Neutral Citation Number: [2022] EWHC 357 (Comm)

Case No: CL-2019-000782

**IN THE HIGH COURT OF JUSTICE**
**THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Rolls Building, Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2022

**Before:**
**THE HON. MR JUSTICE ROBIN KNOWLES CBE**
- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **FLOREAT INVESTMENT MANAGEMENT LIMITED** | **Claimant** |
| **- and –** | |
| **(1) BENJAMIN CHURCHILL**<br>**(2) OUMAR DIALLO**<br>**(3) ZAKI MOHAMMED NUSEIBEH**<br>**(4) IR RELATIONS LTD**<br>**(5) FATOUMATA DIALLO** | **Defendants** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Nigel Jones QC, Sri Carmichael and Oliver Hyams** (instructed by **Lewis Silkin LLP**) for the Claimant
**David Cavender QC and Owain Draper** (instructed by **Greenberg Traurig LLP**) for the Defendants

Hearing dates: 21-24 June, 28-30 June, 1 July, 6-8 July 2021
- - - - - - - - - - - - - - - - - - - - -

## Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

**Robin Knowles J, CBE:**

## The Claim

1. In 2017 The Reading Football Club Limited ("Reading FC") raised finance of US$22,374,000 ("the Financing") from Global Fixed Income Fund 1 Limited ("the Fund").

2. This is the judgment of the Court on the trial of claims challenging the way in which the Defendants, four of whom are individuals, are alleged to have dealt with the early repayment of the Financing.

3. In highest level summary, the Claimant alleges that three of the individual Defendants are responsible and liable for the Fund not receiving three sums of money that the Claimant says were contractually due to the Fund upon early repayment of the Financing.

4. According to the Claimant, two of these sums should have been asked for but were not, and the third was asked for but diverted so that it was received by the Defendants rather than the Fund.

5. Again in highest level summary, the Defendants allege that with the first two sums the three individual Defendants involved acted on behalf of their employer (the Fund's investment adviser), followed instructions given on behalf of the Fund, and acted in its best interests. They allege that they were entitled to the third sum.

6. The claims differ according to which of the three sums of money is involved and which Defendant, but include claims for negligence, claims for breach of fiduciary duty, proprietary claims, claims in deceit, claims for knowing receipt and dishonest assistance, and claims in conspiracy.

7. The dispute exists in what has become an environment of distrust and extreme breakdown in relations between the parties.

8. In its closing argument at trial, the Claimant submitted that the Court was required to determine three overarching questions. It divided these into a number of Issues and with a number of findings (some in compound form) sought in respect of each issue. I turn to these later in the judgment, but it will be convenient to deal with some in the earlier narrative.

## The Fund

9. The Fund is the assignor of the claims that the Court has heard at trial. Its assignee, Floreat Investment Management Limited (the Claimant), was represented at the trial by Mr Nigel Jones QC, Ms Sri Carmichael and Mr Oliver

Hyams. For convenience I will generally refer to the Claimant as "the Fund" so as to distinguish references to the part played by Floreat Investment Management Limited ("FIML") in its own right.

10. The Fund is an exempted company incorporated in the Cayman Islands. It raised capital by the private placement of shares offered through an Offering Memorandum dated 28 September 2015 ("the Offering Memorandum"). The target size of the Fund was US$50 million.

11. Subscription for shares in the Fund was by means of a Subscription Agreement, governed by the laws of the Cayman Islands and subject to the exclusive jurisdiction of the Courts of the Cayman Islands. By Clauses 3.1, 3.2.3 and 3.2.5 of the Subscription Agreement each subscriber acknowledged that:

> "it has received and considered the Offering Memorandum and the [Memorandum and Articles of Association of the Fund] (together, the Documents) and this subscription for Shares is made on the terms and subject to the provisions of the Documents."

12. In its closing submissions at trial, the Fund sought the following finding:

> "Legal finding 6.1: The Offering Memorandum was incorporated into the Subscription Agreement between the Fund and its investor shareholders and thus set out the Fund's contractual obligations to its investor shareholders."

13. I am able to make finding 6.1. In other cases, the finding might require some discussion about the nature of obligations owed by a company to its shareholders. But I do not think that necessary in the present case.

14. Investors started subscribing for shares in the Fund in early September 2015.

15. The Offering Memorandum described the Investment Objective of the Fund in these terms:

> "The Fund intends to construct a globally diversified portfolio of Loans and Investments generating a net income of at least 5% to support a target 5% per annum Preference Dividend to be payable to its Shareholders and to return to Shareholders the sum the Shareholders have invested."

16. The Offering Memorandum continued in terms that, broadly speaking, indicated that costs and expenses would be met by its Investment Manager, but the Investment Manager would enjoy the Fund's income beyond that which was required to pay the 5% per annum preference dividend to the shareholders together with principal.

17. Thus, the Offering Memorandum provided:

> "Under the Investment Management Agreement, the Fund's organisational costs and Operating Expenses will be met by the Investment Manager out of its own resources.

> Any excess in the net income of the Fund (including any net income over an annualised 5% on the funds subscribed earned in the initial nine months) over the amounts required to fund the Preference Dividend (including any accrued but unpaid) and after taking into account any impairment in the holding value of any Loan(s) or Investment(s) or any realised loss or shortfall following repayment or disposal will be paid to the Investment Manager, in lieu of any other management or performance fees
>
> …".

A quarterly net asset valuation or NAV was required.

18. The Offering Memorandum stated that the Fund did not have employees, its directors were non-executive and it was "dependent on the Manager and the Investment Adviser for sourcing Loans and Investments". An Opportunity Review Committee would:

> "… review Loan and Investment proposals and provide recommendations as to whether a proposal be submitted for further review and decision by the Manager, or subjected to further due diligence or not proceeded with."

19. In relation to early repayment to the Fund or disposal by the Fund of a Loan or Investment it had made, the Offering Memorandum provided:

> "If break costs, a prepayment fee or premium over principal (or equivalent) is or are payable [to the Fund] on early repayment or disposal of a Loan or Investment, these costs, break fee or premium will be added to the Fund's cash reserves to meet any shortfalls in income received or principal repaid."

## The Floreat Group

20. The Offering Memorandum described, among others, a Mr Hussam Otaibi. He was said to be "the founder of the Floreat Group which he started in 2000 in London and which he created to manage the wealth of the Otaibi family and one other family."

21. It was made clear in the Offering Memorandum that entities in the Floreat Group of companies intended to subscribe for shares in the Fund with a view to owning approximately 10% of the shares issued.

## The Directors of the Fund

22. The directors of the Fund were listed in the Offering Memorandum as Mr Mutaz Otaibi, Mr David Whitworth and Mr Christopher LeBeau. At the trial the Court heard evidence from Mr Mutaz Otaibi and Mr Whitworth.

23. Mr Mutaz Otaibi is Mr Hussam Otaibi's brother. He was described in the Offering Memorandum as "a senior executive and entrepreneur with extensive

venture development, M&A and management experience", serving as a Managing Partner and CEO of the Floreat Group. He was stated to be "a founding member of the Floreat Group which he re-joined in 2011". It is common ground that Mr Mutaz Otaibi was a director of the Fund between 13 July 2015 and 18 April 2018.

24. Mr Whitworth was described in the Offering Memorandum as "qualified in London as a chartered accountant". He accepted in his evidence the description that he was an "offshore professional director" who in 2017 would have held "probably slightly less" than "about 20 directorships".

25. Mr LeBeau, who did not give evidence at trial, was stated in the Offering Memorandum to serve "as an independent director on a wide range of alternative investment funds" and to work at Maples Fiduciary Services (Cayman) Limited.

## The Investment Manager, FIML

26. FIML was incorporated in June 2015. By an Investment Management Agreement dated 20 August 2015, FIML was appointed by the Fund as its Investment Manager.

27. It is common ground that Mr Mutaz Otaibi was a director of FIML between 29 July 2016 and 18 April 2018, and that he is and was at all material times the sole shareholder in FIML.

28. Mr Whitworth's evidence at trial that Mr Mutaz Otaibi was:

> "… merely a non-executive director of [the Fund and FIML], just like myself".

It was true that Mr Whitworth's directorship of the Fund was non-executive (he was not a director of FIML) but what he said was not true as regards Mr Mutaz Otaibi. Mr Mutaz Otaibi was CEO of the Floreat Group and the one executive director of FIML.

29. On 18 November 2016 a Mr Nicola Corsetti was appointed a director of FIML. He too gave evidence at the trial. Mr Corsetti accepted a description of his job as "a professional director of offshore companies", "amongst other things". His evidence was that he probably had between "10 to 15 entities at that time where I was a director", although the figure today would be "say 50 entities where I act as director".

30. There were other directors of FIML from time to time.

## The Investment Management Agreement

31. The Investment Management Agreement was governed by English law. Clause 1.1 (b) of the Investment Management Agreement provided that:

> "… the headings to clauses are for ease of reference only and shall not affect the interpretation or construction of this Agreement".

32. By Clause 3.1 of the Investment Management Agreement, FIML agreed with the Fund, subject to certain exceptions, that FIML shall:

> "… take all day to day decisions and otherwise act as the Manager deems appropriate in relation to the management of the Portfolio for the account of the Fund without prior reference to the Fund".

33. By Clause 3.8, the Fund irrevocably appointed FIML (with full power of substitution) to be its attorney:

> "to sign or execute on its behalf all documents … which the Manager (acting reasonably) deems necessary or desirable in connection with … the proper performance by the Manager of its duties and obligations hereunder".

34. Clause 3.16 of the Investment Management Agreement provided that FIML had, subject to certain requirements:

> "… full power and authority to appoint an investment adviser and/or to delegate the performance of its investment management services under this Agreement to any Associate".

35. "Associate" was given this meaning "unless the context otherwise requires":

> "… in relation to [FIML], any person controlling, controlled by or under common control with [FIML] (where control means possession, directly or indirectly, of the power to direct or cause the direction of the management of any person, whether through the ownership of voting securities, by contract or otherwise)"

36. It is common ground that the Investment Management Agreement contained an exclusion/limitation of liability clause, and an indemnity clause in favour of FIML, each save in the event of actual fraud, gross negligence or wilful default.

37. These provisions included the following within Clause 10, headed "Limitation of Liability and Indemnity of the Manager":

> " 10.1 [FIML] will not be liable for any damage, loss, claims, proceedings, demands, liabilities, costs or expenses whatsoever (each a Loss) suffered or incurred by the Fund, save to the extent that such Loss arises directly as a result of the actual fraud, Gross Negligence or wilful default of [FIML] or its officers or employees, in which case [FIML's] liability to the Fund shall be limited to an amount no more than US$5,000,000.
>
> …

> 10.3 The Fund shall fully indemnify [FIML], its Associates and their respective officers, employees and agents (each an Indemnified Person) from and against any Loss which such Indemnified Person may incur in the course or as a consequence of the performance of [FIML's] duties under or pursuant to this Agreement, except to the extent that such Loss arises directly as a result of any actual fraud, Gross Negligence or wilful default of the Indemnified Person in question, or their officers and employees."

38. Clause 13, headed "Waiver of Fiduciary Duties", was in these terms:

> "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."

39. Clauses 19 and 22 of the Investment Management Agreement provided:

> "19 Entire agreement
>
> This Agreement sets forth the entire agreement and understanding between the parties in connection with the investment management arrangements described herein and no party has relied on any warranty or representation except as expressly stated or referred to in this Agreement."
>
> "22 Variation of the agreement in writing
>
> Save as otherwise expressly provided herein, no alteration or addition to this Agreement shall be valid unless made in writing and signed by both of the parties hereto."

## The Placement Agent, FMB

40. On 1 September 2014 Mr Mutaz Otaibi became a director of Floreat Merchant Bank Limited ("FMB"), replacing Mr Hussam Otaibi.

41. By a Placement Agent Agreement dated 8 September 2015 and governed by English law, FIML as Investment Manager appointed FMB as Placement Agent, with duties to promote shares in the Fund on a private placement basis.

42. By Clause 6.1 of the Placement Agent Agreement:

> "6.1 In consideration of the services described in this Agreement, [FMB] shall be entitled to receive, and [FIML] shall cause to be paid, an administration fee on an investment-by-investment basis, in such amounts and at such times as the parties may from time to time agree."

43. The Offering Memorandum stated:

> "No introduction or placement fees will be payable by the Fund. Any placement agent's fees will be met by the Investment Manager [FIML], pursuant to the Placement Agency Agreement."

## The Defendants

44. Mr Ben Churchill, Mr Oumar Diallo and Mr Zaki Nuseibeh are the first three of five Defendants to this litigation. All five Defendants are represented by Mr David Cavender QC and Mr Owain Draper.

45. Each of Mr Churchill, Mr Diallo and Mr Nuseibeh had been with Deutsche Bank earlier in their career. The Offering Memorandum further described Mr Churchill, Mr Diallo and Mr Nuseibeh as a team "of experienced professionals with strong track records in investment, covering origination, execution, legal and operations". The Court heard the evidence of each of them at the trial.

46. It is common ground that Mr Churchill, Mr Diallo and Mr Nuseibeh are together the only shareholders of the fourth Defendant, IR Relations Ltd, formerly named Floreat Investor Relations Limited ("FIR") until a name change on 29 March 2019.

47. Mrs Fatoumata Diallo, the fifth Defendant, is Mr Diallo's wife.

## FCM London, FAL and FCM Cayman

48. Mr Churchill, Mr Diallo and Mr Nuseibeh met Mr Hussam Otaibi in Spring 2013, and Mr Mutaz Otaibi in May 2013. By a month later they had all broadly agreed to work together.

49. Floreat Capital Markets Limited ("FCM London") was incorporated in England & Wales on 15 July 2013. It is common ground that Mr Mutaz Otaibi and Mr Diallo have been directors of FCM London at all material times.

50. On 22 July 2013 Mr Churchill, Mr Diallo and Mr Nuseibeh began working for FCM London, signing employment contracts on 15 August 2013. It is common ground that they were employees of FCM London between 22 July 2013 and 10 December 2018, when they resigned as employees.

51. Each of the three were also later described in the Offering Memorandum of the Fund as partners and shareholders of FCM London. It is common ground that the shareholding in FCM London has at all material times been held 50% by a

company owned by Mr Mutaz Otaibi, Mr Hussam Otaibi and a Mr James Wilcox, and 50% by Mr Churchill, Mr Diallo and Mr Nuseibeh. The reference in the Offering Memorandum to "partners" appears to have been an informal reference rather than to a legal relationship of partnership.

52. In February 2014 the suggestion was made that a shareholders' agreement should be drafted. A final version was never achieved.

53. An entry in the Offering Memorandum indicated that after establishing FCM London, "the team were quick to attract interest from a wide network of clients, ranging from family offices to investment banks". In Mr Churchill's case the reason given in the Offering Memorandum for establishing FCM London was "to continue his work within the illiquids space and explore other opportunities within the credit space presented by the wider Floreat Group".

54. The fact that FCM London was "onshore" led in practice to the involvement of a Jersey registered company, Floreat Advisors Limited ("FAL"). I accept the following from Mr Diallo's evidence in chief:

> "It transpired that [Mr Mutaz Otaibi] and [Mr Hussam Otaibi] did not want revenue coming into the UK. They would use words to the effect that they did not mind keeping FCM [London] in the UK but wanted it to be as "lean" as possible in terms of the revenue onshore, so that profits would be distributed offshore. … We agreed on the basis that the offshore entity would mirror what we had in FCM [London].
>
> That is when FAL came into the picture. Mutaz said that he had an existing Jersey company, [FAL] which could be converted to mirror the ownership of FCM [London]. Any profits generated would be sent to FAL and split. The difference was [Mr Mutaz Otaibi] decide to hold [Mr Hussam Otaibi's] and [Mr Wilcox's] portion on their behalf …. The offshore structure created a situation where [sums] … generated by FCM [London]'s operations were never in fact received by FCM [London] ….".

55. Another company bore the same name as FCM London (i.e. Floreat Capital Markets Limited). This was a company in which Mr Churchill, Mr Diallo and Mr Nuseibeh owned no interest. It is common ground that Mr Mutaz Otaibi is the sole shareholder of FCM Cayman and Mr Whitworth is the sole director. It had been incorporated on 28 July 2016. In this judgment I will refer to it as "FCM Cayman".

56. In defining "Investment Adviser" the Fund in its Offering Memorandum said this of FCM London:

> "The Investment Adviser to the Fund is [FCM London]. … The Investment Adviser is (inter alia) responsible for advising the Investment Manager [FIML] on the Fund's Loans and Investments and will, if instructed to do so, arrange transactions to give effect to investment decisions made by the Investment Manager. The Investment Adviser may agree to take on additional duties which, where required, it is authorised to perform."

57. I was satisfied at the trial that Mr Churchill, Mr Diallo and Mr Nuseibeh were at all material times familiar with the Offering Memorandum.

## The alleged "Profit Share Agreement" in 2013

58. It is the Defendants' case that there was an agreement that they describe as "the Profit Share Agreement" formed in 2013.

59. At paragraph 17 of the Defence this is described as follows:

> "… at the outset of the arrangement between the Floreat Group and [Mr Churchill, Mr Diallo and Mr Nuseibeh] in or about July 2013, it was agreed with Mr Mutaz Otaibi and Mr Hussam Otaibi (and [FCM London]) that they would share net profits 50/50 – with Mr Churchill, Mr Diallo and Mr Nuseibeh as reflected by the (50/50) management and ownership of [FCM London]. This was to be applied on an agreed basis to each loan/transaction."

60. At trial Mr Mutaz Otaibi's evidence was as follows:

> "… What was agreed is a shareholding of 50 per cent in the company. There was an agreed business plan that was put forward by [Mr Churchill, Mr Diallo and Mr Nuseibeh], negotiated the business plan was very clear on who will fund the working capital until what time and at what milestone. If there are profits in the company, how dividends can be paid, just like any other company."

61. I accept Mr Mutaz Otaibi's evidence. It is consistent with what the parties did at the time in forming FCM London. A number of documents, from later dates, were put on behalf of the Defendants to Mr Mutaz Otaibi to challenge his evidence on this. His evidence withstood the challenge.

62. What was agreed, and done, was to establish FCM London as a company in which the ownership was equally shared and from which dividends would be equally shared. Where FCM London achieved profit that benefit would be enjoyed equally by the two shareholding groups but only in the way that shareholders benefit from the success of a company in which they have shares. Profit would be after costs including salaries paid by FCM London to Mr Churchill, Mr Diallo and Mr Nuseibeh. That is where the parties ended up, however they may have discussed it in initial negotiations and however the position may be confused by subsequent performance differing from what was agreed.

63. To the extent that the Defence suggests more than this, I do not accept it. The evidence from the Defendants was imprecise. An example is Mr Diallo's evidence that "FCM [London] was a new company with 50/50 ownership and it was always intended that profits would be shared 50/50".

64. In its closing, the Fund seeks a finding (its Factual/legal finding 8.1) that there was "no 2013 [Profit Share Agreement]". I am able to make that finding 8.1.

## The appointment of FCM London as Investment Adviser

65. By an Investment Advisory Agreement dated 20 August 2015 FIML appointed FCM London "on a non-exclusive basis as its investment adviser in relation to the Fund".

66. The Offering Memorandum described Mr Churchill, Mr Diallo and Mr Zaki as "the Investment Adviser's team". The description of them as a team was apposite. The description of them as the Investment Adviser's team made clear that they worked for FCM London.

## The Investment Advisory Agreement

67. The Investment Advisory Agreement was governed by English law.

68. Its second, third and fifth recitals were in these terms:

> "(B) Pursuant to (inter alia) clause 3.16 of the Investment Management Agreement, [FIML] may appoint persons to perform (in whole or in part) certain of its duties or obligations under the Investment Management Agreement or to provide advice in connection therewith upon such terms as to authority, liability and indemnity as shall be determined by [FIML].
>
> (C) [FIML] wishes to appoint [FCM London] to provide advice to [FIML] in connection with potential acquisition and realisation of Loans and Investments, and [FCM London] wishes to accept such appointment on the terms and conditions set out herein.
>
> …
>
> (E) [FIML] has agreed to pay the fees and expenses of [FCM London] in connection with the provision of the investment advisory services under this Agreement."

69. Clause 2 provided in part:

> "2.1 [FIML] as [Alternative Investment Fund Manager] of the Fund, hereby appoints [FCM London] on a non-exclusive basis as its investment adviser in relation to the Fund, … on the terms contained in this Agreement, and [FCM London] accepts such appointment and agrees to assume the obligations set out in this Agreement.
>
> 2.2 … [FIML] is a Professional Client (as define in the [Financial Conduct Authority] Glossary) of [FCM London] and [FCM London] will provide the Services under this Agreement on that basis.

70. The Investment Advisory Agreement provided by Clause 3.11 that it was:

> "… intended that the investment advisory services of [FCM London as the Investment Adviser] pursuant hereto will be provided by Ben Churchill, Oumar Diallo and Zaki Nuseibeh as employees of the Investment Adviser".

71. Clause 6.3 of the Investment Advisory Agreement provided:

> "[FCM [London] undertakes that it shall, and shall use all its reasonable endeavours to procure that its officers and employees shall, serve the interests of [FIML] (as AIFM of the Fund) in good faith, discharge its obligations hereunder with reasonable skill and care and devote such time and attention to the performance of its duties hereunder as shall be required properly to discharge such duties in accordance with the provisions hereof."

72. As with the Investment Management Agreement, it is common ground that the Investment Advisory Agreement contained an exclusion/limitation of liability clause and an indemnity clause in favour of FCM London. Clause 8 included these terms:

> "8.1 [FCM London] will not be liable for any damage, loss, claims, proceedings, demands, liabilities, costs or expenses whatsoever (Loss) suffered or incurred by [FIML], save to the extent that such Loss arises directly as a result of the actual fraud, Gross Negligence, dishonesty or wilful default of [FCM London] or its officers or employees.
>
> …
>
> 8.3 [FIML] shall fully indemnify [FCM London], its Associates and their respective officers, employees and agents (each an Indemnified Person) from and against any Loss which such Indemnified Person may incur in the course or as a consequence of the performance of [FCM London's] duties under or pursuant to this Agreement, except to the extent that such Loss arises directly as a result of actual fraud, Gross Negligence, dishonesty or wilful default of the Indemnified Person in question, or their officers and employees."

"Associate" was given this meaning "unless the context otherwise requires":

> "… in relation to [FCM London], any person controlling, controlled by or under common control with [FCM London] (where control means possession, directly or indirectly, of the power to direct or cause the direction of the management of any person, whether through the ownership of voting securities, by contract or otherwise)"

73. Clauses 15, 18 and 21 of the Investment Advisory Agreement provided:

> "15 Entire agreement
>
> This Agreement sets forth the entire agreement and understanding between the parties in connection with the investment management [sic.]

arrangements described herein and no party has relied on any warranty or representation except as expressly stated or referred to in this Agreement.

…

18 Variation of the agreement in writing

18.1 Save as otherwise expressly provided herein, no alteration or addition to this Agreement shall be valid unless made in writing and signed by both of the parties hereto.

18.2 The parties may agree to the assumption by [FCM London] pursuant hereto of additional duties which at the relevant time it is authorised to perform."

…

21 Contracts (Rights of Third Parties) Act 1999

A person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms."

## The Fund: fee structures in more detail

74. It was noted above that, broadly speaking, the Offering Memorandum indicated that costs and expenses would be met by its Investment Manager (that is, by FIML), but FIML would enjoy the Fund's income beyond that which was required to pay the 5% per annum Preference Dividend to the Shareholders together with principal.

75. The Offering Memorandum had more to say on the subject of management fees as follows:

> "No pro-rata management fee is payable. however [FIML] will in lieu of any fee, be entitled to retain (i) in respect of the first nine months any excess in the net income over an annualised 5% on the funds subscribed and in respect of each subsequent quarter any excess in the Fund's net income over the amounts required to fund the Preference Dividend, including any accrued but unpaid, in each case after taking into account any impairment in the holding value of any Loan(s) or Investment(s) or any realised loss or of shortfall following repayment or disposal, on a quarterly basis …
>
> If in respect of any period there is a shortfall (taking into account the Fund's cash reserves), and the required level of Preference Dividend cannot be paid, the shortfall will be carried forward and offset against any excess for the following period and thus taken into account in determining the level of remuneration payable to [FIML] in respect of the following period. The net income of the Fund up to an annualised 5% on the funds subscribed and in the initial nine months will be applied to fund the cash reserves.

> If there is a default in repayment of any Loan, or redemption of an Investment, and the quantum of the principal amount cannot be realised through a sale of the Loan or Investment, this could preclude the Fund from repaying the full amount subscribed to Shareholders. However, if over the course of the life of the Fund, any Loans and Investments are repaid or sold at a premium to their principal amount (or acquisition costs) this excess will be available to fund any shortfall in principal receipts in respect of any other Loans and Investments. Upon the final winding up, or refinancing, of the Fund any excess in the assets of the Fund, after payment of all accrued Preference Dividend at the target rate and payment of all subscription monies received by the Fund back to Shareholders, will be paid to [FIML] in lieu of a management fee in addition to any such payments in excess in respect of excess income as described in the previous paragraph."

76. Clause 4.1 of the Investment Management Agreement provided:

> "[FIML] will, in lieu of any other fee, be entitled to retain: (i) in respect of the first nine months any excess net income over an annualised 5% on the funds subscribed and in respect of each subsequent quarter any excess in the Fund's net income over the amounts required to fund the Preference Dividend, including any accrued but unpaid, in each case after taking into account any impairment in the holding value of any Loan(s) or Investment(s) or any realised loss or shortfall following payment or disposal …".

77. Of investment advisory (rather than management) fees, the Offering Memorandum said:

> "The fees of [FCM London] under the Investment Advisory Agreement shall be met by [FIML] out of the Management Fee and will generally be agreed on a Loan-by-Loan (or Investment-by-Investment) basis."

78. Clause 4.7 of the Investment Advisory Agreement was headed "Advisory Fee" and was in these terms:

> "The Advisory Fee shall be paid out of the Management Fee received by [FIML] pursuant to the Investment Management Agreement in such amounts and at such times as the parties may from time to time agree."

Clause 1.1 defined "Advisory Fee" as meaning:

> "… the fee to be paid by [FIML] to [FCM London] for the services pursuant to this Agreement and in accordance with clause 4.7".

79. By Clause 4.1 of the Investment Advisory Agreement FIML was to pay FCM London:

> "… on a Loan-by-Loan (or Investment-by-Investment) basis, the Advisory Fee in accordance with clause 4.7 … and the terms set out in the Memorandum, and shall reimburse the expenses of [FCM London] as set out in clause 4.8 below".

80. By Clause 4.2, FCM London was to invoice FIML the relevant amounts for the provision of services to the Fund and FIML was to:

> "… pay the Advisory Fee and reimburse the expenses to such account(s) as may be nominated by [FCM London] from time to time".

## The Fund: treatment of fees in practice

81. On the subject of how the Fund operated in practice, the Fund asks the Court to make a number of findings:

> "Factual finding 7.3: Throughout the lifetime of the Fund, the Fund paid its excess net income to FIML, which (after paying its costs and expenses) allocated this to FMB and FCM [London] in equal shares, pursuant to the Placement Agent Agreement between FMB and FIML and the [Investment Advisory] Agreement between FCM [London] and FIML."
>
> "Factual finding 7.4: [Mr Churchill, Mr Diallo and Mr Nuseibeh] were aware of this 50/50 FMB/FCM [London] fee split and Diallo actively promoted it."
>
> "Factual finding 7.5: [Mr Churchill, Mr Diallo and Mr Nuseibeh] believed that any money the Fund received would be considered as income and any excess net income would be paid to FIML and then split 50/50 between FMB and FCM [London], such that they could receive at most 25% of the money paid to the Fund (minus the Fund's and FIML's costs and expenses)."
>
> "Factual finding 7.6: FCM [London] was always balance sheet insolvent."
>
> "Factual finding 7.7: [Mr Churchill, Mr Diallo and Mr Nuseibeh] knew that FCM [London] was reliant on loans from FMB and then FHL and then FIML to operate and had therefore never been in a position to distribute profits."

82. The Fund showed me only very limited underlying financial material. It did not show me full accounts identifying the entries relevant to requested finding 7.3 or 7.4.

83. The position is further complicated by the use of FAL to receive sums generated by FCM London's operations, as described above from the evidence of Mr Diallo, and in this way by Mr Nuseibeh:

> "… work that was being done by FCM was, if you like, being remunerated in a different entity."

The parties did not show me the full financial inter-relationship of FCM London and FAL. Nor can I be confident that FIML in fact met FCM London's expenses

as contemplated by Recital (E) and Clauses 4.1 and 4.2 of the Investment Advisor Agreement.

84. Further, the allocation of net income in equal shares between FMB and FCM London was not, as alleged, "pursuant to the Placement Agent Agreement between FMB and FIML and the [Investment Advisory] Agreement between FCM [London] and FIML." Those agreements each provide for the payment by FIML of fees to FMB and FCM London respectively, but they do not provide for equal shares, or for shares of net income. Mr Muffett's evidence was that FMB and FCM London were allocated "the same fees" by FIML, but then he also said that until December 2017 "FIML only paid advisory fees to FCM". Mr Diallo did give evidence about "dilution of running fees", but then he also said that other fees would "never be shared with [FMB]".

85. In relation to requested finding 7.7 there was evidence to allow me to accept that Mr Churchill, Mr Diallo and Mr Nuseibeh knew that FCM London had loans from FMB and FHL, and on 30 May 2017 an advance on fees from FIML.

86. Unaudited financial statements to 31 December 2014 for FCM London showed net liabilities of £8,282. There was also evidence from Mr Julian Muffett, an associate of a firm of accountants to various companies within the Floreat Group, and "essential[ly] … Floreat Group's Financial Controller" and who was not challenged by cross examination, that FCM London's balance sheet at 31 December 2016 showed net liabilities of £40,066, after a year in which it had made a profit.

87. But with some exceptions just mentioned, in the result I did not consider I had sufficient evidence, and in particular underlying financial material, to persuade me I could reliably make findings 7.3 to 7.7 as asked. This includes the unqualified findings sought in these terms:

    a. that "throughout the lifetime of the Fund" it paid all excess net income to FIML (requested finding 7.3);

    b. that "throughout the lifetime of the Fund" FIML "(after paying its costs and expenses) allocated [excess net income received from the Fund] to FMB and FCM [London] in equal shares" (requested finding 7.3);

    c. that FCM London was "always" balance sheet insolvent (requested finding 7.6);

    d. that FCM London had "never" been in a position to distribute profits.

## Mr Mutaz Otaibi's alleged insistence in 2015 over destination of payments

88. The Fund invites a finding (Factual Finding 7.1) that Mr Mutaz Otaibi expressly insisted on an occasion in June 2015 that money could only be paid to the party to whom it was contractually due.

89. I am able to make this finding 7.1. However, I do not consider it material. The episode was confined to its particular circumstances. The Fund adds the contention that it was a motivation for Mr Churchill, Mr Diallo and Mr Nuseibeh later to lie, but I am not persuaded that it had that effect.

## The alleged "Profit Share Agreement" from 2015

90. The Defendants' case that there was a Profit Share Agreement continued:

> "Following the incorporation of the Fund and FIML (and the entering into of the [Investment Advisory] Agreement and the [Investment Management] Agreement) it was agreed between [Mr Churchill, Mr Diallo and Mr Nuseibeh] (on their own behalves and [FCM London]) and with Mr Mutaz Otaibi (on behalf of FCM [Cayman], FIML and the Fund) that that arrangement would also apply to the net profits in respect of work done by FCM London on behalf of the Fund and FIML ("The Profit Share Agreement")."

91. It was further alleged:

> "That agreement was performed by the parties satisfactorily to summer 2017 that 50/50 agreement being a standing agreement reached and/or continued under clause 4.7 of the [Investment Advisory Agreement] pleaded above. …".

92. I do not accept that the alleged Profit Share Agreement was "a standing agreement reached and/or continued under clause 4.7 of the [Investment Advisory Agreement]". Clause 4.7 of the Investment Advisory Agreement spoke of an agreement from time to time between FIML and FCM London over the amount of income in the form of an advisory fee to be paid to FCM London by FIML, out of a management fee received by FIML pursuant to the Investment Management Agreement. By contrast the alleged Profit Share Agreement is said to have been concerned with an agreement between the owners of FCM London, and over net profits.

93. The Defendants provided no evidence that persuaded me that "following the incorporation of the Fund and FIML (and the entering into of the [Investment Advisory] Agreement and the [Investment Management] Agreement)" there was an additional agreement in the form of the alleged "Profit Share Agreement" in 2015. No such additional agreement was documented. I have already made clear my finding that there was no background of a 2013 "Profit Share Agreement".

94. At the same time, it is fair to note that the ground between the parties over this question whether there was a Profit Share Agreement narrowed. In the Defendants' written closing things were put this way:

> "When pressed, [Mr Mutaz Otaibi] took refuge in semantics: "It's not a profit share per se". If his point is that the agreement as to profit sharing

> was given effect through shareholdings in various corporate vehicles, such that profits were distributed in the form of dividends, that is consistent with [Mr Churchill, Mr Diallo and Mr Nuseibeh's] case. Mr Nuseibeh, for example, said that the initial shareholding in FCM [London], "was to represent the 50/50 JV partnership." As long as the 50/50 split was adhered to as the guiding principle, [Mr Churchill, Mr Diallo and Mr Nuseibeh] were relatively unconcerned as to how [Mr Mutaz Otaibi] wished to give effect to this."

95. However, the most important aspect of the alleged Profit Share Agreement was not whether division was 50/50 but what was to be divided.

96. The Defence refers to "the arrangement" applying to "net profits". In its Defence when dealing with the alleged Profit Share Agreement, a table was provided by the Defendants for the purpose of these proceedings. It is said to set out:

> "… the net profit split agreed by the parties for the activities undertaken by FCM [London] prior to the current dispute – all on the agreed 50/50 basis."

97. The table shows 16 items of revenue with trade dates across the period 18 February 2015 to 21 December 2018. Some are modestly reduced before being restated as "dividends". Leaving aside the item concerned with these proceedings (described in the table as the "[Reading FC] Termination Fee"), the remainder are principally "upfront" fees or quarterly fees attributed to a new fund FAN 1, discussed further below. None appears comparable with the Reading FC Termination Fee, which as will be seen below was (in my judgement) a contractual Termination Fee payable to the Fund on redemption (or exit) of a note facility made available by the Fund. That Fee is one of those shown without reduction before being restated as "dividends".

98. Under cross examination from Mr Jones QC, Mr Diallo was asked and answered this question in this way:

> "Q. And the exit fee isn't just generically a fee, it is in character different from all other fees which were introducer or upfront fees; it is a fee due to the fund, Mr Diallo, isn't it?
>
> A. Yes, contractually the fee was due to the fund. I don't think we ever disputed that. We all knew that, all of us. None of us thought otherwise. There was only one transaction with Reading, that's what I said, and that transaction was the fund's transaction. Nobody else had a contractual link to Reading."

99. There was evidence at trial that Mr Diallo was only later, in 2017, to have the "idea" of applying any Profit Share Agreement to the "[Reading FC] Termination Fee", and even then that "idea" was not agreed. Thus, in the cross examination of Mr Diallo by Mr Jones QC, Mr Jones QC asked:

> "Q. All right. I just want to discuss what's going on behind this: "Found an idea ..." This is your message to Mr Nuseibeh.

A. Correct.

Q. "... on why FIR Exit fees are like upfront fees these are fees and were never to be shared with FMB and due to conflict never to be run via the Fund so we used the two Cayman entities." What's that all about?"

100. Mr Diallo's answer was as follows:

"A. So, this is basically 2 June [2017], I think, is the day where the formal demand for the loan repayment has been made to Reading, and in anticipation to discussion with Mutaz on where to send the fees and how to split the profits, I'm just reminding Zaki, and myself as well, that we agreed that fees were only for FCM JV partners and were never to be shared with FMB. So I think this, what it does, I think, my Lord, is it shows that -- because I read, I think, in the claim that it says that we panicked, I think on 19 June or something like that, and then diverted to two different entities. This is on 2 June and it's already talking about these two entities, FIR and FCM Cayman, and the reference to the fees never being shared with FMB is the reference to what I've talked about this morning on the dilution of the running fees. So when they -- Mutaz and Hussam decided that Hussam was no longer earning from FCM profit because even though he was a shareholder of FHL, they told us that he wasn't getting any of those profits and needed to be remunerated externally, and that is when FMB came. We were quite unhappy about that. We accepted it, but we were not happy with it, and then that was when they reiterated that don't worry, fees will never be shared with them. So that's what my text here is talking about."

101. Mr Jones QC fairly challenged the answer and pressed the point:

"Q. With respect, you weren't just reminding Mr Nuseibeh of that. You said you had found an idea on why exit fees are like upfront fees.

A. Yes, as I said, I reminded him and reminded myself.

Q. Mr Diallo, listen to the question. I suggest to you that this is not reminding Mr Nuseibeh of what you have already agreed with Mutaz Otaibi. It's finding an idea in order to try to justify why an exit fee might be treated like all the other fees in table 17 of your defence, namely an upfront fee. So I want you to comment on that because this is finding an idea to justify, isn't it, that the exit fee is the same as an upfront fee? It's not reminding Mr Nuseibeh that this has already been agreed."

102. Mr Diallo's answer still did not engage with the point that he had said an idea was "found":

A. I'm sorry, I disagree with you. I mean, this is clearly reminding myself and him and this is me basically, ahead of my conversation with Mutaz when we are going to talk about the profit, to remind myself that and remind him as well that fees were never to be shared with FMB, and that's what happened at that music room meeting on 19 June.

> Q. I suggest, Mr Diallo, with the greatest of respect, you are just making that answer up. I want you to explain to his Lordship why you described this as simply reminding Mr Nuseibeh of what had already been agreed with Mutaz Otaibi. Why do you say that this form of words is simply reminding Mr Nuseibeh of what's already been agreed?
>
> A. As I said, my Lord, this is in anticipation of Mutaz's effort to try and dilute the profit share, reminding myself that fees were never to be shared, that they had told us that and we had agreed on that. There is nothing else in there.

103. The subject was addressed again at a different stage:

> Q. What did you mean by the expression "I've found an idea"?
>
> A. I mean, it could be here found an explanation. It's basically me anticipating this chat with Mutaz, where he is 100 per cent going to try and renege and dilute our shares. That has been the overriding theme throughout those Bloomberg Chats. You can see it, and when you use the words standing firm, standing your ground, dilution, it's not about taking something that is not yours, it's protecting your right, it's protecting your position.
>
> …
>
> A. No, I knew these were profits, 100 per cent. We all agreed they were profits. But the -- in this profit share, especially with the fund, because contractually this is due to the fund, you have Mutaz who sits on the investment adviser, manager and fund, so he has got that overriding control there and he can just simply, if he wishes to, renege on the profit share, and this is just me reminding myself of what we have agreed, in case he does say, for example, let's share it with FMB.
>
> …".

104. Under the Fund's Issue 2(c) the Fund seeks this finding:

> "Factual/legal finding 8.3: There was no 2015 [Profit Share Agreement] involving the Fund and FIML."

In the circumstances discussed, I am able to make finding 8.3. But this would still leave FCM London (in which Mr Churchill, Mr Diallo and Mr Nuseibeh had between them a 50% interest) entitled to payment from FIML under the Investment Advisory Agreement, for FCM London's work in relation to the Fund. This would be so even if in practice that payment went to FAL (in which Mr Churchill, Mr Diallo and Mr Nuseibeh also had between them a 50% interest).

## **The Financing of Reading FC**

105. Reading FC raised the Financing from the Fund under the terms of a Note Issuance Facility ("the Facility") of 8 December 2015.

106. Mr Nuseibeh was the lead within FCM London in putting the Facility together.

107. Initial heads of terms were agreed on 13 November 2015. On 1 December 2015 Mr Nuseibeh sent the heads of terms to Mr Mutaz Otaibi, Mr Whitworth and Mr Le Beau. On 4 December 2015 the Fund and Reading FC agreed revised heads of terms.

108. The Facility included these terms:

> "1.1 Definitions
>
> …
>
> "Beneficial Owner" means each of [NN, SS and ST]
>
> …
>
> "Commitment" means in respect of [the Fund], $22,374,000 being the maximum Subscription Price for all Notes available to be issued and purchased under this Deed to the extent not cancelled, reduced or transferred under this Deed."
>
> …
>
> "Discount" means, in respect of a Note, the amount of the original issue discount, being the amount by which the Subscription Price for the Note is less than the Face Value of that Note.
>
> …
>
> "Prepayment Fee" means an amount equal to the sum of the Reduced Amount divided by the Commitment with such amount then multiplied by the Termination Fee.
>
> …
>
> "Reduced Amount" has the meaning given to such term in Clause 8.5
>
> …
>
> "Subscription Price" means, in respect of a Note, the amount to be paid on subscription for that Note on its Issue Date being an amount equal to 97.919% of the Face Value of that Note …
>
> …
>
> "Termination Fee" means $5,705,370 less the total of all payments of Discount made to [the Fund] under this Deed
>
> …

> 2.1 Facility
>
> Subject to the terms of this Deed, [the Fund] grants to [Reading FC], upon the terms and subject to the conditions set out in this Deed and in the Conditions, a note issuance facility pursuant to which [Reading FC] may:
>
> (a) on the Initial Issue date, issue to [the Fund] a Dollar denominated Note with a Subscription Price not exceeding the then available and unutilised Commitment
>
> (b) on any Redemption Date prior to the Final Maturity Date, issue to [the Fund] a Dollar denominated New Note in accordance with Clause 5.6.
>
> …
>
> 8.3 No voluntary redemption of Notes
>
> [Reading FC] may not redeem any Note other than on its Redemption Date.
>
> 8.4 Termination Fee
>
> On any redemption of a Note (including redemption following the exercise by [the Fund] of any of its rights under this Deed or any of the Finance Documents following the occurrence of any Event of Default) where no New Note is issued on the Redemption Date of a Maturing Note [Reading FC] shall pay on the date of redemption to [the Fund] the Termination Fee.
>
> 8.5 Prepayment Fee
>
> Where a New Note is issued on the Redemption Date of a maturing Note which has a Subscription Price of less than the Maturing Note (the difference being the "Reduced Amount"), [Reading FC] shall pay on the date of redemption to [the Fund] the Prepayment Fee."

109. The Facility included a "change of control" clause and a "merger" clause within the Facility. These included the following provisions:

> "8.2 Change of control
>
> (a) If the Beneficial Owners [NN, SS and ST] cease to control [Reading FC]:
>
> (i) [Reading FC] shall promptly notify [the Fund] upon becoming aware of that event; and
>
> (ii) [the Fund] may by notice to [Reading FC] cancel the Commitment and declare the outstanding Note, together with amounts accrued under the Finance Documents immediately due and payable, whereupon the Commitment will be cancelled and such outstanding Note and amounts will become immediately due and payable.
>
> …

> 18.7 Merger
>
> [Reading FC] shall not enter into any amalgamation, demerger, merger or corporate reconstruction."

110. The "Termination Fee" payable by Reading FC to the Fund upon final redemption in the amount of "$5,705,370 less the total of all payments of Discount made to the [Fund] under the Deed" envisaged a calculation that started from a figure (US$5,705,370) equal to three years interest on the principal sum. The "payments of Discount" were equivalent to quarterly payments of interest, with the result that the Termination Fee would mean that the Fund would receive no less than 3 years' interest (or equivalent) under the Facility.

111. Clause 21 of the Facility provided for Events of Default. One of these was, by Clause 21.7:

> "any … legal proceedings or other procedure or step is taken in relation to: … (a) … winding-up … of [Reading FC]".

Clause 21.7 then provided for an exception in these terms:

> "This Clause 21.7 shall not apply to any winding-up petition which is frivolous or vexatious and is discharged, stayed or dismissed within fourteen days of commencement."

112. Clause 31 of the Facility provided:

> "Any term of the Finance Documents may be amended or waived only with the express written consent of [the Fund] and [Reading FC] and any such amendment or waiver will be binding on all Parties."

113. The Facility further provided for Reading FC to maintain a blocked account into which it would pay monthly awards from the FA Premier League and amounts received pursuant to a catering contract. Reading FC granted further security to the Fund in the form of an all assets debenture.

114. Mr Mutaz Otaibi had read the draft Heads of Terms sent to him on 24 November 2015. He also reviewed the draft Heads of Terms provided on 1 December 2015. He read the version on 4 December 2015.

115. Against that background, I am satisfied that Mr Mutaz Otaibi, a businessman with experience in finance, appreciated specifically (and among other things) that there was in effect a three-year commitment by the Fund, and that there was provision for penalties to be paid by Reading FC on prepayment.

## **The Notes to the end of 2016**

116. The Initial Issue of a Note was on 18 December 2015 with a Subscription Price in the total sum of the Financing of US$22,374,000. The Face Value (Principal Amount) was US$ 22,849,447.50 and the Redemption Date was 18 March 2016.

117. In the period to the end of 2016, further Issues of a Note were as follows: Further Issue Dates 18 March 2016, 20 June 2016 and 20 September 2016 with Redemption Dates 20 June 2016, 19 September 2016 and 19 December 2016, each with a Subscription Price of $22,374,000 and Face Value (Principal Amount) of $22,849,447.50.

## The Fund's wish to achieve early repayment of the Financing

118. By October 2016 Mr Mutaz Otaibi was concerned to look for ways to achieve repayment by Reading FC to the Fund.

119. As a matter of record Mr Hastings had had reservations about lending to a football club. So too Mr Richard Nunneley, another witness at trial, and at the time the Vice Chairman of Floreat Wealth Management Limited.

120. Mr Mutaz Otaibi attended meetings at which risks were discussed, including of enforcement against Reading FC's assets. An Investment Memorandum (which he had read) identified that the Reading FC stadium had "no real enforceable value because of restrictions on any sale by the Football League".

121. At trial Mr Mutaz Otaibi accepted that he was relieved when on 10 April 2017 there was news that a takeover of Reading FC was likely to proceed. I find his relief came from the fact that he had been concerned about the Financing for some time, and from the improved prospect, in light of the takeover news, that the Financing would now be repaid.

122. In his evidence Mr Mutaz Otaibi denied concern about Reading FC's ability to repay the Financing but, in the circumstances I describe in this judgment and including in the next section, I do not consider that denial frank and truthful.

123. At the same time, Mr Mutaz Otaibi knew his brother Mr Hussam Otaibi had another reason for wanting early repayment. Mr Hussam Otaibi wanted to secure funding for the launch of a new fund, known as FAN 1. Mr Mutaz Otaibi wanted this to work too. Thus US$ 23 million with the word "Reading" next to it came to be included on a whiteboard at Floreat's offices, showing from where money for FAN 1 was to come.

## The Instructions

124. In these circumstances, Mr Mutaz Otaibi (on behalf of FIML, in its capacity as Investment Manager for the Fund) gave instructions to Mr Churchill, Mr Diallo and Mr Nuseibeh (on behalf of FCM London) to achieve early repayment, and in that effort to ignore recovery of fees to which the Fund might be entitled ("the Instructions").

125. Mr Mutaz Otaibi's authority for FIML and the Fund amply extended to giving the Instructions. And, complying with the Instructions, Mr Nuseibeh, working with Mr Diallo and Mr Churchill, undertook the necessary negotiation with Reading FC (and its shareholders). It is no surprise to find the Fund itself suggesting, in seeking its "Legal finding 29.1" (considered further below) that "[FIML] had delegated its duties to manage the redemption of the [Financing]" to Mr Churchill, Mr Diallo and Mr Nuseibeh.

126. It was the Fund's case that only the full board of the Fund had authority to waive or fail to exercise any contractual obligation owed or potentially owed to it. I respectfully but completely reject this.

127. The task of managing the Fund's portfolio of assets would obviously require decisions of this very nature. They fell amply within Clause 3.1 of the Investment Management Agreement, by which FIML and the Fund had agreed that, subject to certain exceptions, FIML would "… take all day to day decisions and otherwise act as [FIML] deems appropriate in relation to the management of the Portfolio for the account of the Fund" and would do so "without prior reference to the Fund".

128. At one point in his cross examination Mr Mutaz Otaibi was shown a reference to his going so far as saying "I'm the fund". He sought to explain this as having been said in the heat of the moment. But in my judgment what he said was the way he saw things.

129. Of course, Mr Mutaz Otaibi's authority for the Fund and for FIML was not without limit. In particular, it did not allow him to treat assets of the Fund as his own to apply to his advantage or give away for his own purposes. But that limit did not prevent his giving instructions that authorised compromise or concession when that was in the interests of the Fund. The Instructions were of this nature.

130. The Fund seeks these findings:

> "Legal finding 6.2: The Offering Memorandum required the Fund to retain the Termination Fee (including [what the Fund terms the "Diverted Sum" and the "Missing Termination Fee Payment") and [what the Fund terms the "Prepayment Fees"] in its cash reserves had it received those Payments."
>
> "Legal finding 6.3: The Offering Memorandum required the Fund to undertake a quarterly NAV calculation that considered the performance of all its loans and investments as well as its costs before determining whether any income it had received was to be classed as excess net income that could be paid out (to FIML)".

131. I am able to make finding 6.2. In line with the Offering Memorandum the retention in cash reserves would be "to meet any shortfalls in income received or principal repaid". It would not be for all time.

132. I am able to make finding 6.3 save for the reference to costs where these are organisational costs or Operating Expenses (as defined). Those costs and

Expenses were, under the Offering Memorandum, to be met by FIML as the Investment Manager "out of its own resources".

133. The Fund then seeks these findings:

> "Factual finding 6.4: The Fund's board did not delegate authority to [Mr Mutaz Otaibi] to decide that the Fund should act in breach of its obligations to its investor shareholders."
>
> "Factual finding 6.5: The Fund's board did not hold out [Mr Mutaz Otaibi] as having authority to decide that the Fund should act in breach of its obligations to its investor shareholders."

134. I am able to make these findings 6.4 and 6.5 in their particular terms. However, they do not address the question whether Mr Mutaz Otaibi had (or was held out as having) authority to decide how the Fund should act, including through FIML, in compliance with its obligations to its investor shareholders.

135. The Fund goes on to seek these findings:

> "Factual finding 6.6: [Mr] Diallo was, in fact, aware of the term of the Offering Memorandum requiring any Termination Fee or prepayment fees paid by [Reading FC] upon early repayment of the Loan to be retained in the Fund's cash reserves upon receipt ("Break Fee Clause")."
>
> "Factual finding 6.7: [Mr Churchill, Mr Diallo and Mr Nuseibeh] were, in fact, aware of the terms of the [NAV] Assessment Requirement in the Offering Memorandum."
>
> "Factual/legal finding 6.8: [Mr Churchill, Mr Diallo and Mr Nuseibeh] ought to have known about the NAV Assessment Requirement and Break Fee Clause in the Offering Memorandum, because they were required to undertake [FCM London's] role as investment advisor to the Fund in accordance with the Offering Memorandum."
>
> "Legal finding 6.9: [Mr Churchill, Mr Diallo and Mr Nuseibeh] had constructive knowledge of the NAV Assessment Requirement and the Break Fee Clause in the Offering Memorandum."

136. I am able to make findings 6.6, 6.7 and 6.9. If finding 6.8 is still required given those findings, I am able to accept the conclusion in finding 6.8. However, I am not able accept that Mr Churchill, Mr Diallo and Mr Nuseibeh were, as finding 6.8 puts it, "required to undertake FCM [London]'s role as investment advisor to the Funding". FCM London had the role of investment advisor to the Funding and was required to undertake that role; Mr Churchill, Mr Diallo and Mr Nuseibeh were its employees.

137. I accept the following evidence from Mr Nuseibeh as truthful and accurate, doing his best to answer questions from Mr Jones QC and explain the position accurately to the Court:

> "Q . … You say: "So he wants to ensure we get the full Reading back." Correct?
>
> A. That's correct.
>
> Q. Yes. So you are saying that Mutaz Otaibi had said to you that he would want all of what the fund was entitled to receive from Reading, wasn't he?
>
> A. No, that's not accurate. He was adamant that the objective is to get the loan back and repeatedly said, "Forget about fees, forget about fees, I want the loan back."

138. The same is true of this later exchange between Mr Jones QC and Mr Nuseibeh:

> "Q. And you weren't given any sort of instruction, were you, from him to abandon forever any of the fund's contractual rights under the loan?
>
> A. I absolutely was, actually, and I think you will see this when we go further down the line in December and you see the type of events that happened during the course of the lead up to Christmas."

139. It was suggested that it was FAN 1 that Mr Mutaz Otaibi was prepared to "forget", but I do not accept that is the case. The position was, in my judgment, put fairly and accurately by Mr Nuseibeh in this exchange with Mr Jones QC:

> "Q. When you said "Forget the note", he was referring to FAN1, wasn't he?
>
> A. Well, no, because his instructions were, you know, "Forget everything, I just want the money back." Now, I can see this "Forget the note" on the chat as a line, I've seen it yesterday. It could be interpreted in two different ways. It could be the loan facility. It could be the FAN notes, but his instruction – which wasn't only this day. I mean, his instruction started before that, towards the start of December, when all the failure happened, and it is true what Mutaz said about him wanting to pull the plug beforehand. He was pushed into this by Hussam. He was pushed into that situation, but once it became public, once they have talked to their private clients, it became not only a fee matter, it became a reputational matter because this is the first public product that Floreat would do, so the idea that the group fails to issue a -- a relatively small in the grand scheme of things -- I mean, it's 130 million but the group talks about, you know, having billions -- you know that would have been really humiliating. So the pressure increased, not necessarily because Mutaz wanted that product early on but because the circumstances meant that it would be a disaster that this thing doesn't go through.
>
> …
>
> Q. … But Mutaz had made it clear that, if there wasn't the money, then he was quite happy not to go ahead with the FAN issues. Had he not - He had made that clear to you?
>
> A. Sorry he –

> Q. (Overspeaking) couldn't care whether FAN went ahead or not. He was happy for it not to go ahead.
>
> A. Well I wouldn't say "happy". I think the – he would have been less upset than Hussam. But, no, I wouldn't say happy."

140. The Fund seeks this finding:

> "Factual finding 7.13: Mutaz did not give [Mr Churchill, Mr Diallo and Mr Nuseibeh] the alleged Standing Instruction in December 2016 or otherwise instruct [Mr Churchill, Mr Diallo and Mr Nuseibeh] to ensure the Loan's principal was repaid if that meant waiving fees due to the Fund."

141. I am unable to make this finding 7.13. I am quite satisfied, from the evidence I have heard, that the Instructions were given.

## Takeover talks concerning Reading FC

142. Talks for a takeover of Reading FC commenced by November 2016. Its existing shareholding interests included Thai interests. The talks involved Chinese potential investors.

143. Mr "Jack" Srisumrid, a witness at trial, representing existing Thai shareholding interests, notified Mr Nuseibeh of the talks. The takeover under discussion would require the approval of the English Football League. That approval was not provided immediately or indeed for some time.

144. Discussion of early voluntary redemption of the Financing by Reading FC began. In the meantime, and over and above the Financing, Reading FC remained reliant on discretionary shareholding funding.

## "Change of control"

145. In his first witness statement, Mr Mutaz Otaibi spoke of his idea of using what he thought was a "change of control veto" in the Facility as leverage "as that would give the Fund some of the money it needed to invest in FAN 1 and take the pressure off finding external investors". His evidence included evidence of his telling Mr Churchill, Mr Diallo and Mr Nuseibeh that "the imminent change of ownership" of Reading FC was "an opportunity".

146. In fact, although the Facility included a "change of control" clause (Clause 8.2, set out above), that clause did not give the Fund a veto over a change of control. Rather, it entitled the Fund by notice to Reading FC to "cancel the Commitment and declare the outstanding Note, together with amounts accrued under the Finance Documents immediately due and payable".

147. Mr Jones QC questioned Mr Nuseibeh at trial:

> "Q. Let's go on: "[Reading FC] cannot be forced to pay back." said Mr Diallo. And then you pick it up again by saying: "He [Mr Mutaz Otaibi] just went on saying 'forget the note' ... no consent I want my money back!" Let's just unpack that. His reference to "no consent", as you understood it, was to the question of takeover, wasn't it? This was dealing with the fact that he believed that there was a veto and that if there was going to be a change of control, the fund would have to give its consent to it.
>
> A. I don't know exactly what he believed at that moment in time, but what I do know is that at this -- that's the first time we are revisiting the loan, if you like, the loan document. It has been a year on and, even myself, I wasn't sure what that -- I knew we put something in there to deal with an event like that, whereby you have change of shareholding, but I haven't really looked at it because that loan was executed a year before, and when I had the initial conversation with Mutaz, maybe I wasn't fully clear. We went there, I think, later on, I checked what that language is and clarified what a change of control would entail.
>
> Q. You yourself thought that his veto understanding may be correct, didn't you?
>
> A. No, I didn't know -- I knew there was something. I did not know what it would be. As I said, I think for prudence, when we structured the loan, it made sense to put something in there that allows us to deal with a situation when you have new shareholders. Essentially -- you know, ultimate exposure in terms of credit risk is going to be to the ultimate shareholder in a lot of respects, and I guess the thinking, when we put the loan together, is that you need to be able to deal with that one way or another, should there be an event like that. And so I knew there was something going to be in the documents to deal with that, but I did not know what that language is, which is why we checked it on that day.
>
> Q. But in your mind, it might well have been a veto because you didn't say to him, "We don't have a veto, that's silly." Or anything like that, did you?
>
> A. No, I think -- I don't know what I told him. What I do know is that that doesn't sound right. As I said, I don't know what language would have been in there, which is why we went through the document and checked."

148. I accept this evidence as truthful and accurate.

149. The Fund seeks these four findings:

> "Factual finding 7.9: [Mr Churchill, Mr Diallo and Mr Nuseibeh] initially believed that the Fund had a contractual veto that could prevent a change of control of [Reading FC]."
>
> "Factual finding 7.10: [Mr Mutaz Otaibi]'s understanding that there was a change of control veto came from [Mr Churchill, Mr Diallo and Mr Nuseibeh]."

> "Factual finding 7.11: [Mr Churchill, Mr Diallo and Mr Nuseibeh] did not disabuse [Mr Mutaz Otaibi] of the notion that the Fund had a change of control veto rather than a contractual right to call in the Loan *upon* a change of control once they realised that to be the case."
>
> "Factual finding 7.12: [Mr Churchill, Mr Diallo and Mr Nuseibeh] told [Mr Mutaz Otaibi] that the change of control veto was not enforceable at some point in December 2016 and thereafter led him to believe that they were seeking to procure a negotiated [original emphasis] exit of the Loan using the change of control veto as a threat."

150. I am not persuaded that findings 7.9, 7.10 and 7.11 would be reliable and I decline to make those findings. There was certainly confusion, and perhaps confusion all round. The mistaken idea that there was possibly an enforceable veto was cleared up by December 2016.

151. As to finding 7.12, I am not prepared to make a finding that Mr Churchill, Mr Diallo and Mr Nuseibeh told Mr Mutaz Otaibi that there was a change of control veto and that it was not enforceable and did so at some point in December 2016. However, the balance of the finding that I am able to make is simply that Mr Churchill, Mr Diallo and Mr Nuseibeh led Mr Mutaz Otaibi to believe that they were seeking to procure a negotiated exit from the Facility, as indeed they were, and that they used the change of control clause (not a "change of control veto") in that negotiation.

## "The Wilbraham Place Loan"

152. The Fund asks the Court to find (Factual Finding 7.2) that:

> "… by email dated 8 December 2016, [Mr Churchill, Mr Diallo and Mr Nuseibeh] sought to persuade [Mr Mutaz Otaibi] to divert interest made by the Fund on the Wilbraham Place Loan … outside the Fund contractual structure to [FIR] and FCM Cayman. [Mr Mutaz Otaibi] did not accede to it and [it] did not happen."

153. I am able to make finding 7.2. However I do not consider it material. The episode was confined to its particular circumstances. The Fund adds the contention that there was a motivation for Mr Churchill, Mr Diallo and Mr Nuseibeh to lie, but I am not persuaded of that.

## The early repayment of the Financing

154. On 20 December 2016 there was the first of two early partial reductions in the Financing. A second partial reduction in the Financing was achieved on 21 March 2017. These are described in more detail below.

155. No fees (described by the Fund in its claim as "the Prepayment Fees") were paid by Reading FC in relation to these early partial reductions, either at the time or ultimately.

156. After this, the remainder of the Financing was repaid in June 2017. Again, this early repayment is described in more detail below. In addition to the outstanding principal sum, this time a fee of US$2.2 million was paid by Reading FC on this repayment.

157. The Fund describes half of this fee, or US$ 1.1 million, as "the Diverted Sum" in its claim. Further, on the Fund's case, the fee demanded and paid should have been greater by US$817,624.45. The Fund describes the shortfall in its claim as "the Missing Termination Fee Payment".

158. Taken together, leaving aside sums repaid by way of principal, one half of the sum that was paid (the "Diverted Sum" as half the fee paid on repayment of the remainder of the Financing) and the three sums that were not paid (the "Prepayment Fees" and the "Missing Termination Fee Payment") are described as "the Payments" by the Fund.

## "Overarching questions", issues and findings framed by the Fund

159. In its closing argument at trial, the Fund submitted that the Court was required to determine three overarching questions. It divided these into a number of Issues and with a number of findings sought in respect of each issue. A number of the findings are compound in form.

160. The Fund framed the three overarching questions as follows:

> "1: Was the Fund entitled to be paid each of the Payments (the Diverted Sum, the Missing Termination Fee Payment and the Prepayment Fees) under the [Facility]?
>
> 2: Did the Fund give its informed consent to not receiving each of the Payments?
>
> 3: In respect of each Payment, are the relevant [Defendants] liable for the Fund's non-receipt and entitled to the relief [the Claimant] seeks?"

161. Under its first overarching question the Fund invited 2 findings (Findings 5.2 and 5.3), and I deal with these in the next section immediately below.

162. Under its second overarching question, the Fund framed three issues. These were:

> "2(a): Did [Mr Mutaz Otaibi] have the authority of the Fund's board to agree to the Fund's non receipt of the Payments?"

The Fund invited the Court to make 11 findings (Findings 6.1 to 6.11) to lead to a negative answer on this issue.

> "2(b): Did [Mr Mutaz Otaibi], in any case, give his informed consent to the Fund not receiving any of the Payments?

The Fund invited the Court to make 44 findings (Findings 7.1 to 7.41) to lead to an affirmative answer on this issue.

> "2(c): To what extent, if any, did the alleged [Profit Share Agreements] justify the diversion of the Diverted Sum?"

The Fund invited the Court to make 3 findings (Findings 8.1 to 8.3) to lead to the answer "none" on this issue.

163. The Fund divided its third overarching question into 26 issues (Issues 3(a) to 3(y)) under which it asks the Court to make a total of 41 findings (Findings 9.1 to 33.2).

164. The parties were considerably apart over what was in issue and what findings were relevant. I have decided to deal in the course of this judgment with each of the issues suggested by the Fund and the (101) findings requested by the Fund (some findings have of course already been addressed in the paragraphs above). This is so that it is clear what the Fund, as Claimant, does and does not establish. I also deal with separate points from the Defendants in the course of this treatment. I have altered the order of the issues framed and findings sought by the Fund, but kept the numbering.

## Entitlement of the Fund to fees from Reading FC under the terms of the Facility

165. In respect of its first overarching question the Fund invites these two findings:

> "Legal finding 5.2: The terms of the [Facility] entitled the Fund to receipt of the ["Prepayment Fees"] upon the partial repayments of the Loan in December 2016 and March 2017."

> "Legal finding 5.3: The terms of the [Facility] entitled the Fund to receipt of a Termination Fee of just over $3m (including the Diverted Sum and the ["Missing Termination Fee Payment"]) upon the full redemption of the Loan in June 2017."

166. I am not able to make findings 5.2 and 5.3 in these unqualified terms. I am however able to make a finding that the terms of the Facility required the payment by Reading FC of prepayment fees on early partial repayments or reduction of the Financing, and required the payment of a Termination Fee.

167. However, in the circumstances discussed in this judgment, if the Fund had required prepayment fees on early partial repayments or reduction of the Financing in December 2016 and March 2017, Reading FC would not have made the early partial repayments or reduction.

168. Further, in the circumstances discussed in this judgment, a reduced fee of US $2.2 million was agreed between the Fund and Reading FC upon the full redemption or repayment of the Financing in June 2017.

## The first partial reduction or prepayment of the Financing

169. On 20 December 2016 there was the first of two partial reductions in the Financing.

170. No prepayment fee was sought or paid on the partial reduction. The idea was that partial reductions in the Financing be made by taking money from the blocked account. This was the Fund's idea, not Reading FC's, although Reading FC gave its consent, no doubt seeing this as largely neutral for themselves.

171. A Further Issue Notice was duly given for 20 December 2016, with Redemption Date 21 March 2017 but for a Subscription Price of US$ 19,743,123.04 and with Face Value (Principal Amount) of US$20,162,664.40. It is common ground that on 20 December 2016, Reading FC repaid US$2,630,876.96 of the Financing upon the issue of the new note.

172. It is the Fund's case that a prepayment fee should have been paid. But as it was the Fund that wanted early repayment, not Reading FC, the idea that as well as agreeing to what the Fund wanted, Reading FC would also have paid additional fees at the time is commercially unreal.

173. Mr Mutaz Otaibi could offer no explanation why Reading FC would have been prepared to make a voluntary prepayment to assist the Fund if doing so would carry a substantial penalty fee. Nor could he offer any explanation as to how and why (what was suggested to be) a borrower in financial difficulty would pay large voluntary prepayments, unless from the blocked account.

174. Pressed on the point, Mr Mutaz Otaibi could only offer that;

> "… business people sometimes make decisions that don't make sense".

Having heard from Mr Srisumrid, I reject, as invited by Mr Cavender QC, the idea that Reading FC would act irrationally or unintelligently. I also find that Mr Mutaz Otaibi had no reason to think that it would do so.

175. The Fund seeks these findings:

> "Factual finding 7.17: [Mr Churchill, Mr Diallo and Mr Nuseibeh] did not seek the permission of [Mr Mutaz Otaibi], FIML or the Fund to use money from the Blocked Account to finance [Reading FC]'s partial repayments of the [Financing] in December 2016 and March 2017.
>
> "Factual finding 7.18: Neither [Mr Mutaz Otaibi] nor the Fund nor FIML agreed to waive [Reading FC]'s liability to pay the Fund the ["Prepayment Fees"] ultimately.

176. I am able to make these findings 7.17 and 7.18 in the narrow sense of accepting that specific permission or agreement to these matters individually was not sought from Mr Mutaz Otaibi. However that was not required, because the matters were well within the compass of the Instructions already given by Mr Mutaz Otaibi.

## Preparations for the repayment of the Financing; the draft Deed of Release

177. In December 2016 Mr Nuseibeh had instructed Burges Salmon, solicitors acting for the Fund, that a "termination" or "restructuring" fee to be paid by Reading FC upon redemption of the Facility was to be paid to "another Floreat entity" rather than the Fund. The amount of the fee contemplated at the time was £600,000.

178. The Fund invites the following findings:

> "Factual finding 7.19: [Mr Churchill, Mr Diallo and Mr Nuseibeh] decided in December 2016 to divert any Termination Fee paid by [Reading FC] to [FIR] without seeking the Fund's permission to do so."
>
> "Factual finding 7.21: [Mr Churchill, Mr Diallo and Mr Nuseibeh] did not inform [Mr] Whitworth or the Fund's board that they intended to act otherwise than in accordance with the [Facility] in respect of how they calculated the Termination Fee payable by [Reading FC] or diverting the Diverted Sum away from the Fund."

179. I am able to make these findings 7.19 and 7.21, save that I am not satisfied that by this point the decision was to use FIR as the destination for the whole Termination Fee (finding 7.19). I address later in this judgment the circumstances behind the facts accepted in these findings.

180. A draft Deed of Release was prepared. It referred to a Termination Fee. Mr Nuseibeh printed a copy in order to show it to Mr Mutaz Otaibi. However, Mr Nuseibeh agreed with Mr Diallo that he should avoid getting drawn into a discussion with Mr Mutaz Otaibi about what should happen to the fee once paid and should just obtain "appovl for the doc".

181. Mr Mutaz Otaibi denied having ever seen the draft Deed of Release, but I prefer Mr Nuseibeh's evidence that it was shown to him in December 2016 even if Mr Mutaz Otaibi has now forgotten. Little turns on this because it is unlikely that Mr Mutaz Otaibi saw it for more than a moment, and not long enough to take in its contents.

182. The Fund invites a finding in these terms:

> "Factual finding 7.16: [Mr] Nuseibeh and/or [Mr] Diallo did not show [Mr Mutaz Otaibi] the Initial Draft Deed of Release containing the £600,000 Termination Fee on 14 December 2016, or if they did, they deliberately did so in such a way that [Mr Mutaz Otaibi] was not alerted to the fact that a

> Termination Fee was due to the Fund or its amount (with [Mr] Churchill's knowledge and approval)."

183. I am not able to make this finding 7.16. The true position is as I have just discussed. I am not satisfied that Mr Nuseibeh or Mr Diallo, handled the draft in a way that deliberately sought to avoid Mr Mutaz Otaibi being alerted to its content.

184. Burges Salmon sent an "execution version" of the Deed of Release to Mr Nuseibeh on 23 December 2016. A covering email passed on the information that Reading FC's solicitors wanted the documents signed quickly so that the redemption could proceed once approval for the takeover was obtained from the Football League.

185. On 27 December 2016, Mr Nuseibeh emailed Burges Salmon, saying the "execution version looks fine", save for a query as to whether the document should identify that the principal amount and fee would be "split" and sent by Burges Salmon to "two different Floreat entities".

186. The next day, Mr Nuseibeh sent a draft Deed of Release to Mr Whitworth for signature. It was undated and the outstanding principal to be repaid was left blank as was the Termination Fee to be paid. In sending the draft, Mr Nuseibeh forwarded the email from Burges Salmon dated 23 December 2016.

187. At trial Mr Nuseibeh was accused of having "doctored" this email. It was alleged that Mr Nuseibeh had deliberately removed from the email chain an email sent by Mr Nuseibeh to Burges Salmon on 20 December 2016 dealing with the flow of funds. It was also alleged that Mr Nuseibeh had added a confidentiality notice used by Burges Salmon onto the bottom of the email chain, when no such notice appeared in that place in the email chain copied elsewhere in the disclosure.

188. I reject these allegations of forgery or deception, having seen Mr Nuseibeh deal with them in cross examination. The more likely explanation in my judgment is that the message failed to download fully (with its chain) or that content was deleted accidentally. If Mr Nuseibeh had wanted to conceal content, he could simply have omitted emails with Burges Salmon altogether.

189. In the circumstances I am not able to make finding 7.20 sought by the Fund, which is in these terms:

> "Factual finding 7.20: Nuseibeh deliberately doctored a chain of emails he forwarded to Mr Whitworth … on 28 December 2016, attaching a blank, undated Draft Deed of Release for his signature, so as to remove the emails between [Mr Churchill, Mr Diallo and Mr Nuseibeh] and Burges Salmon discussing sending any Termination Fee paid by [Reading FC] to another offshore entity other than the Fund."

190. Mr Whitworth signed the draft Deed of Release, leaving the spaces for the redemption amount and "Termination Fee" blank. Mr Nuseibeh explained that the figures for the redemption amount and Termination Fee were left blank

because the amounts would depend on the date of redemption, which remained uncertain. He expected Burges Salmon would calculate the figures when the redemption date was known. I accept Mr Nuseibeh's evidence here.

191. On 29 December 2016 Mr Whitworth emailed Mr Nuseibeh requesting a memorandum on the "case for disinvestment" of the Financing. I am quite clear that this requested paperwork - a memorandum - was to provide a record for an objective (i.e. repayment of the Financing) already decided upon by Mr Mutaz Otaibi, rather than as part of a process of decision on whether the Fund wished to divest. As Mr Whitworth himself wrote, the requested memorandum "would be useful for the file". On 4 January 2017 Mr Whitworth emailed Mr Nuseibeh reminding him to produce the memorandum on the case for disinvestment.

192. The Fund asks the Court to make this finding:

> "Factual finding 7.22: [Mr] Whitworth asked [Mr Churchill, Mr Diallo and Mr Nuseibeh] to provide him with a disinvestment memorandum regarding the redemption of the Loan for the Fund, which would have set out any fees due to the Fund, but [Mr Churchill, Mr Diallo and Mr Nuseibeh] chose not to do this."

193. I am able to make finding 7.22. However, I make clear that I do not accept that Mr Whitworth was concerned to find out about fees, or that in not producing the requested memorandum Mr Churchill, Mr Diallo and Mr Nuseibeh were seeking to conceal anything.

194. It is a fact that Mr Mutaz Otaibi was not copied in on external emails with Burges Salmon and others. This was highlighted at trial, but I do not consider it a change to any previous practice or suspicious.

195. Three findings sought by the Fund are:

> "Factual finding 7.14: [Mr Churchill, Mr Diallo and Mr Nuseibeh] did not copy any representative of the Fund or FIML into any of their communications with [Reading FC] regarding the redemption of the [Financing] or show them any such communications."
>
> "Factual finding 7.15: [Mr Churchill, Mr Diallo and Mr Nuseibeh] did not copy any representative of the Fund or FIML into any of their correspondence with Burges Salmon regarding the redemption of the [Financing] or show them any such correspondence (save for the limited exchanges at the end of December 2016 …)."

196. I am able to make findings 7.14 and 7.15 as generally accurate (I was not shown every communication or piece of correspondence). The findings do not take the Fund very far however because (as employees of FCM London) Mr Churchill, Mr Diallo and Mr Nuseibeh themselves represented the Fund and FIML in this work.

## A winding up petition

197. Mr Mutaz Otaibi accepted that the pressure on the Fund to obtain repayment from Reading FC continued into 2017.

198. In January 2017 a winding up petition was issued against Reading FC by a third party. Mr Nuseibeh emailed Reading FC on 12 January 2017 to complain he had not been informed directly.

199. It was put to Mr Nuseibeh at trial that the presentation of the petition amounted to an Event of Default under the Facility. It will be recalled that not all petitions would amount to an Event of Default, under the terms of the Facility at Clause 21 and including Clause 21.7. I am not satisfied that this petition did: it is at least clear that the petition was resolved by 18 January 2017.

200. In any event, as pointed out by the Defendants, it would plainly not have been in the interests of the Fund to seek to rely on an Event of Default in January 2017 whilst there remained the alternative of allowing the takeover to proceed and the Chinese shareholders to inject money into Reading FC.

201. The Fund invites the following finding:

> "Factual finding 7.23: [Mr Churchill, Mr Diallo and Mr Nuseibeh] chose not to act in the Fund's best interests in order to retain control of the Loan redemption process in not informing the Fund's board that a genuine winding-up petition was presented against [Reading FC] in January 2017, which gave the Fund the right to call in the Loan under the [Facility], or procuring the Loan to be called in.

202. I accept that the Fund's board was not informed of the petition by Mr Churchill, Mr Diallo or Mr Nuseibeh and that the Loan was not called in. However I am not otherwise able to make this finding 7.23.

## The second partial reduction or prepayment of the Financing; the "Prepayment Fees"

203. On 30 January 2017 Mr Nuseibeh emailed Mr Srisumrid about Reading FC's ability to repay, saying:

> "As you know the capital we used to bridge the gap was very expensive and keeping it open ended is not sustainable".

204. A second partial reduction in the Financing was achieved on 21 March 2017. A Further Issue Notice was given for that date, with Redemption Date 20 June 2017 but for a Subscription Price of US$ 17,243,021.01 and with Face Value (Principal Amount) of US$17,609,435.20.

205. On 20 March 2017, Mr Nuseibeh obtained agreement from Reading FC to again take money from the blocked account. On 21 March 2017, Reading FC repaid a further $2,500,102.03 upon the issue of the new note using funds held on the

blocked account. Mr Mutaz Otaibi accepted in cross-examination that he had been aware of and approved the prepayment.

206. As with the first partial reduction in the Financing three months before, no prepayment fee was paid on the partial reduction. The Fund's case continues to be that a prepayment fee was payable and should have been paid. This, the Fund terms the second of two "Prepayment Fees". But in my judgment, this again ignores the circumstances. It was the Fund that wanted early repayment, not Reading FC. As with the first partial reduction, the idea that as well as agreeing to what the Fund wanted, Reading FC would also have paid additional fees at the time is commercially unreal.

207. In his oral evidence Mr Mutaz Otaibi accepted he was aware that no prepayment fees had been charged. He then suggested that Mr Nuseibeh had said he would, "deal with the whole thing when the full loan will be repaid". I do not accept this was said. Mr Mutaz Otaibi gave March 2017 as the time when it was said. At that time, the idea of additional fees at any time for the two prepayments was still commercially unreal. Asked why the suggestion was not mentioned in his written evidence Mr Mutaz Otaibi said:

> "In my witness statement, I put the events as I remembered them back then. You are asking me questions and showing me documents, I'm answering them now."

208. As with the first partial reduction in the Financing, the Fund sought findings 7.17 and 7.18. I have dealt with these above.

## Football League approval for the takeover of Reading FC

209. A BBC news article on 10 April 2017 brought the news to Mr Nuseibeh that Reading FC had now obtained provisional approval from the Football League for the takeover of Reading FC by the Chinese investors. He emailed Mr Mutaz Otaibi, Mr Hussam Otaibi and Mr Wilcox with this news.

210. The Fund invites the Court to make this finding at this time:

> "Factual finding 7.24: [Mr Churchill, Mr Diallo and Mr Nuseibeh] ensured that they did not have Loan documents open in the office where [Mr Mutaz Otaibi] might see them and did not speak on the phone to [Reading FC] representatives when Mutaz was in earshot.

211. The Fund satisfied me that this was generally the position by this time, prompted by an atmosphere of growing mistrust between Mr Mutaz Otaibi on the one hand and Mr Churchill, Mr Diallo and Mr Nuseibeh on the other. I am prepared to make finding 7.24.

212. The Fund seeks this finding:

> "Factual finding 7.25: On 10 April 2017, [Mr] Nuseibeh and [Mr] Diallo discussed ensuring that [Mr Churchill, Mr Diallo and Mr Nuseibeh] received at least half the Termination Fee to be paid by [Reading FC].

213. I am able to make this finding 7.25, save for the words "at least". The discussion is dealt with in more detail below at paragraph 235 and following, from which it will be clear that the finding captures only part of a more complex exchange.

214. On 8 May 2017 Mr Jason Yin (a representative of Mr Dai Yongge, the prospective Chinese investor) emailed Mr Nuseibeh, Mr Diallo and Mr Churchill stating:

> "I believe Zaki, KP and the new buyer met and agreed the figure of US$750k for the prepayment penalty."

The reference here was to the broad US$ equivalent to the figure of £600,000 from December 2016.

215. A month or so later, on 16 May 2017 the Football League announced that it had approved the takeover of Reading FC. Mr Nuseibeh emailed Mr Mutaz Otaibi, Mr Hussam Otaibi and Mr Wilcox to advise of this.

216. The approval of the takeover further crystallised and strengthened the Fund's position that it was able to require rather than encourage repayment of the Financing because of the "change of control" clause. But there was still a very material difference between being able to require repayment and actually achieving it. I am quite satisfied that Mr Mutaz Otaibi understood this.

## Negotiating positions over the Termination Fee

217. Mr Mutaz Otaibi recalled saying to Mr Nuseibeh:

> "I don't understand a Chinese want to take over a whole club but they cannot plug a gap of 2.5 million or 3 million or 4 million for a repayment"

The remark showed his frustration, but in my judgment he fully appreciated and understood that while there was an opportunity there was still a problem.

218. That was true in relation to the principal sum quite apart from any fee or penalty. For all the remaining security the Fund held in respect of the Financing, understandably and rightly Burges Salmon had advised on the challenge that enforcement would represent.

219. The Chinese investors were resistant to any penalty fee at all. Their view was that the Fund should simply waive its rights and retain the Financing. From their perspective, the Financing was at a high rate of interest and the takeover would make Reading FC more creditworthy as borrower.

220. The Fund seeks the following findings:

> "Factual finding 7.26: On 3 May 2017, [Mr Churchill, Mr Diallo and Mr Nuseibeh] considered the Termination Fee payable by [Reading FC] to be $2.574m, but they offered the Thai owners of [Reading FC] a $320,000 discount without seeking the permission of [Mr Mutaz Otaibi], the Fund or FIML to do so."
>
> "Factual finding 7.27: [Mr Churchill, Mr Diallo and Mr Nuseibeh] continued to let [Mr Mutaz Otaibi] believe that they were negotiating [original emphasis] an exit of the Loan even after there was a change of control on 17 May 2017."

221. I am able to make these findings 7.26 and 7.27, but with qualifications.

222. First, in relation to finding 7.26, [Mr Churchill, Mr Diallo and Mr Nuseibeh] considered it possible rather than certain that the Termination Fee calculation was of that size. And, as emphasised before, they had permission because of the Instructions.

223. In relation to finding 7.27, Mr Mutaz Otaibi had already given the Instructions for FIML and in turn the Fund. The change of control did not bring to an end to the need to deliver repayment of principal as soon as possible and without risk. Letting matters get to the brink of a default and enforcement carried risk, and default and enforcement would consume time.

## The Cancellation Notice

224. At the end of May 2017 Mr Nuseibeh instructed Burges Salmon to draft a Cancellation Notice on the basis of the change of control clause in the Facility.

225. In the course of cross examination at trial it was put to Mr Nuseibeh that it was "an extraordinary omission" for him to have failed to mention at a meeting on 31 May 2017 that he had just instructed solicitors to send a Cancellation Notice under the Facility.

226. I think little turns on the point, not least because Mr Mutaz Otaibi knew enough of the position, and I do not consider the omission "extraordinary". However, given the strength of the challenge in cross examination and the fact it was directed to Mr Nuseibeh's integrity I should record that I do not consider he was in fact present at the meeting in question.

227. Mr Nuseibeh was not identified in the draft agenda. He was not copied into various emails sent to the intended participants in advance of the meeting, including reports to be considered. Although Mr Nuseibeh's name is listed in a draft minute of the meeting, it is Mr Diallo who is shown in that draft as providing the update on Reading FC. Mr Nuseibeh was not sent the draft minute.

228. Mr Nuseibeh instructed Burges Salmon to amend the Cancellation Notice so that it was in the name of FCM London. On 2 June 2017 Burges Salmon sent Mr

Churchill, Mr Diallo and Mr Nuseibeh the amended Cancellation Notice. In line with Mr Nuseibeh's instructions, it was in the name of FCM London.

229. The Cancellation Notice was then signed by Mr Diallo on behalf of FCM London "acting in its capacity as Investment Advisor to the Noteholder [i.e. the Fund]". It was sent to Reading FC. It included the request that a Termination Fee of US$ 2.2 million be paid to FIR.

230. The Fund asks the Court to make these findings:

> "Factual finding 7.28: [Mr Churchill, Mr Diallo and Mr Nuseibeh] instructed Burges Salmon to call in the Loan on 30 May 2017 pursuant to the Fund's contractual rights under the [Facility] without first seeking the permission of [Mr Mutaz Otaibi], the Fund or FIML to do so and without then informing the Fund's board that they had done so at a board meeting held half an hour later."
>
> "Factual finding 7.29: [Mr Churchill, Mr Diallo and Mr Nuseibeh] instructed Burges Salmon to amend the Cancellation Notice such that (i) it was signed by Diallo on behalf of FCM [London] and the Fund rather than a representative of the Fund, (ii) it no longer stated in clause 5 that the Termination Fee paid by [Reading FC] was due and payable to the Fund, and (iii) it included bank details for payment of the Termination Fee directly to [FIR]."
>
> "Factual finding 7.30: [Mr Churchill, Mr Diallo and Mr Nuseibeh] instructed Burges Salmon to issue the Cancellation Notice to [Reading FC] on 2 June 2017, which demanded a Termination Fee of $2.2m payable to [FIR], without seeking the permission of [Mr Mutaz Otaibi], the Fund or FIML to do so."

231. Save that the instructions to Burges Salmon were from Mr Nuseibeh and save that Mr Mutaz Otaibi had already given the Instructions (on behalf of FIML and in turn the Fund), I am able to make the findings 7.28, 7.29 and 7.30 sought.

232. The Fund seeks the following finding:

> "Factual finding 7.31**:** [Mr Churchill, Mr Diallo and Mr Nuseibeh] all knew – including on 2 June 2017 and 7 June 2017 - that [FIR] had no entitlement to the [Reading FC] Payment."

I am able to make this finding 7.31.

## The amount of the Termination Fee sought and paid; "the Missing Termination Fee Payment"

233. The Facility defined "Termination Fee" as "$5,705,370 less the total of all payments of Discount made to [the Fund] under" the Facility. On the Fund's case, the latter total was US$2,687,745.55, leaving US$3,017,624.45 to be paid. But Reading FC was asked to and did pay US$2.2 million. What the Fund terms

the "Missing Termination Fee Payment" is the US$817,624.45 difference that Reading FC was not asked to pay and did not pay.

234. In a "summary of claim" in its Particulars of Claim, the Fund alleged that Mr Churchill, Mr Diallo and Mr Nuseibeh:

> "6.2 knowingly and deliberately, and in pursuit of their own interests over those of the Fund, failed to demand or procure that [Reading FC] pay the Fund $817,624.45 of the Termination Fee that [Reading FC] was liable to pay upon redemption of the [Financing] (the "Missing Termination Fee Payment")".

235. On 10 April 2017 Mr Nuseibeh discussed things with Mr Diallo on Bloomberg chat, including the subject of Termination Fee. The Termination Fee was referred to as "6 quarters of fees … on 17.5 mil" or "2.3 mio" in this conversation, later shared with Mr Churchill:

> Mr Nuseibeh: "how can you justify the fee … ? .. it will all just be back to [the Fund]"
>
> Mr Diallo: "that's details … lets agree the max then we see how we do it."
>
> Mr Nuseibeh: "it's not v much left … I think … let me check. Say we have one more quarter of interest … so target 21st June … we will have only 6 quarters of fees … on 17.5 mil … right"
>
> Mr Diallo: "yes … still v significant … because the cash invested in the note … so no need to keep the shareholder shares."
>
> Mr Nuseibeh: "2.3 [million]"
>
> Mr Diallo: "If we don't get diluted this is huge … and we have to stand firm not to get diluted."

236. There are several themes here, including calculation of fee and destination of fee. But when Mr Nuseibeh asked Mr Diallo "how can u justify the fee?" I accept the submission of Mr Cavender QC that Mr Nuseibeh was concerned with how the fee could be justified to the Chinese investors, given their resistance to any penalty fee at all.

237. The Bloomberg chat does make clear enough that Mr Diallo was calculating a Termination Fee by reference to the discount, or effective quarterly interest, that the Fund would no longer receive after repayment of principal. Mr Nuseibeh's evidence is that he calculated the Termination Fee:

> "… to be roughly USD 2.3 million (based on 6 quarters of interest left to the end of 3 years, if the loan was redeemed in June)."

238. Mr Nuseibeh said:

> "Looking back at the documents, I can see that I initially proposed a fee of USD 2.27 million (which I suppose I rounded up to USD 2.3 million …

> which was because I had included USD 70,000 of interest to account for the time between the assumed repayment date of 2 June and the end of the quarter. It turned out that this would be covered by the principal, rather than the Termination Fee, but this shows how much I was focussed on the commercial agreement that the fee was to provide compensation for lost interest."

239. This focus on what Mr Nuseibeh saw as the "commercial agreement" was not on the actual provisions of the Facility. The calculation made was again confirmed in cross examination at trial:

> Mr Diallo: That was the balance of the three years of interest on the notional of the trade. It's as simple as that.
>
> Q. Yes, it's, as you would say, not a Termination Fee calculated in accordance with the loan facility deed wording but it's the way you calculated it?
>
> A. Yes …".

240. The Fund asks the Court to make this finding:

> "Factual finding 7.34: [Mr Churchill, Mr Diallo and Mr Nuseibeh] knew – including on 14 June 2017 – that there was no legal basis for calculation of the $2.2m Termination Fee they had demanded from [Reading FC]."

241. I am not able to make finding 7.34. There was a commercial basis for the calculation and the assumption was made that that was the calculation the Facility required. If the figure was wrong then there was a mistake, and no more. The position is however very confused, and it is possible that some (and this includes Reading FC) saw the calculation on the commercial basis as a compromise.

242. There remained the fact that the Fund still wanted repayment ahead of time, both because of concern about Reading FC and because of ambitions for the new fund, FAN 1. The Instructions still authorised a compromise or a concession when that was in the interests of the Fund, and specifically to forgo fees where it achieved the early repayment the Fund wanted.

243. Of course, first the possibility and then the approval and then realisation of the takeover of Reading FC strengthened the Fund's hand. The Fund rightly points out that Chinese investors had made financial commitments to Reading FC even before they had gained control and that they would be very keen to avoid default under the Facility. I understand the point but do not think it was seen as sure at the time. The Fund also points out that there was security for the Financing. Again I understand the point but consider that at the time the time and risk required for successful enforcement weighed heavily.

244. It was also relevant that the takeover would still involve the Thai interests. As to that, Mr Mutaz Otaibi accepted that Mr Nuseibeh probably told him in April 2017 that the Thai shareholders would be responsible for 25% of the repayment

of the Financing. The Thai shareholders discussed with Mr Nuseibeh and Mr Diallo the possibility of entering into a further facility to finance what was described as "their share" of the repayment of the Facility, or effectively retaining US$6 million of the Financing. Mr Mutaz Otaibi accepted it was "no secret that the Thais were struggling, based on all what we have seen".

245. Having heard each of Mr Churchill, Mr Diallo and Mr Nuseibeh give evidence, I do not consider the calculation was reached other than in good faith.

246. The Fund raised the allegation that there were "parallel and inherently conflicting personal business relationships that Mr Diallo and Mr Nuseibeh had and/or were seeking to develop with the representatives of the Thai owners of [Reading FC]". I am satisfied these amounted to no more than the hope any business person has of maintaining good business relationships with those they come across in business. There was no impact at all on any of the decision making.

247. In my judgment the interests of Mr Churchill, Mr Diallo and Mr Nuseibeh were in fact aligned with those of the Fund and FIML to achieve the best outcome. I am quite sure that the objective to achieve "the max", as Mr Diallo put it in the Bloomberg chat, was the common objective.

248. The outcome achieved was the US$2.2 million Termination Fee ultimately paid by Reading FC, together with complete repayment of principal without litigation or enforcement. If a negotiated outcome, I have no reason to treat the outcome they achieved as anything other than the best outcome that the circumstances allowed. To achieve the further US$800,000 would have risked a damaging, time consuming, and uncertain enforcement exercise affecting the entire repayment. Mr Hussam Otaibi was later to remark in September 2017 that, but for Mr Nuseibeh's work, the Reading FC transaction "would have been a disaster".

249. Putting things bluntly but commercially, Reading FC could not really afford to default, but the Fund could not really afford to enforce.

**The Fund's Issue 3(e) (breach of fiduciary duty, conspiracy, negligence, dishonest assistance):**

250. This issue asks:

> "Would the [Facility] have been rectified such that the Termination Fee properly payable by [Reading FC] on 23 June 2017 was $2.2m?"

This did not feature as a major issue.

251. The Fund asks the Court to make this finding:

> "Factual finding 13.1: There is no evidence of any outward expression of accord by the Fund and [Reading FC] shortly before the [Facility] was entered into that the [Facility] should operate in such a way as to make the

> Termination Fee properly payable by [Reading FC] on 23 June 2017 $2.2m; in fact the evidence indicates that the parties agreed to [Reading FC] being required to pay a minimum of three years' of interest if the [Facility] was terminated within the first three years, which is precisely what the terms of the [Facility] provided."

252. I am able to make the finding sought in the first part of this finding 13.1 (up to the semi-colon), which is sufficient for the present case. I would answer issue 3(e) in the negative.

## Alleged "Bonus Fee Misrepresentations"

253. On 5 June 2017 Reading FC offered to repay the Facility by 16 June 2017.

254. This was another good sign. But the Fund asks the Court to make a finding that would put things this high at around this time:

> "Factual finding 7.32: [Mr Churchill, Mr Diallo and Mr Nuseibeh] believed in light of the financial commitment the Chinese shareholders had shown to [Reading FC] before they had even gained control of the club – and including on 8 June 2017 - that the [Reading FC] would comply with its contractual obligations to repay the Loan and any fees due if pressed (using Chinese shareholder money if necessary) because there would be too many ramifications if the club defaulted."

255. The finding sought at finding 7.32 is one of belief without qualification. I am not able to make that finding. I am able to find that Mr Churchill, Mr Diallo and Mr Nuseibeh considered it was likely, even very likely, that Reading FC would repay.

256. This was why reference was still being in the days ahead made not simply to the contractual position and in particular the change of control clause, but also to the internal cost of funds to the Fund as lender and to losses made by the Fund as lender when early repayment was delayed beyond the anticipated point.

257. The context was also in reality one of negotiation, though on occasion neither side in this litigation has chosen (no doubt for their own tactical reasons) to dwell on this. The shareholders in Reading FC would require persuasion to pay a substantial Termination Fee, even where the Facility provided for one. In the real world, the effort to persuade would go beyond mere reference to the contractual right. From the perspective of the incoming Chinese investors, the change of control made Reading FC substantially more creditworthy, and there was no good reason for the Fund to call in Financing that was paying (as this was) high interest at 8.5% p.a., and a sum as low as US$750,000 (£600,000) had been mentioned when termination fees had been discussed previously. All these points would need answers to persuade.

258. Even as at about 8 June 2017 (the date identified in finding 7.32), by which point it was reported that the Chinese investors had asked all shareholders

(including the Thai shareholders) in Reading FC to pay against risk of dilution of their shareholding, I accept the position was fairly described by Mr Diallo under cross examination from Mr Jones QC:

> "Q. … So the message to come from this chat is that the belief that you held, as the investment adviser to the fund, is that the Chinese would pay and the redemption would be met?
>
> A. Correct, and that information was passed on to [Mr Mutaz Otaibi] but again, we are all speculating but yes, at this stage, we think that it's more likely than not that they will manage to save the day. No certainty, but that's the thinking here."

259. On 14 June 2017 a face-to-face conversation took place between Mr Nuseibeh and Mr Mutaz Otaibi in Floreat's Mayfair offices. Mr Diallo was present too. The redemption of the Facility was discussed. Prior to the conversation, Mr Churchill, Mr Diallo and Mr Nuseibeh had discussed on Bloomberg chat whether the redemption monies to be paid by Reading FC should be split two ways or three ways.

260. Paragraph 79 the Particulars of Claim alleges that Mr Nuseibeh made at this point what it describes as "the Bonus Fee Misrepresentations" regarding the fee that Reading FC was to pay. The allegation is as follows:

> "79. On or around 14 June 2017, Mr Nuseibeh misled Mr [Mutaz] Otaibi as to the financial benefit to the Fund of a change of control of R[eading] FC during face-to-face conversation at Floreat's offices."

261. Three individual representations are alleged:

> "In that exchange, Mr Nuseibeh made the following representations to Mr [Mutaz] Otaibi, all of which Mr Nuseibeh knew to be false but which he wished Mr [Mutaz] Otaibi to believe and rely upon (the "Bonus Fee Misrepresentations"):
>
> 79.1. Burges Salmon had advised FCM [London] and Mr Nuseibeh that it would not be in the Fund's interests to enforce the contractual rights that a change of control of R[eading] FC had given the Fund under the [Facility].
>
> 79.2. R[eading] FC would pay a "bonus fee" upon redemption of the [Financing] that was not required to be paid to the Fund.
>
> 79.3. Mr Whitworth and Burges Salmon had been consulted and were content that this "bonus fee" was not due to the Fund."

262. Paragraph 80 of the Particulars of Claim adds:

> "80. These Bonus Fee Misrepresentations fitted with Mr Nuseibeh's repeated statement to Mr [Mutaz] Otaibi since around December 2016 that Mr Nuseibeh had persuaded R[eading] FC to provide compensation for the fact that the Fund had needed cash injections in order to invest in other

> opportunities until R[eading] FC completed the repayment of the [Financing].”

263. I wish to bring out two preliminary points. First, in relation to the first of the three individual representations, Mr Churchill, Mr Diallo and Mr Nuseibeh accept that Mr Nuseibeh said to Mr Mutaz Otaibi that “seeking to enforce a security was not a good idea”. This was put to Mr Mutaz Otaibi by Mr Cavender QC as Counsel for Mr Churchill, Mr Diallo and Mr Nuseibeh in the course of Mr Mutaz Otaibi’s cross examination.

264. The second preliminary point I wish to bring out is that in the present case the word “bonus” is important to the Fund’s case as a word used to provide a contrast with something that is an existing contractual right. Of course, in some contexts the payment of a bonus may be an existing contractual obligation, but in the present case the word has been used to describe a sum of money beyond that or apart from that already provided by the terms of the Facility.

265. That is so even where the word is used in the phrase “bonus fee”. Central to understanding the Fund’s allegation of the “Bonus Fee Misrepresentations” are two characteristics of the word “bonus”, alone or in the phrase “bonus fee”, in the present case. First, it was distinct from the Termination Fee provided for by the Facility. Second, the Facility did not provide for it to be paid to the Fund.

266. In the normal way, this litigation was preceded by a letter before action from the Fund’s solicitors. At trial, Mr Mutaz Otaibi confirmed that he had approved the letter before action. The letter before action used the word “penalty” (and not “bonus fee”) when describing what Mr Nuseibeh allegedly said on 14 June 2017.

267. When this was discussed at trial, this exchange followed between Mr Cavender QC and Mr Mutaz Otaibi, ending with some acceptance that the word “penalty” (in contrast to bonus) was used by Mr Nuseibeh:

> “Q. I suggest to you your use of the word "penalty fee" in the letter before action reflects your understanding that this was a contractual sum due under the loan.
>
> A. I asked Mr [Nuseibeh] about the repayment of the loan and he said, "I'm expecting a fee." Whether it's a penalty because there is a delay or a penalty as part of the contract, in this context I can't -- you know, I'm not sure what he meant about "penalty".”

268. In cross examination of Mr Mutaz Otaibi by Mr Cavender QC at trial there were three further exchanges that I wish to highlight. The first was as follows:

> “Q. … He [Mr Nuseibeh] did not say that you could not rely on the change of control clause, did he? What he said to you was that seeking to enforce a security was not a good idea.
>
> A. As I said before, my Lord, the conversation was very short and the details that Mr Cavender is talking about, there is no way I can remember them

> now or any time before. All I remember, he said, "I have some good news. I might be expecting a fee," and that's about it. These details that Mr Cavender is talking about, I can't recall that he talked about them…."

269. The second exchange was as follows:

> "Q. He [Mr Nuseibeh] did not say that the fee wasn't for the fund, did he?
>
> A. He said, "I'm expecting a fee."
>
> Q. And he didn't say that Burges Salmon were happy with us taking the money. He didn't say that either, did he?
>
> A. He said, "I'm expecting a fee."
>
> Q. And he didn't say that David Whitworth had confirmed that he was happy with us taking the money either, did he?
>
> A. He said, "I'm expecting a fee."

270. The third of the three exchanges I wish to highlight was as follows:

> "Q…Are you saying he used the word "bonus" or is that a word you were using?
>
> A. He used the word "bonus".
>
> Q. You didn't say that a moment ago. A moment ago you said three or four times the only thing you really recall is Zaki Nuseibeh saying to you that you would be due a fee and you are now saying something different. You are now saying he said to you that you would be entitled to be paid a bonus.
>
> A. When I answered that question, Mr Cavender showed me a chart that was in front of me on the screen and he asked me what he had said a fee; I was confirming that what I saw on the screen. My recollection of what happened that day, he said, "I have a fee and it's a bonus."…"

271. I acknowledge that Mr Nuseibeh did accept that he:

> "… may have joked that the profit would be a nice present for Eid".

The reference to Eid had been addressed by Mr Mutaz Otaibi in his evidence in these terms:

> "When he talked to me on in June 14th, he said "I'm expecting something and it's a nice Eid gift", which means Eidi. So if I say Eidi, that means something I'm not expecting, it's a bonus".

272. However, I accept the point made on behalf of the Defendants, that the idea of a gratuitous ex-contractual "bonus" from Reading FC or supported by the

Chinese owners or the Thai owners, was implausible. Mr Mutaz Otaibi was quite experienced enough in business to realise this.

273. The three exchanges from cross examination that I have just highlighted show Mr Mutaz Otaibi's recollection does not provide an adequate evidential foundation for the alleged "Bonus Fee Misrepresentations". No other evidence made up the deficiency.

274. I do not accept the addition of the word "bonus" by Mr Mutaz Otaibi in what he attributed to Mr Nuseibeh in the third highlighted exchange was true and accurate. Without it, the allegations that the second and third alleged misrepresentations were made are materially undermined. If, as I find, there was no reference to bonus, it is hard to accept, and I do not, that further part of the "Bonus Fee Representations" that Mr Whitworth and Burges Salmon were content that this "bonus fee" was not due to the Fund. I also accept Mr Diallo's evidence that Mr Whitworth's name was not mentioned in the conversation between Mr Nuseibeh and Mr Mutaz Otaibi on 14 June 2017.

275. Having heard Mr Mutaz Otaibi give his evidence, in my judgment the word used was "fee" alone, and that word is apt to describe early payment fee or Termination Fee. Mr Nuseibeh's evidence, which I accept, was that he did not use the word bonus or the concept of a bonus.

276. Mr Nuseibeh remarked in Bloomberg chat that Burges Salmon had advised him it was a bad idea to move to enforcement action (i.e. enforcing against the security). In the circumstances that advice was entirely understandable. Mr Nuseibeh reported that Mr Mutaz Otaibi had asked whether the change of control right to call in the loan "has no value at all". As set out below, Mr Nuseibeh said he explained this was "not [really]" the case, "but we discussed it back in April … and lawyers said u don't really want to down this route".

277. The following exchange took place between Mr Cavender QC and Mr Mutaz Otaibi in cross examination, and gave Mr Mutaz Otaibi the opportunity to explain:

> "Q. So why want this money paid to FIML and onwards to FCM?
>
> A. As I said before, Mr Nuseibeh said "This is not for the Fund, not for FIML."
>
> Q. The truth is, acting with your hat on as MD of the Fund, you agree to short circuit the payment structure.
>
> A. I am not MD of the Fund.
>
> Q. Not to pay it directly to FIML, and acting with your hat on as MD of FIML, you agree to divert its management fees to third parties, i.e. the two offshore companies, and acting with [Mr Diallo], as directors of FCM, you agreed that company would agree for its fee to go offshore. That's how it worked, isn't it?

A. No it didn't work that way. Mr Zaki told me, "This is not for the Fund or FIML.

Q. But even if you were told that – and I don't accept for a moment that you were – you wouldn't have believed it. You knew a Termination Fee was due, a sizeable Termination Fee. You knew that was a contractual entitlement. No one else had mentioned some other sum of money which reflected the Termination Fee. So you knew the fee that [Mr Nuseibeh] was talking to you about was that Termination Fee.

A. No.

Q … Parties don't give you 2.2 million because of your disappointed expectations that are non-contractual, do they?

A Mr [Nuseibeh] told me that he negotiated that fee in accordance with what he was telling for six months that he will make them pay for the pain."

278. The Fund's attempt to build a case on the alleged "Bonus Fee Misrepresentations" is further undermined by Mr Mutaz Otaibi in oral evidence accepting this of his knowledge:

"Q … So I'll ask the question again: you knew, from your knowledge of going into the transaction, that close on 10 April a change of control was going to occur which would entitle the fund to an early prepayment penalty, didn't you?

A. At that point in time, I knew that the loan will be repaid with interest and whatever penalties in the loan agreement: correct.

…

Q. You knew that a hefty repayment penalty would be due, reflecting the unpaid interest for the remainder of the three years, didn't you? We are talking about millions. It is a large sum of money.

A. I wasn't aware its going to be millions or hundreds of thousands. But I knew there are penalties coming with the repayment of the loan."

279. The Fund invites the Court to make this finding:

"Factual finding 7.33: [Mr] Nuseibeh, with [Mr[ Churchill's and [Mr] Diallo's knowledge and approval, lied to [Mr Mutaz Otaibi] on 14.06.17 about the redemption of the [Financing], and told him that (i) [Mr Churchill, Mr Diallo and Mr Nuseibeh] were <u>negotiating</u> [original emphasis] an exit of the Loan because the Fund's lawyers had said that the Fund's contractual rights regarding the change of control were not enforceable, (ii) [Reading FC] would be paying a 'bonus fee' that was not contractually due to the Fund, (iii) DW and Burges Salmon were content that this fee was not due to the Fund."

280. Save that I am able to and do find that Mr Mutaz Otaibi was told that the terms of an early repayment of the Financing were being negotiated, I am not able to make finding 7.33 sought by the Fund.

281. I respectfully point out that the lie alleged at (i) is not that alleged in the Fund's statement of case. Paragraph 79(1) of the Fund's Particulars of Claim alleged that Mr Mutaz Otaibi was told that Burges Salmon had advised FCM London and Mr Nuseibeh that it "would not be in the Fund's interests to enforce" the contractual rights that a change of control of R[eading] FC had given the Fund under the [Facility]. The finding sought at 7.33(i) is that the Fund's lawyers, Burges Salmon, had said that the Fund's contractual rights regarding the change of control "were not enforceable". These are, in context, altogether different. The one is about the wisdom of enforcing rights; the other is about the absence of enforceable rights.

## "I lied so much just now"

282. Mr Churchill, Mr Diallo and Mr Nuseibeh later discussed on Bloomberg chat the conversation that Mr Nuseibeh and Mr Mutaz Otaibi had had on 14 June 2017.

283. In the course of the discussion with Mr Diallo and Mr Churchill, Mr Nuseibeh said of his conversation with Mr Mutaz Otaibi:

> "I lied so much just now".

Unsurprisingly the use of these words featured heavily in the Fund's case.

284. It is important to consider the words in their full context. To start, the immediate surroundings of the discussion by Bloomberg chat included the following:

> "Mr Nuseibeh: "v [difficult] questions guys on [Reading FC] … I really struggled I wish u culd jump on".
>
> Mr Diallo: "it was mixed English and Arabic … so I assume you wanted one on one".
>
> Mr Nuseibeh: "he dwelled about change of control … why its not enforceable … its hard … he said so it has no value at all? … I said not really … but we discussed it back in April … and lawyers said u don't really want to go down this route".
>
> Mr Diallo: "we still need to be careful … otherwise next time we cant use it at all to defend a deal".
>
> Mr Nuseibeh: "I know but what can I say … his brain was thinking … its bloody hard … what can I argue".
>
> Mr Diallo: "no I fully appreciate".

…

Mr Nuseibeh: "I don't think he was buying everything I was saying … should I drop that I told them the fee of around 2.5 mi … ? … I told him im expecting a fee but they asked me to give them some days as they are fighting with the new guy as to who pays what … he was like cant the new guy lend him".

Mr Diallo: "did you not mention the range … you should say 2m … not 2.5".

Mr Nuseibeh: "I said its difficult cuz he is trying to screw them".

Mr Diallo: "because its 2.2 … you want to overdeliver … not the other way around".

Mr Nuseibeh: "but then how did it end up being 2.2?".

Mr Diallo: "as u started to say we used the basis of losses and redeployment on lower yielding asset … or the change of control as basis … my worry with latter is he says the fee goes to FIML".

Mr Nuseibeh: "maybe u want to jump in now … and say zaki did u tell m about the fees potential … I lied so much just now … its bloody difficult …".

Mr Diallo: "but we don't have a basis for the calc … what is it?".

Mr Nuseibeh: "we don't … I will just tell him [what] I told them … that we borrowed the money at 15% internally … plus we had 750 agreed back in December as you may remember … plus we had to liquidate portfolios at losses when they didn't pay [at the] end of march … when they told me they would … and we just used the change of control as a threat".

Mr Diallo: "so all you want me to do is draw you in …?".

Mr Nuseibeh: "not sure but u need to jump in cuz its hard … maybe then we say … can we go to the room quicly … and then just tell him … its better while its hot … especially cuz I didn't mention the amount just now".

Mr Diallo: "you are better off in public … he will ask less questions".

Mr Nuseibeh: "ok … so".

Mr Diallo: "in private we need to be 100% clear …he will want to take more money … once he sees it".

> Mr Nuseibeh: "how shall we do this … I do all the talking ? … about the fee quantum being around 2 mil?".
>
> Mr Diallo: "yes … but I can just say did you tell him … then u give him the spiel above …".
>
> Mr Nuseibeh: "should I say 2 – 2.5 …?".
>
> Mr Diallo: "I would say 2".

285. For the Defendants, Mr Cavender QC is right to caution that Bloomberg chat cannot be read like an email or any other self-standing document capable of easy interpretation. It is easy to read into the words on the screen something that is not there, especially with confirmation bias. I proceed with caution, but also with the benefit of the evidence given at trial which took matters, and the context, further.

286. This included the following when Mr Nuseibeh was asked at trial about his use of the words "i lied so much right now". He said he had not told Mr Mutaz Otaibi anything like the whole truth (or even a fair summary) of what he had just been told by the Thai owners about their ability to pay. He had told Mr Mutaz Otaibi that there would be a delay but that repayment was still expected in a few days, when in truth the simple message was that the Thais were unable to pay.

287. In oral evidence, Mr Nuseibeh was uncomfortable recalling the situation:

> "…the panic that was going on in me because I wasn't being completely upfront about what's just happened and I almost felt like I needed to go back to the conversation".

288. In further cross examination, there was this exchange between Mr Jones QC and Mr Nuseibeh:

> "Q. Then you go on to say: "I lied so much just now. It's bloody difficult." Would you like to enumerate for his Lordship what lies you told Mr Otaibi.
>
> A. I believe precisely what I've just explained. I was telling him that, "They're not -- they are fighting a bit with each other, they've asked me for a few days and KP is happy to pay," or something. I said KP is happy to pay but he wants to put it on the other guys. KP has come and told me, "I cannot pay, I cannot pay," and maybe part of the game he was playing was a bit of bluffing so that he is hoping to put it on the Chinese but the message to me was clear, and if you see further down the line in the chat, when we asked Ben, do you agree, the first thing that Ben said is, "I don't have the context," and my answer immediately to that was, "Basically KP can't pay on Friday." So that is the thing on my head, is the default, and how we deal with that and how we take the next steps and how much do I share with [Mr Mutaz Otaibi], which clearly I wasn't sharing in a very transparent manner, and I think I was very uncomfortable with that conversation as a result of that."

289. I can accept that Mr Nuseibeh was uncomfortable with the fact that he had not been transparent over the risk of default. But I am not prepared to accept that this was the principal respect in which he felt he had lied. That was rather over the amount of the fee, where he had also not been frank and transparent. And the reason he had not been frank and transparent over the amount of the fee was because all three of Mr Churchill, Mr Diallo and Mr Nuseibeh were concerned to keep their options open over the destination of that payment.

290. Mr Jones QC asked Mr Nuseibeh, in cross examination:

> Q. Why would you be considering telling him there is a fee of around 2.5 million?

291. Mr Nuseibeh's reply and the exchange that follows were as follows:

> "A. Well, I didn't want to give a specific number. As I said, I wanted to keep it vague on that day because I had no certainty whatsoever and I'm trying to manage him and telling him, we are going to get a fee, don't worry.
>
> Q. Well, no, why were you considering lying to him in your conversation with Mr Diallo that you might suggest to him a fee of around 2.5 million, when you knew that to be completely untrue?
>
> A. Yes, I did feel very uncomfortable about that chat that day, and I always was like, I'm not used to this. I'm being a bit vague, he wasn't really buying it. Part of that effort to improve the image of what's going on, I'm considering whether to drop a line or not, and the reason why I'm now starting to debate it with Oumar is because if there is any precision on that day on when we need to take that discussion forward with Mr Otaibi.
>
> Q. I just want to check what you are saying. You were considering with Mr Diallo telling something to Mutaz Otaibi which you knew to be false?
>
> A. No, no, no, no.
>
> Q. You knew that a fee of 2.5 million would be false?
>
> A. No, what I'm asking --
>
> Q. No, Mr Nuseibeh, let me take it one stage at a time.
>
> A. Sure.
>
> Q. Did you know, on 14 [June], that suggesting to him there might be a fee of $2.5 million was false? … Did you know on that day the 2.5 million would be a false statement?
>
> A. If I had told him that, it would have been, yes
>
> Q. Okay. Here you are considering telling him that. So you are considering telling him a lie. I want to ask why.

A. Because I'm sat there, right after that meeting, in complete nervousness, having a default literally 48 hours away and I'm not telling Mutaz that there is a default. I'm not telling him about that. He knew that there is a delay, but all I'm saying that that delay is because the two parties are playing against each other, which was partly true, by the way, because it looked like they were playing poker and they want to see who blinks first. But the real story was that KP was going to default. So I had absolutely no confidence about what's going to happen. The complete contradiction point is that I'm giving him some confidence that don't worry, we are going to get a fee, and this is in circumstances where we have established well before, well, well before, that the contract entitlement, we are going to try and work as much of it as possible. So you know, the panic that was going on in me was because I wasn't being completely upfront about what's just happened and I almost felt like I need to go back to that conversation.

Q. That was a very long recitation which does not qualify as an answer to my question. Were you actively considering in this chat saying something to Mutaz Otaibi, which you knew would be a lie?

A. No, in the heat of the moment and in a panic, I'm trying to see whether we specify the fee there and then because we realised it's not that that's only at risk, it's the notional that's going to be at risk. I did not have any confidence what we were going to receive, and what we didn't want to do, and clearly what Oumar then brought to me is that no, underpromise and overdeliver. So he said if you are going to share a number, share it as 2, and so that's -- and, in fact, that's what we were talking about and later figured out that there is no point having that conversation because we need to have precision. So we didn't. At that point, I finished my conversation with Mr Otaibi.

Q. But, Mr Nuseibeh, just forgive me. You know you've issued a formal demand for $2.2 million, which you think is the correct amount, rightly or wrongly.

A. Correct.

Q. And you know, therefore, that suggesting to Mutaz Otaibi, were you to go and do so, that 2.5 million could be the fee would be a lie. Do you agree?

A. If I communicated 2.5, yes, absolutely.

Q. So my question is: why were you even considering lying to him? For what purpose?

A. For the purpose of covering a rosier picture that I was trying to cover. I was literally in panic and I'm thinking what's going to happen. Can I just say, if you go back at the start of that day, on the 14th, there is reference to a meeting, I believe, Mutaz himself mentioned last week, where he said for the first time in our five years at Floreat, he asked his brother to come up

> and apologise to Oumar because he insulted us. This was a very, very heated time. The trust was at an all time low. We were having lots of tensions. There was a massive blow-up in a meeting on that week, I believe, and so with a default coming up, this is a trade that I've managed closely. It would have been the first exit where I've just been told a default is happening. I'm not being completely upfront about the true nature of what I have just been told by the client and yet I'm trying to give a contradicting message that actually, don't worry, we are going to get a fee. So that's the context to what was going on."

292. Mr Jones QC continued the cross examination:

> "Q. Why did you say then: "How did it end up being 2.2?"
>
> A. I don't believe this line in isolation makes sense.
>
> Q. You typed it. Can you try and help his Lordship, if you can, with what you meant by it.
>
> A. I believe it's a typo. I think Oumar's analysis, that I heard yesterday, is accurate because we are trying to put -- you see, if you go and give a number to Mr Otaibi at that stage, I would need to explain how is it that we got to that number and then I would need to go into further details into that conversation, which I wasn't going to be comfortable with because I have just come out of that meeting and so –
>
> Q. So if he asked you a question, as the investment adviser to the fund, you would not wish to answer it? You would prefer to lie to him than answer the question. Is that your evidence, Mr Nuseibeh?
>
> A. No, my evidence is I was trying to manage him. …"

293. Mr Cavender QC observed in the course of submissions that if the cross-speaking is disentangled, it is tolerably clear that "2.2" is a slip and "2" was intended. But it is the reference to an attempt to "manage" Mr Mutaz Otaibi that speaks again to their central concern to keep him away from the subject of destination.

294. Mr Nuseibeh continued:

> "… Don't forget, from our point of view, at that point, the relationship was pretty -- on a downhill slope. There was tension on that very week, and I've just had a default land on my desk, the first potential exit was going to be a default."

295. The cross examination of Mr Nuseibeh by Mr Jones QC also looked at what Mr Diallo had been saying in the Bloomberg chat about giving other reasons to Mr Mutaz Otaibi:

> Q. Let's pick up what Mr Diallo was saying. So we go back to 14.46.38: "As you started say we used the basis of losses and redeployment on lower

yielding asset or the change of control ..." What is he talking about there, do you think?

A. Well, if you are not going to give him the actual amount, then, you know, you need to explain the reasons you've given to your client about how we managed to get a fee negotiated because it's not the actual Termination Fee amount.

Q. I'm sorry, I simply don't follow that. We know what the actual Termination Fee is and we know what the fund's right is. So why are you having a conversation with Mr Diallo and he with you about finding other reasons to justify there being a fee?

A. Because we are trying to give a -- not the actual number. If we were to give it on that day, which we didn't.

Q. You see what this is all about is really supporting what you told Mr Otaibi, that you were trying for a fee and it was not a fee that was due to the fund under the contract.

A. Well --

Q. You were just using change of control as a basis or a threat. That's what this is all about.

A. That doesn't make sense at all because we have established change of control way before, months before. What was only in discussion here is enforceability and how we deal -- how we take the next step.

Q. His Lordship will decide in due course what was established between you and Mr Otaibi in December. Let us now press on. Mr Diallo says: "My worry with the latter is he says the fee goes to FIML." And "the latter" refers back to the change of control. That's what you understand him to be saying, isn't it?

A. No, I don't understand what he means with "the latter".

Q. What did you understand at the time he meant?

A. I didn't actually. I mean, I was -- my worry – my worry was the default that was going to happen. If you look at the whole thread, as you said yourself, there is two worries. Oumar seems to be worrying about when to have the conversation with Mutaz and I'm worried about if we have any precision there and then, then we are committing to it and have no visibility whatsoever how we are going to treat the client by Friday and how we are going to deal with the situation. I haven't even had a chance to speak to the lawyers after that KP meeting."

296. In my view the worries were accurately touched upon. For Mr Nuseibeh there was a concern over non payment, but for both Mr Nuseibeh and Mr Diallo there was a concern to avoid a situation in which Mr Mutaz Otaibi would say that the

payment must go to FIML, when that was not the course that Mr Churchill, Mr Diallo and Mr Nuseibeh were prepared to risk.

297. Mr Nuseibeh and Mr Diallo went on to express their concern that Mr Mutaz Otaibi would ask to whom the fee was to be paid. Mr Diallo indicated:

> "we still have a way to change because you were vague on repayment".

When Mr Nuseibeh explained that he had told Mr Mutaz Otaibi that Reading FC had promised a fee and to "expect a nice present for eid hopefully". Mr Diallo responded:

> "thats enough for now for me. any precision at this stage is too premature and he will want some control on where it goes. because we can still alter things."

298. Discussion by Bloomberg chat included the word "enforceable". In the present case I conclude that is a reference to the commercial viability of enforcing rather than to legal enforceability.

## The destination of the Termination Fee; the "Diverted Sum"

299. Mr Nuseibeh had observed on Bloomberg chat: "it will all just be back to [the Fund]". This attracted Mr Diallo's response: "that's details … lets agree the max then we see how we do it." Here, the first and last words of the exchange concern the destination of Termination Fee.

300. In the "summary of claim" within its Particulars of Claim, the Fund alleged that Mr Churchill, Mr Diallo and Mr Nuseibeh:

> "6.1 misused their position as investment advisers to the Fund, through FCM [London], to procure the improper diversion to their corporate vehicle [FIR], of $1,099,986.29 that was contractually due to the Fund from [Reading FC] as part of a Termination Fee payable upon redemption of the [Financing] (the "Diverted Sum"), which Diverted Sum [Mr Churchill, Mr Diallo and Mr Nuseibeh] then procured that [FIR] transferred in equal shares to their personal bank accounts, Mr Diallo holding the bank account to which his share was transferred jointly with his wife, Mrs Diallo."

301. In the way described in greater detail above, US$1.1 million of the US$2.2 million Termination Fee was paid to FIR and thence to Mr Churchill, Mr and Mrs Diallo, and Mr Nuseibeh. This, of course, is what the Fund terms "the Diverted Sum". The Fund alleges a proprietary claim against each of the five Defendants in respect of it. The Fund also alleges breach of fiduciary duty, conspiracy, deceit, dishonest assistance, knowing receipt and negligence against Mr Churchill, Mr Diallo and Mr Nuseibeh. Knowing receipt is additionally alleged against FIR.

302. The Fund invites the Court to make this finding:

> "Factual finding 7.8: [Mr Churchill, Mr Diallo and Mr Nuseibeh] knew that had the Diverted Sum trickled down from the Fund to FIML to FCM [London], it would have been used to fund FCM [London]'s ongoing debts and expenses rather than paid out to its shareholders."

303. I have reviewed earlier in this judgment the contractual position across the Offering Memorandum, the Investment Management Agreement and the Investment Advisory Agreement, and commented what is and is not available to me with regard to the financial position of FCM London (and the use of FAL, and the FIML obligation to meet expenses of FCM London). In the circumstances reviewed, I am not able to make finding 7.8. However I am able to make a finding that Mr Churchill, Mr Diallo and Mr Nuseibeh were concerned that if the "Diverted Sum" was sent to "trickle down" from the Fund to FIML to FCM London there was a material risk that it would not reach the shareholders of FCM London.

## 19 June 2017

304. Reading FC did not, in fact, come up with the money by Friday 16 June 2017.

305. The Bloomberg chats on the days that followed show that Mr Nuseibeh remained for the next few days in tense negotiations over the redemption, possible default and the prospect of enforcement against the security. The last of these includes Mr Nuseibeh passing on that he had told Mr Srisumrid:

> "i m out of options here and im under huge pressure"

306. On 16 June 2017 itself, Mr Nuseibeh told Mr Diallo he was increasing the pressure on Reading FC to repay but,

> "…reality is [Oumar] is the [T]hais have no money … and reality is … we cant enforce a default".

307. On 17 June 2017 the Chinese investors proceeded to purchase 75% of the shares of Reading FC.

308. It is common ground that on Monday 19 June 2017 there was discussion at Floreat's offices about Reading FC. There were at least two occasions for this discussion. The first, a noon meeting in what was known as the Music Room at Floreat's offices. The second, later in the afternoon, in passing at Mr Mutaz Otaibi's desk at the offices.

309. During the latter conversation, according to Mr Mutaz Otaibi, Mr Nuseibeh mentioned that the loan was about to be repaid and that he had obtained some compensation as a bonus. Mr Mutaz Otaibi was asked to agree to the money being sent to FIR and to FCM Cayman (the Cayman Islands incorporated company under the control of Mr Mutaz Otaibi and in which Mr Churchill, Mr

Diallo and Mr Nuseibeh owned no interest.) According to Mr Mutaz Otaibi, he was not shown the Cancellation Notice.

310. Against the background of earlier discussion about a fee being paid, I do not accept Mr Mutaz Otaibi's evidence that what was mentioned to him now was a bonus. I can accept that he either was not shown or did not take in the content of the Cancellation Notice. But I reject Mr Mutaz Otaibi's suggestion, designed to support his case that there were limits to his authority for the Fund and FIML, that the reason for his not being shown or taking in the content of the Cancellation Notice was that information in the Cancellation Notice was:

> "… not for me to see. It's for the board of the fund and the management".

He was asked to, and as appears below, he did agree to the money being sent to FIR and FCM Cayman.

311. For the Defendants, Mr Diallo and Mr Nuseibeh say that in the meeting at noon, they presented Mr Mutaz Otaibi with a Cancellation Notice which then showed the entire Termination Fee being paid to FIR. On their account, it was after discussion that it was agreed to pay the Termination Fee to FCM Cayman and FIR and not just FIR. I do not accept Mr Diallo and Mr Nuseibeh's account that, as a starting point leading to a conversation, the Cancellation Notice was shown to Mr Mutaz Otaibi at least in a way that revealed it as showing the entire Termination Fee being paid to FIR. As was observed at trial, "all hell would have broken loose" had the Cancellation Notice been shown to him showing that, but no-one suggests that reaction occurred. And Mr Jones QC makes the point even on the Defendants' case, FIR was not entitled to that money; at highest, FCM Cayman was entitled to half of it.

312. On the theme of a negotiation between Mr Mutaz Otaibi on the one hand and Mr Churchill, Mr Diallo and Mr Nuseibeh on the other, in Bloomberg chat that day, Mr Churchill observed that "M" (Mr Mutaz Otaibi) "seems a bit down", asking whether this was because he was "Stewing over the 2.2m". The Defendants suggest that Mr Mutaz Otaibi was "stewing" because (just as they had proposed the whole sum be paid to FIR and been unsuccessful, so he had been unable to persuade Mr Diallo and Mr Nuseibeh to accept the whole USD2.2m going to a company under his control (i.e. FCM Cayman). I do not accept that the relationship between the parties was such that a negotiation of this nature was in any way a likely event.

313. There is however common ground that the position that resulted was that Mr Mutaz Otaibi, Mr Churchill, Mr Diallo and Mr Nuseibeh all appreciating and agreeing that the relevant payment was going to be paid to FCM Cayman and FIR. The Fund recognises this within the finding it asks the Court to make at its Factual finding 26.1, addressed further below, and in which its states "[Mr Mutaz Otaibi] … ultimately agreed on 19 June 2017 to the [Reading FC] Payment being paid to [FIR] and FCM Cayman."

314. In a little more detail, Mr Mutaz Otaibi's evidence of what was discussed that day included the following passages, highlighted by the Defendants:

> "A. That day, in the afternoon, Mr Zaki came to my desk and said, "By the way, I negotiated a fee, 2.2 million." I ask him, "Is it for the fund?" He said, "No." "Is it for FIML?" He said, "No." He said, "I want to -- can I send it to FIR and FCM Cayman?" I said, "Are you sure it's not for the fund and FIML?" He said, "They're not. This is what I negotiated for us, for our pain." I said, "That's fine."
> …
> A…My Lord, the only time I knew about a payment of 2.2 million is near my desk that day in the afternoon. That's the only time I was told the amount of the fee… The only time and only time in this whole period that I came to know about the 2.2 million is when Mr Zaki came to my desk and said, "I negotiated the fee. It's 2.2 and it's a bonus because of the pain we had to suffer for the non-repayment for six months." That's the only time. In that board meeting -- in that meeting in the music room, there was no discussion about splitting fees or anything else.
> …
> A… In the afternoon I was coming back to my desk and Mr Zaki came to me and said, "Look, there is a 2.2 million that I negotiated for our pain for the last six months. Can I send it to FIR and FCM Cayman?" I asked him, "Is that payment for the fund or FIML?" He said, "No, this is extra. I got it from the [Reading FC] people. Can I send it to these two companies?" And I said, "That's fine."
> …
> A…This payment came to my knowledge on that day when I was coming back to my desk and Mr Zaki told me, "I negotiated an extra payment for us." I said, "What do you mean for us?" He said, "This is not for the fund or FIML, for the pain we incurred the last six months." That's what he said."

315. The Defendants contend that this account was "pure invention and knowingly false evidence". In my judgment the account is partly true and partly false.

316. What matters is what was said at some point that day. I accept that there was reference to a fee and to a fee of US$ 2.2 million, and that it could be sent to "FIR and FCM Cayman". As discussed above, I do not accept there was reference to it going just to FIR or just to FCM Cayman. I do not accept there was reference to a bonus, or that Mr Mutaz Otaibi asked whether it was for the Fund or FIML and received assurance that it was not. Even if he had it would have meant nothing. As experienced commercial people, well aware of the difficult circumstances Reading FC faced, none of Mr Mutaz Otaibi, Mr Churchill, Mr Diallo or Mr Nuseibeh seriously believed that US $2.2 million was being paid by Reading FC for pain or without an underlying obligation to the Fund to pay. Any reference to pain was not a description of the basis of the entitlement to the fee but to part of a (fair or unfair) description of the experience of dealing with Reading FC and as something mentioned to Reading FC to explain why the contractual Termination Fee was being insisted on, and at this high level. Any suggestion that a sum of US$2.2 million that Reading FC was prepared to pay was a sum it would be prepared to pay to anyone other than the Fund (a separate matter from what the Fund would then do with it, or to whom

Reading FC might be asked to make the transfer of the sum it was prepared to pay the Fund), was almost absurd.

317. Mr Cavender QC points out, referring to the available Bloomberg chat, that the first two sets of entries (in advance of the meeting) show a firm intention to raise the question of the Termination Fee with Mr Mutaz Otaibi, and argues that it is implausible that, despite such planning (and the taking of Mr Nuseibeh along to the meeting for the express purpose), the question of the Termination Fee was not dealt with at that meeting

318. The second two set of entries (immediately following the meeting) show, Mr Cavender QC further points out, that the issue of the Termination Fee had been raised at the meeting and resolved. That fact is further supported by Mr Nuseibeh emailing Burges Salmon, which he did immediately following the meeting (at 12.38), instructing them to deal with the redemption monies to be paid by Reading FC as follows: outstanding principal amount to the Fund; Termination Fee Payment to be split equally between FIR and FCM Cayman.

319. I accept the force of these points made by Mr Cavender QC. However I emphasise that whether the discussion was at the first meeting and not at the desk, the content was as I have discussed.

320. On 19 June 2017, Mr Nuseibeh said:

> "had a call with B S [Burges Salmon] … there is kind of nothing we can do … apart from enforce … which is a whole different procedure … and isnt just a simple thing … so we kind of played all our cards for now".

He noted that:

> "lawyers advice is to leave it for tonight … and maybe silence will scare them".

321. The Fund asks the Court to make these findings:

> "Factual finding 7.35: [Mr] Nuseibeh with the knowledge and approval of [Mr] Diallo and [Mr] Churchill, told [Mr Mutaz Otaibi] on 19 June 2017, 17 days after the Cancellation Notice was issued, that [Mr Churchill, Mr Diallo and Mr Nuseibeh] had <u>negotiated</u> [original emphasis] a $2.2m extra-contractual fee from [Reading FC] as compensation for its delay repaying which was not due to the Fund."
>
> "Factual finding 7.36: None of [Mr Churchill, Mr Diallo and Mr Nuseibeh] showed [Mr Mutaz Otaibi] the Cancellation Notice on 19 June 2017 or at any other time."
>
> "Factual finding 7.37: [Mr Mutaz Otaibi] did not appreciate on 19 June 2017, or at any other time, that the $2.2m fee to be paid by [Reading FC] was money that was contractually due to the Fund."

> "Factual finding 7.38: On 19 June 2017, [Mr Mutaz Otaibi] agreed with Nuseibeh to split the $2.2m fee paid by [Reading FC] between [FIR] and FCM Cayman on the basis of the lies that Nuseibeh had told him (with the knowledge and approval of Diallo and Churchill) on 14 June 2017 and 19 June 2017 about the [Reading FC] Payment being paid."

322. I am able to make finding 7.35 but not that Mr Mutaz Otaibi was told that the fee was extra contractual, compensation for Reading FC's delay in repaying, or not due to the Fund.

323. I am unable to make finding 7.36, but I am able to find that if Mr Mutaz Otaibi was shown the Cancellation Notice he did not take the content in. What is important is what he was told about it and what was and was not discussed about cancellation. I am unable to make finding 7.37. I am able to make the finding of agreement sought by finding 7.38, but not the basis there alleged.

## The Deed of Release; payments of principal and fees by Reading FC

324. On 21 June 2017 Mr Srisumrid emailed Mr Nuseibeh stating that a "Hong Kong bridge loan" had been secured for US$5 million to help cover a shortfall in the repayment of the Facility. This underlined that even at the end repayment had not been straightforward.

325. A Deed of Release dated 23 June 2017 in two counterparts, recited at (B) that Reading FC had agreed to pay and the Fund had agreed to accept a sum in full and final settlement of:

> "… all present and future obligations and liabilities of [Reading FC] … which are, or are expressed to be, or may become, due, owing, or payable to [the Fund] under or in connection with any of the Finance Documents [as defined in the Facility] …".

326. The Fund seeks the following finding:

> "Factual finding 7.39: [Mr Churchill, Mr Diallo and Mr Nuseibeh] did not procure the Fund to sign a complete version of the Deed of Release, instead allowing Burges Salmon to amend the blank, undated version Whitworth had signed in December 2016 by hand, and not then providing a copy of that complete version to [Mr Mutaz Otaibi], the Fund or FIML before (or after) the Loan was fully redeemed on 23 June 2017."

I am able to make this finding 7.39 in its terms, but add that the procedure it describes were not out of the norm for the Floreat Group.

327. The sum agreed in settlement was US$19,809,435.20. This comprised US$17,609,435.20 in full redemption of the then outstanding Note and US$2.2 million "in respect of the Termination Fee". Burges Salmon inserted these figures by hand into the draft Deed of Release signed by Mr Whitworth earlier.

328. It is common ground that Reading FC repaid, at that time, $17,537,744.46 by way of principal, and an additional $2,200,000.00. On 26 June 2017, FIR and FCM Cayman each received payments of US$1,099,986.29 and US$1,099,986.28 respectively from Burges Salmon.

329. Transfers from FIR's account were then made as follows: US$366,000 to a bank account in the name of Mr Churchill; US$100,000 to a bank account in the name of Mr Nuseibeh; US$266,050 to a bank account in the name of Mr Nuseibeh; US$366,000 to a bank account in the joint names of Mr and Mrs Diallo. For completeness the Fund seeks as its factual finding 31.1 (and I make) a finding that "[FIR] received the Diverted Sum and paid this onto [Mr Churchill, Mr Diallo and Mr Nuseibeh]", although noting that this is not in dispute.

330. The Fund asks the Court to make this finding:

> "Factual finding 7.40: When [Mr Mutaz Otaibi] emailed [Mr] Diallo on 27 June 2017, in response to [Mr] Diallo's email informing him that $1.1m had been paid to FCM Cayman, [Mr Mutaz Otaibi]'s response is to be interpreted as his asking [Mr] Diallo whether the Fund had been paid all sums due to it under the [Facility]."

331. The Fund highlights this passage in Mr Mutaz Otaibi's email in response:

> "Has RFC re-paid the full outstanding loan amount into GFIF account?"

In its written closing the Fund argued:

> "This can only be sensibly understood as [Mr Mutaz Otaibi] asking if the Fund has received its full contractual entitlement, and [Mr] Diallo confirming this, with the implication that [Mr Mutaz Otaibi] had been led to understand that FCM Cayman's receipt of USD $1.1 m was in some way extra-contractual."

332. With respect, I do not agree. In my view, and in context, Mr Mutaz Otaibi was asking about the principal outstanding under the Facility, to check that that had been paid. He knew that the US$1.1 million had been received by FCM Cayman, and so his concern was the principal sum because this would be used towards FAN 1 (and in particular expensive financing within that project). When Mr Mutaz Otaibi gave evidence that he was talking about "the loan with all its associated fees and interest as per the contract" I do not accept that evidence. For the reasons explained earlier in this judgment I reject the idea that Mr Mutaz Otaibi ever understood that FCM Cayman's receipt of USD $1.1 million "was in some way extra-contractual."

333. The Fund seeks this finding:

> "Legal finding 6.10: [Mr Churchill, Mr Diallo and Mr Nuseibeh] could not reasonably have interpreted any act by the Fund as giving [Mr Mutaz Otaibi] authority to agree to the Fund not receiving the Payments in circumstances where they had at least constructive knowledge of the Break Fee Clause and the NAV Assessment Requirement in the Offering

> Memorandum, and therefore ought to have known that any such decision involved the Fund breaching its contractual obligations to its investor shareholders."

334. I can accept Mr Churchill, Mr Diallo and Mr Nuseibeh had "at the least constructive knowledge of the Break Fee Clause and the NAV Assessment Requirement in the Offering Memorandum."

335. However I am not able to make this finding 6.10 in relation to the sums that were not paid by Reading FC (i.e. what the Fund terms the "Prepayment Fees" and the "Missing Termination Fee Payment").

336. The treatment of those items was by FCM London (acting by Mr Churchill, Mr Diallo and Mr Nuseibeh) in an overall effort, in good faith, successfully, and in accordance with the Instructions, to achieve early repayment of the Financing to the Fund. The Fund's contractual obligations to its investor shareholders are not breached when it concedes a fee in connection with an asset in order to achieve a better overall outcome for the Fund in relation to that asset.

337. In the present case, the origins of the Fund's authority for this to happen lie at the outset of the Fund's existence. By Clause 3.1 of the Investment Management Agreement, the Fund, subject to certain exceptions, had expressly agreed that FIML:

> "… take all day to day decisions and otherwise act as [FIML] deems appropriate in relation to the management of the Portfolio for the account of the Fund without prior reference to the Fund".

Mr Mutaz Otaibi was the executive director of FIML. Clause 3.16 of the Investment Management Agreement gave FIML, subject to certain requirements, "… full power and authority" to appoint FCM London an investment adviser and to delegate the performance of its investment management services to FCM London (I am satisfied on the facts of the case that FIML's "Associates" included Mr Mutaz Otaibi (as a person controlling FIML) and FCM London (as a person controlled by FIML)). The Fund made clear in the Offering Memorandum that FCM London "might arrange transactions to give effect to investment decisions made by [FIML]."

338. On the other hand, I am able to make finding 6.10 in relation to the Termination Fee, including what the Fund describes as the "Diverted Sum", in this way. Mr Churchill, Mr Diallo and Mr Nuseibeh could not reasonably have interpreted any act by the Fund as giving Mr Mutaz Otaibi authority to agree to the Fund not receiving the Termination Fee that was to be paid, and to someone else receiving it instead, in circumstances where Mr Churchill, Mr Diallo and Mr Nuseibeh knew that the right to the Termination Fee was the Fund's.

## The Fund's Board Meeting on 23 November 2017

339. The Fund asks the Court to find:

> "Factual finding 7.41: In the Fund's board meeting on 23 November 2017, [Mr Mutaz Otaibi] did not correct whoever stated that the Fund had received an exit fee of $2million because he did not know what the sum paid to the Fund comprised in terms of principal, interest and fees."

340. I am not able to make finding 7.41.

341. The final finding sought by the Fund under its Issue 2(a) is this:

> "Factual/legal finding 6.11: If the Court finds that [Mr Mutaz Otaibi] knew that the [Reading FC] Payment was a Termination Fee due to the Fund and gave his informed consent to its diversion (both of which are denied), then [Mr Mutaz Otaibi] would have had no reason to lie to the Fund's board by omission at the Fund's board meeting on 23 November 2017 by not correcting whoever wrongly stated that the Fund had received a $2m exit fee if he had been acting with the authority of the Fund's board."

342. I do find that Mr Mutaz Otaibi knew that the [Reading FC] Payment was a Termination Fee due to the Fund. I also find that he gave informed consent to its diversion. Given his position with the Fund and FIML it was not open to him to agree to the diversion away from the Fund, and to the benefit of himself and others, of a payment that was being made and to which the Fund was entitled. He was not acting with the authority of the Fund's board.

343. On these foundations, I am not able to find that Mr Mutaz Otaibi "would have had no reason to lie to the Fund's board by omission" on 23 November 2017, in the manner alleged by the Fund in the final clause of this requested finding 6.11.

344. The Fund also asks for this finding:

> "Factual/legal finding 8.2: Even on [the Defendants'] case [that there was a 2015 Profit Share Agreement], the 2015 [Profit Share Agreement] did not permit [Mr Churchill, Mr Diallo and Mr Nuseibeh] to procure the diversion of the [Reading FC] Payment away from the Fund without further agreement from the Fund."

I have already held that there was no 2015 Profit Share Agreement, so that this finding is not material. However for completeness, the Fund's requested finding 8.2 would be correct in the circumstances discussed and where the Fund was not alleged to be a party to the alleged Profit Share Agreement.

## The return of US$1.1 million by FCM Cayman

345. On 17 April 2019 FCM Cayman paid US$1,201,379.63 to the Fund. On the Fund's case, supported by Mr Mutaz Otaibi's evidence which I accept on this point, this payment was to reimburse the Fund in respect of part (the second half) of the Termination Fee that the Fund had not received upon repayment of the Facility.

346. FCM Cayman had no entitlement to this money in the first place, the money should not have been paid to it, and it should have been repaid earlier.

347. But then on 12 June 2019, the Fund paid US$1,201,379.63 to FIML. On Mr Mutaz Otaibi's evidence this was to pay for FIML's legal fees in these proceedings which it pursues as assignee of the Fund. A similar version of events was provided in the course of answer to a request for further information of 12 February 2021, with which Mr Adrian Beltrami QC (sitting as Deputy High Court Judge) had ordered the Fund to comply.

348. On 6 May 2021 the Fund was ordered to produce:

> "… documents evidencing the contemporaneous justification of and any accounting process undergone in relation to the Fund's payment to FIML in June 2019".

349. The Fund had actively resisted providing this disclosure. As observed by the Defendants, the documents disclosed by order showed the following:

a. A Memorandum from the Fund's Administrators dated 30 May 2019 sets out an asserted counterfactual, in these terms:

> "Had the [Reading FC] Termination Fee been received by [the Fund] in June 2017, it would have been recorded as income…which would have constituted part of the Excess Income for the period, which would be paid the Manager [FIML]. As such, the amount of $1,201,279.63 received by [the Fund] will be recorded as an amount due and payable to [FIML]".

b. A Written Resolution of the Fund dated 5 June 2019 refers to the money as an "Excess Amount" that "was and is payable to" FIML. The payment instruction was signed by Mr Mutaz Otaibi and Mr Whitworth.

c. The Fund's Audit Report for the year ending 31 December 2019 states that the c. US$ 1.2 million was paid to the Fund as:

> "… excess amount available for distribution to Investment Manager after payment of distributions to shareholders".

d. No mention of legal fees incurred by FIML.

350. Reinforced by this material, the Defendants contend that if the so-called "Diverted Sum" (or any other fee) had been paid to the Fund in June 2017, it would immediately have been paid out to FIML as profit ("excess") and available to be distributed between "the JV partners". (The Defendants also describe FCM Cayman's repayment to the Fund in April 2019 as pure artifice.)

351. Viewed as at June 2017 I cannot accept that this is what would have happened, and I note that the Defendants did not believe it at the time. It was precisely because of their material concern that this would or might not happen that they took the steps they did to route half the sum of the termination payment to themselves directly.

352. In addition I do not have confidence in the reliability of the documents as at 2019, and would not be prepared to accept what they say without examination of underlying material and a full explanation of the Fund's financial position from 2017 to 2019.

## Disclosure more generally

353. Each party criticised the other over disclosure. Frankly, I doubt that disclosure in the present case was complete on either side. Both had the opportunity to apply for disclosure in the course of the litigation, and the opportunity was taken. I have expressly indicated points where I have not felt able to reach conclusions, principally because I was not shown certain financial records. Those apart, I am satisfied that the evidence and documents available at trial allow fair conclusions to be drawn, and that deficiencies in disclosure by one party have not ultimately damaged the position of the other.

## Mr Hussam Otaibi

354. The Defendants criticised the Fund for the absence, in particular, of Mr Hussam Otaibi as a witness at trial. They invited the Court to draw inferences from that absence. These were:

(1) In or around June 2013, Mr Hussam Otaibi agreed with Mr Churchill, Mr Diallo and Mr Nuseibeh that they would obtain 50% of the net profits generated by joint venture activities.

(2) In or around June / July 2015, Mr Hussam Otaibi confirmed that the structures set up for the Fund would not affect the economics of the joint venture.

(3) Mr Hussam Otaibi was familiar with the terms of the Facility Deed because in December 2015 he (1) read and understood (a) the Heads of Terms dated 4 December 2015, (b) the Burges Salmon summary of the Facility Deed dated 16 December 2015 and (c) the Facility Deed itself, including the change of control, Termination Fee and prepayment fee provisions and (2) participated in the ORC meetings and related discussions.

(4) Hussam shared the knowledge at (3) with Mutaz as appropriate.

(5) In a discussion with Mr Churchill on 29 June 2017, Mr Hussam Otaibi said words to the effect "Congrats on RFC – nice to get repaid in full and with some interest". "Interest" was a reference to the USD2.2m as penalty interest due to the Fund.

(6) At the FCM board meeting on 23 November 2017, (1) Mr Hussam Otaibi knew Reading FC had paid approx. USD2m as an "early repayment penalty" / "exit fee" and (2) Mr Hussam Otaibi (or another person) said this was "in favour

of the Fund". He accordingly knew the USD2.2m Termination Fee in fact paid out to FCM Cayman and FIR had been due to the Fund.

(7) Mr Hussam Otaibi decided in December 2018 that the Floreat Group would pursue claims against the Individual Ds to bankrupt them, using money owed to them to finance this.

355. In Royal Mail Group Ltd v Efobi [2021] UKSC 33 the Supreme Court said at para [41]:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical thought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

356. I have examined the position with the benefit of the trial and its illumination of what matters and what does not. I have a closer vantage point now of what is fair and what the interests of justice do and do not require in this case. In the result I am not satisfied that it is appropriate to draw inferences simply from the absence of Mr Hussam Otaibi.

357. I am confident that Mr Hussam Otaibi was available to give evidence. However Mr Mutaz Otaibi did give evidence and, between the two, he was the most important for the Court to see and hear from. Even if inferences (1) and (2) were drawn about what Mr Hassam Otaibi said, they would not have affected my conclusions in relation to the alleged Profit Share Agreement in the context of the Financing. Inferences (3) and (4) do not materially advance the evidence I can derive from Mr Mutaz Otaibi's evidence. I do not need to rely on inference for (5) (which I accept was said) because, although a hearsay reference there, I can derive it from the Bloomberg chat. I am not persuaded that inferences (6) and (7) are sufficiently central to what I have to decide, however unattractive the light that they might cast on Mr Hussam Otaibi.

358. I have however had regard and given weight, in favour of the Defendants and untempered by any explanation from Mr Hussam Otaibi himself by way of

evidence at trial, to the recorded comment of Mr Hussam Otaibi that was in these terms:

> "I take my hat off to you as a team, and especially to [Mr Nuseibeh] for [] exiting that [] Reading deal []. It would have been a disaster, but you exited, and we made a good profit."

## Dishonesty: the Termination Fee

359. Dishonesty is not alleged by the Fund in relation to the "Prepayment Fees". In light of my findings in this judgment in relation to what the Fund terms the "Missing Termination Fee Payment", there is no question of dishonesty on the part of the Mr Churchill, Mr Dalleo and Mr Nuseibeh in relation to the fact that that payment was not made by Reading FC.

360. However, the question of dishonesty does arise in relation to the "Diverted Sum".

361. I discussed earlier, in the context of the alleged "Profit Share Agreement", Mr Diallo's "idea" about arguing that the Termination Fee should be treated as an upfront fee. As I said in that discussion, I am quite clear that the position was that Mr Diallo had an idea that would help with an objective of Mr Churchill, Mr Diallo and Mr Nuseibeh. That objective was to minimise the risk that Mr Mutaz Otaibi could "renege" on the arrangements and agreements between them with the result that Mr Churchill, Mr Diallo and Mr Nuseibeh did not (through their ownership of half of FCM London) benefit from the Termination Fee, or (if that Termination Fee went from FIML to FMB and FCM London rather than just to FCM London) did not benefit as much as they might.

362. In cross examination of Mr Nuseibeh by Mr Jones QC:

> "Q. Let's go on to see how honest your answers are being, Mr Nuseibeh, because you go on to say: "It will just be all back to [the Fund]." Help his Lordship as to what you meant by that?
>
> A. Well, again, this might be in reference to the point I was making earlier. As I said, there is two concurrent issues on my mind.
>
> Q. Yes. So the money that is intended to go to [the Fund], to which [the Fund] had an absolute right, yes, you are trying to work out ways of avoiding that to benefit yourself; correct?
>
> A. I'm trying to find ways to ensure that the profit share agreement is respected.
>
> Q. Well, if the money goes to the fund, the fund will do with it what the fund wishes to do with it. So the only way you could ensure that your profit share, as you call it, was respected, was to find some way of ensuring the money did not go to the fund. Do you agree?

> A. No, the fund -- the fund, obviously -- the structure couldn't do anything with that money. So it had to be then paid up to FIML, and the concern is the one I've just outlined, which is, if it does go there, there is a possibility that we end up dividing it not the right 50/50 but 25/75 –
>
> Q. Precisely, Mr Nuseibeh, which is why you were trying to think up ways to ensure that it never got to the fund; yes?
>
> A. I wasn't thinking up ways, I was trying to make sure how do we deal with this eventual problem that we are going to face, and Oumar clearly on that chat goes, "Let's just agree the max with the client and then see how we deal with it."
>
> Q. Yes, so you were putting off whether you might have to lie and cheat about what happened to the money or whether it went to the fund or not until another day. That's all that the back end of this chat describes, isn't it, Mr Diallo telling you, "Let's get the maximum we can from Reading and we will worry about all this distribution of funds and dilution later."
>
> A. Well, we worry about the flow of money and where it's going to go at some point in the future, as he always did. So often -- as I said before, they will sit down and agree which structure receives it, how much is done with what amount, et cetera, et cetera. So he is saying, "Let's just go." You know, "Try and make sure you get the maximum you can based on what's contractually due. Try and achieve as much as you can". And the second worry is kind of something he needs to deal with …"

363. In the normal way, the Termination Fee that was sought and paid, of US$2.2 million, was payable contractually to the Fund as provider of the Financing under the Facility.

364. As between the Fund and its investors, in accordance with the relevant Offering Memorandum there would be a quarterly calculation to ascertain whether and what could be paid out after a return to investors which was fixed at 5% per annum.

365. Any sum that could be paid out would be a sum to which FIML was entitled, under the terms of the Investment Management Agreement. FCM London would be entitled to be paid by FIML fees agreed with FIML, under the terms of the Investment Advisory Agreement.

366. Mr Churchill, Mr Diallo and Mr Nuseibeh would expect to enjoy, beyond their salaries from FCM London, dividend payments from FCM London that reflected the payment of fees to FCM London which in turn reflected the payment of the Termination Fee to the Fund.

367. But Mr Churchill, Mr Diallo and Mr Nuseibeh had no confidence that they would be paid sums ultimately due to them, including their share of reward resulting from the Facility. They did not trust Mr Mutaz Otaibi.

368. By reason of their lack of confidence, and their distrust of Mr Mutaz Otaibi, Mr Churchill, Mr Diallo and Mr Nuseibeh acted to ensure that they received 50% of the Termination Fee, US $1,099,986.29, between them. The sum was first received by FIR and from there, US$366,000 was received by Mr Churchill, US$366,000 by Mr and Mrs Diallo, and US$366,050 by Mr Nuseibeh.

369. That money was due to the Fund, and Mr Churchill, Mr Diallo and Mr Nuseibeh knew it. Yet they decided to take it and keep it.

370. Of course, a share of reward as a result of the Termination Fee might have reached Mr Churchill, Mr Diallo and Mr Nuseibeh in time and due course, but that would be when and if (and to the extent) FIML was obliged to pay money to FCM London, and FCM London in turn declared dividends to its shareholders. Mr Churchill, Mr Diallo and Mr Nuseibeh arranged for half the money to be received and enjoyed by them regardless, and not to go to the Fund or to FIML for the Fund.

371. Indeed they also proposed and arranged for the other half of the US$2.2 million to go to a destination that was to Mr Mutaz Otaibi's personal financial benefit, i.e. FCM Cayman.

372. Mr Churchill, Mr Diallo and Mr Nuseibeh appreciated that the Fund had not agreed to this treatment of the US$2.2 million. They further appreciated that Mr Mutaz Otaibi's authority, considerable though it was, did not extend to allow him to treat assets of the Fund as his own to apply to his advantage or give away for his own purposes. They knew it was outwith the Instructions because it was not necessary for the US$2.2 million to be treated in this way in order to achieve early repayment of the Financing.

373. I find that the conduct in this area of Mr Churchill, Mr Diallo and Mr Nuseibeh was not honest.

374. I accept that within the three, it was Mr Nuseibeh and Mr Diallo, rather than Mr Churchill, who were involved principally in dealing with Mr Mutaz Otaibi, with Reading FC and its investors and with Burges Salmon.

375. Mr Churchill said in his evidence that if he had ever heard Mr Nuseibeh or Mr Diallo suggesting or implying that they were going to mislead anyone, he:

> "… would have come down on them like a ton of bricks. That's just not who they are or who we are as individuals".

376. However, Mr Churchill willingly received and retained to enjoy an equal one third share of half of the Termination Payment, and allowed the same to happen to Mr and Mrs Diallo and to Mr Nuseibeh, without a question or challenge. I am satisfied he knew and agreed to arrangements being made for half the Termination Fee not to go to the Fund or to FIML for the Fund, but instead to go to the Defendants to benefit each of them individually, when throughout he knew that that money was payable to the Fund whatever might be the Fund's obligation in due course to pay money to FIML and FIML's obligation to pay money to FCM London where the Defendants might enjoy benefit from it.

377. In an additional written argument for the Defendants provided at the closing of the trial, Mr Cavender QC challenged the Fund's written closing argument, in particular for the way in which it advanced allegations of fraud or dishonesty.

378. There was no material dispute that the principles expressed by Lord Millett in Three Rivers DC v Bank of England (No 3) [2003] 2 A.C.1 apply. For present purposes these were sufficiently and helpfully summarised by Mr Cavender QC in these terms:

> "(1) it is an abuse of process to advance an allegation of dishonesty without proper evidential basis (para. 181), (2) the primary facts relied upon for an allegation of dishonesty must be distinctly pleaded (para. 186) and (3) it is not open to the court to infer dishonesty from facts which have not been pleaded (*ibid*)."

379. It was suggested, in particular, that allegations of dishonesty had been advanced that were not pleaded, had not been put to a relevant witness, or were contrary to the Fund's own witness evidence.

380. I have had careful regard to the instances to which Mr Cavender QC drew attention. It may be that the concerns are reduced, at least to some extent, by sight of this judgment and what has and has not mattered to my decision. But where appropriate I have confined myself to the case as pleaded and had close regard to what was and was not put to the witnesses. I add that I do not consider the way in which the case was advanced by Mr Jones QC, Ms Carmichael and Mr Hyams was other than fair.

381. It was suggested that allegations made were contrary to the Fund's own witness evidence. In some instances that is unavoidable in a case where in some respects witnesses for the Fund gave evidence that differed from each other, or where a witness (Mr Mutaz Otaibi is an example) gave a different or additional account in the witness box from that given by witness statement.

382. It is however also fair to observe that Mr Mutaz Otaibi has much to answer for over his willingness to agree that half the Termination Fee be received and enjoyed by FCM Cayman (and thus to his benefit). Even the Fund seeks a finding that Mr Mutaz Otaibi "agreed to the diversion of the Diverted Sum from the Fund without the actual or apparent authority of the Fund" (see finding 10.1 sought by the Fund, addressed below).

383. But the sum received by FCM Cayman was returned and no claim is brought against Mr Mutaz Otaibi in relation to the "Diverted Sum".

## The Fund's claims in negligence by Mr Churchill, Mr Diallo and Mr Nuseibeh

384. I turn to the Fund's claims, and first to the Fund's claims in negligence.

385. The Fund's Issue 3(l) (negligence) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] owe a duty of care to the Fund in respect of how they managed the redemption of the [Financing]?"

386. The Fund's written opening recognised the importance of the question whether imposing a duty of care would be fair, just and reasonable. The Fund emphasised, quoting from Hedley Byrne v Heller [1964] AC 465, that for the purpose of this question the relevant relationships:

> "… are not limited to contractual relationships or to relationships of fiduciary duty, but also include relationships which … are 'equivalent to contract' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.".

387. The Fund stated that its position could be "expressed shortly" in these terms:

> "The Fund was vulnerable to [Mr Churchill, Mr Diallo and Mr Nuseibeh] in circumstances where they: (i) controlled the flow of information between [Reading FC] and the Fund; (ii) were, in practical terms, managing the operation of the [Facility] and its redemption, and the Fund relied on them to do so; and (iii) were in a position to expose the Fund to very substantial losses if they did not exercise reasonable care and skill."

388. In its closing argument the Fund asks the Court to make this finding:

> "Legal finding 20.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh] assumed a duty of care to the Fund in respect of how they managed the redemption of the [Financing] and directed the Fund's cash flows as a result of the Fund's lack of any real oversight of [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s conduct in that regard, the trust and confidence the Fund placed in [Mr Churchill, Mr Diallo and Mr Nuseibeh] and the vulnerability to which this exposed the Fund."

389. I am unable to make the finding 20.1 sought. It was FIML, not Mr Churchill, Mr Diallo and Mr Nuseibeh, that the Fund engaged as its Investment Manager. And it was FCM London, not Mr Churchill, Mr Diallo and Mr Nuseibeh, that FIML in turn engaged as Investment Adviser to the Fund.

390. To the extent that Mr Churchill, Mr Diallo and Mr Nuseibeh controlled information or managed the operation of the Facility they did so as employees of FCM London. It was on FIML and FCM London that the Fund relied, including to manage its exposure to loss.

391. As employees of FCM London, Mr Churchill, Mr Nuseibeh and Mr Diallo each owed to FCM London an implied duty of fidelity under their contracts of employment with FCM London. That is common ground. As a director of FCM London, Mr Diallo would owe a fiduciary duty to that company. These points do not suggest an assumption of responsibility to the Fund by them as individuals.

392. I see no principled basis for recognising as regards employees of FCM London, or imposing on employees of FCM London, a duty of care to the Fund (or FIML, which did not employ them), in addition to the duties they owed to their employer, and the duties their employer owed to the Fund or FIML. To do so would be an unusual outcome or step for the law where the relationships were configured as they are in this case.

393. The Fund's pleaded case included, at paragraph 81 of the Particulars of Claim, the following:

> "The Fund and FIML had delegated the management of the [Facility] and its redemption to [Mr Churchill, Mr Diallo and Mr Nuseibeh], through FCM [London] ….".

In fact, delegation was to FCM (London), which acted through Mr Churchill, Mr Diallo and Mr Nuseibeh, rather than "to [Mr Churchill, Mr Diallo and Mr Nuseibeh], through FCM (London)".

394. If, contrary to the above, there was a duty of care, was it breached? The Fund's Issue 3(m) (negligence) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s roles in (i) procuring the diversion of the Diverted Sum, (ii) failing to demand the [Missing Termination Fee Payment] from [Reading FC], and (iii) falling to demand [Prepayment Fees] from [Reading FC] in December 2016 and March 2017 amount to breaches of those duties?"

395. The Fund asks the Court to make this finding:

> "Legal finding 21.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s roles in (i) diverting the Diverted Sum from the Fund, (ii) failing to demand the [Missing Termination Fee Payment] from [Reading FC], and (iii) failing to demand [Prepayment Fees] from [Reading FC] in December 2016 and March 2017 amounted to breaches of that duty of care."

396. As to finding this 21.1, had there been a duty of care I would have found in the circumstances discussed in this judgment that there was breach in diverting the "Diverted Sum", but not in failing to demand the "Prepayment Fees". The decisions not to demand prepayment fees for the first and second partial reductions of the Financing are best seen as well within the range of reasonable decisions in the management of the operation of (early) redemption of the Financing in the present case. As regards the "Missing Termination Fee Payment", I have dealt with this at Finding 7.34 above.

397. If there had been breach or breaches of a duty of care, was loss caused? The Fund's Issue 3(n) (negligence) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s breaches of their duty of care to the Fund cause the Fund to suffer loss in respect of each of the Payments?"

398. The Fund invites these findings:

> "Factual finding 22.2: The Fund would have received the ["Prepayment Fees"] in December 2016 and March 2017 had [Mr Churchill, Mr Diallo and Mr Nuseibeh] demanded them, because (i) [Reading FC]'s then Thai owners have confirmed that they understood (wrongly) that had [Reading FC] paid the ["Prepayment Fees"] then the club would have paid a lower Termination Fee when the Loan was ultimately redeemed (such that there was no financial downside to paying the ["Prepayment Fees"]), (ii) there was a benefit to the Thai owners of [Reading FC] in paying down the club's debt because it greased the wheels of the Chinese takeover, when the Chinese were uncomfortable with the Loan and wished it resolved, and (iii) there was no downside to [Reading FC] using money from the blocked account to pay a lower principal repayment plus a (slightly lower) ["Prepayment Fee"], because [Reading FC] could not use that money for any other purpose."
>
> "Factual finding 22.1: The Fund would have received the [Missing Termination Fee Payment] had it been demanded, because (i) [Reading FC] would have paid what it was contractually required to pay rather than see the Fund take enforcement action, and (ii) the Fund would have enforced the security it held over [Reading FC]'s assets."
>
> "Legal finding 22.3: The Fund (and therefore C as assignee) suffered loss because the Offering Memorandum required the Fund to retain the Termination Fee (including the Diverted Sum and the ["Missing Termination Fee Payment"]) and the ["Prepayment Fees"] in its cash reserves had it received those Payments."

399. I am unable to make finding 22.2. The central point on which the Fund's case fails in relation to prepayment fees is that it ignores the circumstances. It was the Fund that wanted early repayment, not Reading FC. The Fund had the idea of using monies otherwise held in the blocked account. As a result the matter was straightforward for Reading FC and seen by them as entirely neutral.

400. Had a prepayment fee been taken the proposition would have been very different. In its written opening the Fund suggested there was no credible evidence that Reading FC was unwilling to pay a prepayment fee. The position is rather that there is no evidence that it would have been prepared to such a fee in the circumstances.

401. Mr Srisumrid's evidence, which I accept, was that there was "no way" Reading FC would have agreed to partial payments at the Fund's request if a fee had been imposed. He made the understandable, and in my judgment crucial, distinction between a prepayment made at Reading FC's request and one that the lender wanted.

402. The Fund argued that Mr Srisumrid's evidence must be treated with real caution "given his personal relationship with Mr Diallo and Mr Nuseibeh". It was said that correspondence eventually disclosed in the proceedings evidenced Mr Diallo seeking to build "a secret and inherently conflicting personal business

relationship with representatives of [Reading FC's] Thai owner around the time of the redemption of the [Financing]". It is sufficient for me to say that nothing in the disclosure or in his evidence caused me to doubt Mr Srisumrid's evidence that Reading FC would have not made the partial reductions in the Financing that the Fund wanted had that involved prepayment fees as well.

403. I am also unable to make finding 22.1. The answer is that, as explained above, accepting a figure of US$2.2 million was a sensible commercial compromise. It was "the max" achievable in the circumstances that existed. For the Fund to enforce the security would be a last resort damaging to the Fund. Reading would likely, but not certainly have paid what it was contractually required to pay.

404. Had there been a duty of care and breach of that duty, I would have been able to make finding 22.3. My present view is that it seeks to prove more than necessary, but the point is academic.

405. The Fund's issue 3(o) asks:

> "Do [Clauses 10.1 or 10.3 of the Investment Management Agreement or Clauses 8.1 or 8.3 of the Investment Advisory Agreement] provide a defence to the claim?".

406. The Fund invites the Court to find (Legal Finding 23.1) that "These clauses do not prevent a finding that [Mr Churchill, Mr Diallo and Mr Nuseibeh] owed a duty of care to the Fund that has been breached and for which they are liable".

407. In fairness to the Fund, the issue and the finding 23.1 simply seek to anticipate a point that it considered might be raised. The answer to the issue is no. I am able to make the finding sought but only because it is not the clauses that prevent the finding of a duty of care or breach or liability. None of the Clauses addresses the question whether a duty of care existed as between Mr Churchill, Mr Diallo and Mr Nuseibeh and the Fund. The question (see Clauses 8.3 and 21 of the Investment Advisory Agreement) whether FIML has obligations to indemnify them as employees of FCM London (and as a director of FCM London in the case of Mr Diallo) is not the subject of this litigation.

## The Fund's claim in deceit against Mr Churchill, Mr Diallo and Mr Nuseibeh

408. The Fund's Issue 3(p) asks:

> "Did [Mr] Nuseibeh, on behalf of himself, [Mr] Diallo and [Mr] Churchill, make the Bonus Fee Misrepresentations to [Mr Mutaz Otaibi]?"

409. The Fund invites a finding (Factual finding 24.1) in the affirmative, but as I have explained above, I find that the "Bonus Fee Misrepresentations" were not made.

410. The Fund's Issue 3(q) to (t) ask: "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] know the Bonus Fee Misrepresentations to be false, or did they have no belief in their truth, or were they reckless as to whether they were true or

false?", "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] intend the Fund to rely on the Bonus Fee Misrepresentations?", "Did the Fund rely on the Bonus Fee Misrepresentations?" and "Has the Fund suffered loss as a result of that reliance?".

411. The fund seeks these four findings under Issues 3(q) to (t):

> "Factual finding 25.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh] knew the Bonus Fee Representations to be false."
>
> "Factual finding 26.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh] intended [Mr Mutaz Otaibi] to rely on the Bonus Fee Misrepresentations, when he ultimately agreed on 19 June 2017 to the [payment of US$2.2 million by Reading FC] being paid to FIR and FCM Cayman."
>
> "Factual finding 27.1: Insofar as the Court finds [Mr Mutaz Otaibi] acted with the authority of the Fund in agreement to the diversion of the [payment of US$2.2 million by Reading FC], the Fund relied on the Bonus Fee Representations in doing so."
>
> "Legal finding 28.1: The Fund (and therefore [FIML] as assignee suffered loss because the Offering Memorandum required the Fund to retain the Termination Fee (including the "Diverted Sum" and the ["Missing Termination Fee Payment"]) and the ["Prepayment Fees"] in its cash reserves had it received those payments."

412. None of these issues or findings arise because the Bonus Fee Misrepresentations were not made. But I should also add that the first of the three alleged representations would, if made, have been true ("Burges Salmon had advised FCM [London] and Mr Nuseibeh that it would not be in the Fund's interests to enforce the contractual rights that a change of control of R[eading] FC had given the Fund under the [Facility].").

## The Fund's Issue 3(h)

413. Before turning to the Fund's proprietary claims against the Defendants and its claims for breach of fiduciary duty by Mr Churchill, Mr Diallo and Mr Nuseibeh, it is convenient to address the Fund's Issue 3(h). This is raised in relation to its claims for breach of fiduciary duty, dishonest assistance and knowing receipt and asks:

> "Do [Clauses 10.1 or 10.3 of the Investment Management Agreement or Clauses 8.1 or 8.3 of the Investment Advisory Agreement] provide a defence to the claim?".

414. The Fund asks the Court to make this finding:

> "Legal finding 16.1: These clauses have no impact on any of the claims because (i) none of them concern the relationship between [Mr Churchill, Mr Diallo and Mr Nuseibeh] and the Fund, and/or, (ii) none of them apply

> to loss arising as the result of fraud or dishonesty, which is what is claimed in respect of each of these causes of action."

415. The terms of Issue 3(h) are identical to those of Issue 3(o) dealt with above. However, the terms have different application here. Nonetheless I am still able to answer the Issue in the negative, and make the finding 16.1 sought.

416. It is also important to note that where (as with what the Fund terms the "Diverted Sum") the result of a successful claim would be to restore sums to the Fund to which it was entitled and Mr Churchill, Mr Diallo and Mr Nuseibeh were not, then that result may, leaving aside questions of costs, mean that there was no loss by Mr Churchill, Mr Diallo and Mr Nuseibeh against which to seek indemnification from FIML or FCM London.

## The Fund's claims for breach of fiduciary duty by Mr Churchill, Mr Diallo and Mr Nuseibeh

417. The Fund's Issue 3(c) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] owe fiduciary duties to the Fund in respect of how they managed the redemption of the [Facility]?".

418. The Fund asks the Court first to make these findings:

> "Factual finding 11.1: Neither the Fund, FIML or [Mr Mutaz Otaibi] had any real oversight of [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s communications with [Reading FC] and Burges Salmon and were entirely reliant on what [Mr Churchill, Mr Diallo and Mr Nuseibeh] told them about how they were handling the redemption of the [Financing] and the cash flows resulting from it."
>
> "Factual finding 11.2: [Mr Churchill, Mr Diallo and Mr Nuseibeh] were in a position to, and did in fact, take steps on behalf of the Fund in relation to the redemption of the [Financing] and cash flows to the Fund without seeking the Fund's consent or informing the Fund, e.g. issuing the Cancellation Notice demanding a reduced Termination Fee be paid, and be paid to [FIR] rather than the Fund."

419. I am able to make finding 11.1, but with an important exception. This is that, save in one respect, communications with Reading FC and Burges Salmon, and reports on how the redemption and cash flows were being handled, were by FCM London. That FCM London acted by Mr Churchill, Mr Diallo and Mr Nuseibeh as its employees does not alter that position. Only communications and reports concerned to alter the destination of the Termination Fee in the interests of Mr Churchill, Mr and Mrs Diallo and Mr Nuseibeh were made by Mr Churchill, Mr Diallo and Mr Nuseibeh acting on their own behalf.

420. As to finding 11.2, I find:

a. The Fund gave its consent to FCM London taking steps on behalf of the Fund in relation to the redemption of the Facility including cash flows, through the Instructions.

b. However this consent did not extend to steps concerned to alter the destination of the Termination Fee in the interests of Mr Churchill, Mr and Mrs Diallo and Mr Nuseibeh.

c. The steps taken on behalf of the Fund in relation to the redemption of the Facility including cashflows were taken by FCM London, acting by Mr Churchill, Mr Diallo and Mr Nuseibeh as its employees, save for those concerned to alter the destination of the Termination Fee in the interests of Mr Churchill, Mr and Mrs Diallo and Mr Nuseibeh. Those steps were taken by Mr Churchill, Mr Diallo and Mr Nuseibeh.

d. Mr Mutaz Otaibi agreed on 19 June 2017 to the reduced Termination Fee (of US$2.2 million) being paid half to FIR and half to FCM Cayman.

421. The next finding sought by the Fund is this:

> "Factual/legal finding 11.3: There was a relationship of trust and confidence between the Fund and [Mr Churchill, Mr Diallo and Mr Nuseibeh] that was fiduciary in nature."

422. Authority cited by the Fund refers to a party acting on behalf of another (Bristol & West Building Society v Mothew [1998] Ch 1 at [18]), or having a relationship with another (Arklow Investments Ltd v Maclean [2000] 1 WLR 594 at 598G-H), or a role with respect to another (Al Nehayan v Kent [2018] CLC 216 at [165], citing Re Goldcorp Exchange Ltd [1995] 1 AC 74, or assuming responsibility in respect of the conduct or the affairs of another (F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch) at [225]. These are situations in which one then asks the questions (posed by finding 11.3) "was the relationship one of trust and confidence and fiduciary in nature".

423. There is no question that simply by being employees of FCM London as Investment Adviser, appointed by the Investment Manager to the Fund, Mr Churchill, Mr Diallo and Mr Nuseibeh had a relationship with the Fund, let alone one of trust and confidence that was fiduciary in nature. The Fund's relationship was with FIML, or perhaps with FCM London.

424. It is tempting in the particular circumstances of the case, to reach a different conclusion at the point from which Mr Churchill, Mr Diallo and Mr Nuseibeh set about to alter the destination of the US$1.1 million of the Fund's money to their benefit. But, as the present case illustrates, that is the point at which the obligations of any relationship were not honoured, and the first question is whether there was a relationship.

425. Academic opinion rightly challenges whether a conscious wrongdoer, such as a thief, is to be treated as a fiduciary (see, for example, Professor Sarah Worthington "Fiduciaries then and now" [2021] 80 CLJ 154 at 160, and with

reference to Professors Sealy and Finn). To treat the conscious wrongdoer as a fiduciary is only the start, because then the question of what fiduciary duties apply to that relationship arises, and this in a context where the concepts of "trust and confidence", and especially "confidence" are not an easy fit.

426. It may be that the particular circumstances in each case will require different answers. In the present case, it is when the Fund's proprietary claims, and claims in dishonest assistance and knowing receipt, are addressed (below) that the legal ground sufficient for the present case is reached.

427. Although in these circumstances it does not arise, the Fund then seeks a finding in these terms:

> "Legal finding 11.4: Clause 13 of the [Investment Management] Agreement, entitled 'waiver of fiduciary duties', does not in any way prevent a finding that [Mr Churchill, Mr Diallo and Mr Nuseibeh] owed fiduciary duties to the Fund, at least where such breaches were dishonest or fraudulent in nature (which includes acting recklessly as to the interests of the Fund)."

428. As to finding 11.4, Clause 13 is addressed to FIML, not Mr Churchill, Mr Diallo and Mr Nuseibeh. Even in the case of FIML, and despite the heading of the clause (which by Clause 1.1 (b) is for ease of reference only and is not to affect the interpretation or construction of the Agreement), Clause 13 does not in terms prevent a finding that FIML "is acting as the Fund's fiduciary".

429. Instead, Clause 13 in terms limits the duties and obligations that the Fund owes "(whether arising from the fact that [FIML] is acting as the Fund's fiduciary or otherwise)". In the circumstances, I am able to find that Clause 13 of the Investment Management Agreement does not prevent a claim against Mr Churchill, Mr Diallo and Mr Nuseibeh for breach of fiduciary duty, if and where they owed fiduciary duties to the Fund, and where such breaches were dishonest or fraudulent in nature (which includes acting recklessly as to the interests of the Fund).

430. The Fund's Issue 3(d) (breach of fiduciary duty) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s roles in (i) procuring the diversion of the Diverted Sum from the Fund and (ii) failing to demand the Missing Termination Fee Payment from [Reading FC] amount to breaches of their fiduciary duties to the Fund?"

431. In relation to the "Missing Termination Fee Payment" the Fund asks the Court to make these findings:

> "Factual finding 12.3: [Mr Churchill, Mr Diallo and Mr Nuseibeh] were reckless as to the quantum of the Termination Fee they demanded [Reading FC] paid the Fund, failing to give proper consideration to the Fund's contractual rights under the [Facility]."

> "Factual finding 12.4**:** [Mr Churchill, Mr Diallo and Mr Nuseibeh] demanded a lower Termination Fee from [Reading FC] in their own interests rather than the Fund's in circumstances where they intended to divert some of the [Reading FC] Payment to themselves, and to support the parallel and inherently conflicting personal business relationships that Mr Diallo and Mr Nuseibeh had and/or were seeking to develop with the representatives of the Thai owners of [Reading FC]."
>
> "Factual finding 12.5: It was not in the best interests of the Fund for the full Termination Fee not to be demanded from [Reading FC] because the Fund had security it could have enforced and it is likely the Chinese shareholders would have paid any sum contractually due rather than face the ramifications of the club defaulting. In any event, it was always in the Fund's best interests for the Fund itself to assess such decisions."
>
> "Legal finding 12.6: [Mr Churchill, Mr Diallo and Mr Nuseibeh] breached their fiduciary duties to the Fund in failing to demand the ["Missing Termination Fee Payment"] from [Reading FC]."

432. Findings 12.3. and 12.4 are said by the Fund to be "only necessary in relation to the ["Missing Termination Fee Payment"] to establish a dishonest breach of duty if the Court considers that Clause 13 somehow prevents [Mr Churchill, Mr Diallo and Mr Nuseibeh] owing fiduciary duties to the Fund in respect of negligent breaches)." Whilst I do consider, as explained above, that Mr Churchill, Mr Diallo and Mr Nuseibeh do not owe fiduciary duties to the Fund in respect of the "Missing Termination Fee Payment", that is not because of Clause 13. However I will still deal with findings 12.3 to 12.6 sought by the Fund as a whole. I find as follows.

433. Mr Churchill, Mr Diallo and Mr Nuseibeh were not reckless as to the quantum of the Termination Fee Reading FC was asked to pay. The calculation had a commercial basis, and it was understandably assumed the Facility reflected that commercial basis. The lawyers involved, who had been provided with a calculation (at US$2.27 million) did not raise a question save as to US$70,000. The interests of Mr Churchill, Mr Diallo and Mr Nuseibeh were aligned with the Fund to achieve a high rather than low Termination Fee. They aimed to achieve "the max". It plainly was not, as the Fund asserts, "in their own interests" that they should demand a lower Termination Fee from Reading FC where, as alleged by the Fund, "they intended to divert some of the [Reading FC] Payment to themselves".

434. The US2.2 million demanded was in fact a high Termination Fee. The Instructions from Mr Mutaz Otaibi on behalf of the Fund remained, in effect not to delay repayment of the loan over a matter of fees. Enforcement was commercially highly undesirable, including for the Fund, and this was a view shared by the commercial solicitors involved.

435. The Fund's reference to "personal business relationships that Mr Diallo and Mr Nuseibeh had and/or were seeking to develop with the representatives of the Thai owners of [Reading FC]" had no impact at all on any of the decision making. Even the formulation of finding 12.5 puts it no higher than "likely" that

the Chinese shareholders would have paid any sum contractually due rather than face the ramifications of the club defaulting. The contention that it was always in the Fund's best interests for the Fund itself to assess such decisions takes no account of the fact that the Fund (including through Mr Mutaz Otaibi) left matters to advisers and employees.

436. In these circumstances I am unable to make findings 12.3 to 12.6 sought (or where sought) by the Fund.

437. The Fund asks the Court to make these findings in relation to the US$1.1 million "Diverted Sum":

> "Factual finding 12.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh] procured the diversion of the Diverted Sum away from the Fund, knowing that it was contractually due to the Fund and believing that the Fund would have treated it as income subject to the [NAV] Assessment Requirement before it could be paid out."
>
> "Legal finding 12.2: [Mr Churchill, Mr Diallo and Mr Nuseibeh] breached their fiduciary duties to the Fund in procuring the diversion of the Diverted Sum from the Fund."

438. I am able to make these two findings 12.1 and 12.2 sought by the Fund.

439. The Fund's Issue 3(f) (breach of fiduciary duty) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s breaches of their fiduciary duties to the Fund cause the Fund to suffer loss in respect of the Diverted Sum and the ["Missing Termination Fee Payment"]?"

440. The Fund asks the Court to make this finding:

> "Legal finding 14.1: The Fund suffered loss because the Offering Memorandum required the Fund to retain the Termination Fee (including the Diverted Sum and the ["Missing Termination Fee Payment"]) in its cash reserves had it received those Payments."

441. As to the question of loss in finding 14.1, the Fund suffered the loss of the "Diverted Sum" because it was entitled to that sum.

442. The fact that the Offering Memorandum required the Fund to retain the Termination Fee in its cash reserves is a separate matter, potentially material to the question of liability but immaterial to the question of loss suffered by the Fund.

443. The question of the entitlement of FIML (as investment manager) to be paid a sum in lieu of management fees is similarly a separate question. So too the question of the entitlement of FCM London (as investment adviser) to be paid a fee by FIML.

## The Fund's proprietary claims against the Defendants

444. The Fund's Issue 3(a) (proprietary claim) asks:

> "Did the Fund have a proprietary interest in the Diverted Sum?"

445. The Fund invites the following finding:

> "Legal finding 9.1: The terms of the [Facility] entitled the Fund to receipt of a Termination Fee that included the Diverted Sum upon the full redemption of the Loan in June 2017. The Fund had a proprietary interest in that debt and therefore in the Diverted Sum ultimately paid and its traceable proceeds."

446. In the circumstances of the case, and in particular of the receipt of the US$1.1 million "Diverted Sum", I am able to make finding 9.1 sought.

447. The Fund's Issue 3(b) (proprietary claim) asks:

> "Did or do [Mr Churchill, Mr Diallo and Mr Nuseibeh], [FIR] and Mrs Diallo hold the Diverted Sum or its traceable proceeds on constructive trust for the Fund, such that C is entitled to trace into those monies?"

448. The Fund invites the following finding:

> "Legal finding 10.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh], [FIR] and Mrs Diallo held (or hold) the Diverted Sum or its traceable proceeds on constructive trust for the Fund by reason equitable title in those monies not passing to them, because (i) [Mr Mutaz Otaibi] agreed to the diversion of the Diverted Sum from the Fund without the actual or apparent authority of the Fund, such that the transfer is void, and/or (ii) they procured consent to the diversion by fraud."

449. As regards FIR and Mrs Diallo, contrary to the finding 10.1 sought, the Fund did not allege that FIR or Mrs Diallo "procured consent to the diversion by fraud". However it is clear that FIR and Mrs Diallo received the "Diverted Sum" (in the case of FIR) or part of it (in the case of Mrs Diallo) as volunteers. On the evidence neither was entitled to any payment.

450. As regards Mr Churchill, Mr Diallo and Mr Nuseibeh, they were not honest in the respect found above. They did not "procure consent to the diversion by fraud", but they did procure the diversion by fraud.

451. I am also able to find Mr Mutaz Otaibi did not have (or appear to have) the Fund's authority to agree to the diversion of the "Diverted Sum" from the Fund. The Fund did not satisfy me that the transfer was void in law. However that is not a necessary finding for the Fund to be able to recover its property in the hands (here) of volunteers or those who have taken it.

452. I understand the claim to be confined in the case of each Defendant to the sum received by that Defendant. In the circumstances of this case, I am able to find that Mr Churchill, Mr Diallo and Mr Nuseibeh, FIR and Mrs Diallo held (or

hold) the "Diverted Sum" or its traceable proceeds on constructive trust for the Fund. I am also able to hold that the Defendants hold the "Diverted Sum" or its traceable proceeds on constructive trust for the Fund. The parties invited me to confine my findings and holdings at this stage to whether tracing was available in law, leaving over questions that went to the carrying out of any tracing and to the identification of what were traceable proceeds.

## The Fund's claims for knowing receipt and dishonest assistance

453. The Fund's Issue 3(u) asks:

> "Did [FIML] and/or FCM [London] owe fiduciary duties to the Fund in respect of the management of the redemption of the [Facility]?"

454. The Fund invites these findings:

> "Legal finding 29.1: [FIML] owed fiduciary duties to the Fund in respect of the actions of FCM [London] and [Mr Churchill, Mr Diallo and Mr Nuseibeh] to whom [FIML] had delegated its duties to manage the redemption of the [Financing] but in respect of which actions it remained responsible."
>
> "Legal finding 29.2: FCM [London] owed fiduciary duties to the Fund in respect of the actions of [Mr Churchill, Mr Diallo and Mr Nuseibeh], as its employees, and [Mr Diallo], as its director, who carried out its duties on its behalf but in respect of which actions it remained responsible."

455. Unless the position was successfully changed by the contract between them, an investment manager to an investment fund would readily qualify as a fiduciary owing fiduciary duties to the investment fund. In the present case, Clause 13 of the Investment Management Agreement, addressing the relationship between the Fund and FIML, was headed "Waiver of Fiduciary Duties". However, Clause 1.1 (b) provided that the headings to a clause "shall not affect the interpretation or construction of this Agreement". The terms of Clause 13 itself refer to "the fact that [FIML] is acting as the Fund's fiduciary", and includes duties "arising under any applicable … law … to which [FIML] is subject" within the "duties or obligations [FIML] owes to the Fund."

456. In these circumstances, notwithstanding the heading to Clause 13, and giving Clause 13 its true interpretation, in my judgment FIML was the Fund's fiduciary and owed the fiduciary duties that arose by law by reason of that relationship. It is not necessary at this point to detail those duties. Fiduciary duties may differ between different forms of fiduciary relationship (see Worthington, above).

457. In the result, leaving aside the reference to FIML having "delegated its duties to manage the redemption of the [Financing]" to Mr Churchill, Mr Diallo and Mr Nuseibeh (which I do not accept, as addressed earlier in this judgment, but which is not essential to the Fund's case at this point), I am able to make finding 29.1.

458. There is no equivalent to Clause 13 in the Investment Advisory Agreement, addressing the relationship, and in particular the question of any fiduciary relationship, between FIML and FCM London. The Investment Advisory Agreement recorded the parties' agreement on the duties that FCM London would owe FIML. These were, at Clause 6.3, that FCM London would "serve the interests of [FIML] (as AIFM of the Fund) in good faith", "discharge its obligations hereunder with reasonable skill and care" and "devote such time and attention to the performance of its duties hereunder as shall be required properly to discharge such duties in accordance with the provisions hereof." In these circumstances I am not persuaded that the relationship between FIML and FCM London was a fiduciary relationship. I am unable to make finding 29.2.

459. The Fund's Issue 3(v) asks:

> "Was the Diverted Sum diverted from the Fund in breach of those duties?"

460. The Fund invites this finding:

> "Factual finding 30.1: [The Fund]'s and/or FCM [London]'s duties were breached by [Mr Churchill, Mr Diallo and Mr Nuseibeh] procuring the diversion of the Diverted Sum away from the Fund, knowing that it was contractually due to the Fund and believing that it would have been subject the NAV Assessment Requirement had it been received by the Fund before it could be paid out."

461. I am able to make finding 30.1.

462. Liability on the basis of knowing receipt is alleged against Mr Churchill, Mr Nuseibeh, Mr Diallo and FIR. As Hoffmann LJ summarised in El Ajou v Dollar Land Holdings plc [1994] 1 All ER 685, 700:

> "[For the purpose of] a claim to enforce a constructive trust on the basis of knowing receipt. … the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

The authorities also show that the knowledge required must be such as to make it unconscionable for the relevant Defendants to retain the benefit of the receipt.

463. The Fund frames this Issue 3(w) in relation to knowing receipt as follows:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] and [FIR] receive the Diverted Sum and/or its traceable proceeds in the knowledge that it received those sums by reason of a breach of fiduciary duty, whether by [FIML], FCM [London] or [Mr Churchill, Mr Diallo and Mr Nuseibeh] (in the case of FIR only), such that it is unconscionable for them to retain the benefit of that receipt?".

464. The Fund invites these findings:

> "Factual finding 31.2: [Mr Churchill, Mr Diallo and Mr Nuseibeh] and [FIR] had sufficient knowledge, given their knowledge that the Diverted Sum was contractually due to the Fund and their actual or constructive knowledge of the terms of the Offering Memorandum, that their receipt of those sums were referable to breaches of fiduciary duty, such that it is unconscionable for them to retain the benefit of that receipt."
>
> "Legal finding 31.3: [FIR] is to be fixed with the knowledge of [Mr Churchill, Mr Diallo and Mr Nuseibeh] in circumstances where they were clearly its directing mind and will, as together its only beneficial shareholders (through nominees) and where [FIR]'s sole director, [Mr Whitworth], did not even have access to [FIR]'s bank account."

465. I am prepared to make these findings.

466. Liability on the basis of dishonest assistance is alleged against Mr Churchill, Mr Nuseibeh and Mr Diallo. There was no material dispute that this requires a trust or fiduciary relationship, that was breached, where the relevant Defendants induced or assisted in that breach and where the relevant Defendants did so dishonestly.

467. In relation to what the Fund terms the "Missing Termination Fee Payment", the Fund's Issue 3(x) in relation to dishonest assistance asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh]' failure to demand the ["Missing Termination Fee Payment"] amount to breaches of C's and/or FCM [London]'s fiduciary duties to the Fund cause loss?"

468. The Fund asks the Court to make these findings:

> "Factual finding 32.1**:** [FIML]'s and/or FCM [London]'s duties were breached by [Mr Churchill, Mr Diallo and Mr Nuseibeh] being reckless as to the quantum of the Termination Fee they demanded [Reading FC] paid the Fund, by failing to give proper consideration to the Fund's contractual rights under the [Facility].*"*
>
> "Factual finding 32.2: [FIML]'s and/or FCM [London]'s duties were breached by [Mr Churchill, Mr Diallo and Mr Nuseibeh] demanding a lower Termination Fee from [Reading FC] in their own interests rather than the Fund's, namely to support the parallel and inherently conflicting personal business relationships that Diallo and Nuseibeh had and/or were seeking to develop with the representatives of the Thai owners of [Reading FC].

469. The findings are said by the Fund to be "[o]nly necessary in relation to the ["Missing Termination Fee Payment"] to establish a dishonest breach of duty if the Court considers that Clause 13 somehow prevents FIML and/or FCM [London] owing fiduciary duties to the Fund in respect of negligent breaches". I do not consider Clause 13 has this effect.

470. However, as discussed earlier in this judgment, I reject the allegations that Mr Churchill, Mr Diallo and Mr Nuseibeh were reckless as to the quantum of the Termination Fee they demanded Reading FC paid to the Fund, and that they demanded a lower Termination Fee from Reading FC in their own interests rather than the Fund's. I am therefore unable to make findings 32.1 or 32.2.

471. The Fund also seeks the following finding in relation to what it terms the "Missing Termination Fee Payment":

> "Factual finding 33.2: [Mr Churchill, Mr Diallo and Mr Nuseibeh] procured [FIML]'s and/or FCM [London]'s breaches of duty in respect of the ["Missing Termination Fee Payment"] dishonestly because they knew that the [Reading FC] Payment was not the correct Termination Fee payable by [Reading FC] under the [Facility] or, given the imprecision with which they calculated it, were reckless as to whether it was the correct Termination Fee."

472. Again, I am not able to make this finding 33.2 on the facts.

473. In relation to what the Fund terms the "Diverted Sum", the Fund's Issue 3([y]) (dishonest assistance) asks: "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] dishonestly procure [FIML]'s and/or FCM [London]'s breaches of those duties?".

474. The Fund asks the Court to make this finding:

> "Factual finding 33.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh] procured C's and/or FCM [London]'s breaches of duty in respect of the Diverted Sum dishonestly because they knew that the Diverted Sum was contractually due to the Fund and they had actual or constructive knowledge of the terms of the Offering Memorandum, which required the Fund to retain the Diverted Sum in its cash reserves and which they believed required any money the Fund received to be subject to the NAV Assessment Requirement before it could be paid out."

475. The fiduciary duties in question were those of FIML. I am able to make finding 33.1.

## The Fund's claims in conspiracy against Mr Churchill, Mr Diallo and Mr Nuseibeh

476. Clerk & Lindsell at [23-105] summarises the position that for a claim in conspiracy the alleged conspirators must be shown (i) to have combined and taken action which is (ii) unlawful in itself with (iii) the intention of causing damage to the Fund which (iv) has incurred the intended damage. There was no material issue between the parties seeking a departure from this summary.

477. The Fund's Issue 3(i) (conspiracy) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] combine to take unlawful action to procure the diversion of the Diverted Sum from the Fund and non-payment of the ["Missing Termination Fee Payment"] to the Fund?".

478. The Fund asks the Court to make the following findings:

> "Factual finding 17.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh] combined to take action that ensured that the Fund did not receive the full Termination Fee of just over $3m which it was entitled to be paid by [Reading FC] in June 2017 – in Nuseibeh's case, by misleading [Mr Mutaz Otaibi] about the nature of the [Reading FC] Payment, deciding not to inform the Fund that the [Reading FC] Payment was properly due to it and failing to calculate the proper Termination Fee due to the Fund or informing the Fund of that proper quantum, and in Diallo's and Churchill's case, in deciding not to inform the Fund that the [Reading FC] Payment was properly due to it and failing to calculate the proper Termination Fee due to the Fund or informing the Fund of that proper quantum."

> "Legal finding 17.2: Such actions were unlawful in that they amounted to breaches of [Mr Churchill, Mr Diallo and Mr Nuseibeh]' fiduciary duties to the Fund, breaches of [Mr Churchill, Mr Diallo and Mr Nuseibeh]' duties of care to the Fund, breaches of [Mr Churchill, Mr Diallo and Mr Nuseibeh]' duties of good faith and fidelity to FCM [London] that are to be implied into their employment contracts and/or breaches of [Mr Diallo's] statutory obligations to FCM [London] as one of its directors under the Companies Act 2006."

479. I can deal with the requested findings 17.1 and 17.2 in the following way.

480. I find that [Mr Churchill, Mr Diallo and Mr Nuseibeh] combined to take action that ensured that the Fund did not receive US$1.1 million (i.e. the "Diverted Sum") within the "full Termination Fee". I reject the allegation that that fee was "just over $3m".

481. The allegations that are then made against Mr Nuseibeh and then Mr Diallo and Mr Churchill, are also allegations that (as will be seen above) I reject, but they go principally to the case of conspiracy in relation to the alleged non-payment of what the Fund terms the "Missing Termination Fee Payment" rather than the diversion of what the Fund terms the "Diverted Sum". In the latter instance, the unlawful action was the diversion itself and to themselves of money due to the Fund.

482. The Fund's Issue 3(j) (conspiracy) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh] intend to harm the Fund by their combined action?"

483. The Fund asks the Court to make the following finding:

> "Factual finding 18.1: [Mr Churchill, Mr Diallo and Mr Nuseibeh] intended to harm the Fund by (i) procuring the diversion of the Diverted Sum from

> the Fund when, at the very least, they knew it was contractually due to the Fund and (wrongly) believed it was required to be subject to the NAV Assessment Requirement before it could be paid out, and (ii) failing (either deliberately or recklessly) to ensure that the full Termination Fee was demanded from [Reading FC]."

484. As to finding 18.1, I find that [Mr Churchill, Mr Diallo and Mr Nuseibeh] intended to harm the Fund by procuring the diversion of the Diverted Sum from the Fund when, at the very least, they knew it was contractually due to the Fund. For reasons already traversed I do not make the additional findings sought within finding 18.1.

485. The Fund's Issue 3(k) (conspiracy) asks:

> "Did [Mr Churchill, Mr Diallo and Mr Nuseibeh]'s combined action cause the Fund loss?".

486. The finding that the Fund invites the Court to make is this:

> "Legal finding 19.1: The Fund (and therefore C as assignee) suffered loss because the Offering Memorandum required the Fund to retain the Termination Fee (including the Diverted Sum and the ["Missing Termination Fee Payment"]) in its cash reserves had it received those Payments."

487. The conspiracy did not extend to what the Fund calls the "Missing Termination Fee Payment". Loss was caused to the Fund in the amount of what the Fund calls the "Diverted Sum", and to that extent I make the finding 19.1 sought.

488. In the latter part of the next section of this judgment, I explain why what the Fund was required to do with fees once received from Reading FC does not reduce the Fund's loss. The point goes beyond the requirement to hold the fees in its cash reserves, on which the finding focusses.

## Credit

489. The Fund's Issue 3(g) asks:

> "Is [FIML] (as assignee of the Fund's claim) required to give credit for any sums that [Mr Churchill, Mr Diallo and Mr Nuseibeh] would have received had the Payments been received by the Fund?"

490. The Fund asks the Court to make this finding:

> "Legal finding 15.1: [The Fund and FIML as its assignee] is not required to give any credit to [Mr Churchill, Mr Diallo and Mr Nuseibeh] because (i) had the Payments been paid to the Fund, they were required to be retained in the Fund's cash reserves and could not properly trickle down to FMB and FCM [London] as excess net income of the Fund, (ii) even had some of the Payments trickled down to FCM [London], there would have been

> no distribution to [Mr Churchill, Mr Diallo and Mr Nuseibeh], as FCM [London] was heavily insolvent, and (iii) [Mr Churchill, Mr Diallo and Mr Nuseibeh] are not entitled to any further remuneration (outside a profit distribution from FCM [London]) as they were already well remunerated by FCM [London] for their roles managing the redemption of the [Financing]."

491. The Issue is on its face directed to sums that Mr Churchill, Mr Diallo and Mr Nuseibeh, "would have received had the Payments been received by the Fund". However, it will be apparent from the finding 15.1 sought that the Fund is saying, at least substantially, that sums would not have been received by Mr Churchill, Mr Diallo and Mr Nuseibeh had the Payments been received by the Fund.

492. The entitlement of Mr Churchill, Mr Diallo and Mr Nuseibeh to some reward for their work leading to the repayment of the Financing and the payment of the Termination Fee by Reading FC took two forms. First, their right to be paid salary by FCM London. Second their right to benefit from the value of FCM London in their capacity as shareholders in FCM London.

493. Where the Fund's claim is for the loss of the asset (the debt that is the Termination Fee, or any Prepayment Fees), neither form of entitlement affects the loss of the asset. For that reason, neither is available as a credit.

494. But what where the Fund's claim is for loss to the Fund, rather than of the asset? On the facts, the Fund has still lost income in the full amount of the Termination Fee and any Prepayment Fees. The Fund would have a debt to FIML in the amount of FIML's fee as Investment Manager, and that fee might be higher, and potentially higher by an amount equal to the Termination Fees and any Prepayment Fees. But that does not reduce the Fund's loss; rather it reduces its ability to meet its debts including its debt to FIML.

495. None of this ignores the entitlements of Mr Churchill, Mr Diallo and Mr Nuseibeh. However, those entitlements fall to be enjoyed not as a "credit" against the Fund's claim, but through the outcome of a chain of events under which the Fund recovers, then meets its liability to FIML, which in turn meets its liability to FCM London, the value of which would increase. The fact that at this remove in time and relationship the chain would be at least uncertain in practice, does not alter the fact that this was the structure agreed.

## Conclusions

496. The trial showed the level of distrust and extreme breakdown in relations that was apparent by December 2016 between Mr Churchill, Mr Diallo and Mr Nuseibeh on the one hand and Mr Mutaz Otaibi and Mr Hussam Otaibi on the other hand, and has only worsened since. This is unedifying on all sides. It has generated suspicion that has included unfounded suspicion.

497. As will have been clear from this judgment, I was able to accept parts of the evidence of Mr Mutaz Otaibi, but there were parts I could not accept. The same was true for Mr Churchill, Mr Diallo and Mr Nuseibeh. This was not a case in which any of the four was a witness whose evidence was to be rejected wholesale.

498. Having seen each in the witness box, I do not consider each of Mr Churchill, Mr Diallo and Mr Nuseibeh as men without any integrity, prepared to be dishonest wherever it suited them. However, through fear of being treated unfairly if they did not, they together crossed the line from honesty to dishonesty in relation to their conduct over the destination of the Termination Fee but not otherwise.

499. Let me return to the three "overarching questions" framed by the Fund in its closing argument. In summary in my view the answers are:

> "Q1: Was the Fund entitled to be paid each of the Payments (the "Diverted Sum", the "Missing Termination Fee Payment" and the "Prepayment Fees") under the [Facility]?"
>
> Answer: Yes, in the case of the "Diverted Sum". No, in the events that happened in late 2016 and in 2017, in the case of the "Missing Termination Fee Payment" and the "Prepayment Fees".
>
> "Q2: Did the Fund give its informed consent to not receiving each of the Payments?"
>
> Answer: Yes, in the case of the "Prepayment Fees" and the "Missing Termination Fee Payment". No, in the case of the "Diverted Sum".
>
> "Q3: In respect of each Payment, are the relevant [Defendants] liable for the Fund's non-receipt and entitled to the relief [the Claimant] seeks?"
>
> Answer: Yes in the case of the "Diverted Sum" or the part of it they received, but not on all of the grounds alleged by the Fund. No, in the case of the "Prepayment Fees" and the "Missing Termination Fee Payment".

500. The core outcome in broad terms is that (what the Fund terms) the "Diverted Sum" must be paid back so that it goes to the current holder of the Fund's rights, which is FIML. I will deal with interest, costs and the precise terms of relief when the terms of the order on this judgment are discussed on or after the judgment being handed down.