GROUP LOYALTY – A COMPANY V X AND OTHERS

By Jennie Wild

"The distinguishing obligation of a fiduciary is the obligation of loyalty" [1]

It is well-known that barristers and solicitors owe fiduciary duties to their clients (the core duty being that of loyalty) such that they must not act for a second client if that would put them in conflict with the interests of the first. But what about expert witnesses? And what about multi-national groups of expert witness companies, who offer expertise in a variety of specialisms? Are such companies different to barristers' chambers whose members routinely act for opposing sides?

The TCC has recently grappled with these issues in *A Company v X and Others*[2], granting an injunction to restrain a group of expert witness companies from providing both delay and quantum expert services, despite setting up different teams, in different countries and putting in place measures to protect confidentiality. It is a case of some significance.

Fiduciary Duties (short form)

Consideration of when and, if so, what fiduciary duties arise fills entire textbooks. There is not time for great analysis here. In short:

1. A company or individual may owe fiduciary duties where:

    a. a relationship falls under a previously accepted category (eg a solicitor and client); or

    b. there is an inherent relationship of trust and confidence between the parties (described by the Law Commission as a test of *"discretion, power to act and vulnerability"*[3]).

2. The core fiduciary duty is that of loyalty[4]. "Loyalty" encompasses a number of obligations, including that a fiduciary must not put themselves in a position where their duty towards one client conflicts with a duty they owe to another[5]. A client may consent to conflicts of interest, but the consent must be fully informed (as to which, read on).

A Company v X and Others: The Facts

This was an application by the Claimant, for a continuation of an injunction restraining the Defendants (a group of related companies) from acting as experts for a third party ('the Third Party') in arbitration proceedings against the Claimant ('the EPCM Arbitration'), in circumstances where the Defendants were also acting for the Claimant in another, related, arbitration ('the Works Package Arbitration')

The Claimant was the developer of a petrochemical plant ('the Project') and entered into agreements in respect of the Project including:

(i) two agreements with the Third Party for engineering, procurement and construction management services ('EPCM Contracts');

(ii) two agreements with a contractor ('the Contractor') for the construction of facilities.

Two ICC arbitrations ensued.

First, the Works Package Arbitration was brought by the Contractor against the Claimant, seeking additional costs due to delays to the Project, including the late release of drawings produced by the Third Party pursuant to the EPCM Contracts. The Claimant engaged the First Defendant (in particular "K" of the First Defendant) to provide delay expert services.

The Claimant contended that it would pass on any additional costs it was required to pay due to late release of the drawings, to the Third Party.

Second, the EPCM Arbitration was brought by the Third Party against the Claimant, seeking sums due and owing under the EPCM Contracts. The Claimant brought counterclaims in respect of delay and disruption and passing on any additional sums payable by the Claimant to the Contractor caused by the Third Party's failures under the EPCM Contracts. The Third Party engaged the Defendants (in particular "M") to provide quantum expert services.

1 Per Lord Millet in Bristol and *West Building Society v Mothew* [1998] Ch 1 at 18A

2 [2020] EWHC 809 (TCC)

3 (1992) Consultation Paper No 124 para 2.4.6; (2013) Consultation Paper No 215 para 5.7

4 Mothew at 18

5 Mothew at 18-19

"The circumstances in which an expert witness is retained could give rise to a relationship of trust and confidence, such that the obligation of loyalty arose".

The Claimant contended that the provision of services by the Defendants to the Third Party in connection with the EPCM Arbitration was a breach of the Defendants' fiduciary duty of loyalty to the Claimant. The Defendants contended they didn't owe any fiduciary duties – such a duty was excluded by the expert's overriding duty to the tribunal – and there was no conflict of interest.

A Company v X and Others: Judgment

Does an expert witness owe a fiduciary obligation of loyalty?

The Defendants contended that an expert witness does not owe a fiduciary obligation of loyalty because such a duty would be inconsistent with the independent role of the expert.

The Court considered the cited authorities established no more than:

1. there is no property in an expert witness (*Harmony Shipping Co SA v Davis*[6]);

2. where no fiduciary duty arises, the obligation to preserve privileged and confidential information (pursuant to the "Bolkiah" test) does not prevent an expert witness from acting or giving evidence for another party (*Meat Corporation of Nambia Ltd v Dawn Meats (UK) Ltd*[7]).

3. an expert has a paramount duty to the Court (much like a barrister), which may require the expert to act in a way which does not advance their client's case (*Jones v Kaney*[8]),

but none of these rules were determinative as to whether fiduciary duties were owed.

Therefore, the Court concluded, as a matter of principle, the circumstances in which an expert witness is retained (as to which, read on) could give rise to a relationship of trust and confidence, such that the obligation of loyalty arose.

Did the First Defendant owe a fiduciary obligation of loyalty?

The Court held that a clear relationship of trust and confidence had arisen (imparting a fiduciary duty of loyalty), because the First Defendant:

1. was engaged to provide expert services for the Claimant in connection with the Works Package Arbitration;

2. had been instructed to provide an independent report and to comply with the duties set out in the ClArb Expert Witness Protocol; and

3. had been engaged to provide extensive advice and support for the Claimant throughout the arbitration proceedings.

I discuss what parties might make of this finding, below.

Did all the Defendants owe a fiduciary obligation of loyalty?

The Court noted that where a duty of loyalty arises, it is not limited to the individual concerned, but extends to the firm or company they are employed by (*Bolkiah; Marks & Spencer Group Plc v Freshfields Bruckhaus Deringer*[9]*; Georgian American Alloys Inc v White & Case LLP*[10]).

Yet here, the duty extended further – to the group of defendant companies. This was because:

6 [1979] 3 All ER 177 at 180-181 and 183 per Lord Denning
7 [2011] EWHC 474 (Ch)
8 (2011) 135 ConLR 1
9 [2004] EWCA Civ 741
10 [2014] EWHC 94 (Comm)

1. There was a common financial interest in the Defendants;

2. The Defendants were managed and marketed as one global firm;

3. There was a common approach to identification and management of conflicts.

Was the duty breached?

The Defendants contended that, even if they did owe a duty of loyalty, it had not been breached because of the physical and ethical barriers that had been put in place to separate the Defendants as commercial entities. This, the Court held, was not enough. The fiduciary obligation of loyalty is not satisfied by simply putting in place measures to preserve confidentiality and privilege. Such a fiduciary must not place himself in a position where his duty and interest may conflict.

It was plainly a conflict of interest for the Defendants to act for the Claimant in the Works Package Arbitration and against the Claimant in the EPCM Arbitration. The arbitrations were concerned with the same delays, and there was a significant overlap in the issues.

As a result, the injunction was granted.

Analysis

One rule for some?

It is not unusual for self-employed barristers from the same set of Chambers to act on opposite sides of a dispute, or even as barrister and arbitrator. Why, you might ask, are they able to do so, if expert witness firms are not?

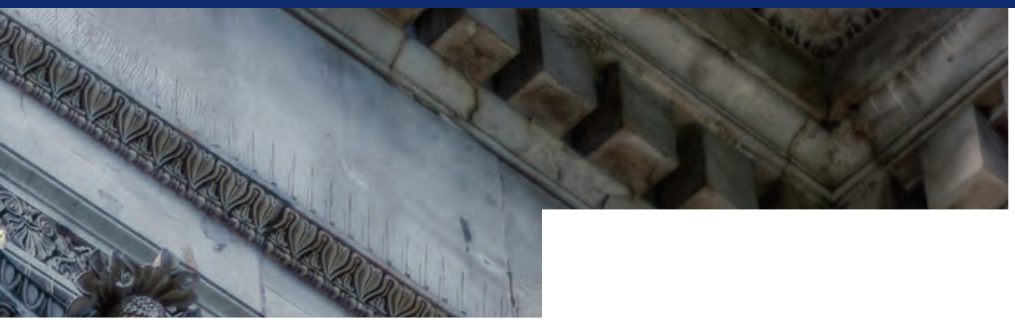
As O'Farrell J explained in A Company (at [58]) it is because:

> *"...First, unlike the defendant companies, barristers do not share profits and therefore do not have a financial interest in the performance of their colleagues. Secondly, barristers are frequently required to represent unpopular clients or causes. They do not have the luxury of considering a case and then deciding not to accept instructions because the client or case does not fit their corporate image. Thirdly, and perhaps most importantly in the context of this case, it is common knowledge that barristers are self-employed individuals working from sets of chambers and that different barristers from a set of chambers may act on opposing sides ..."*

(see also *Laker Airways v FLS Aerospace & Another*)[11]

I suggest that a relationship of trust and confidence may not arise, for example, where an expert is retained to report on a discrete issue, without more

11 [2000] 1 WLR 113 per Rix J



Whilst not raised in the application, policy considerations may also come into play. In my view (unsurprisingly), a party's freedom to choose the advocate of their choice ought to be paramount. This right is preserved by the cab rank rule[12] (perhaps alluded to by O'Farrell J's comment set out above) and, for example, in rules of a number of arbitral institutions[13].

Do all expert witnesses owe a fiduciary obligation of loyalty?

So, what does the Court's finding in A Company mean for expert witnesses? Will they always owe a fiduciary duty of loyalty?

I suggest not. It is necessary to consider the detailed nature of the relationship between the expert and their client. Clues as to when a relationship of trust and confidence arises outside of established categories are few and far between. Here, whilst not stated expressly in the judgment, in my view it seems that the third reason (engaged to provide extensive advice and support) held sway. The Court noted that, in all the cases it was taken to, no fiduciary obligation of loyalty arose because *"either because there was no retainer, or on the particular facts of any retainer did not give rise to such a relationship, or any retainer had been terminated"*[14], such that it was the nature of the retainer which appeared to guide the Court's finding.

It will also be necessary to consider the degree of overlap between the two (or more) cases in question and the relationship between the group companies. On the facts of A Company the overlap between the disputes was obvious and needed little analysis. But it may not always be so. As the Court of Appeal noted in Marks and Spencer (re solicitors acting in respect of two transactions): "*The court must consider what the relationship is between the two transactions concerned" and that "It is important … to analyse the facts of the particular case".*[15]

Taking what we can from the judgment (necessarily limited by the confidentiality issues that arose in the context of on-going arbitrations) I suggest that a relationship of trust and confidence may not arise, for example, where an expert is retained to report on a discrete issue, without more – the degree of similarity between the retainer in question and that considered in A Company ought to be considered. Further, the facts and circumstances of the relevant cases will need to be carefully analysed to determine the degree of overlap. And, where expertise is split between group companies, the commercial relationship between those companies is likely to be instructive. However, the position is far from certain.

Contracts and consent

If fiduciary duties arise, can expert witnesses contract out of them? Yes, but with care. As one author notes *'a short sighted assumption that all relevant duties are prescribed in a contract can be, and has been responsible for, serious misbehaviour'*[16].

In a nutshell, the principles with respect to contracting out are as follows:

1. Fiduciary duties may be modified by fully-informed consent (*Boardman v Phipps*[17]*; New Zealand Netherlands Society "Oranje" Inc v Kuys*[18]*; Kelly v Cooper*[19].

2. The fiduciary bears the burden of proving full and proper disclosure (*Hurstanger v Wilson*[20]).

3. In recognition of the vulnerability inherent in a relationship that gives rise to fiduciary duties, the Courts impose a high test. For example, it is not enough to:

   a. merely disclose that the fiduciary has an interest (*Cobbetts LLP v Hodge*[21]*; FHR European Ventures LLP v Mankarious*[22]),

   b. or to say something that ought to cause the principal to make enquiries (Novoship (UK) Ltd v Mikhaylyuk[23]),

   c. or to establish that if permission had been asked for it would have been given (*Murad v al-Saraj*[24]*; Gidman v Barron*[25]*; FHR European Ventures LLP v Mankarious*[26]).

Therefore, a boiler-plate clause added to a retainer before the second case is taken on may not be sufficient. More fundamentally, I question whether a client who is owed a duty of loyalty and who is fully informed of the nature of the second case and services the expert wishes to provide would consent – it seemingly not being in their interests to agree to anything that assists an opponent. More safely, expert witness firms may wish to consider company policy with respect to acting for two opposing clients.

This article first appeared on the PLC Construction Blog in June 2020. Jennie will be discussing this topic on Thursday, 9 July 2020 as part of our webinar programme. Please contact **marketing@keatingchambers.com** for further information.

12 Conduct Rules, rC29
13 (see Article 26(4) ICC Rules 2017, Article 18.1 LCIA Rules (2014)
14 at [50]
15 at [11 – 12]
16 "Bowstead & Reynolds on Agency" (Sweet & Maxwell, 2010, 19th edition) para 6-034.
17 [1964] 1 WLR 993, affirmed [1967] 2 AC 46
18 [1973] 2 All ER 1222 at 1227
19 [1993] AC 205)
20 [2007] EWCA Civ 299 at [35]
21 [2009] EWHC 786 (Ch) at [110]
22 [2011] EWHC 2308 (Ch) at [78]
23 [2012] EWHC 3586 (Comm) at [83]
24 [2005] EWCA Civ 959
25 [2003] EWHC 153 (Ch) at [126]
26 [2011] EWHC 2308 (Ch) at [79]