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TECHNOLOGY AND CONSTRUCTION COURT OF ENGLAND AND WALES HOLDS THAT EXPERTS CAN OWE CLIENTS A FIDUCIARY DUTY OF LOYALTY

To Our Clients and Friends:

The Technology and Construction Court of England and Wales (“**TCC**”) has this month held that expert consultancy firms can owe a fiduciary duty of loyalty to a client. The relevant decision is *A Company v (1) X (2) Y (3) Z*, in which Mrs Justice O’Farrell has continued an injunction preventing the Defendant, an expert witness services firm, from acting for Claimant’s opponent in an ICC arbitration because, in short, that would be contrary to the firm wide fiduciary duty of loyalty that was created when Defendant’s Asian subsidiary was retained by the Claimant in another ICC arbitration that relates to the same project and overlaps on issues.[1] The court’s decision can be read [here](#). The party names have been anonymised by the court because the litigation relates to two ongoing arbitrations. Below is our summary and initial reaction to the decision.

The background facts

Claimant is the developer of a petrochemical plant on which multiple construction related disputes have arisen. Claimant approached the First Defendant X (“**X**”) to provide expert services on 15 March 2019. A confidentiality agreement was signed on the same day and a letter of engagement concluded on 13 May 2019. Claimant’s formal letter of instruction, incorporating the confidentiality agreement by reference, followed on 26 May 2019. In short, as per the letter of engagement, X’s expert K and his team in Asia were to, in broad terms, undertake a delay analysis and prepare a report, give oral evidence at the arbitration hearing, and provide “ad-hoc support” to Claimant and its “*professional team*” (presumably lawyers and other experts) in connection with an arbitration commenced against Claimant in relation to Packages A and B of the project (the “**Works Package Arbitration**”). K and his team started work – evaluating delays on the construction subcontract for non-process buildings - around June 2019.

Later in the summer of 2019, an ICC arbitration was commenced against Claimant by a third-party entity seeking payment for sums due and owing under the project’s EPCM agreement (the “**EPCM Arbitration**”). In defence of those arbitration proceedings Claimant is advancing counterclaims for delay and disruption. Claimant is also alleging that the third-party caused Claimant loss by failing to manage and supervise the contractor. Materially, in the EPCM Arbitration, the delays in dispute are the same as those in the Works Package Arbitration. In October 2019, however, the Second and Third Defendants were approached to provide expert services – quantum and delay - for the Claimant’s opponent in the EPCM Arbitration.[2] K emailed Claimant noting the third party’s approach and setting out his firm’s position that there was no legal conflict because other experts and offices in the

Defendant's network would be involved in the EPCM Arbitration and not K and his team working on the Works Package Arbitration.

Between October and February there was no correspondence between Claimant and the Defendants in relation to the EPCM Arbitration, but later, in February 2020, Claimant learnt that its opponent on the EPCM Arbitration was in the process of instructing M – an expert working for the Defendant X firm – to act as quantum expert. The appointment of M was confirmed to Claimant by email dated 10 March 2020. Prior to this confirmation, on 5 March 2020, Claimant had written to K of X to expand his engagement to include expert services (delay) in respect of the EPCM Arbitration. On learning of M's appointment in the EPCM Arbitration, Claimant's counsel put on record its position, requested further information to consider the issues more thoroughly, and reserved all rights - including the right to challenge the appointment of the Defendants in the EPCM Arbitration. Counsel for Claimant's opponent responded by rejecting Claimant's position, resisting the information request, and countering that Claimant's objections were simply an attempt to derail the EPCM Arbitration timetable.

By letter dated 12 March 2020, Claimant informed X that its engagement in the EPCM Arbitration created a conflict of interest contrary to its terms of engagement in respect of the Works Package Arbitration. In a letter of response seven days later, N of the Third Defendant ("Z") rejected the suggestion of conflict and set out the measures taken to ensure X's compliance with its confidentiality obligations to Claimant. As a result of this impasse, on 20 March 2020, Claimant applied (*ex parte*) to the TCC seeking an interim injunction preventing the Defenders from providing expert services to the third party in the EPCM Arbitration. The application was granted.

Continuation Hearing

At the continuation hearing, Claimant submitted that the interim injunction should be continued on the ground that Defendant's provision of services to the third party in the EPCM Arbitration is a breach of the rule that a party owing a duty of loyalty to a client must not, absent informed consent, agree to act or actually act for a second client in a manner which is inconsistent with the interests of the first.

The Defendants opposed continuation on the grounds that the claimant's application is misconceived. In short, they said, independent experts do not owe a fiduciary duty of loyalty to their clients and there is, in this case, no conflict of interest or risk that confidential information has been or will be disclosed to the third party.

The material issues before the court at the continuation hearing were:

- i) whether independent experts, who are engaged by a client to provide advice and support in arbitration or legal proceedings, in addition to expert evidence, can owe a fiduciary duty of loyalty to their clients;
- ii) whether, on the evidence before the Court, the claimant is entitled to a fiduciary obligation of loyalty from the first and/or second and /or third defendants;
- iii) whether there has been, or may be, a breach of any duty of loyalty or confidence; and

iv) if so, whether the Court should exercise its discretion and grant the injunction.

Whether independent experts can owe a fiduciary duty of loyalty to clients

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty; the principal is entitled to the single-minded loyalty of his fiduciary.[3] A number of legal authorities were cited by the parties in argument. In respect of expert witnesses, Mrs Justice O'Farrell distilled the authorities to the following general principles:

- i) an expert can be compelled to give expert evidence in arbitration or legal proceedings by any party, even in circumstances where that expert has provided an opinion to another party;[4]
- ii) when providing expert witness services, the expert has a paramount duty to the court or tribunal, which may require the expert to act in a way which does not advance the client's case;[5] and
- iii) where a fiduciary duty of loyalty arises, it is not limited to the individual concerned. It extends to the firm or company and may extend to the wider group[6].
- iv) Where no fiduciary relationship arises, having regard to the nature and circumstances of the expert's appointment, or where the expert's appointment has been terminated, the *Bolkiah* test based on an ongoing obligation to preserve confidential and privileged information does not necessarily apply to preclude an expert from acting or giving evidence for another party.[7]

Accordingly, having regard to the above - and noting Defendants' failure to cite any authority supporting its proposition that an independent expert does not owe a fiduciary obligation of loyalty to his or her client - Mrs. Justice O'Farrell found that experts can, in fact, owe such a fiduciary duty. Paragraph 53 of the judgment:

“[a]s a matter of principle, the circumstances in which an expert is retained to provide litigation or arbitration support services could give rise to a relationship of trust and confidence. In common with counsel and solicitors, an independent expert owes duties to the court that may not align with the interests of the client. However, as with counsel and solicitors, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client.”

Disposal

Having established that an expert can in principle owe a fiduciary duty to his or her client, Mrs Justice O'Farrell assessed whether a duty of loyalty was owed by the Defendants to Claimant as a result of expert K's engagement in respect of the Works Package Arbitration.

Mrs Justice O'Farrell found it was clear in the circumstances that there was a “*clear relationship of trust and confidence*” giving rise to a fiduciary duty of loyalty because, in addition to providing an expert

report, the engagement was to “*provide extensive advice and support for the [C]laimant throughout the arbitration proceedings*”.

Given that a fiduciary duty of loyalty had arisen, it was held, applying *Bolkiah*, that the duty of loyalty extended – because of the global management, marketing and common financial interest of the Defendants – beyond subsidiary X to the entire group (including Y and Z).[8] On that basis, accepting instruction on the EPCM Arbitration for another client was “*plainly a conflict of interest*” in breach of the fiduciary duty.[9] The injunction was continued pending trial on the issue.

Observations

This decision will no doubt cause concern among expert consultancy firms. An initial and understandable reaction will be to update terms of engagement to expressly exclude the fiduciary duty of loyalty. It is however the substance – the contract as a whole, the scope of the engagement - that is examined when deciding whether a relationship is fiduciary. While an express exclusion will help, it is by no means the complete solution: to avoid the suggestion of a fiduciary relationship, experts must ensure that the terms and parameters of their engagement are clearly and comprehensively set out. Also, before accepting an appointment relating to a project on which the firm is already engaged, it’s essential to carefully consider the conflicts position. As this case illustrates, the position of the individual expert or his subsidiary is not all that matters: if another expert in the group owes a fiduciary duty then that may extend to the group as a whole, and where that is the case – absent express consent – the firm cannot act without breaching its duty of loyalty to the first client.

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[1] *A Company v (1) X (2) Y (3) Z* [2020] EWHC 809 (TCC).

[2] The First, Second and Third Defendants are part of the same group.

[3] *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA), per Millett LJ at p. 18 (as cited at para. 40 of the Judgment in the present case).

[4] *Harmony Shipping Co SA v Saudi Europe Line Limited* [1979] 1 WLR 1380.

[5] *Jones v Kaney* [2011] 2 AC 98 (SC).

[6] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 (HL) , per Lord Millett at p. 234; *Marks and Spencer Group plc and Another v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741; *Georgian American Alloys, Inc & Or v White and Case LLP & Anor* [2014] EWHC 94.

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[7] *Meat Corporation of Namibia Ltd v Dawn Meats (UK) Ltd* [2011] EWHC 474 (Ch); *A Lloyd's Syndicate v X* [2011] EWHC 2487 (Comm); *Wimmera Industrial Minerals Pty Ltd v Iluka Midwest Ltd* [2002] FCA 653.

[8] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 (HL).

[9] *A Company v (1) X (2) Y (3) Z* [2020] EWHC 809 (TCC), per O'Farrell J at p. 61.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration Practice Group or the following authors:

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