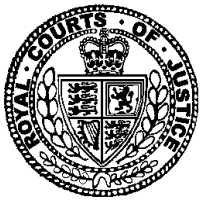

Neutral Citation Number: [2020] EWHC 809 (TCC)

HT-2020-000112

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
IN PRIVATE

Rolls Building
London, EC4A 1NL

Date: 03/04/2020

Before:
MRS JUSTICE O'FARRELL DBE

- - - - - - - - - - - - - - - - - - - -

Between:

A COMPANY **Claimant**

- and -

(1) X
(2) Y
(3) Z

Defendants

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Roger Stewart QC and Shail Patel (instructed by **King & Spalding LLP**) for the **Claimant**
Anneliese Day QC and Max Evans (by licensed access) for the **Defendants**

Hearing date: 31st March 2020

- - - - - - - - - - - - - - - - - - - -

APPROVED JUDGMENT

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 3 April 2020.**"

.....

MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This hearing has been held in private because it is necessary to do so to secure the proper administration of justice. The application concerns two ongoing arbitrations. As such it raises issues of confidentiality, not just of the parties before the Court but also of others who are not parties to the claim and therefore not before the Court.

2. The matter before the Court is an application by the claimant, for the continuation of the injunction granted by the Court on 23 March 2020, restraining the defendants from acting as experts for a third party in ICC arbitration proceedings against the claimant.

Background

3. The claimant is the developer of a petrochemical plant ("the Project").

4. In 2012 the claimant became the employer/owner in respect of the following three agreements with third party group companies in connection with the Project:

   i) a contract with one of the companies for engineering, procurement and construction management ("EPCM") services;

   ii) a contract with another company for EPCM services;

   iii) a parent company guarantee and co-ordination deed, pursuant to which the parent company guaranteed the performance of the other third party companies under the terms of their EPCM agreements.

5. In 2013 the claimant entered into two contracts with a contractor, Contract Package A and Contract Package B, for the construction of facilities in connection with the Project.

6. Disputes arose between the contractor and the claimant concerning delays to the Package A and Package B works. The contractor commenced ICC arbitration proceedings against the claimant, seated in London with an English choice of law clause ("the Works Package Arbitration"). In the Works Package Arbitration, the contractor claims additional costs incurred by reason of delays to its works, including the late release of Issued For Construction ("IFC") drawings.

7. The IFC drawings were produced by the third party pursuant to its EPCM agreements with the claimant. The claimant's position is that if, and to the extent that, it is liable to pay additional sums to the contractor under the Package A and Package B contracts as a result of the third party's late issue of the IFC drawings, the claimant will seek to pass on those claims to the third party.

8. The claimant approached the first defendant, based in Asia, with a view to engaging it to provide expert services and on 15 March 2019 they signed a confidentiality agreement.

9. Under the confidentiality agreement, the first defendant agreed to:

> "(a) hold all Confidential Information in strict confidence and shall in any case protect such Confidential Information with no less diligence than that with which

> it protects its own confidential or proprietary information;
>
> (b) take all precautions to ensure that the secrecy of the Confidential Information is preserved among its employees, agents and representatives …"

'Confidential Information' was defined as:

> "any information in possession of [the solicitors] relating to its representation of its client that is disclosed to [the first defendant] or that [the first defendant] otherwise obtains in connection with its engagement for the provision of expert witness services."

10. It is common ground that the confidentiality agreement is subject to the laws of England and Wales and contains an exclusive jurisdiction clause for disputes or claims to be dealt with in the court of the Abu Dhabi Global Market.

11. By letter dated 13 May 2019 the claimant engaged the first defendant to provide expert services in connection with the Works Package Arbitration. The letter was signed by both parties and included the following:

> "[The claimant] is pleased to confirm that it would like to engage you as an expert witness in the arbitration referenced above.
>
> Your work on this engagement is to·be performed at the direction of our legal representatives in this matter [J]. [J] shall issue to you a letter of instruction shortly….
>
> … your scope of works comprises the following:
>
> - Familiarise yourself with the Project and the reference materials that [J or the claimant] will send to you from time to time;
> - Propose a fit-for-purpose methodology for the determination of the delays to the Works under each of Package A and Package B;
> - Identify and analyse each of the delay events that gave rise to delays to the Works, allocate a delay period to each delay event, and calculate the total delay under each of Package A and Package B;
> - Identify and analyse the root cause for the delays;
> - Reflect your opinions and analysis in a report;
> - Meet with [the contractor's] expert to the extent directed by the Tribunal and prepare any joint statements that may be required;

> - Provide ad-hoc support to [the claimant] and its professional team in the arbitration; and
>
> - Give oral evidence at the hearing.
>
> …
>
> You acknowledge that you are bound by the terms of the Non-Disclosure Agreement dated 15 March 2019 appended to this letter. You agree that you will treat all information, facts, matters, documents and all other materials that come to your attention as a result of this engagement as confidential (except insofar as you have to refer to them when setting out the substance of your instructions in your report).
>
> …
>
> [The claimant] is engaging you to provide expert services, led by [K]. It is agreed that [K] shall retain full responsibility for the work products for the duration of this engagement. In particular, [K] shall be responsible for the accuracy of the report and [K] shall be the testifying expert at the hearing.
>
> You confirm that the work which is carried out in relation to this engagement will be [K's] own and will not be delegated or sub-contracted to someone else. Where it is necessary or will be more cost effective to delegate some aspects of the work, you will inform [J], with copy to [the claimant], before involving anybody else, which aspects of the work are likely to be delegated, to whom they are likely to be delegated, their experience and their charge out rates. You agree that [K] will supervise and review all work carried out by others and take full responsibility for the end product, including the report.
>
> You have confirmed you have no conflict of interest in acting for [the claimant] in this engagement. You will maintain this position for the duration of your engagement."

12. The claimant's instructions to the first defendant were set out in a formal letter of instruction from J on 26 May 2019. K and his team in Asia started work on the Works Package Arbitration from about June 2019. The first defendant has invoiced a total of USD 700,000 approximately in respect of work connected with the Works Package Arbitration.

13. In the summer of 2019 the third party commenced ICC arbitration proceedings against the claimant, seated in London with an English choice of law clause ("the EPCM Arbitration"). In the EPCM Arbitration, the third party claims sums due and owing under the EPCM agreements. The claimant has brought counterclaims against the third party in respect of delay and disruption to the Project, including any additional sums payable by the claimant to the contractor caused by the third party's alleged failure to manage and supervise the contractor.

14. In about October 2019 the defendants were approached by the third party to provide quantum and delay expert services in connection with the EPCM Arbitration. K sent an email to J, stating:

> "Our firm has received enquiry from lawyers representing [the third party] on its potential dispute against [the claimant]. They have asked for quantum and delay experts (outside Asia) to assist them on the matter and have requested us to run a conflict check in relation to the same.
>
> We have informed them that we (in Asia) are currently engaged by [the claimant] on a separate dispute on the same project (without revealing any further details) and they do not seem to consider it as a conflict. We told them that we would be speaking to you regarding the same as well.
>
> Since [the third party's] contract with [the claimant] is for EP and CM works for the full complex, and our engagement is in relation to the evaluation of delays on the construction subcontract for non-process buildings, our view is that working on the two matters (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.
>
> I was hoping to have a chat regarding this. Would you be available anytime today?"

15. Later that day, a telephone conversation took place between K of the first defendant and a solicitor at J, during which the solicitor stated that he considered that there would be a conflict if the defendants accepted the third party instructions.

16. The next day K sent an email stating:

> "We've had an internal discussion at length and do not consider it to be a true conflict. I can explain more on a phone call, if need be."

17. There was no further discussion of the issue, by telephone or in correspondence.

18. In February 2020 discussions took place between J, acting for the claimant, and L, acting for the third party, regarding the scope of issues in the EPCM Arbitration. As part of those discussions, on 24 February 2020 L sent an email to J, indicating that the third party was in the process of instructing M of the defendants as a quantum expert. By email dated 1 March 2020, J replied to L, marking up the earlier email with comments, including: "[The claimant] engaged [K] of [the defendants], who has been actively investigating certain delay claims [the claimant] may have…"

19. On 5 March 2020 J sent an email to K of the first defendant, stating that they would like to expand the scope of their instructions to include expert witness services in respect of the EPCM Arbitration, stating:

> "As you will have identified, [the third party] is ultimately responsible for a portion of the delay claims in the [Works Package] arbitrations. While the [Works Package] delay claim is only one of the many claims that [the claimant] will be pursuing, we believe that the knowledge you and your team have acquired on this project will be invaluable for the delay analyses that will be required in the [EPCM] arbitration."

20. On 10 March 2020 L sent an email to J, stating:

> "I … formally confirm that [M] of [the defendants] has been engaged as [the third party's] quantum expert and is already working…"

21. On the same date J replied:

> "Thank you for notifying us that [the third party] has engaged [M] of [the defendants] to act as its quantum expert in the arbitration, and that he is "already working" on the matter.
>
> As notified to you on 1 March 2020, [the claimant] have engaged [the defendants] on the Project and [K] (who holds a senior position within [the defendants]) has been actively investigating delay claims [the claimant] may have in the arbitration. [K] has been supported in his engagement by number of people within [the defendants]. The work product that has been created by [the defendants] is likely to form a part of the evidential record in this arbitration. As you would expect, [the defendants] ha[ve] been privy to confidential information during the course of their engagement ..."

Further information was sought as to the defendants' appointment and S stated:

> "We reserve our client's rights in this matter, including the right to challenge [the third party's] appointment of [the defendants]. In these circumstances, please can you confirm whether [the third party] will suspend any engagement with [the defendants] until [the claimant] has had the opportunity to consider the issues more thoroughly with the benefit of the information that it requests in this email…"

22. L replied by email dated 13 March 2020:

> "As stated in the CMC, [the third party] do not see the use of [the defendants] as a problem. First and foremost, each expert has a duty to act independently and to assist the tribunal. Secondly, the expert is not the company – it is the individual. Thirdly, in any event, [K] and [M] are experts in different disciplines and are based in completely different geographic regions. Fourthly, consultancy companies like [the defendants] maintain

> confidential information barriers between experts and their teams precisely to avoid transfer of any confidential information…
>
> [The claimant] is not entitled to ask [the third party] to suspend its engagement of [M], nor is it appropriate for [the claimant] to ask [the third party] to do so. Indeed we are concerned that [the claimant] is seeking to distract [the third party] from its work on pleading its case by 23 March 2020 and/or is now seeking to invent an issue in the hope of derailing the tribunal's timetable …"

23. By letter dated 12 March 2020 J informed [the first defendant] that its engagement by [the third party] created a conflict of interest, contrary to the terms of its engagement by [the claimant].

24. On 19 March 2020 N of the third defendant, responded to that letter, stating the defendants' position that there was no conflict of interest and setting out measures overseen by N to ensure compliance with its confidentiality obligations.

25. On Friday 20 March 2020 the claimant issued this application. On 23 March 2020 this matter came before the Court as an urgent *ex parte* application by the claimant but with informal notice given to the defendants. Having heard argument from Roger Stewart QC, leading counsel for the claimant, and Anneliese Day QC, leading counsel for the defendants, but with limited evidence before the Court, interim relief was granted until the return date, 31 March 2020.

The Issues

26. The claimant seeks to continue the interim injunction on the ground that the provision by the defendants of services to the third party in connection with the EPCM Arbitration is 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.

27. In its claim form, the claimant also sought an order that the defendants should be prohibited from disclosing to the third party confidential and privileged material which had come into its possession in the performance of that role. However, during oral submissions, it was clarified by Mr Stewart that the claimant is content with the assurances of confidentiality that have been given by the defendants and does not pursue an injunction to restrain the defendants from disclosing to the third party confidential information obtained from its engagement by the claimant.

28. The defendants oppose continuation of the interim injunction on the grounds that the claimant's application is misconceived; independent experts do not owe a fiduciary duty of loyalty to their clients and there is no conflict of interest. There is no risk that confidential information has been or will be disclosed to the third party. The Court should, in any case, refuse to grant the claimant an injunction, because (*inter alia*) of its serious failure of full and frank disclosure.

29. The issues that arise for determination by the Court are as follows:

i) whether the Court has jurisdiction to deal with the application on its merits and, if so, whether it should exercise such jurisdiction;

ii) whether 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;

iii) whether, on the evidence before the Court, the claimant is entitled to a fiduciary obligation of loyalty from the first and/or second and /or third defendants;

iv) whether there has been, or may be, a breach of any duty of loyalty or confidence;

v) if so, whether the Court should exercise its discretion and grant the injunction.

Evidence before the Court

30. The Court has the following evidence before it:

i) Witness statements of S dated 20 March 2020 and 27 March 2020 respectively;

ii) Witness statement of K dated 26 March 2020;

iii) Witness statement of M dated 26 March 2020;

iv) Witness statement of N dated 26 March 2020.

Jurisdiction

31. Service of process is the foundation of the court's jurisdiction to determine this application on its merits. There does not appear to be any challenge to the existence of the Court's jurisdiction in this case. I am satisfied that the Court has jurisdiction to hear this application for the following reasons.

32. Firstly, the claimant is entitled to serve proceedings against the second defendant because the company is domiciled in England and therefore the Courts of England and Wales have territorial jurisdiction over it.

33. Secondly, the claimant would obtain permission to serve proceedings on the other defendants out of the jurisdiction under CPR 6.36, relying on ground (3) of paragraph 3.1 of Practice Direction 6B. The second defendant is the anchor defendant in this action because it is the company which the third party has retained to advise it in the EPCM Arbitration. The claimant's case is that the duties of loyalty towards it are owed by the defendant group as a whole. On that basis, the first and third defendants are necessary and proper parties to the claim against the second defendant.

34. Thirdly, the claimant would obtain permission to serve proceedings on the other defendants out of the jurisdiction under CPR 6.36, relying on ground (2) of paragraph 3.1 of Practice Direction 6B. This is a claim for an injunction seeking to prevent the defendants from providing expert services in connection with an ICC arbitration in London.

35. Fourthly, the claimant would obtain permission to serve proceedings on the other defendants out of the jurisdiction under CPR 6.36, relying on ground (6)(c) of paragraph 3.1 of Practice Direction 6B. The claim made relates to alleged breach of a contract in respect of expert services in connection with an ICC arbitration in London. Accordingly, there is an implied choice of English law, and/or England is the jurisdiction with which the contract is most closely connected.

36. There is a challenge by the defendants to the Court's exercise of jurisdiction by reason of the exclusive jurisdiction agreement in the confidentiality agreement. Clause 8 of the confidentiality agreement provides:

> "The validity and interpretation of this Agreement, the rights and obligations of the parties and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of the Abu Dhabi Global Market shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims)."

37. However, the claimant's claim for relief is not based on any rights or obligations arising under, out of or in connection with the confidentiality agreement; rather, it is based on the fiduciary duties said to arise out of the contract of engagement. The contract of engagement does not contain an exclusive jurisdiction agreement but, as set out above, the dispute concerns the provision of expert services in two arbitrations, both seated in London and governed by English Law. Therefore, England is the most appropriate forum for determination of this application and the Court will exercise its jurisdiction to determine the application.

Fiduciary Duty

38. The claimant's case is that the engagement of the defendants to provide expert services gives rise to a fiduciary duty of loyalty. The defendants are in breach of that duty of loyalty by agreeing to provide expert services to the third party in circumstances where there is a conflict, or potential conflict, of interest.

39. The defendants' position is that independent experts do not owe a fiduciary duty of loyalty to their clients. Such duty is excluded by the expert's overriding duty to the tribunal.

40. The definition of a fiduciary is set out in *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA), a case concerning the fiduciary obligations owed by a solicitor acting for both parties to a property transaction, per Millett LJ at p.18:

> "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. This 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 …"

41. There is a distinction to be drawn between existing client conflicts, where the issue is whether there is a potential breach of the fiduciary obligation of loyalty, and former client conflicts, where the issue is whether there is a risk of misuse of confidential information.

42. In *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 (HL), the House of Lords considered whether, and if so, in what circumstances, a firm of accountants which had provided litigation services to a former client and in consequence obtained confidential information could undertake work for another client with an adverse interest. In allowing the appeal and granting the injunction, Lord Millett explained the difference between the nature of the duty owed by solicitors to existing clients and that owed to former clients at p.235C:

> "Where the court's intervention is sought by a former client … the court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

And at p.234H:

> "It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."

43. There is no dispute as to the above principles. However, Ms Day submits that an expert witness does not owe a fiduciary obligation of loyalty to his client because such duty would be inconsistent with the independent role of the expert. In support of that submission, reliance is placed by Ms Day on decisions in which the principle described as the *Bolkiah* test has not been applied to expert witnesses.

44. The case of *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380 (CA) concerned a handwriting expert, who gave his expert opinion to the plaintiffs in an action and subsequently gave his expert opinion to the defendants in the same action, not appreciating until afterwards that he had already been consulted by the plaintiffs. The issue was whether, in those circumstances, the plaintiffs were entitled to an injunction to exclude the expert from giving evidence pursuant to a subpoena issued by the defendants. The Court of Appeal dismissed the plaintiff's appeal and upheld the first instance court's refusal to grant an injunction per Lord Denning at p.1384G-1385F:

> "So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth …
>
> "The question in this case is whether or not that principle applies to expert witnesses …
>
> Many of the communications between the solicitor and the expert witness will be privileged … Subject to that qualification, it seems to me that an expert witness falls into the same position as a witness of fact. The court is entitled, in order to ascertain the truth, to have the actual facts which he has observed adduced before it and to have his independent opinion on those facts."

45. Lord Denning added that a contract under which an expert undertook not to give evidence against a client to whom he gave an opinion would be contrary to public policy (at p.1386 F-H):

> "There is no property in an expert witness as to the facts he has observed and his own independent opinion on them. There being no such property in a witness, it is the duty of a witness to come to court and give his evidence in so far as he is directed by the judge to do so."

46. The observations by Lord Denning in *Harmony* were adopted by the Federal Court of Australia in *Wimmera Industrial Minerals Pty Ltd v Iluka Midwest Ltd* [2002] FCA 653, a case in which the court refused to grant an injunction to the applicant to restrain the respondent from conferring with an expert in patent proceedings. The court found that the original consultancy contract under which the expert was engaged by the applicant did not contain any express duty of loyalty. There was no implied duty of loyalty in circumstances where the applicant was aware that the expert continued to provide consultancy research to others, including the respondent. On the facts, there was no risk that the expert would use or disclose any confidential information.

47. In *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch), the court declined to exclude the evidence of a meat trader expert, who had been consulted (but not retained) by the claimant and was subsequently instructed by the defendant. The basis of the claimant's application was the expert's possession of confidential and privileged information derived from the initial consultation and her inability to act independently. The application was refused by Mann J, who stated at [31]:

> "… it is not contested that Mrs Burt-Thwaites was given some privileged and confidential information. However I do not think that the application of the strict test in, and the strict requirements in, *Prince Jefri* should be imposed simply because of that fact alone. The facts of *Prince Jefri* were striking. First, the accountants had acted like solicitors. Second, unlike the present case, they were engaged to provide services, and they obtained their information in that context. Third, the information was capable of being very damaging to Prince Jefri. Fourth, the accountants were essentially in the same position as solicitors in relation to that information. In those circumstances what the House of Lords was protecting was a quasi-solicitor/client relationship and all the disclosure that went with it. It is that relationship which is so serious and significant as to attract the disabilities identified in *Prince Jefri* and to require the heavy burden which the Committee held to apply."

48. At [39] Mann J accepted that there were cases where an expert would not be permitted to act for one party, having been consulted by the other party:

> "Those cases demonstrate 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. Stopping him from acting was therefore seen to be necessary in order to protect the privilege. Where the use of privileged material is inevitable the court will intervene."

49. Similar facts arose in the case of *A Lloyd's Syndicate v X* [2011] EWHC 2487 (Comm). The claimant sought an injunction restraining the defendant expert from giving evidence on the ground that he had obtained privileged and confidential information when providing his opinion on the same contractual clause for the claimant on an earlier case. The court refused an injunction on the basis that there was no evidence that the expert would misuse the information. The case was distinguished on its facts from *Bolkiah* because the service provided by X was not considered to be of the same scope, breadth or depth as the services typically provided by a solicitor – per Teare J at [32]:

> "I do not therefore consider the facts of the case to be analogous to the facts of *Prince Jeffri Bolkiah v KPMG* [1999] AC 222 where KPMG carried out very extensive litigation support services; see p.229 C-E of the report. It is appropriate that in such a case, having regard to the scope of such litigation support services, the burden should be on the solicitor (or other provider of extensive litigation support services) to show that there is no

> risk of confidential or privileged information being misused. It does not follow that where an expert is engaged to provide his view of the meaning of a clause that the same stringent test should apply."

50. Thus, in each of the above cases, there was no existing fiduciary relationship giving rise to a duty of loyalty, either because there was no retainer, or the particular facts of any retainer did not give rise to such a relationship, or any retainer had been terminated. The issue in those cases was whether, in the absence of a duty of loyalty, an obligation to preserve confidential and privileged information should preclude the expert from acting, or giving evidence, for another party.

51. In *Jones v Kaney* [2011] 2 AC 398 (SC) the Supreme Court abolished immunity from suit for breach of duty by expert witnesses in relation to evidence which they gave in court or views expressed in anticipation of court proceedings. Lord Phillips explained that there is no conflict between the duty that an expert owes to his client and the duty that he owes to the court when giving evidence:

> "[49] There is no longer any scope, if indeed there ever was, for contrasting the duty owed by an expert to his client with a different duty to the court, which replaces the former, once the witness gets into court. In response to Lord Woolf's recommendations on access to justice the CPR now spell out in detail the duties to which expert witnesses are subject including, where so directed, a duty to meet and, where possible, reach agreement with the expert on the other side. At the end of every expert's report the writer has to state that he understands and has complied with his duty to the court. Where an expert witness is retained, it is likely to be, as it was in the present case, on terms that the expert will perform the functions specified in the CPR. The expert agrees with his client that he will perform the duties that he owes to the court. Thus there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court…
>
> [50] Thus the expert witness has this in common with the advocate. Each undertakes a duty to provide services to the client. In each case those services include a paramount duty to the court and the public, which may require the advocate or the witness to act in a way which does not advance the client's case. The advocate must disclose to the court authorities that are unfavourable to his client. The expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests. The expert witness has far more in common with the advocate than he does with the witness of fact."

52. The general principles that can be drawn from the above authorities in respect of expert witnesses are as follows:

i) 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: *Harmony Shipping*.

ii) 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: *Jones v Kaney*.

iii) 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 *Bolkiah* test 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: *Meat Traders; A Lloyd's Syndicate; Wimmera*.

53. None of the authorities cited by the defendants supports their proposition that an independent expert does not owe a fiduciary obligation of loyalty to his or her client. 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. As explained by Lord Phillips in *Jones v Kaney*, the terms of the expert's appointment will encompass that paramount duty to the court. Therefore, there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court.

Fiduciary duty in this case

54. In this case, the first defendant was engaged to provide expert services for the claimant in connection with the Works Package Arbitration. The first defendant was instructed to provide an independent expert report and to comply with the duties set out in the CIArb Expert Witness Protocol as part of the engagement. However, it was also engaged to provide extensive advice and support for the claimant throughout the arbitration proceedings, as explained by S in his witness evidence. In those circumstances a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty.

55. Where a fiduciary duty of loyalty arises, it is not limited to the individual concerned: *Bolkiah* (above) per Lord Millett at p.234H. It extends to the firm or company and may extend to the wider group: *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741; *Georgian American Alloys v White & Case* [2014] EWHC 94 (Comm).

56. The organisation of the defendant group is explained by N in his witness statement and illustrated in the organogram attached as an exhibit:

i) The first defendant and the second defendant are wholly owned subsidiaries of P Inc.

ii) P Inc. and the third defendant are both owned in part by individual shareholders and in part by Q LLC.

57. Thus, there is a common financial interest by Q LLC (and the un-named shareholders) in the defendants. The defendant group is managed and marketed as one global firm. There is a common approach to identification and management of any conflicts, as explained by N in his letter dated 19 March 2020.

58. Ms Day submits that barristers are in this position – with common funding, marketing and an interest in each other's success – but they act on opposing sides in litigation as a matter of course. I do not consider that the comparison is apt for at least three reasons. Firstly, 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. In this case, the defendants did not inform the claimant that they might take instructions to act both for and against the claimant in respect of the dispute. If they had done, the claimant would not have instructed the defendants. That is clear because when the defendants asked whether the claimant objected to it acting for the third party on this dispute, the claimant objected.

59. In those circumstances, I accept Mr Stewart's submission that it is unrealistic to conclude that any duty of loyalty is limited to the first defendant; it is owed by the whole of the defendant group.

Breach of obligation

60. The defendants' evidence has focused on the separation of the defendants as commercial entities, the physical and ethical screens in place. However, that addresses the risk that confidential information might be shared inappropriately. As clarified in the hearing, the claimant's application is no longer based on the preservation of confidential information but on the obligation of loyalty. The fiduciary obligation of loyalty is not satisfied simply by putting in place measures to preserve confidentiality and privilege. Such a fiduciary must not place himself in a position where his duty and his interest *may* conflict.

61. The first defendant has been advising and assisting the claimant in the formulation and presentation of its defence to the contractor's claims in the Works Package Arbitration, including the provision of advice, analysis and opinions as to the cause of delays to the Project. In the EPCM Arbitration, the claimant seeks to pass on to the third party any claims arising from late provision of the IFC drawings. The arbitrations are concerned with the same delays and there is a significant overlap in the issues. There is plainly a conflict of interest for the defendants in acting for the claimant in the Works Package Arbitration and against the claimant in the EPCM Arbitration.

Exercise of Discretion

62. As set out by Teare J in *A Lloyd's Syndicate*, in circumstances where the grant of the injunction, albeit an interim injunction, will in effect provide the claimant with the whole relief which it seeks in the claim, the court should only grant the injunction if, as explained in *Zockoll v Mercury* [1998] FSR 354 at pp.364-366, it is likely that the claimant will succeed at trial. However the court has a discretion whether or not to issue the injunction based on where the balance of justice lies.

63. The defendants submit that there have been failures of the claimant's duty of full and frank disclosure at the *ex parte* hearing, namely, the claimant failed to bring passages from the textbook, *Hollander and Salzedo* or the *Meat Traders* or *A Lloyd's Syndicate* cases to the Court's attention, and failed to tell the Court that the EPCM tribunal has apparently already considered the position concerning the second defendant. I reject those criticisms. The cases relied on by the defendants in opposition to the application have now been considered by the Court and do not support the defendants' position. The Court has not been given details of any rulings by the tribunal but in its evidence the defendants have raised objection to any disclosure being made relating to the EPCM Arbitration. In any event, the views of the tribunal in the EPCM Arbitration are not determinative of any relief to which the claimant is entitled based on a breach of fiduciary duty.

64. I also reject the defendants' submission that there was no urgency in making this application. The application was made the day after it received N's letter of 19 March 2020, setting out the defendants' position that there was no conflict. Very properly, the claimant gave informal notice to the defendants so that they were able to obtain legal representation at the hearing of the *ex parte* application.

65. On the material before the Court, I am satisfied that the claimant is likely to succeed at trial and the balance of justice lies in continuing the injunction.

Conclusion

66. For the reasons set out above, I conclude that:

    i) The defendant group owes a fiduciary duty of loyalty to the claimant arising out of its engagement to provide expert services in connection with the Works Package Arbitration.

    ii) The defendant group is in breach of that fiduciary duty of loyalty by accepting instructions to provide expert services in connection with the EPCM Arbitration.

    iii) Pending trial of this matter, the claimant is entitled to a continuation of the interim injunction to restrain the defendants from providing expert services to the third party in connection with the EPCM Arbitration.