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Court of Appeal addresses expert's duties and conflicts of interest

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Introduction

In *Secretariat Consulting PTE Ltd v A Company,* the Court of Appeal considered for the first time the question of an expert's duty to avoid a conflict of interest.(1) The Court of Appeal's decision, while not deciding the point finally, means that it is unlikely that a court will now recognise such a duty as a matter of law. The issue is a matter of contract. On the terms of the expert firm's engagement in this case, the Court of Appeal upheld the High Court's decision to grant an injunction restraining the firm from acting for a third party in a connected arbitration. The judgment contains a useful analysis of when conflicts can arise in related cases and the circumstances in which a large organisation offering expert or litigation support services may find itself conflicted.

Facts

The respondent (Company A) is a developer of a large petrochemical plant. The respondent engaged a project manager (PM) who provided engineering, procurement and construction management services and a contractor (X) for the construction of certain parts of the plant. Due to the PM's alleged late release of issued-for-construction (IFC) drawings, X claimed costs of the delay from Company A (Arbitration 1).

The first appellant, Secretariat Consulting PTE Ltd (SCL), is a Singaporean company that is part of the well-known Secretariat group, which provides a range of expert services for construction disputes. In March 2019 SCL was approached by Company A to provide arbitration support and expert delay evidence for Arbitration 1. A confidentiality agreement containing a conflicts clause was entered into shortly thereafter, followed by a conflicts check and an engagement letter.

In August 2019 the PM commenced a separate arbitration (Arbitration 2) against Company A, claiming unpaid fees. Company A's defence was in part based on delayed IFC drawings and it counterclaimed for the costs sought by X in Arbitration 1.

Secretariat International UK Limited (SIUL), a UK company within the Secretariat group, was instructed by the PM in Arbitration 2 (notwithstanding Company A's prior knowledge and objection) to provide arbitration support services and expert quantum evidence. Company A applied to the High Court for an injunction to restrain SIUL from acting for the PM in Arbitration 2.

Legal background

A 'fiduciary' is a person who acts on behalf of another in circumstances which give rise to a relationship of "trust and confidence".(2) A fiduciary owes certain duties to their principal, including the obligation of loyalty. 'Loyalty' is itself a broad term that encompasses several requirements, including a duty not to act for third parties where there is a conflict of interest. Fiduciary duties normally arise in certain settled categories (recognised by the courts), such as trustee and beneficiary or solicitor and client. The categories are not fixed, but courts have not reacted to attempts to expand them with any enthusiasm.

High Court decision

At first instance, Mrs Justice O'Farrell (the judge) granted the injunction on the basis that the whole Secretariat group (including SCL and SIUL) owed Company A a fiduciary duty of loyalty.(3) This was the first time that an English court had recognised that an expert witness was subject to such a duty.

The judge noted the unhelpful dearth of authorities on the matter, and that those which were referred to in submissions did not deal with duties during the course of a retainer but the distinct obligation to protect confidential information after the engagement had ended. The leading case in that area remains *Prince Jefri Bolkiah v KPMG,*(4) which concerned accountants providing litigation support services. That case clearly informed the position which Secretariat took in its communications with Company A, as it insisted that it had established appropriate information barriers to prevent Company A's confidential information from being disclosed to the PM.

The judge saw no impediment to identifying a fiduciary duty of loyalty so long as there was a relationship of trust and confidence. The judge identified a fiduciary duty of loyalty on the basis that SCL had been engaged not only to provide a delay expert report, but also to "provide extensive advice and support for the claimant throughout the arbitration proceedings".(5) Further, the duty was owed not just by SCL but by the whole of the Secretariat group (including SIUL) on the basis that a fiduciary duty at law is owed not just by the individual but by the entire firm, company or "wider group".(6) The companies in the Secretariat group should be treated as a single entity for these purposes because they:

- had common ownership;
- were marketed as a single global firm; and
- had purported to carry out the initial conflict search on a group-wide basis.

Having reached these conclusions, the judge had little trouble finding that acting in overlapping arbitrations was a conflict of interest and, therefore, that SIUL was in breach of duty and should be restrained.

Court of Appeal decision

Lord Justice Coulson provided the leading judgment, with concurring judgments rendered by Lord Justice Males and Lady Justice Carr. Coulson LJ divided his judgment into four issues:

- Did SCL owe a fiduciary duty of loyalty to the respondent?
- Alternatively, did SCL owe a contractual duty to the respondent to avoid conflicts of interest?
- Did this duty extend to other Secretariat entities?
- Was there a conflict of interest as a result of SCL's engagement in Arbitration 1 and SIUL's subsequent engagement in Arbitration 2?

Fiduciary duty of loyalty

On the first issue, the Court of Appeal departed from the first-instance judge's analysis but did not decide the point conclusively. Coulson LJ explained that he wished to avoid the "baggage" of the term fiduciary, much of which was inapt for a relationship between expert and client.(7) However, he did not find the issue straightforward and agreed that the relationship does have at least some characteristics of a fiduciary relationship.(8) He also expressed the view that delay and quantum experts have a different, and potentially closer, relationship with a client in litigation than "conventional experts".(9) He left open the possibility that, in the right circumstance, a 'freestanding' (ie, common law) duty of loyalty may arise but ruled that this need not be decided here where there were specific contract terms dealing with the issue.

Males LJ agreed that the attempt to characterise the relationship as fiduciary was an unnecessary distraction but was more emphatic in his view that it was hard to imagine any circumstances in which an expert would be a fiduciary. This does not give rise to any broader difficulties for parties because the duties owed by an expert to their client are primarily a matter of contract and (in Males LJ's view) it would be unusual, in substantial litigation or arbitration, for there not to be terms dealing with conflicts of interest.

The Court of Appeal agreed with the judge at first instance when it unanimously rejected the suggestion that there was no fiduciary duty because the expert owed an overriding duty towards the court or, as in this case, an arbitral tribunal. The Court of Appeal held that the matter had been effectively settled by the Supreme Court in *Jones v Kaney.*(10) Coulson LJ also observed that a fiduciary duty and duty to the court or a tribunal are not only compatible but also closely intertwined. An expert's obligation to give a true report before the court (or, in this case, in accordance with the Chartered Institute of Arbitrators' Expert Witness Protocol) creates reassurance for the client that the expert is providing them with an accurate and unbiased appraisal of their case.

Contractual duty to avoid conflicts of interest

Coulson LJ and Males LJ concluded that the clause dealing with conflicts in SCL's engagement letter created an

ongoing obligation for SCL to avoid conflicts of interest. The clause confirmed not only that SCL had no conflicts at the time of signing but also that it would "maintain this position for the duration of [SCL's] engagement".

Coulson LJ and Males LJ also agreed that SCL's undertaking to avoid conflicts extended to all other entities within the Secretariat group (including SIUL). Coulson LJ held that this was a matter of contractual construction (dismissing arguments that it improperly pierced any corporate veils) and that it was the proper construction for a number of reasons. First, the initial conflicts check carried out by Secretariat covered the entire Secretariat group and this suggested that the obligation in the engagement letter was intended to have the same scope. Second, it was consistent with the manner in which Secretariat marketed itself (eg, 'Secretariat International' email addresses were used across all entities within the group and its promotional material referred to a global enterprise rather than separate regional entities). Third, the fact that each office was a separate legal entity was less relevant than the reality that Secretariat's offices functioned as a single, cohesive team. Coulson LJ also referred to Royal Institution of Chartered Surveyors guidance (albeit according it no particular weight) which contained criteria to determine whether companies were related and pointed towards SCL and SIUL being related.

Conflict of interest

The Court of Appeal considered the question of whether there was a conflict of interest in greater detail than the first-instance court. Both strove to identify any specific conflicts of interests arising, rather than just relying broadly on the fact that there were closely connected arbitrations.

Coulson LJ started by setting out the scope of the services being provided by SCL and SIUL respectively. Secretariat sought to distinguish between a 'testifying expert' and a 'consulting expert', arguing that only the latter advised on or helped to prepare a case, leaving the former free from conflicts. Coulson LJ and Males LJ doubted that this was a valid distinction when it came to quantum and delay experts, who would likely be involved in extensive case preparation, not just give evidence. In any event, Coulson LJ held that both SCL and SIUL were consulting experts because of the wide-ranging support and advice that they had provided in preparing the case, which exacerbated the risk of conflicts arising.

In that context, Coulson LJ identified four sources of a conflict:

- SCL and SIUL had provided advice on the commercial positions of their respective clients.
- There was a close relationship between X and Company A.
- SCL and SIUL had both given advice on the design and construction of the same project.
- The critical issues in Arbitrations 1 and 2 were the same (ie, causes of delay in the design and construction of the project).

Coulson LJ concluded that the overlaps in this case were "all-pervasive". In short, Secretariat could not act in the best interests of both Company A and X at all times. Males LJ addressed the question in a slightly different way, but came to the same conclusion.

The High Court's injunction was upheld.

Comment

The Court of Appeal's decision is pragmatic and consciously seeks to avert further litigation on the question of whether a particular expert-client relationship gives rise to fiduciary duties. It leaves parties to protect themselves with suitable contractual terms but also empowers parties and experts to define the relationship most suited to their circumstances.

There are a number of points to note for regular users of expert services, particularly delay and quantum experts in the construction sector, and expert services firms themselves.

First, the case demonstrates the importance of taking potential conflicts seriously. For obvious reasons, neither judgment explains why the PM decided to instruct SIUL notwithstanding the potential conflict. However, the injunction has likely now disrupted preparations for Arbitration 2 and left it with significant unrecoverable costs. Parties should carefully consider the implications of instructing an expert whose firm is already working on a potentially related matter and, if there is any risk, ensure that appropriate consents are obtained. The Court of Appeal's doubt that there was a meaningful distinction between a testifying expert and a consulting expert (at least in the case of delay and quantum experts) means that this issue arises not only where experts are on the record but also where they are working behind the scenes.

Second, the decision emphasises the importance of a careful review of the terms of an expert's engagement. Engagement letters are (increasingly) contracts in their own right and often incorporate standard terms and

conditions. Those terms are sometimes focused on general consulting and advisory work and are not tailored specifically to litigation. The following points should also be kept in mind when instructing experts:

- Expert services firms should run conflicts checks across their entire group and record the result in the engagement letter.
- A no-conflicts warranty and ongoing obligation should be included in the engagement letter clearly specifying, where relevant, whether the expert firm's wider corporate group is within its scope.
- Parties should consider whether it is appropriate to try to define what will be a 'related matter' for the purposes of the no-conflicts warranty.
- Specific obligations for the return or destruction of data at the end of the engagement should be considered.

Third, expert services firms may now seek to alter these terms so that they permit other parts of their global group to act adverse to a client even on related matters. Both the Court of Appeal and the first-instance court recognised that this is permissible, although rightly queried whether Company A would still have instructed Secretariat on such terms. This will be a commercial decision for clients to take on a case-by-case basis.

Finally, it is worth noting that the Court of Appeal refused to keep Secretariat's identity private as it had been in the first-instance decision on the ground of arbitral confidentiality. Males LJ commented that there was no good reason why Secretariat's identity should not be made public and the interests of open justice required that it should. This approach follows similar sentiments recently expressed by the Supreme Court in *Halliburton Company v Chubb Bermuda Insurance Ltd* ([2020] UKSC 48). Parties applying to the English courts on arbitration-related matters should bear in mind that their anonymity should not be assumed.

For further information on this topic please contact Marie Berard or Sam Brown at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or sam.brown@cliffordchance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.

Endnotes

(1) [2021] EWCA Civ 6.

(2) *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA).

(3) *A Company v X* [2020] EWHC 809 (TCC).

(4) [1999] 2 AC 222. The House of Lords held that a provider of litigation services (akin to a solicitor) cannot act for a third party where:

- the professional holds information which may be adverse to its former client's interests in new proceedings; and
- there is a real risk of disclosure.

Further, the burden is on the service provider to demonstrate that there is no risk.

(5) *A Company v X* [2020] EWHC 809 (TCC), Paragraph [54].

(6) See *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741 and *Georgian American Alloys v White & Case* [2014] EWHC 94 (Comm).

(7) *Secretariat Consulting PTE Ltd v A Company ltd* [2021] EWCA Civ 6, Paragraph [64].

(8) *Id*, Paragraph [38].

(9) *Id*, Paragraph [57].

(10) [2011] UKSC 13.

Ioana Burtea, trainee solicitor, assisted in the preparation of this article.

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