Appointed Experts May Owe a Fiduciary Duty of Loyalty – The English High Court's Ruling in A Company v X, Y, Z

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In a decision with potentially far reaching implications for expert witness services, on 3 April 2020, the English High Court (Technology and Construction Court) continued an interim injunction against three related expert consultancies forming part of the same global group[1]. The injunction prevents the firms (including the English-domiciled second defendant) from accepting instructions in a London seated ICC arbitration against the claimant developer, due to one of their number having an ongoing instruction to provide delay analysis and expert witness services for that developer in a related arbitration on the same construction project. The injunction remains in force pending trial on the developer's claim for permanent relief against the consulting firm

The injunction, granted by Mrs. Justice O'Farrell DBE, is significant in concluding that the appointed defendant expert firm—together with its global affiliates—owed a fiduciary duty of loyalty to the claimant developer. Disputes arising from large-scale construction projects frequently lead to a series of related proceedings. Different parts of the project may be subject to contemplated or existing arbitral or court proceedings, at any one time. Several expert firms may be involved, acting for a number of adverse parties. This ruling will likely limit the extent to which "global" multi-disciplinary firms (an increasingly common feature of the industry) will be able to accept multiple appointments by more than one party in connection with the same project. To the extent that brings experts' duties more in line with party expectations that may of course be a welcome development.

The ruling does however leave some uncertainty as to when an expert's involvement with an appointing party creates a fiduciary relationship so as to prevent the expert, or their colleagues, from acting for a party with an interest adverse to that of the existing appointment.

Background. The claimant in the TCC proceedings (the "Claimant") was the developer of a petrochemical plant (the "Project"), and in 2012 had entered into an Engineering, Procurement and Construction Management contract (the "EPCM Agreement") with a

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

third party (the "Third Party") for the provision of engineering and construction management services. In 2013 the Claimant had also entered into two separate contracts with a contractor for the construction of certain facilities at the plant (the "Construction Contracts").

The Construction Contracts gave rise to a dispute, then an arbitration, in which the contractor sought to recover additional costs incurred by reason of delays to works from the Claimant (the "Work Packages Arbitration"). The Claimant's position in the Work Packages Arbitration was that certain delays (associated with the late release of drawings) were the responsibility of the Third Party under the EPCM Agreement. Consequently, the Claimant would seek to pass on any damages it was ordered to pay under the Work Packages Arbitration to the Third Party.

The Claimant approached the first defendant to provide delay analysis and expert services in connection with the Work Packages Arbitration, setting out formal instructions in a letter dated 26 May 2019. That appointment was with the expert firm, named an individual expert to testify, and stated that the expert was and would continue to be under no conflict for the duration of the appointment.

Separately, the Third Party commenced parallel arbitration proceedings against the Claimant for sums owing under the EPCM Agreement, and the Claimant brought counterclaims for delay and disruption to the Project (the "EPCM Arbitration"). In October 2019, the Third Party approached a different expert at the second defendant to provide quantum and delay expert services in the EPCM Arbitration.

The first defendant made limited disclosures of a potential involvement in the EPCM Arbitration to the Claimant in late 2019. In March 2020 the Claimant's lawyer informed the first defendant that its appointment by the Third Party created a conflict of interest, contrary to the terms of its appointment in the Works Package Arbitration. The defendants did not consider there to be a conflict, and emphasis was placed on the fact that the two individual experts would be acting in an independent capacity; they were based in different offices and were experts of different disciplines; and certain information barriers would be put in place to ensure that confidentiality could be adequately maintained.

Fiduciary Duties Owed by Experts. The Claimant's application for continuation of the injunction was based on breach of fiduciary duty. The duty was said to be owed to the Claimant by all three of the expert firms involved, over each of which the court had jurisdiction. If the duty existed, in these circumstances the defendants would have breached it by accepting conflicting appointments (a principle known as the "double employment" rule). Considerations of confidentiality were not pressed by the Claimant.

The defendants maintained that testifying experts do not owe fiduciary duties on the grounds that such duties would be incompatible with the independent nature of those individual appointments, and the expert's overriding duty to the tribunal or court. The defendants argued that case law established that expert witness consultancies had not been subject to restrictions that arise from being designated as fiduciaries.

Rejecting those submissions, the court held that testifying expert witnesses could be fiduciaries, and in the circumstances concluded that all three defendants owed a fiduciary duty to the Claimant because of the extant Work Packages Arbitration appointment. O'Farrell J recalled that 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*", as established in *Bristol & West Building Society v Mothew*[2]. Following the Supreme Court Authority of *Jones v Kaney*[3], which determined that experts' overriding duties to tribunals were not incompatible with owing a duty to the client, the submission that testifying experts could never be fiduciaries could not be sustained. Reference was made to *Prince Jefri Bolkiah v KPMG*[4] in which the House of Lords held that accountants, who had obtained confidential information by providing litigation services to a former client, could not subsequently act for another client with adverse interests. The obligation in that case applied to the organisation as a whole.

O'Farrell J concluded that retaining experts to provide litigation or arbitration support services could give rise to a relationship of trust and confidence. In this case, the instruction for the first defendant to provide advice and develop an analysis before providing an independent expert report appears to have been particularly important in establishing a fiduciary duty of loyalty. Crucially, this duty was owed by all three defendants, who had common shareholders and were marketed as one global firm.

Since the experts owed this fiduciary duty, an appointment for an adverse party with potentially conflicting interests would amount to a breach of the "double employment" rule, which prohibits a fiduciary from acting for two different principals with conflicting interests. There was a significant overlap of issues between the two arbitration disputes, because the appointments concerned the same project and the disputes in the Work Packages Arbitration and EPCM Arbitration were interrelated. The defendants had breached their obligation, and were enjoined from acting for the Third Party in the EPCM Arbitration.

Comment. Three important propositions emerge from the judgment. First, the provision of expert services may give rise to fiduciary obligations including the duty of

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2 [1998] Ch 1 (CA)

3 [2011] 2 AC 398 (SC)

4 [1999] 2 AC 222 (HL)

loyalty. Second, that obligation is not negated by an overriding duty to the court or tribunal. Third, the fiduciary duties may extend beyond the individual expert, or team, engaged in providing the services, such that it catches the whole consultancy. However, the judgment does not offer comprehensive guidance on the type or extent of services to be performed under an expert engagement in order to give rise to a fiduciary duty of loyalty. The judgment should be taken as reflecting that, where an existing appointment involves more than testifying and there is investigatory or advisory element to the services performed (as is commonly the case in disputes arising out of complex construction projects), a fiduciary duty of loyalty will exist unless any factors can be pointed to that negate this position. The extent to which expert consultancies will be able to contract out of that fiduciary duty may well be circumscribed, as the test should still turn on the true nature and/or scope of services to be performed.

The judgment also indicates that—where existing expert appointments are involved, and disputes are highly interrelated or concern related expert disciplines—an injunction will follow as a matter of course. Until the nature of the fiduciary duty is tested, potential experts and the lawyers appointing them would be well advised to follow up on conflicts checks, disclosing the results to their colleagues and existing clients where necessary. From the perspective of a party, early-stage appointments or confidentiality undertakings would be well advised to contain a continuing prohibition against conflict (as the claimants' solicitors secured from the first defendant in this case).

The judgment leaves some uncertainty as to the scope of any fiduciary duty that might arise. It may be subject to appeal, and/or permanent relief may not be granted following the trial. Nevertheless, in the short term at least it is likely to constrain the ability of a "global" expert consultancy to take on multiple appointments for parties with potentially adverse interests in connection with the same project.

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Please do not hesitate to contact us with any questions.

LONDON


Tony Dymond
tdymond@debevoise.com


Gavin Chesney
gchesney@debevoise.com


Robert Hoose
rhoose@debevoise.com


Laith Najjar
lnajjar@debevoise.com


Anna Olayos
aolayos@debevoise.com


Raeesa Rawal
rrawal@debevoise.com