

# Fiduciary duties and whether they can be contractually waived (*Floreat Investment Management Limited v Benjamin Churchill and others*)

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**Commercial analysis:** This case concerns Reading Football Club Ltd (the ‘Football Club’), who raised finance of US\$22,374,000.00 (the ‘Financing’) from Global Fixed Income Fund 1 Ltd (the ‘Fund’), a fund of which Floreat Investment Management Ltd (FIML) was appointed the Investment Manager and which later became the assignee of the claim in these proceedings. The factual background to this case is voluminous, and this analysis focuses only on those facts pertinent to the legal points discussed. Further details of the facts of the case and how the Financing of the Football Club worked, can be found within the heart of the judgment, which looks at the various evidence that was given, including the 101 factual findings made by the Judge. Written by Sam Claydon (partner) and Callum Reid-Hutchings (paralegal) at CANDEY.

*Floreat Investment Management Ltd v Benjamin Churchill and others* [2022] EWHC 357 (Comm)

## What are the practical implications of this case?

FIML was successful in its claim that the first three defendants had diverted and misappropriated part of the termination fees which were contractually due to the Fund. Mr Justice Knowles found that those defendants were liable for breach of fiduciary duty, conspiracy and dishonest assistance. Additionally, those defendants and the fourth defendant were liable for knowing receipt. Finally, all defendants were found to have held the Diverted Sum as constructive trustees.

The case further demonstrates that, in cases of fraud, the court is willing to find liability against individuals who would otherwise be able to ‘hide behind’ a corporate entity and various contractual structures. As to whether fiduciary duties may arise within certain similar relationships, careful analysis will need to be made of the factual matrix and the evidence given in each case, and further consideration will need to be made of the documentation and the role each individual has, and the actual responsibility that was placed on them within the particular contractual structure.

Simply inserting a ‘waiver of fiduciary duties’ clause will not be enough to vitiate the obligations that arise in a fiduciary relationship. As the judge did, one needs to give full consideration to the entire agreement, giving it its true interpretation and assess who, in substance, the clause is addressed to and upon whom the relevant duties and obligations are imposed.

## What was the background?

The judgment concerns the way in which the defendants, three of whom assisted with the financing arrangements for the Football Club as employees of FCM London, were alleged to have dealt with the early repayment of the Financing. Specifically, it was the Fund’s claim that three of the individual defendants were responsible for the Fund not receiving three specific sums of money—the Missing Termination Fee Payment, the Prepayment Fees and the Diverted Sum (as defined in the judgment). Further, the Fund claimed that these sums were contractually due to the Fund upon early repayment of the Financing. Knowles J held that the Fund was entitled to be paid only one of the payments, this is because the Fund had given its informed consent to not receiving the other two payments.

The Fund also contended that two of these three sums should have been asked for, but were not. The third was asked for, but was diverted so that it was received by the defendants rather than the Fund.

The first three defendants alleged that with regard to the first two sums, they acted on behalf of their employer, FCM London that was acting under its authority as Investment Adviser in respect of the Fund appointed by FIML, and had followed instructions on behalf of the Fund while acting in its best interests. The first three defendants argued that they were entitled to the third sum notwithstanding that it was prima facie contractually due to the Fund.

The claims differ as to which of the various parties were involved, but the causes of action advanced by FIML against the defendants were:

- negligence
- claims for breach of fiduciary duty
- proprietary claims
- claims in deceit
- claims for knowing receipt
- dishonest Assistance, and
- conspiracy

### **The Parties**

The Fund was the assignor of the claims heard. The assignee was FIML (the Investment Manager) which was appointed by the Fund.

The defendants were Mr Benjamin Churchill, Mr Oumar Diallo and Mr Zaki Nuseibeh (the first three defendants). These three were the only shareholders of the fourth defendant, IR Relations Ltd. All three worked for FCM London, which was the Investment Adviser to the Fund, which was in turn responsible for advising the Investment Manager FIML. Mrs Fatoumata Diallo, the fifth defendant, was Mr Diallo's wife.

The focus of this case analysis is the nature and scope of the fiduciary duties alleged against the defendants, and whether these duties had been waived by contract.

### **What did the court decide?**

#### **The nature and scope of the alleged duties**

The judge analysed first the Fund's claim for breach of fiduciary duty against the first three defendants.

Various factual findings were sought from the judge. First, the judge found that neither the Fund, nor FIML, had any oversight over the first three defendants' communications with the Football Club.

Furthermore, the judge found that the Fund via its instructions to FIML had given its consent to FCM London to take steps on behalf of the Fund in relation to the redemption of the facility including cash flows, through to giving instructions to others in relation to the redemption. Nevertheless, it was held that this consent did not extend to steps taken to change the destination of the Termination Fee, which the judge found was undertaken in the interests of the first three defendants and not the Fund.

Consequently, the Fund sought a determination that there was a relationship of trust and confidence between the Fund and the first three defendants, and that this was fiduciary in nature. The authorities referred to were *Bristol & West Building Society v Mothew* [1998] Ch 1 at para [18], in circumstances where a party is acting on behalf of another, or having a relationship with another as in *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 598G-H. Various other authorities were outlined at para [422].

There was no question that simply by being employees of FCM London as the Investment Adviser, which was appointed by the Investment Manager to the Fund, the three defendants had some form of relationship with the Fund, even though the Fund's direct contractual relationship was with FIML or FCM London.

The Fund additionally sought a determination from the court that by the first three defendants' roles in procuring the diversion of part of the termination fees from the Fund and failing to demand the Missing Termination Fee Payment from the Football Club amounted to breaches of their fiduciary duties to the Fund. The judge found in their favour only in respect of procuring the diversion of the Diverted Sum from the Fund, which was considered a breach of the three defendant's fiduciary duty to the fund.

#### **Waiver of Fiduciary Duties**

It was the defendants' primary argument that their fiduciary duties had been waived. Of significance here was clause 13 of the Investment Management Agreement entitled 'Waiver of Fiduciary Duties', which provided as follows:

'The Fund hereby agrees that, although [FIML] will take investment decisions and may act as the Fund's agent hereunder, the only duties or obligations [FIML] owes to the Fund are those set out in this Agreement or arising under any applicable statute, law or regulation to which it is subject and that [FIML] does not owe the Fund any other or further duties or obligations (whether arising from the fact that [FIML] is acting as the Fund's fiduciary or otherwise). The Fund hereby also agrees that any consent or waiver given by the Fund in this Agreement (including the schedules) in relation to any duty or obligation [FIML] might otherwise owe to the Fund, as applicable, shall be valid, effective and comprehensive even though the consent (or the disclosure to which it relates) is general only and not specific to the particular transaction concerned.'

The Fund further sought a determination that the above clause does not prevent a finding that the first three defendants owed fiduciary duties to the Fund. As the judge explained, clause 13 concerns FIML's obligations, not those of the first three defendants personally. Further, the clause itself does not prevent a finding that FIML is acting as the Fund's fiduciary. Instead, it limits the duties and obligations that FIML owes to the Fund. Thus, the judge found that clause 13 does not prevent a claim against the first three defendants, and found that fiduciary duties were owed by them to the Fund. The fact that the first three defendants had acted dishonestly assisted the judge in reaching that conclusion. In addition, clause 1.1(b) of the Investment Management Agreement provided that the headings to a clause 'shall not affect the interpretation or construction of this Agreement'. The terms of clause 13 itself referred to 'the fact that [FIML] is acting as the Fund's fiduciary'. The judge, looking at the true interpretation of the clause, found that FIML/FCM was also the Fund's fiduciary and owed the fiduciary duties that arose by law by reason of that relationship. Therefore, those duties were not waived by that clause.

**Case details:**

- Court: Commercial Court, Queen's Bench Division, Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mr Justice Robin Knowles CBE
- Date of judgment: 18 February 2022

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