Construction Newsletter – The TCC throws a spanner in the works of expert witness firms

Summary

In what is likely to be a significant blow to firms providing expert witness services, the TCC has recently issued a judgment that may heavily curtail their activities.

In a decision issued last week in A Company v X, Y, Z [2020] EWHC 809 (TCC) the claimant succeeded in continuing an injunction restraining the three defendant consultancy firms from acting as expert witnesses for a third party in ICC proceedings against the claimant.

It was held that by agreeing to provide expert services to the claimant in connection with one contract on a project, the entire consultancy group to which the first defendant belonged owed a fiduciary duty of loyalty to the claimant. That duty of loyalty would be breached if another company within the defendant group accepted instructions to provide expert services in relation to another arbitration arising out of the same project.

The practical implications of this decision is that once a consultancy undertakes any substantial work for a party, it needs to very carefully consider the fiduciary duty of loyalty that it owes to that party and not accept other instructions that would be in conflict with that duty. That would obviously include, as here, instructions from another party in proceedings against the instructing party concerning the same project and may even have broader implications.

Being subject to a fiduciary duty is a very serious matter. Experts will have undertaken appointments on the basis of owing a duty of confidentiality to their appointing party and will not have considered owing a duty of loyalty which goes well beyond ordinary criticism that could be levied at an expert for a lack of independence. This will result in uncertainty and excessive cautiousness going forwards and likely a state of panic in ongoing proceedings that involve experts that could be said to be in breach of that duty. There is likely to be scramble by parties looking to review decisions in which there may be arguments that experts have breached this fiduciary duty.

It has very serious implications for the expert witness 'industry' and given those implications is likely to be the subject of an appeal.

The Decision

The claimant was the developer of a petrochemical plant (the "**Project**") and entered into contracts with a main contractor (the "**Contractor**"), as well as engineering, procurement and construction management consultants (the "**EPCM Consultants**"). In due course, disputes arose about delays to the Project, and the Contractor commenced an ICC arbitration against the claimant (the "**Works Package Arbitration**"). The claimant engaged the first defendant as delay experts in the Works Package Arbitration. That expert appointment included a confidentiality agreement.

Meanwhile, the EPCM Consultants commenced an ICC arbitration against the claimant (the "**EPCM Arbitration**") in respect of unpaid fees. The claimant counterclaimed in respect of delay and disruption, including any sums payable to the Contractor caused by the EPCM Consultants' late release of drawings, and failure to properly manage and supervise

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the Contractor. The EPCM Consultants sought the services of delay and quantum experts for the EPCM Arbitration and engaged another expert of the first defendant.

The first defendant informed the claimant of that appointment and advised that it did not consider that there was a conflict of interest because each expert owed a duty assist the Tribunal and act independently, was the individual and not the company, were of different disciplines and based in different geographic region and information barriers were operated.

The claimant advised the first defendant that its engagement by the EPCM Consultants created a conflict of interest and was contrary to the terms of its appointment. An interim injunction was sought restraining the defendants from providing expert services to the EPCM Consultants on the EPCM Arbitration.

The Issues

At the return date, the Court had to grapple with the following issues:

1. Whether as a matter of principle 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.
2. Whether on the facts of this case, the Employer was entitled to a fiduciary obligation of loyalty from any or all of the Defendants.
3. Whether there had been, or may be, a breach of any duty of loyalty or confidence.
4. If so, whether to grant the injunction.

The Arguments

The claimant argued that the defendants' provision of expert services to the EPCM Consultants was 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 argued that independent experts do not owe a fiduciary duty of loyalty to their clients because that would be inconsistent with their overriding duty to the tribunal, and that there was no conflict of interest as sophisticated information barriers were in place that prevented the transmission of confidential information between the appointed experts.

Fiduciary duty

The parties were in agreement as to the principles governing fiduciary relationships. The court set out the relevant definition of a fiduciary citing *Millett LJ in Bristol & West Building Society v Mothew* [1998] Ch 1 (CA):

"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. The core liability has several facets. A fiduciary must act in good faith; … he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal …
A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other …This is sometimes described as "the double employment rule". Breach of the rule automatically constitutes a breach of fiduciary duty…"

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The recognised classes of fiduciaries were limited to trustees, guardians, executors, administrators, agents, doctors and lawyers. The addition of experts to that list might be considered somewhat unusual. Hence, the parties were in dispute as to whether expert witnesses were fiduciaries, the defendant arguing that such a duty would be inconsistent with the independent role of the expert support for which was found in *Harmony Shipping v Saudi Europe Line* (1979) that was adopted by the Federal Court of Australia in *Wimmera Industrial Minerals v Iluka Midwest* [2002] FCA 653.

Historically the courts' concern in relation to experts was the protection of privileged material; hence the decision in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 (HL) which was considered to be an exceptional case in which the defendant accountants were essentially in the same position as solicitors and had an ongoing obligation to preserve confidential and privileged information. This was explained by Mann J in *Meat Corporation of Namibia Limited v Dawn Meats* (UK) Limited [2011] EWHC 474 (Ch) who concluded that "*on certain facts an expert should not be permitted to act because it is likely that the expert will be unable to avoid having resort to privileged material that he should not resort to*".

The TCC concluded that in each of the above cases there was no existing fiduciary duty giving rise to a duty of loyalty; the issue was whether, absent a duty of loyalty, an obligation to preserve confidential and privileged information should preclude the expert from acting for another party.

Experts' immunity was abolished in *Jones v Kaney* [2011] 2 AC 398 (SC) with Lord Phillips explaining that there is no conflict between the duty that an expert owes to his client and that owed to the court. The TCC set out the following general principles in respect of expert witnesses:

1. In principle, 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.
2. 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.
3. 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 test from *Prince Jefri Bolkiah* 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.

The above appear to point to a conclusion that the defendants should not be restrained from providing expert witness services to the EPMC Consultants. However, the Court stated that:

"None of the authorities supports the proposition that an independent expert does not owe a fiduciary obligation of loyalty to his or her client."

And further that: "*As 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*".

The apparent justification for this conclusion appears to be the Supreme Court decision in Jones v Kane; albeit that the Supreme Court did not consider whether or not an expert owed its client a fiduciary duty.

On the facts of this case, a relationship of trust and confidence did arise, because X "*was engaged to provide expert services for the claimant in connection with the Works Package Arbitration. […] However, it was also engaged to provide extensive advice and support for [the Employer] throughout the arbitration proceedings*".

Whilst the TCC did not decide that all experts owe their client a fiduciary duty, confining its decision to one that the circumstances in which an expert is retained could give rise to such a duty, nevertheless, the implications are clear.

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Particularly as the TCC went on to find not only that the first defendant owed such a duty to the claimant but that the defendant group owed such a duty thereby potentially precluding employees of other companies within that group from acting for anyone against the claimant. That seems very broad-reaching and as expert services firms have become much more multi-disciplinary in nature, likely to present real hurdles in practice.

The TCC was clear that X's fiduciary duty of loyalty extended to the wider group, and thus precluded Y and Z from being engaged by the EPCM Consultants. This was on the basis of the close financial links between the defendants: the defendants' shareholders had a common interest in the performance of the group, and that each defendant had a financial interest in the performance of others within the group.

The TCC rejected the Defendants' arguments to rebut those concerns and concluded that the defendant group owed fiduciary duties to the claimant:

1. Not unreasonably and particularly in light of the previous authorities, firms providing these services had in place firm-wide conflict management system intended to preserve confidentiality and privilege. It was held that that did not change the position: a fiduciary must not place himself in a position where his duty and his interest may conflict. Therefore, steps to prevent any such conflict arising in fact did not assist. It might be thought that such issues were more relevant to whether or not a breach of duty had occurred; rather than deemed irrelevant to its existence.
2. Barristers were in a similar position sharing funding, marketing and an interest in each other's success and often appearing on other sides of litigation without issue. It was held that the comparison was 'not apt' as barristers do not share profits, are required to represent unpopular clients or causes (a reference to the 'cab rank' rule) and (deemed most importantly) that it is common knowledge that barristers are self-employed and those in the same set may act on opposing sides. Whether that is 'common knowledge' or not must be open to some debate. The Court also raised the fact that the defendant did not inform the claimant that they might take instructions to act both for and against the claimant in respect of the dispute and the conclusion drawn that if it had done, the claimant would not have instructed the defendant. That conclusion is drawn from the fact that when the defendant advised the claimant that it was acting, the claimant objected.

The Court then concluded that the fiduciary duty had been breached because the two arbitrations were concerned with the same subject matters and there was an overlap of issues so "plainly" a conflict of interest. Accordingly, the Court was satisfied that it was likely that accepting the EPCM Consultants' instruction was a breach of fiduciary duty. The nature of the services being provided by the defendants was considered as part of the analysis of breach, rather than imposition of a duty. Furthermore, the Court did not consider the extensive information barriers that had been erected within the defendant group when considering the issue of breach.

Practical Implications

This judgment will not be welcomed by consultancy firms.

First, whilst the ratio of the decision is that the existence of a fiduciary duty depends on the nature of the particular retainer, a fiduciary relationship was nevertheless found in what were fairly common circumstances. Appointing parties and experts would expect their relationship to give rise to a duty of confidentiality rather than one of loyalty. That may differ where an expert is involved in all stages of case for a lengthy period of time but would not generally apply. That said, such relationship would not ordinarily be expected by the parties to extend to a duty of loyalty indefinitely and/or without anchoring in the specific project. This judgment would preclude firms that provide expert services from accepting instructions on any dispute where a conflict of interest may (rather than will) arise and could prevent an appointed expert from ever acting against that appointing party on any other project.

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Second, acceptance of instructions by one office of a global firm is likely to conflict out the entire firm. It is difficult to see what more a global consultancy can do to separate offices from one another than what the Defendants did in this case: they were separate legal entities, and had a firm-wide conflict management system in place. This was not enough. It therefore appears that any large consultancy "managed and marketed as one global firm" [57] may have to decline instructions to act against a party which has instructed an office in any region and in any discipline. Prudence would require them to as professional indemnity insurance would not cover them for any breach of fiduciary duty.

The judgment is available on BAILII.

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