

March 2022

Follow @Paul\_Hastings



## *PH Insight for News and Analysis of the Latest Developments from the Courts of England and Wales*

By [Alex Leitch](#), [Jack Thorne](#), [Alison Morris](#), [Jonathan Robb](#), [Gesa Bukowski](#) & [Harry Denlegh-Maxwell](#)

PHlit is our London litigation know-how blog, where you will find the latest developments on commercial litigation topics delivered in a monthly round-up of the most important topics addressed by the Courts of England and Wales, as well as key regulatory and legislative updates. You can subscribe to this site if you would like our updates sent to you by email as soon as they are posted.

◇ ◇ ◇

### *In this edition...*

#### **Case Summary**

- This case relates to Reading Football Club's ("RFC") raising of finance in the sum of US\$22,374,000 in 2017 (the "**Financing**") from Global Fixed Income Fund 1 Limited (the "**Fund**"). It is a case of extensive factual detail, in which the High Court was tasked with making 101 factual findings.
- The claimant (the assignee of the Fund's claims) brought proceedings principally in connection with the first three individual defendants' management of the early repayment of the Financing and three categories of related fees. The claims were reliant on: negligence, deceit, breach of fiduciary duty, proprietary claims under a constructive trust, knowing receipt, dishonest assistance, and conspiracy. The claims succeeded on all causes of action save for negligence and deceit, but in respect of just one of the three fee categories, as to which the first three defendants were held to have been dishonest.

#### **What does this mean for you?**

- This case demonstrates the types of claims available in relation to complicated financial transactions, particularly where there are allegations of dishonesty. As we explain further below, the existence of fiduciary duties owed by the first three defendants to the Fund and/or a trust to the benefit of the Fund was an essential element in the claims with a dishonesty element.
- Whilst the Court held that individual employees of a company will unlikely have assumed a duty of care to a third party that contracts with the employer-company (with the result that a claim in negligence would fail), those individuals can owe fiduciary duties to that third party, particularly where their actions involve dishonesty. This decision again highlights the Court's willingness to take action against individuals acting dishonestly, who would otherwise be veiled by a corporate body.

- The Judge's closing remarks noted that the case was "*unedifying on all sides*", characterised by individuals not fully lacking integrity, but willing to cross the line into dishonesty. The substantial amount of evidence from Bloomberg chats recited in the judgment alone (including "*I lied so much just now*") offers a stark reminder of the potency of instant messaging in evidence, and that the courts are prepared to order disclosure in respect of various data repositories.

## Case overview

### The parties

- The Fund appointed Floreat Investment Management Limited ("**FIML**") as its investment manager in August 2015 in connection with the Financing pursuant to an investment management agreement (the "**IMA**"). FIML brought the present proceedings as assignee of the Funds claims. Where we refer to "FIML" we are referring to FIML in its capacity as investment manager; where we refer to the "Claimant" we are referring to FIML in its capacity as assignee of the claim.
- The first three (and key) defendants are the only shareholders in the fourth defendant (IR Relations Ltd, formerly known as Floreat Investor Relations Limited ("**FIR**"). The fifth defendant is the wife of the second defendant. Floreat Capital Markets Limited ("**FCM London**") employed each of the first three defendants and was appointed as FIML's investment advisor.

### The background

- By November 2016, takeover talks for RFC commenced, which resulted in discussions surrounding the early voluntary redemption of the Financing sum. RFC made two partial repayments in December 2016 and March 2017 (the "**First Prepayments**"). In the event of early prepayment, in accordance with the Financing arrangements, RFC was liable to the Fund for a prepayment fee; no such fee was paid by RFC on the First Prepayments (the "**Prepayment Fees**"). In June 2017, the remaining principal amount of the Financing was repaid together with a contractual "Termination Fee" in the amount of US\$2.2 million (the "**Final Payment**"). The Claimant argued that the first three defendants failed to ask for an additional termination fee amount of US\$817,624.45 (the "**Outstanding Termination Fee**") from RFC, and that half of the US\$2.2 million of the Final Payment had been unlawfully diverted to FIR (i.e. the fourth defendant) at the direction of the first three defendants (the "**Diverted Sum**").
- In circumstances where it was the Fund that sought the First Prepayments, the Court considered it "*commercially unreal*" that RFC would have agreed to those prepayments together with the additional Prepayment Fees. In any event, the Fund had given its informed consent not to receive the Prepayment Fees, such that any related claims failed.
- With regard to the Final Payment, the Court found that the first three defendants acted to divert any termination fee paid by RFC and had instructed solicitors to draft certain termination documents without consent. However, the Fund had given its informed consent to not receiving the Outstanding Termination Fee. In respect of the Diverted Sum only, the Court found that the conduct of the first three defendants "*was not honest*", and made determinations on that basis, as below.

## **The claims**

### *Negligence*

- The Court was unable to find that the first three defendants had assumed a duty of care in respect of the management of the redemption of the Financing, as it was FIML (not the three defendants) that had been engaged by the Fund as Investment Manager. In turn, it was FCM London (and not the three defendants) that FIML had engaged as investment adviser.
- Whilst the first three defendants owed duties of fidelity under their contracts of employment with FCM London, and Mr Oumar Diallo owed a fiduciary duty in his position as director of FCM London, this did not equate to the first defendants assuming a duty of care to the Fund.

### *Deceit*

- The Claimant sought to rely on certain misrepresentations made by the first three defendants; however, the Court determined that the statements complained of had not in fact been made, with the effect that the claim in deceit failed.

### *Breach of fiduciary duty*

- The Claimant sought a determination that there was a relationship of trust and confidence as between the Fund and the first three defendants that was fiduciary in nature.
- Notwithstanding that the Fund's direct relationship was with FCM London, the Court found that the Fund had not consented to the steps taken by the first three defendants - who were acting on their own behalf - in respect of the Diverted Sum with the result that they owed fiduciary duties to the Fund as regards that Diverted Sum. In view of the dishonest conduct of those individuals taken in their own interest and not that of the Fund, the Court held that such a duty had been breached.
- The Court further determined that the existence of a clause headed "*Waiver of Fiduciary Duties*" within the IMA applied only to FIML and not to the first three defendants. In any event, the clause, properly construed, served to define the extent of the fiduciary duties owed by FIML, it did not prevent the existence of such duties.

### *Proprietary claims*

- The Court determined that the first three defendants had procured the diversion of the Diverted Sum by fraud, with the result that they held it (or its traceable proceeds) on constructive trust to the benefit of the Claimant.

### *Knowing receipt*

- Having determined that the first three defendants had breached their fiduciary duties to the Fund in respect of the Diverted Sum, the Court held that those defendants had sufficient knowledge that their receipt of the Diverted Sum was referable to the breaches of fiduciary duty, such that it would be unconscionable for them to retain the benefit.

### *Dishonest assistance*

- It was common ground that this cause of action requires a breach of fiduciary duty or trust. In respect of the Diverted Sum only, the Court determined that the first three defendants procured FIML's and/or FCM London's breaches of duty because they knew that the Diverted Sum was contractually due to the Fund.

### Conspiracy

- As identified at paragraph 476 of the judgment, for a claim in conspiracy to succeed, the alleged conspirators must be shown to: (i) have combined to take action, which is (ii) unlawful in itself with (iii) intention of causing damage to the Fund, which (iv) has incurred the intended damage.
- The Court ruled that there had been a conspiracy on the terms above in respect of the Diverted Sum, but not the Outstanding Termination Fee.

For the full case transcript, see [here](#).

◇ ◇ ◇

*Paul Hastings' London litigators form an integral part of our global litigation practice and provide services across a wide range of contentious areas including company and commercial disputes, banking, insolvency, intellectual property, employment law, data privacy, reputation management, civil and criminal fraud, internal investigations, bribery and corruption, money laundering and international arbitration.*

*Our London litigators understand the business implications of litigation and are trusted by clients to counsel them through their most complex and significant disputes. Please do not hesitate to contact any of the following Paul Hastings' London litigators:*

**Alex Leitch**

Partner  
Litigation and Investigations  
T: +44 (0)20 3023 5188  
[alexleitch@paulhastings.com](mailto:alexleitch@paulhastings.com)

**Jack Thorne**

Senior Associate  
Litigation and Investigations  
T: +44 (0)20 3023 5155  
M: +44 (0)7841 584814  
[jackthorne@paulhastings.com](mailto:jackthorne@paulhastings.com)

**Harry Denlegh-Maxwell**

Associate  
Litigation and Investigations  
T: +44 (0)20 3021 1008  
M: + 44 (0)7500 848498  
[harrydenlegh-maxwell@paulhastings.com](mailto:harrydenlegh-maxwell@paulhastings.com)

**Jonathan Robb**

Associate  
Litigation and Investigations  
T: +44 (0)20 3023 5110  
M: +44 (0)7498 930035  
[jonathanrobb@paulhastings.com](mailto:jonathanrobb@paulhastings.com)

**Gesa Bukowski**

Associate  
Litigation and Investigations  
T: +44 (0)20 3023 5169  
[gesabukowski@paulhastings.com](mailto:gesabukowski@paulhastings.com)

**Alison Morris**

Associate  
Litigation and Investigations  
T: +44 (0)20 3023 5143  
M: +44 (0)7523 131903  
[alisonmorris@paulhastings.com](mailto:alisonmorris@paulhastings.com)

---

Paul Hastings LLP

PHlit is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2022 Paul Hastings LLP.