THE LINE OF DUTY:
DOES AN EXPERT OWE A FIDUCIARY DUTY?

A Note from the 2TG Commercial Group | January 2021

***Secretariat Consulting PTE Ltd and Others v A Company* [2021] EWCA Civ 6**

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Introduction

1. On 11th January 2021, the Court of Appeal handed down judgment in *Secretariat Consulting Pte Ltd and Others v A Company* [2021] EWCA Civ 6, upholding an injunction granted on 23 March 2020, preventing the Secretariat group of companies ("the Secretariat Group") from providing expert witnesses for opposing sides in two separate, but related, international arbitrations.

2. This was the first time that the Court of Appeal has considered whether an expert owed a fiduciary duty to his client.

The Facts

3. A Company ("A Co") retained Secretariat Consulting Pte Ltd ("SCL") in an international arbitration against one of its sub-contractors arising out of the construction of a petrochemical plant ("Arbitration 1"). The cost of the plant was measured in billions of dollars.

4. A third party (A Co's project manager) then retained Secretariat International UK Ltd ("SIUL") in an international arbitration against A Co arising out of the same project and concerned with the same or similar subject matter as Arbitration 1 ("Arbitration 2").

5. SCL and SIUL were related companies and part of the Secretariat Group.

A Co and K/SCL

6. In March 2019, A Co approached SCL to provide arbitration support and expert services in Arbitration 1. A confidentiality agreement between A Co and SCL was entered into on 15th March 2019.

7. The next stage in the engagement of SCL's services was a conflicts check.

8. On 18th March 2019, A Co's solicitors wrote to 'K' of SCL who was to be the lead expert for A Co asking him to confirm that there were no conflicts of interest.

9. It was common ground that the conflicts check was carried out across the whole Secretariat Group, including SIUL. The breadth and scope of the conflicts check was known to A Co.

10. On 20th March 2019, K confirmed to A Co's solicitors that "there are no conflicts."

11. This position was further reiterated in a letter dated 13th May 2019, confirming (a) the engagement of SCL's services, (b) that there were no conflicts of interest and (c) that K/SCL would maintain this position for the duration of the engagement.

12. On 26th May 2019, A Co's solicitors sent a letter to SCL setting out the scope of instructions, as well as the duties of an expert.

13. In June 2019, SCL began work on the Arbitration 1 issues.

SIUL

14. In August 2019, the third party commenced Arbitration 2 against A Co claiming unpaid fees under the terms of its management contract.

15. In October 2019, the third party approached SIUL to provide arbitration support and quantum and delay expert services.

16. SIUL ran a conflicts check, again involving all entities in the Secretariat Group, which revealed the engagement of SCL by A Co.

17. On 8th October 2018, K wrote to A Co's solicitor informing them of the third party's enquiry about retaining the services of SIUL. K informed A Co's solicitors that he did not believe that there was a 'strict' legal conflict and that both SCL and SIUL could provide expert services for both A Co and the third party in a manner that ensured physical and electronic separation between the teams.

18. Later that day, K then had a conversation with A Co's solicitors during which they indicated that they considered that there was a conflict of interest.

19. K agreed to revert back to them after stating that the matter would be discussed internally. He responded to them by email on 9th October 2019, where he stated that the matter was not a 'true conflict'.

20. K continued to work on behalf of A Co in relation to Arbitration 1, and SIUL began their work on behalf of the third party, in relation to Arbitration 2.

21. On 5th March 2020, A Co's solicitor wrote to K, to say that they would like to expand the scope of the instructions to SCL to include expert witness services in Arbitration 2.

22. On 12th March 2020, A Co's solicitors wrote to SCL to inform them that there was a risk of conflict in relation to confidential information being used by SIUL. The third party had already confirmed to the tribunal (in Arbitration 2) that SIUL had been engaged as the quantum expert.

23. On 20th March 2020, A Co issued an urgent ex parte application for an interim injunction against SCL, SIUL and Secretariat Advisors LLC ("SAL"). The claim was focused on two separate grounds: breach of fiduciary duty and a breach of confidence.

24. Interim relief was granted on 23rd March 2020 and continued on the return date.

Issues

25. The Court of Appeal considered four issues in the case:

    (i) Did SCL owe a fiduciary duty of loyalty to A Co?

    (ii) If not, did SCL owe a contractual duty to A Co to avoid conflicts of interest?

    (iii) If so, was that duty also owed to A Co by other Secretariat entities?

    (iv) If so, was there a conflict of interest as a result of SCL's engagement in Arbitration 1 and SIUL's subsequent engagement in Arbitration 2?

The Decision

26. Coulson LJ gave the lead judgment, with concurring judgments from Males LJ and Carr LJ.

The Law

27. The parties agreed that there was no direct English authority on the issue of whether an expert owes a fiduciary duty of loyalty to his client.

Experts Generally

28. The Court cited Jones v Kaney [2011] UKSC 13 (where experts' immunity from suit was abolished) in which the Supreme Court drew a close comparison between expert witnesses and advocates. In that case, the Court noted that whilst experts may owe a duty to their client, they also have a duty, when and if it applies, to help the court with matters within their expertise and that this duty overrides any obligations to the client.

29. Given the subject matter of Arbitrations 1 and 2 concerned delay, Coulson LJ also explained that delay experts have a very different function from conventional experts.:-

    "They are there to collate the myriad information relating to delay and quantum during the preparation of the case and, as a key component of the client's arbitration support team, to focus on the particular factual matters which are going to be important to any consideration of the delay claims and crossclaims" [57].

    He noted that in *Van Oord v All Seas UK Limited* [2015] EWHC 3074, he had observed *"a little unfairly perhaps, that delay experts' reports 'are simply vehicles by which the parties reargue the facts'"* [57].

Issue 1: Did SCL owe a fiduciary duty of loyalty to A Co?

30. The Secretariat Group's principal objection to the finding of a fiduciary duty in the instant case was that the expert's overriding duty to the court would conflict with or negate any fiduciary duty of loyalty to his client, because he would have to put the interests of the court first [60].

31. Coulson LJ accepted that an expert had an overriding duty to the court, but did not accept that such a duty meant the expert could not in law owe a fiduciary duty of loyalty to his client [61]. In fact, he went further and explained that an expert's overriding duty to the court could

be one of the prime reasons why the expert might owe a duty of loyalty to his client, as the client would want the expert to give a frank and honest appraisal of his case. The client would know that, because an expert has to stand up before the judge or the arbitrators and say that the report is true to the best of his knowledge and belief and represents his honest opinion, the expert would only do that if the pre-trial work had led to the formation of a position which the expert could support. None of that was contrary to any duty of loyalty: on the contrary, complying with his duty to the Court was the best possible way an expert could satisfy his professional duty to the client [62].

32. Carr LJ gave a concurring judgment and specifically highlighted this point [125]. Males also agreed with this point [110].

33. However, on the facts of the case, Coulson LJ found that it was unnecessary to designate the relationship between SCL and A Co as fiduciary, because the contract had an express clause dealing with conflicts of interest. Therefore, in his view, a fiduciary duty of loyalty would not enhance or add to the obligations arising from that clause [65].

34. On this basis, he found that it was unnecessary to reach a conclusion on this matter [65] - [66], but for the purposes of the rest of the issues, they were treated on the assumption that SCL did not owe a fiduciary duty to A Co. The matter is therefore left open for future cases.

Issue 2: Did SCL owe A Co a contractual duty to avoid conflicts of interest?

35. Coulson LJ concluded that SCL owed A Co a contractual duty to avoid any conflict of interests as they had previously confirmed that there were none and agreed that they would not create any such conflicts in the future [69]. So, SCL owed A Co a contractual duty to avoid any conflict of interest from May 2019 onwards [72].

Issue 3: Was that duty also owed by the other Secretariat entities?

36. The Secretariat Group marketed themselves under the brand name 'Secretariat International' and it was 'Secretariat International' who were regarded by its clients as their expert, not an individual entity within the group structure.

37. Coulson LJ concluded that the conflicts check having been carried out across the Secretariat Group, the undertaking given by SCL in its retainer bound all the companies in the group. They were all providing the same form of litigation support/expert services [81].

Issue 4: Was there a conflict of interest?

38. There was a conflict of interest, due to the extent of the experts' involvement in Arbitrations 1 and 2. It was made clear in both SCL and SIUL's scope of work retainer letters that their services would be far more wide-ranging than merely testifying at a hearing [84] – [86]. As Males LJ said, such experts are often part of the 'litigation team' [111] – [113].

39. Coulson LJ said there was a conflict of interest for four reasons:

    (i) SCL would be acting for A Co in Arbitration 1. If SIUL were engaged by the third party in Arbitration 2, then they would be giving advice (and evidence) against A Co [88].

    (ii) The third party as project manager was effectively A Co's representative/ agent/'alter ego' on site. Coulson LJ stated that he found it impossible for the same firm to be acting for A Co and

simultaneously against its representative/agent/'alter-ego' [89].

(iii) SCL and SIUL would both be advising their clients on the design and construction of the same project [90].

(iv) Finally, in respect of one of the critical issues in both Arbitrations 1 and 2, namely the causes of the delays in construction, SCL and SIUL would both be advising their clients on the same issues [91].

40. Coulson LJ said at [92]:-

"In my view, the overlaps in this case are all-pervasive. There is an overlap of parties, role, project, and subject matter."

41. Coulson LJ referred to Rule 6 of the SRA's Code of Conduct and said the present case concerned the same or related matters, so would qualify as a conflict for a solicitors' firm and there was no reason to reach a different conclusion here.

42. Therefore, in light of these significant overlaps, a conflict of interest in this case was established.

43. Coulson LJ pointed out that the same expert was not forbidden from acting for and against the same client. At [98] he said:-

"None of this should be taken as saying that the same expert cannot act both for and against the same client. Of course, an expert can do so. Large multinational companies often engage experts on one project and see them on the other side in relation to a dispute on another project. That is inevitable. But a conflict of interest is a matter of degree. In my judgment, the overlaps to which I have referred – of parties, of role, of project, of subject matter - make it plain that in the present case, there was a conflict of interest."

44. Males LJ gave a concurring judgment in which he said:-

(i) Save in exceptional circumstances, an expert witness was not a fiduciary and did not owe fiduciary duties to his client [104].

(ii) The expert's contract/retainer contained an express term dealing with conflicts of interest. That was usual in any substantial commercial litigation or arbitration [105].

(iii) *"The Civil Procedure Rules do not apply in arbitration and we must not assume that ICC arbitrators will follow English-style procedural rules, even in an arbitration with an English seat. The procedure to be followed in an arbitration, where the parties have not agreed, is for the arbitrators to determine. Nevertheless, it is common practice for international arbitrators to require that experts give independent evidence unaffected by any sense of loyalty or obligation to the party instructing them. For example, the widely used IBA Rules on the Taking of Evidence in International Arbitration (2010) provide that an expert report must include a statement of the expert's independence from the parties, their legal advisors and the arbitral tribunal, together with an affirmation of the expert's genuine belief in the opinions expressed in his report. Similarly, the Chartered Institute of Arbitrators Expert Witness Protocol, on the basis of which K was instructed in this case, contains provisions to essentially the same effect as the Civil Procedure Rules. These are designed to*

ensure that the expert's evidence is his own impartial, objective and unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration" [108].

(iv) *"Mr Hollander submitted that to construe the contract in this way amounted to piercing the corporate veil and would have serious ramifications for those offering litigation support services as expert witnesses. He suggested that it would be greeted by them with some alarm. Like Coulson LJ, I do not agree. Our decision depends on the way in which this particular group chooses to present itself to present and potential clients, without regard to any corporate veils but rather as a global firm providing expert witness services in a variety of offices in different jurisdictions. But if this is a concern, the solution is simple, as Coulson LJ points out at [101] above. An expert witness group which operates on a global scale with separate subsidiaries in a variety of jurisdictions can, if it wishes, make clear that any conflicts search which it carries out and any undertaking which it gives is limited to the particular company being instructed and does not extend to other companies in the group, which remain free to act for parties opposed to the client in the same or related disputes. Whether, if it does so, it will secure the instruction, is another matter"* [123].

45. For these reasons, the appeal was dismissed.

Conclusions/Impact

46. This decision is compulsory reading for multi-national firms that provide consulting and expert witness services in relation to international arbitrations (and the clients/solicitors that instruct them). They need to review their contractual terms, their conflict checks and their procedures for resolving conflict disputes when they are raised.

47. Furthermore, it provides useful guidance on the regulation of professional relationships between clients and experts in relation to international disputes involving major projects.

48. It also leaves open the possibility to argue (where no contract deals with the point) that an expert *does* owe a fiduciary duty to his client.

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