• On the LLH side, bill GP a total of 5,410 + 672 (RE reporting) - 2,000 (advance paid in December) = approx. 4,082

• On the TC side, bill VP a total for the second half (the first half has already been paid) of 2,985 - 1,377 (1st half 1st tranche) - 23 (1st half 2nd tranche) = approx. 1,585

• So a profit for SB of 860 then remains (of which 231 to repatriate in another way)

Can you please confirm by simulating the various tranches, the times and amounts (from SB to LLH and from VP to TC) and also the distribution of the cumulative dividends in SB to TC (now the architecture is complete so we can repatriate the maximum dividends).

Then when you can, please send me the first bills with attachments (LLH and TC) so we can check compliance and also the reason for the transfers.”

## Loss

87. The second part of the LL Defendants' case relates to the loss. It is really another facet of the chronology case. It is said that a late joining conspirator cannot be liable for any damage that predates their joining the conspiracy. The LL Defendants pointed to *The Bank of Tokyo Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AC* [2009] EWHC 1276 (Ch) at [949]. It is their case that the kind of damage which would follow from the "real" conspiracy properly arguable against the LL Defendants is (i) tiny (some small amount of fees) and (ii) not pleaded.
88. However this comes back again to the continuing nature of the deprivation of investment advice. The "real" conspiracy is not focussed on the content of the advice but on the lack of independence and its consequences. While it is easy to see a complaint relating to fees as relevant to the lack of independence viewed narrowly, the reality is that the pleaded conspiracy was capable of having wider impacts. The harm suffered by the Claimants in consequence of the deprivation of independent financial advice can resonate in the actions taken as a consequence of that conspiracy by the Claimants – such as investments - and right up to the moment when they could no longer exit the investments.

89. I therefore accept that it is at least arguable that the damages to which they are entitled, in tort, are not quantified by reference to the secret profits that Mr Migani received and that they are entitled to be made whole, by reference to the position they would have been in had the conspiracy not taken place. If the Claimants do at trial establish that there was a conspiracy and that they have suffered some pecuniary loss, damages for conspiracy are “at large”: see, e.g., *Capital for Enterprise Fund a LP v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch) at [14].
90. As a matter of analysis therefore the LL Defendants' challenge fails. These are issues for trial.

### MR FALESCHINI'S STRIKE OUT APPLICATION

#### **The deceit claim against Mr Faleschini**

91. Mr Ahlquist fairly accepts that this application turns on the fraudulent misrepresentation/deceit claim, as the elements of conspiracy overlap considerably with it. Therefore if I determine that this claim raises triable issues, then the allegation of unlawful means conspiracy is also properly a matter for trial.
92. A summary of the Claimants' pleaded case in misrepresentation against Mr Faleschini is as follows:
- i) Mr Faleschini is and was at all material times the company secretary of XY UK and the CFO of the parent company XY SA;
  - ii) He was a director of Twinkle from 15 December 2017;
  - iii) Mr Faleschini made representations that XY UK was an independent adviser and provided unbiased advice, during meetings on 12 May 2016 and 9 June 2016;
  - iv) It is to be inferred that Mr Faleschini was formally or informally remunerated in correlation with the performance of XY UK, XY SA or Twinkle and/or from XY UK and Twinkle's activities in designing, pricing and/or negotiating trades on behalf of VP Liecht and XY UK directing investors to the Skew Base Fund;
  - v) It is alleged that Mr Faleschini made the representations with the knowledge of the facts that made them unlawful;
  - vi) Even if the representations were not false when they were made, they were continuing representations and became false by the time they were acted upon by GIG and/or MDM when investing in the Skew Base Fund; Mr Faleschini was aware that they had become false given his role in the XY Group and Twinkle; and Mr Faleschini did not retract the representations when he became aware of their falsity.
93. The ingredients of the tort of deceit were set out by Jackson LJ in *Ludsin Overseas Ltd v Eco3 Capital Ltd* [2013] EWCA Civ 413 at [77]:

- i) The defendant makes a false representation to the claimant;
- ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false;
- iii) The defendant intends that the claimant should act in reliance on it, and
- iv) The claimant does act in reliance on the representation and in consequence suffers loss.

94. As to the first ingredient, Sir Andrew Morritt V.C. in *Spice Girls Ltd v Aprilia World Service BV* [2002] EMLR 27 at [51]-[52] set out four well-established propositions:

“At the outset it is necessary to reiterate certain well-established principles.

First, though the representation must be one of fact representations as to the future or of opinion frequently contain implied representations with regard to the present or to the knowledge of the representor. ...

Second, a representation once made is likely to have continuing effect. So if made for the purpose of an intended transaction it will continue until the transaction is completed or abandoned or the representation ceases to be operative on the mind of the representee.

Third, if at a time when it is continuing the representor discovers that the representation was false when made or has become false since he should correct it. ...

Fourth, the meaning and effect of a statement or of conduct must be ascertained in the light of the circumstances pertaining at the time. Those circumstances will include the course of the negotiations and any earlier representations.”

95. The principal basis for Mr Faleschini’s strike out application is that he could not have known that the representations were untrue at the time they were made because he had no role at Twinkle and on the Claimants’ own case, the alleged connections and mutual benefits which are said to render the representation untrue did not exist at the time of the initial Independence Representations. Further, it is submitted that it cannot be said that the Independence Representations relied on were representations of existing fact, or were false at the time they were initially made. Overall it is submitted for Mr Faleschini that the case against him has not been properly considered, and when considered, cannot stand.
96. Before passing onto consider the issues I should pause to note that Mr Ahlquist for Mr Faleschini advanced the submissions with great skill and clarity, and that those submissions could not well have been put better.

Overarching issues

97. The first point to grapple with is the extent to which Mr Faleschini's case has to be considered entirely distinctly from the case being advanced against the other defendants – notably Mr Migani. There is some force in Mr Ahlquist's submission here, which was that Mr Faleschini must not simply be subsumed into the case as a defendant because those he worked with or for are legitimately defendants in the action.
98. He is quite right that the court must be astute not to elide Mr Faleschini with the other defendants if he is on analysis distinct from them. There must be no “lumping in” of Mr Faleschini simply because claims are being brought against people with whom he associated or companies for whom he worked. Nor would I tend to accept the argument advanced for the Claimants that even if there was no sufficiently arguable case against Mr Faleschini he should be kept in because he will inevitably have to be at trial, qua witness if not qua Defendant.
99. However, I do not accept that Mr Faleschini's position has to be completely (and artificially) divorced from that of the other Defendants. The case against him concerns allegations of interrelationship with those Defendants. It arises in the context of a broader claim by the Claimants against Mr Migani, companies alleged to be owned or otherwise controlled by him, and individuals and entities alleged to have been involved in Mr Migani's activities. It would be inappropriate in a matter such as this, where the relationship between the Defendants is a central part of the case, to consider the position of each Defendant not just individually but also in isolation from the broader claim. Just as Mr Faleschini cannot be elided with the other Defendants, nor can his position be considered without looking at how he and his actions fit into the broader picture.
100. The second point to consider is whether in considering the case I am confined to the pleaded case. Mr Ahlquist suggests that I am, by reference to *Okpabi v Royal Dutch Shell* [2021] UKSC 3; [2021] 1 WLR 1294 where at [22] Lord Hamblen stated:
- "Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupported, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue."
101. Reference was also made to the passage at [103] where Lord Hamblen said: *"Where, as in this case, there are particulars of claim, that is an issue which should ordinarily fall to be addressed by reference to the pleaded case."*
102. I do not however regard that case as authority for the proposition that on a strike out or reverse summary judgment the court is so confined. *Okpabi* was a jurisdiction dispute, where

particular issues arise. And while the adjurations of the *Okpabi* court to avoid a mini-trial are ones which also sound in the strike out/reverse summary judgment jurisdiction it is not the case that such applications are expected to proceed without reference to evidence, particularly where matters have moved on since the case was pleaded, as is the case here. Even in *Okpabi* itself, where the jurisdictional challenge did depend on satisfaction of the "real prospects of success" test, the court at [128] invoked Lord Briggs JSC in *Lungowe v Vedanta* [2020] AC 1045, [ 45]: "*the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue.*"

103. Pausing here it is worthy of note that both of these overarching points involve attempts to ring-fence Mr Faleschini's position. The perceived need to take these points reflects the reality which emerges when the position overall is considered.

#### Representations: Existence

104. The Claimants invite me to conclude that it is – at the very least - arguable that the Independence Representations were representations of fact (in the sense of being representations as to intent) and were false at the time they were made. They also submit (and I accept) that if Mr Faleschini knew that Mr Migani had intended to create the Skew Base Fund (or a similar captive investment vehicle) and that XY UK intended to advise its clients to invest in that fund, then any actionable independence representations made by Mr Faleschini would have been false when they were made. So falsity can in essence be put to one side.
105. The first question is whether a case to the effect that the Independence Representations were representations of fact is fanciful.
106. The relevant chronology is as follows:
- i) The Claimants allege that the representations were made during meetings on 12 May 2016 and 9 June 2016. Mr Faleschini also accepts that he attended a meeting with the Claimants on 14 July 2016;
  - ii) For the purposes of the strike out application, Mr Faleschini does not dispute that the Independence Representations were made, though his case is that he was there to talk about something completely different – namely the technological reporting services that XY UK could provide;
  - iii) Twinkle was incorporated relatively shortly thereafter, on 28 October 2016, for the purpose of launching the Skew Base Fund;
  - iv) SB GP was incorporated on 24 November 2016;
  - v) The Skew Base Fund was incorporated on 9 February 2017;
  - vi) On 2 March 2017, MDM signed a “Commitment Letter” to subscribe €10 million in the HFPO compartment of the Skew Base Fund;

- vii) GIG and MDM invested in compartments of the Skew Base Fund between June 2017 and October 2019.
107. Looking first at the question of whether the Independence Representations could be representations of fact given the timeline, I conclude that they could be, essentially for the reasons given by Sir Andrew Morritt in the passage quoted above. He said: "*...representations as to the future or of opinion frequently contain implied representations with regard to the present or to the knowledge of the representor*". Essentially the same point was made by the Claimants by reference to Clerk and Lindsell paragraph 17-12, which states that "*a representation of present intention ... is a sufficient representation of an existing fact to form the foundation of an action for deceit. ...a statement as to the future will often indeed imply a statement as to present intention ....a promisor generally represents by implication that he has at the moment of making the promise the intention of fulfilling it*".
108. The example given in the text was very apt: *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, where false statements of what the company intended to do with investors' money when it received it was held to be deceptive.
109. This fairly well known territory was not contradicted in reply. It is in my judgment realistically arguable that to the extent that Mr Faleschini made representations about the position XY UK intended or anticipated to be in, vis-à-vis the Claimants, those could be actionable as representations as to present intent, which is itself a fact.

#### Falsity and Knowledge

110. We then turn to the question of falsity and knowledge on which for present purposes the evidence marches together. The backdrop here is the pleaded case as to the nature of the fraud and conspiracy which also encompasses allegations that XY UK was in breach of the fiduciary duty because of the advisory relationship it had, and in not disclosing the connections throughout and that Mr Migani is liable for dishonest assistance.
111. This is reinforced by the conclusion of the Judge on the VP jurisdictional challenge that the case in deceit is arguable against those defendants.
112. Clearly the assumption for present purposes has to be that Mr Migani knew of his own intention to create the Skew Base Fund and to present it as independent when it was not. It is now established as arguable that the VP Defendants also knew of this intent.
113. As to whether Mr Faleschini knew that Mr Migani had intended to create the Skew Base Fund, the Claimants' case as developed in the evidence is that:
- i) He was aware of the intention to create the Skew Base Fund (although potentially not then named as such) at the time the representations were made;
  - ii) He was involved in early meetings with private equity investors in the Skew Base Fund before he became a director of Twinkle.

114. On the evidence so far it appears that there is some evidential base for this, in that there is material tending to show that arrangements were made relating to the creation of the Skew Base Fund at the same time as Mr Faleschini and Mr Migani were first meeting with the Claimants and making the Independence Representations.
115. Mr Faleschini at paragraph 47 of his first witness statement refers to an “internal discussion” at the XY Group in or around March 2016 (i.e. before the representations were made) which concerned “*establishing a vehicle for XY’s clients to make private equity investments*” and from which the Skew Base Fund was derived.
116. The implication of that evidence is contentious: Mr Faleschini states that (i) he understood that the idea never progressed; and (ii) he was not made aware of the Skew Base Fund until after it was created. Mr Faleschini’s evidence in his first witness statement for the purposes of this application at [49] is that “*I was not aware of the Skew Base Fund at the time it was created because I was not involved in its creation and was not a director of Twinkle until much later, in December 2017.*” But he is not clearly right about this. On the face of it there is a tension between that case and the evidence that he attended or was scheduled to attend a meeting in 2017 where the agreement was concluded to set up the fund.
117. Certainly whether or not Mr Faleschini knew that the fund was to be called "Skew Base Fund" is nothing to the point. What does matter is whether it is realistic to contend that he was aware that XY UK intended to establish a captive investment vehicle. That is, on the basis of this evidence, arguable.
118. Then one comes to knowledge of the advice; as to which the critical issue is whether there is an arguable case that Mr Faleschini knew the intent was to direct XY UK’s clients (and specifically the Claimants) to invest in that vehicle, at the time when the representations concerning XY UK’s independence – i.e. that it was independent from the financial products which it recommended - were made.
119. For the purposes of there being an arguable case for trial the Claimants do not, as a matter of law, need to establish the knowledge of intent to advise the Claimants. It was common ground between the parties that Mr Faleschini only needed to be aware of a class of people (of which the Claimants are part) that were intended to be misled by the misrepresentations. There is therefore no need to establish that Mr Faleschini knew specifically that the Claimants were investors in Skew Base Fund.
120. The relevant facts pleaded by the Claimants on this aspect are as follows:
- i) Mr Faleschini participated in meetings with the Claimants in May to June 2016, during which he personally made the Independence Representations. He held very senior roles in the XY Group and later in Twinkle;
  - ii) Twinkle was created in order to launch the Skew Base Fund and it was intended that he be appointed as a director before the operations began;
  - iii) He knew that XY UK’s clients were to be advised to invest in the Skew Base Fund;



- iv) He was aware that the Claimants continued to be clients of XY UK until at least September 2019.
121. Mr Faleschini of course points to the fact that the pleaded case is largely pointing at his role at Twinkle. What is said is that in the absence of an existing connection to Twinkle, or Twinkle doing any of the things that it is alleged to have done for the Skew Base Fund, which only started in 2017, at the time of the representations in May 2016 the representations cannot have been made fraudulently.
122. But this is to focus too tightly both on just part of the pleaded case and on Mr Faleschini's role at Twinkle. Once one pans out slightly, this point appears, on the pleaded case and evidence to date, to be very well arguable – and therefore comfortably to clear the relevant merits hurdle.
123. Mr Faleschini's argument ignores his (pleaded) role at XY UK (company secretary and CFO of XY SA). That role is reflected in the factual evidence. Mr Faleschini does not appear from nowhere when appointed to Twinkle. On the contrary, Mr Faleschini was to all appearances rather involved in the arrangements for the establishment of the Skew Base Fund and in its affairs before he became a director of Twinkle. Firstly, as already noted, he accepts that he was aware of discussions in March 2016 around the creation of a "*vehicle for XY UK's clients to make private equity investments*".
124. It also appears that the plan from at least March 2016 was for XY UK's clients to invest in a captive investment vehicle from which XY UK, Mr Migani, or other companies owned or controlled by him would derive a financial benefit - whether through a private equity fund as initially contemplated or, as eventuated, the Skew Base Fund. That plan, which appears to be inherent in what Mr Faleschini accepts he knew, was plainly at odds with any assertion of XY UK's independence.
125. Yet at the same time Mr Faleschini cannot escape from the Independence Representations themselves. Mr Faleschini accepts in his evidence to the Swiss prosecutor that he was aware of the terms of the XY UK website which (then and now) professed transparency and independent advice. The current iteration states that XY UK: "*operates in line with the highest quality standards and is committed to transparency and independence in all aspects of its work in accordance with its Code of Ethics and framework for working with all internal and external parties without conflict of interest*". The 2016 version is not significantly different.
126. That acceptance by Mr Faleschini therefore at least arguably amounts to an acceptance that he knew that XY UK was holding itself out as independent to clients and prospective clients. It is also for present purposes accepted that he made the Independence Representations at the May 2016 meeting.
127. There therefore appears to be a good basis for arguing that Mr Faleschini as well as Mr Migani knew both what was being said and what was the real state of affairs and therefore had knowledge of falsity. That is the more so when one bears in mind the background facts that (i) Mr Faleschini is a close associate of Mr Migani, at least in matters relating to Mr

Migani's business activities; (ii) Mr Faleschini is XY's company secretary and CFO of the XY Group; (iii) Mr Faleschini was in a relationship with and is now married to Ms Gaveni, an employee of both Twinkle and SB GP.

128. Further in the context of the Swiss criminal investigation, the Swiss Court of Appeal concluded that Mr Migani did not act alone in the matter for which he was investigated, that Mr Faleschini had a key role in the alleged criminal conduct of Mr Migani:

“Given the complexity of the facts, explicitly invoked by the investigating magistrate, considering that Daniele Migani obviously did not act alone in the matter for which he was investigated, but rather was coordinating several people and different companies, also considering that the roles of Pietro Dell’Era, Antonio Grasso, Stefano Sampietro and Federico Faleschini have yet to be fully clarified and evaluated, in particular with reference to the subjective aspect of their participation, there is a risk that they could attribute roles and blame to each other. That is, they could seek to evade their respective responsibilities, with a concrete danger of contradictory decisions as to what occurred. ...

If the Defendants, due to their roles, their functions, their tasks and, furthermore, due to their training and professional experience and their personal knowledge of Daniele Migani (through professional or private association) knew or should have known of the existing conflicts of interest in which Daniele Migani found himself, their possible complicity in the facts cannot in fact be ruled out.”

129. Secondly as to Mr Faleschini's involvement generally and the likelihood of him being outside the circle of knowledge as he alleges, there is evidence that dovetails with the pleaded point about meetings before he became a director of Twinkle. That is because, in the context of setting up Skew Base Fund potentially with a private equity element, Mr Konig of HarbourVest Partners (UK), a private equity investor, had a discussion with someone using the “Info Skewbase” email address in March 2017 (i.e. just after the MDM Letter of Commitment) which indicated Mr Faleschini, though not yet a director of Twinkle, was involved in Skew Base's business. So:
- i) By email on 27 March 2017, the Skew Base team invited HarbourVest to a meeting with (amongst others) Mr Migani and Mr Faleschini to discuss the Skew Base Fund. The email states that “*subscriptions to the RAIF will be over 100M€*”. Mr Faleschini is not just named, he is second in a list of eight people likely to attend.
  - ii) The email goes on to state that “[o]ne relevant topic of the discussions will be the investment policy (in particular geographical diversification and exposure to Italian market will be relevant given the presence of Italian subscriber)”. The Claimants infer that this is a reference to MDM, but certainly at this stage I accept the submission for Mr Faleschini that it is a step too far to infer that Mr Faleschini was aware that XY UK had recommended that the Claimants personally invest in the Skew Base Fund. Nonetheless it raises a question.

- iii) Enclosed with this email was a diagram which explained the operation of the Skew Base Fund. It posits a structure whereby clients of the XY Group would (presumably on advice) invest in the relevant compartments of the Skew Base Fund, and the flow of funds to Mr Migani (p.1). It also states (under the heading “Ziusudra SA”, which was the former name of Twinkle) “*Ziusudra SA will appoint Federico Faleschini as a member of the board before operations start.*” While it is possible for this to be consistent with Mr Faleschini's evidence he was not aware of the Skew Base Fund at the time it was created (i) it is in tension with his attempt to suggest he was a *tabula rasa* on the subject until December 2017, and (ii) it is not fanciful to suppose that he saw it and hence is a matter for exploration at trial.
  - iv) Most significantly at this stage, the response from HarbourVest stated “*Daniele Migani is the founder and CEO. Federico Faleschini is his second hand man, CFO. Not sure I know the others*”. Given that "second hand man" appears likely to be a phrase intended to reflect the concept of "right hand man" there appears to be a credible case that Mr Faleschini had a key role, at an early stage, before he was publicly involved with the Skew Base Fund and formally appointed a director of Twinkle.
130. While Mr Faleschini objected to this evidence as being a new factual case, that is not really correct. Mr Faleschini’s role as “second hand man, CFO” is pleaded (explicitly as to CFO, and by fairly clear implication as to second/right hand man by his bracketing with Mr Migani) in paragraph 13 of the Particulars of Claim.
131. Given the points made thus far, it is clearly realistic that Mr Faleschini knew that investors in Skew Base Fund might be misled. On the evidence before me the only investors in Skew Base Fund other than Twinkle itself were XY investors. Given the facts noted above it is clearly arguable and a point for trial as to whether Mr Faleschini must have known that all investors in Skew Base Fund apart from Twinkle were clients of XY UK and were recommended to invest in Skew Base Fund by XY UK. He accepts some part of this, saying that “*it is true that I knew, and I believe others at Twinkle knew, that ‘some clients in the Skew Base Fund’ were also XY’s clients.*” This involves an implied suggestion that the Skew Base Fund might have had clients which did not derive from XY UK, and therefore that Mr Faleschini might not have previously known.
132. But given that there certainly seems to be an evidential base for the case that all the investors in the Skew Base Fund (other than Twinkle) were XY UK clients, as an officer of XY UK it is also arguable that he must have been aware of at least some of the connections between XY UK, Skew Base Fund, proto-Twinkle, and Mr Migani. As (later) a director of Twinkle, he would know all this and that Twinkle was earning fees from investments in Skew Base Fund and Mr Migani controlled both Twinkle and XY UK.
133. This latter point is underlined by the evidence of Mr Grasso, the director of Twinkle from October 2016 to February 2018 and Chairman of the Board from February 2018 to December 2019. In his evidence in the Swiss proceedings, he stated that Mr Faleschini was heavily involved in the operation of Twinkle in relation to the Skew Base Fund.
- i) Mr Grasso described Mr Faleschini’s work as follows:

“FALESCHINI managed all the “financial” part of TWINKLE related to the flow of information. FALESCHINI was Chief Operating Officer and on the board with me. Please note that the hiring of FALESCHINI in TWINKLE coincides with his listing in the Trade Register as director. From that moment on, I no longer dealt with that part of the business with SKEW BASE, and I returned to doing my administrative and accounting part with Fidav SA. It was the beginning of 2018.”

ii) When asked what he saw Twinkle doing for the Skew Base Fund, he said:

“I did not actually see any work being done, it was FALESCHINI who dealt with it.”

134. Accordingly there is a more than real case that Mr Faleschini knew facts which are sufficient to enable him to know that the representations were false when made or became false.
135. As to knowledge of the Claimants' position specifically there is a dispute as to whether Mr Faleschini was aware that the Claimants were investors of the Skew Base Fund. This knowledge is denied by Mr Faleschini. For the reasons given it is not necessarily a legally significant point. Mr Ahlquist attempted to persuade me that there was a non sequitur here in that *“it does not follow that claimants were among the group of XY clients who were given that advice”*. However given the knowledge of structure, the knowledge of the plan as to advising investors, the knowledge of lack of independence, the knowledge of falsity and the question raised by the reference to the Italian investor against the background of Mr Faleschini’s right hand man role I would conclude that there is sufficient evidence for the point to be arguable at trial.
136. Mr Faleschini also asserts that the Claimants do not allege that he knew that they would rely on the Independence Representations. The criticism therefore appears to be that the Claimants have not sufficiently particularised the basis upon which it is said he knew the relevant matters. Given the point just made, knowledge of reliance by the Claimants personally is not significant, and given the nature of the allegations it is plainly arguable that the other parts of the cause of action provide enough material for this. Further I am not minded to regard this pleading point as to a subsidiary aspect of the cause of action as material. It is not unusual for the Claimants in a fraud claim to be unable to provide further particulars at the pleading stage: *Gulati v MGN Ltd* [2013] EWHC 3392 (Ch) at [9].
137. Overall I conclude that there is therefore sufficient evidence that Mr Faleschini was aware of the key matters as to advice and lack of independence, as well as reliance for the case not to be fanciful and that the case is one which requires to be tested at trial.
138. On that basis the issues as to (i) continuing representations and (ii) conspiracy do not matter. However, I shall consider them for completeness.

#### Continuing representations

139. The Claimants’ case is that (i) the representations are continuing representations; (ii) if not false *ab initio* they became false by the time at which they were acted upon by GIG and/or

MDM when investing in the Skew Base Fund; and (iii) Mr Faleschini was aware that they had become false given his role in the XY Group and Twinkle, and did not retract the representations when he became aware of their falsity. The argument at the hearing focused on whether, assuming the representations continued, they did continue beyond the First Advisory Agreement between GIG and XY UK on 18 July 2016 or when the Claimants first invested in the Skew Base Fund.

140. If the Independence Representations continued to be operative on the minds of GIG and MDM when they made their investments in the Skew Base Fund and thereafter in retaining those investments then by that stage, the “*relevant factual matters*” to which Mr Faleschini refers plainly did exist – and he was indisputably aware of them. Mr Faleschini was on his own case by then aware of the fact that Mr Migani (directly or indirectly) owned XY UK, XY SA, Twinkle, the Skew Base Fund and SB GP. Mr Faleschini occupied very senior roles at XY UK, XY SA and Twinkle, and he also knew that XY UK was recommending the Skew Base Fund to its clients (which of course included the Claimants, whom he knew continued to follow XY UK’s advice into late 2019). In the circumstances, if the representations continued he would have had a duty to correct the representation or communicate the change in circumstances.
141. Mr Faleschini's case is that the analysis based on continuing representations cannot be correct because the representations only continue until the point of the parties entering into the relevant contract. Mr Faleschini relies on the case of *Gross v Lewis Hillman* [1970] Ch 445. This was a case where A made a fraudulent misrepresentation to B, in reliance on which B purchased property from A, which B then sold to C. Upon discovering the misrepresentation, C sought to rescind the sale and claim damages for deceit as against A. Mr Ahlquist points to the judgment of Harman LJ, who followed a line of analysis by reference to the judgment of Cross LJ in *Peek v Gurney* (1873) LR 6 HL 377, 411 that “*when the contract is made with A, the misrepresentation is spent*”.
142. I do not consider that this case assists Mr Faleschini. It is clearly a different kind of case where there was a chain of contracts, one of which was voidable for fraudulent misrepresentation by A and one which was not. The factual distinction is also highlighted later in the same passage, where Harman LJ stated that the “*misrepresentation was not made to the plaintiff: it was made to ... the persons who entered into the contract to purchase the property. It was, therefore, they who relied on the representation and not the plaintiff.*” This is clear from the later reference to avoiding the position where “*everybody who comes to know of [the misrepresentation] can rely on it.*” This present case – a case of a contract to advise, with the representation being made to the claimants themselves, is a long distance from the *Hillman* case which was a one-off property transaction where a representation was made and (without the representor's knowledge) was relayed to a third party who relied on it.
143. I also agree with Mr Saoul KC's submission, made by reference to the judgment of Flaux J in *Concept Oil Services v En-Gin Production* [2013] EWHC 1897 (Comm) at [133] that the case established no such general principle as to the exhaustion of a continuing representation. In that case Flaux J had no difficulty in concluding that a representation remains extant until

it is fully acted on – in that case well after an umbrella agreement was concluded and encompassing subsequent agreements made under that agreement.

144. Whether a representation made prior to entry into a contract remains extant after the contract is concluded is a question which will be fact specific. The answer may well depend at least in part upon whether the representation is alleged to have been fraudulent, negligent or innocent. On this basis I would regard the case of *Cramaso LLP v Ogilvie-Grant* [2014] AC 1093 and the case of *Limit No. 2 v Axa* [2008] EWCA Civ 1231 which was relied on in oral argument as rather different cases to the present. *Cramaso* concerned an allegation of negligent misrepresentation and *Limit No 2* one of innocent misrepresentation.
145. Here I certainly regard the argument that these alleged representations, made in the context of these alleged facts – particularly as to the contract with XY UK being a contract essentially for advice - is more than realistic. The Claimants allege that the Independence Representations were made to induce them to seek and act on XY UK's advice including in the making of investments recommended by XY UK. There is no reason why those representations should not have continued to operate on their minds throughout the currency of the relationship, and in particular when taking investment decisions in accordance with XY UK's recommendations. It is not fanciful to contend that the force of the representations was not extinguished when the Claimants retained XY UK – to the contrary, it endured and remained the core premise of their relationship and the trust the Claimants had in XY UK's investment advice. That is a complete answer to this argument on Mr Faleschini's part, if (contrary to the conclusions I have reached above) the argument arose.

### Conspiracy

146. The principal basis for seeking to strike out the conspiracy claim against Mr Faleschini is “[t]he only alleged involvement in unlawful means by Mr Faleschini is through his allegedly fraudulent representations”. Mr Faleschini concedes that, if the Court were to conclude there was a triable issue on the deceit claim, then the same would follow for the unlawful means conspiracy claim. Accordingly, as already noted, the arguments on conspiracy do not arise.
147. I would if necessary also accept the submission that even without a case in deceit against him the Claimants have identified material to support, at least past the real/fanciful boundary, the allegation that Mr Faleschini was a party to the conspiracy. This is substantially the same point as that made above in relation to “passive participation” on the part of the LL Defendants.
148. In my judgment it is arguable that Mr Faleschini could be found to be part of a conspiracy, the object of which was to create and maintain the façade that the Skew Base Fund was independent of XY UK. There are other unlawful means available to supply that element. As regards Mr Faleschini's involvement in such a conspiracy, this case hinges on the background information outlined in relation to the deceit claim, in particular:
- i) Mr Faleschini held senior positions in the XY Group and Twinkle. He was seen as Mr Migani's right hand man;
  - ii) He was involved in the process to establish the Skew Base Fund;

- iii) In the context of the Swiss criminal investigation, the Swiss Court of Appeal concluded that Mr Migani did not act alone in the matter for which he was investigated, that Mr Faleschini had a key role in the alleged criminal conduct of Mr Migani and that he could, subject to the evidence, also be found to be liable:

“Given the complexity of the facts, explicitly invoked by the investigating magistrate, considering that Daniele Migani obviously did not act alone in the matter for which he was investigated, but rather was coordinating several people and different companies, also considering that the roles of Pietro Dell’Era, Antonio Grasso, Stefano Sampietro and Federico Faleschini have yet to be fully clarified and evaluated, in particular with reference to the subjective aspect of their participation, there is a risk that they could attribute roles and blame to each other. That is, they could seek to evade their respective responsibilities, with a concrete danger of contradictory decisions as to what occurred. ...

If Ds, due to their roles, their functions, their tasks and, furthermore, due to their training and professional experience and their personal knowledge of Daniele Migani (through professional or private association) knew or should have known of the existing conflicts of interest in which Daniele Migani found himself, their possible complicity in the facts cannot in fact be ruled out.”

- iv) Further, the evidence of Mr Grasso, the director of Twinkle from October 2016 to February 2018 and Chairman of the Board from February 2018 to December 2019, reveals that Mr Faleschini was heavily involved in the operation of Twinkle in relation to the Skew Base Fund. Mr Grasso described Mr Faleschini’s work as follows:

“FALESCHINI managed all the “financial” part of TWINKLE related to the flow of information. FALESCHINI was Chief Operating Officer and on the board with me. Please note that the hiring of FALESCHINI in TWINKLE coincides with his listing in the Trade Register as director. From that moment on, I no longer dealt with that part of the business with SKEW BASE, and I returned to doing my administrative and accounting part with Fidav SA. It was the beginning of 2018.”

- v) When asked what he saw Twinkle doing for the Skew Base Fund, he said:

“I did not actually see any work being done, it was FALESCHINI who dealt with it.”

### **Negligent misrepresentation**

149. It was confirmed at the hearing that the Claimants do not pursue a claim for negligent misrepresentation against Mr Faleschini. The only debate was as to what should be done about that in my judgment and the order which will follow. As to this Mr Faleschini contended for a strike out, while Mr Saoul suggested that it was an obvious error and that there should simply be an amendment to remove it.

150. On this I will accede to the Defendants' submissions. If it was an obvious error the Claimants were slow to acknowledge it. After the point having been raised in correspondence for some time and in the evidence for the strike out as long ago as summer 2022, there was no discontinuance or amendment and the point was only abandoned very shortly before the hearing.
151. In those circumstances the Defendants are entitled to a judgment and order on this point.

### **The individual Claimants**

152. Mr Faleschini also contends that the cases advanced by the individual Claimants, MDM and LDM ought in any event to be struck out.
153. As regards MDM it is said that there is no allegation in the Particulars that a representation was made to MDM by Mr Faleschini; it is said that his case rests as pleaded on representations made by XY UK and Mr Migani. On examination I was not persuaded of the robustness of this argument. The Particulars of Claim may not be as explicit as they could/should be but what is clearly pleaded is that the representations made to Mr Nuzzo by Mr Faleschini were repeated at the meeting attended by MDM. Mr Nuzzo's attendance at that earlier meeting is said to be on behalf of GIG and LDM (not MDM) but he is elsewhere pleaded as head of the di Montezemolo family office. In the normal course of events it would be expected that representations made to him would be passed on (*inter alia*) to MDM. On this basis I accept Mr Saoul's submission that there is plainly a sufficient degree of proximity for there to be at least an arguable case that the representation made by Mr Faleschini is conveyed to MDM, whether through Mr Nuzzo or through the representations which are expressly pleaded in paragraph 15 of the Particulars of Claim and that this is sufficient to give rise to a viable cause of action. It is probably preferable for this point to be dealt with by way of tidying up of the pleading, but it is not a strike out point.
154. As for LDM there is no claim in conspiracy. He invested only in non-Skew Base investments. It is said that there is no logic in a fraudulent misrepresentation claim being brought by him if he was not advised to invest in Skew Base Fund and never did so invest. This argument has a superficial attraction, but I am not persuaded that it is correct that there is no claim with a real prospect of success by LDM. The conspiracy relates to the Skew Base Fund only. Hence it is logical that there is no conspiracy claim.
155. Given the overlap of the conspiracy and fraudulent misrepresentation claims there is certainly reason for pause for thought as to whether a claim in deceit lies. However on deceit the reliance and loss can take a different form: LDM invested in other products which as it turned out were loss making. He says he would not have invested in them (on XY UK's advice) if he had been aware that the Independence Representations were not true. That is a less obvious argument than the one advanced by the Claimants who invested in Skew Base Fund, but it is an arguable case.



**CONCLUSION**

156. For the reasons set out above, I conclude that it is appropriate to dismiss both Strike Out Applications, save as to the single point of negligent misrepresentation.