

FIDUCIARY DUTIES

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 London International Disputes Week (LIDW)

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Relationships of trust and confidence



"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" (Mothew at 18A)

Relationships of T&C:

- **Established categories** (solicitor/client; trustee/beneficiary; agent/principal)
- **Fact-based:**
 - "exceptional" (Sheikh per Leggatt LJ at [157]).
 - not "*necessarily closed*" (English v Dedham Vale Properties at 398)
 - particular kind of trust and confidence (Sheikh at [165])

"... typically ... one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions ... also ... where the responsibility ... involves the giving of advice in a context ... where the adviser has a substantial degree of power over the other party's decision-making" (Sheikh at [159])

A Company v XYZ/Secretariat v A Company

ICC arbitration 1

Subcontractor

ICC arbitration 2

Project Manager

Delay and quantum expert (UK, Secretariat International)

Employer

Delay expert (Singapore, Secretariat Consulting)

Employer

Delays, incl late IFC drawings provided by Project Manager (EPCM) to Subcontractor

Claim - Sums due CC – delays incl any sums payable to Subcontractor due to late IFC drawings

Development 1: Experts

- E > S was in breach of fiduciary duty of loyalty. S > excluded by duty to Tribunal, no conflict and no risk
- Contractual warranty: ***“You have confirmed that you have no conflict of interest in acting for [the Employer] in this engagement. You will maintain this position for the duration of your engagement”***
- HC:
 - Based on terms of the retainer “a clear relationship of trust and confidence arose”.
 - group of companies (common financial interest, one global firm, common approach to conflicts)
 - Duty not satisfied by confidentiality/privilege measures.
- CoA:
 - “no purpose”, “some characteristics of a fiduciary relationship (in particular an obligation of loyalty)” “not a fiduciary and does not owe fiduciary duties” ([65], [38], [104])
 - All companies (known conflict check across all entities: [74]; marketed under one brand: [75])
 - “all pervasive” [92]: Overlap of parties, role, project, and subject matter.

Development 2: Untangling duties

- Fiduciary duties, exercise of contractual power, relational contracts, cooperation, good faith, confidentiality, expert duties to the court
- **relational contracts:**
 - “*may require a high degree of communication, cooperation and predicable performance based on mutual trust and confidence and involve expectations of loyalty ...*” (Yam Seng, Leggatt J);
 - “*involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination of one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation ...*” (Sheikh, Leggatt J)
- **good faith:** includes fidelity to the parties’ bargain (Yam Seng, Paciocco v ANZ [288])
- **contractual powers:** “*the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest ...*” (Hale in Braganza)

Development 3: Fiduciary duties and contract

“a short sighted assumption that all relevant duties are prescribed in a contract can be, and has been responsible for, serious misbehaviour” (Bowstead & Reynolds on Agency 19th ed, para 6-034)

- **Contract does not displace** (Re Goldcorp Exchange [1995] 1 AC 74 (Privy Council) at 98 per Lord Mustill; Yasuda Fire [1995] QB 174 at 186 per Coleman J)
- **Fully informed consent:**
 - *“no precise formula which will determine all cases”* (Maguire v Makaronis (1997) 188 CLR 449 at 466)
 - Positively shown (Paton v Rosesilver Group Corp [2017] EWCA Civ 158 at [34])
 - Not sufficient to disclose interest, put principal on enquiry, or say that consent would have been given (Gluckstein v Barnes [1900] AC 240; Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908; Murad v Al-Saraj [2005] EWCA Civ 959)

Development 3:

Fiduciary duties and contract

- Terms of contract may suggest no duties arise/duties are limited: (Kelly v Cooper [1993] AC 205, 214; Torre Asset Funding Ltd v The Royal Bank of Scotland Plc [2013] EWHC 2670) (Ch) at [143]; AP-Fonden v Bank of New York Mellon SA/NV EWHC 3127 (Comm) at [177]; Ranson v Computer Systems [2012] EWCA Civ 841 [25-26])
- Secretariat:
 - Contract “loomed rather larger on appeal”
 - Males LJ “relationship between the expert and his client is essentially contractual” at [105]
 - Warranty (CoA at [69]). But “perfectly possible” to “make plain” representations “based solely on the entity involved” (Coulson LJ, CoA at [101])
- Some doubt: “this purely contractual approach is not beyond question” (Bowstead & Reynolds on Agency, 22nd Ed, 6-034, 6-056)



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