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Bulletin

Secretariat Consulting Pte Ltd v A Company

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In this case, the England and Wales Court of Appeal overturned the decision of the England and Wales High Court that an expert witness owed a fiduciary duty of loyalty to its client. Instead, the Court of Appeal found the expert owed its client a contractual duty to avoid conflicts of interest.

The respondent is the developer of a petrochemical project costing billions of dollars. It engaged a third party (a project manager) to provide engineering, procurement and construction management services for the project, which included the provision of issued for construction drawings (IFC drawings) which the contractors would use to build the plant. The developer entered into two construction agreements with a contractor.

The contractor commenced an arbitration against the developer for additional costs associated with delay and disruption resulting from the late issue of IFC drawings by the third party (Arbitration 1).

The developer's solicitors approached Secretariat Consulting Pte Ltd based in Singapore (Secretariat Singapore) to provide arbitration support and expert services in Arbitration 1.

The developer and Secretariat Singapore entered into a confidentiality agreement providing at cl 4:

> Under no circumstances shall [Secretariat Singapore] at any time, without the prior written approval of [the developer's solicitors] acknowledge to any third party what is or is not a part of the Confidential Information, nor shall [Secretariat Singapore] acknowledge to any third party the execution of this Agreement, the terms and conditions contained herein or the underlying discussions with [the developer's solicitors].[1]

Secretariat Singapore did a conflict check across all Secretariat Consulting group entities, including Secretariat Singapore, Secretariat International UK Ltd (Secretariat UK) and Secretariat Advisors LLC (Secretariat Advisors). Following this, on 13 May 2019, the developer wrote to Secretariat Singapore (addressed to K, who would lead Secretariat Singapore's team), recording that Secretariat Singapore had "confirmed you have no conflict of interest in acting for [the respondent] in this engagement. *You will maintain this position for the duration of your engagement*."[2] This letter was part of the contract between the developer and Secretariat Singapore. K and his team then started work on Arbitration 1.

Three months later, the third party commenced an arbitration against the developer claiming unpaid fees under its contract with the developer (Arbitration 2). The developer counterclaimed in Arbitration 2 for the cost consequences of the third party's failure to issue IFC drawings on time (which formed the basis of the contractor's claims against developer in Arbitration 1).

The third party approached Secretariat UK to provide arbitration support and act as a quantum expert in Arbitration 2. Secretariat UK did a conflict check across all Secretariat Consulting group entities which revealed the engagement of Secretariat Singapore by the developer.

K wrote to the developer's solicitors advising:

> Our firm has received enquiry from lawyers representing [the third party] . . .
>
> . . .
>
> [o]ur view is that working on the two matters [ie Arbitration 1 and Arbitration 2] (in different offices) would not constitute a 'strict' legal conflict. Our firm also has the ability to set the engagements up in a manner that there is the required physical and electronic separation between the teams.[3]

The developer's solicitors told K they thought there was a conflict. K reiterated his view that there was no conflict and said Secretariat would discuss the issue internally and come back to the developer's solicitors.

Without resolving the debate about the alleged conflict of interest, M, Secretariat UK's lead consultant, began working for the third party on Arbitration 2.

Trial

An interim injunction was granted against Secretariat Singapore, Secretariat UK and Secretariat Advisors. The trial judge, O'Farrell J, found a clear relationship of trust and confidence had arisen, giving rise to a fiduciary duty of loyalty to the developer that was owed by the Secretariat Consulting group as a whole.[4]

Her Honour concluded that there was plainly a conflict of interest for the Secretariat Consulting group in acting for the developer in Arbitration 1, and against the developer in Arbitration 2, where the arbitrations were concerned with the same delays and there was a significant overlap in the issues.[5]

The Secretariat Consulting group entities appealed. The developer's claim pleaded that Secretariat Singapore owed the developer a contractual obligation to avoid conflicts of interest, and that Secretariat Singapore entered into the agreement with the developer as agents for all entities in the Secretariat Consulting group. This issue was not pressed at trial but loomed large on appeal.

Appeal

In summary, the Court of Appeal found that Secretariat Singapore, and the other entities in the Secretariat Consulting group, owed the developer a contractual duty to avoid conflicts of interest.

Nature of fiduciary duty

The Court of Appeal[6] noted that it is exceptional for fiduciary duties to arise other than in settled categories of relationships in which they normally arise, which include the relationship between trustee and beneficiary, solicitor and client, and agent and principal. It noted the task of determining whether fiduciary duties exist outside such established categories is not straightforward because there is no generally accepted definition of a fiduciary.

The Court of Appeal noted:

> . . . fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (*Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making . . .*) *The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal*. This is the core of the obligation of loyalty which Millett LJ in the *Mothew case* . . . , described as the "distinguishing obligation of a fiduciary" [emphasis added].[7]

It also pointed out that the existence of trust and confidence in a relationship is not alone sufficient to give rise to fiduciary obligations.[8]

The Court of Appeal distinguished the position of delay experts with that of more conventional experts along the following lines. The line between time and money is notoriously blurred and can be very difficult to discern especially in large projects.[9] Delay experts are usually construction professionals with quantity surveying backgrounds. It can sometimes be difficult to identify what specialist expertise they bring to bear on the issues in a dispute, but that is of limited importance because they have a very different function to more conventional experts. Delay experts collate and sift information relating to delay and quantum during the preparation of a case, so as to focus on the particular factual matters which are going to be important to any consideration of delay claims. By the time their reports are produced, a long way down the line, the subject matter of those reports will reflect the detailed sifting exercise that has gone before.[10]

Secretariat Singapore did not owe a fiduciary duty of loyalty to the developer

The Court of Appeal noted that a retainer may impose a duty of loyalty, or put another way, a duty to avoid conflicts of interest, which is one of the characteristics of a fiduciary relationship. It noted that the retainer in this case imposed a contractual duty of loyalty. It concluded that a fiduciary duty of loyalty would not add to the obligations arising from that contractual duty and on that basis did not consider it necessary or appropriate to find a fiduciary duty of loyalty in this instance.[11]

The court stated:

> The close nature of a fiduciary's relationship with the other party — the need for the fiduciary to be "on his side" . . . — does not seem to me the most accurate way of describing what a litigation support professional/expert does and should do when instructed in litigation or a commercial arbitration.[12]

However, the court did not rule out the possibility of a fiduciary duty arising between the provider of litigation support services/expert and their client. In this regard, it noted two points:

- First, the lack of prior authority finding such a fiduciary duty does not preclude it arising in future.[13]
- Second, an expert's overriding duty to a court could be said to be a prime reason an expert may indeed owe a duty of loyalty to her client.[14]

The reasoning is along the following lines. The client wants a frank and honest assessment of their case. There is little point in the client spending a good deal of money pursuing their claims if their legal position is hopeless but none of their advisors are prepared to tell them so. The client knows the expert must tell the judge that their report is true to the best of their knowledge and represents their honest opinion. The client also knows the expert will only be prepared to do so if they had first ensured the pre-trial work has led to a position they can support.

Secretariat Singapore owed the developer a contractual duty to avoid conflicts of interest

The Court of Appeal concluded that the contractual provision in the 13 May 2019 letter meant Secretariat

Singapore:[15]

- confirmed it had no conflict of interest at the time of entering into the retainer and
- undertook it would not create any such conflict in future

This imposed on Secretariat Singapore a contractual duty to avoid conflicts of interest for the duration of its retainer (from May 2019 onwards).

The contractual duty to avoid conflicts of interest was also owed by other entities in the Secretariat group

The Court of Appeal concluded[16] that the undertaking given by Secretariat Singapore in its retainer, having resulted from a conflict check carried out across the Secretariat Consulting group, bound all companies in the Secretariat Consulting group. This conclusion was supported by other evidence that entities in the group marketed themselves as one global firm under the brand name "Secretariat International".

Was there a conflict of interest in this case? Yes

The Secretariat Consulting entities sought to distinguish between a "testifying expert" and a "roving expert". They argued that the Secretariat Singapore (in the person of K) was a testifying expert, and hence did not have a wider advisory role. They relied on this limited role as pointing away from the existence of a fiduciary duty of loyalty and away from the possibility of conflict of interest arising between Secretariat Singapore and Secretariat UK, who were dealing with quantum issues as well as delay, and who prepared parts of the third party's pleadings.

The Court of Appeal said that to the extent there was a valid distinction between such experts (about which the court expressed some doubt), it suggests that an expert with a wider advisory role is much more likely to run the risk of creating conflicts of interest than an expert who is limited to giving evidence at trial. It stated:

> If the expert is involved in numerous aspects of the preparation of a client's case long before it is presented, then that increases the risk that there will be a conflict of interest with an expert employed by another party to carry out the same or similar wide-ranging role, but this time against the interests of that client.[17]

In any event, the Court of Appeal concluded[18] that the terms of Secretariat Singapore's retainer showed that K's scope of work was far more than testifying at trial and included a wider litigation support role.

The Court of Appeal concluded that there was a clear conflict of interest for several reasons, including the following:[19]

- Secretariat Singapore was advising the developer as to its commercial position in Arbitration 1 as well as giving expert evidence to support that position — in so doing, it was acting for the developer. Secretariat UK, if engaged by the third party, would be giving advice opposing the developer.
- The third party, as project manager, acted as the developer's (or employer's) representative or agent on-site. To any on-site contractor, the third party was (to all intents and purposes) the employer's client. It is impossible to see how the same firm (no matter how many global offices it had) could act for the employer, and at the same time, act against employer's representative/agent/alter ego in respect of the same or similar disputes on the same project.
- A crucial issue in both arbitrations was the causes of delay in the design and construction of the petrochemical plant. Secretariat Singapore was giving advice to the developer about those causes of delay. If Secretariat UK was then engaged by the third party, it too would be giving advice about the causes of the same delays to the third party, and the extent to which such matters were or were not the third party's responsibility.

Court's concluding remarks

Overall, the Court of Appeal's view was that the overlap of the parties, role, project and subject matter, was all persuasive.

The Court of Appeal gave some practical guidance as to whether a conflict of interest might exist in a particular circumstance, referring with approval[20] to the following test:

> It's not difficult to work out what a conflict is. You put yourself in the client's shoes, and ask yourself "would you like you doing what the other client has asked you to do?" If the answer is "no", you've probably got a conflict.[21]

The Court of Appeal pointed out[22] that its judgment did not mean that the same expert could not act both for and against the same client. It noted that large multinational companies often engage experts on one project and see them on the other side in relation to a dispute on another project. The court said that "a conflict of interest is a matter of degree"[23] and indicated that whether a conflict of interest exists in a particular case will often depend on the degree of overlap of the parties, the role of the expert, and the subject matter of the relevant disputes.

Practice tips:

- Before beginning work, experts should try to resolve any alleged conflicts of interest, especially when raised in writing by a litigant's solicitors.
- Where an expert's retainer does not include an obligation to avoid conflicts of interest, and the circumstances of the retainer resemble the circumstances of this case, that is, related litigation between the same parties regarding the same underlying facts and claims, two or more parties sourcing expert witnesses from the one company, then the possibility of the expert owing its client a fiduciary duty of loyalty could arise.
- An expert's scope of work, including the degree of pre-trial case preparation, could be an important factor in ascertaining whether an expert might have a fiduciary duty of loyalty to its client. This may be particularly relevant for delay experts.
- Whether a conflict of interest exists is a matter of degree, so consulting firms should consider any potential overlaps in relation to parties, the role of the expert, and the subject matter of the relevant disputes.
- Consulting firms should note that a contractual undertaking to avoid conflicts of interest, in the retainer of one company in a group of companies, could extend to other companies in that group, especially if those companies market themselves as a single unified group.

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Footnotes

1. *Secretariat Consulting Pte Ltd v A Company* [2021] EWCA Civ 6; [2021] 4 WLR 20 at [7].
2. Above, at [13].
3. Above n 1, at [19].
4. *A Company v X* 189 ConLR 60; [2020] BLR 433; [2020] EWHC 809 (TCC) at [54], [55]–[57].
5. Above, at [61].
6. Coulson LJ, with whom Carr and Males LJJ agreed, delivered the court's principal judgment. This paper refers to the judgment of Coulson LJ.
7. Above n 1, at [40].
8. Above n 1, at [41].
9. Above n 1, at [57].
10. In an earlier decision, Coulson LJ observed that delay experts' reports "are simply vehicles by which the parties reargue the facts" (see *Van Oord v All Seas UK Ltd v Allseas UK Ltd* [2015] All ER (D) 178 (Nov); [2015] EWHC 3074). Above n 1, at [57] he subsequently described his earlier observation as perhaps being a little unfair.
11. Above n 1, at [66].
12. Above n 1, at [64].
13. Above n 1, at [59].
14. Above n 1, at [62].
15. Above n 1, at [69].
16. Above n 1, at [81].
17. Above n 1, at [83].
18. Above n 1, at [84].
19. Above n 1, at [87].
20. Above n 1, at [95].
21. See the C Hollander and S Salzedo, *Conflicts of Interest*, 6th edn, Sweet & Maxwell Ltd, UK, 26 August 2020, [1-005], fn 4.
22. Above n 1, at [97].
23. Above n 1, at [98].