DISPUTE RESOLUTION

WHO DO EXPERTS OWE A FIDUCIARY DUTY TO? - ENGLISH COURT RESTRAINS EXPERT FROM ACTING IN ARBITRATION DUE TO BREACH OF FIDUCIARY DUTY & CONFLICT OF INTEREST

On 3rd April 2020, the Technology & Construction Court in the case of ***A Company v X, Y and Z* [2020] EWHC 809 (TCC)** decided to continue an injunction to restrain the Defendant i.e. a global consultancy group, from acting as expert witnesses in arbitration proceedings against the Claimant.

This article discusses the facts, issues and judgment of the case.

INTRODUCTION

The court held that in situations where a subsidiary within the group had already been engaged as an expert for the Claimant in two arbitrations that are concerned with the same delays and that there is a significant overlap in the issues, there would be a conflict of interest for the subsidiary to act. The court found that there was "*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*".

BACKGROUND FACTS

The Claimant, a petrochemical plant developer, engaged third parties as engineering, procurement and construction management services providers ("**EPCM Providers**") and as Contractors. Two disputes arose between the Claimant and the Contractors, as well as between the Claimant and the EPCM Providers. The disputes were referred to ICC arbitration.

The 1st Defendant, i.e. an Asian subsidiary of a global consultancy firm, was engaged by the Claimant as expert witness in the ICC arbitration with the Contractors. In May 2019, the parties executed a formal letter of engagement & confidentiality agreement wherein the 1st Defendant confirmed that it was free from conflicts of interest and would remain free of conflicts for the duration of the engagement.

Subsequently, the EPCM Providers commenced ICC arbitration proceedings against the Claimant. The Claimant counterclaimed against the EPCM Providers. The Defendants were then approached to be expert witnesses in the ICC arbitration with the EPCM Providers, for the EPCM Providers but now against the Claimant.

Through a series of inquiries by the Claimant & correspondence between the Defendants and the Claimant, the Defendants explained to the Claimant that there was no conflict of interest. The Claimant noted that the 1st Defendant's reports would likely form part of the evidence in the arbitration proceedings against the EPCM Providers.

As such, the Claimant reserved its right to challenge the appointment of the Defendants in the arbitration with the EPCM Providers. The Claimant requested to expand the scope of the 1st Defendant's instructions to include expert services that would overlap with the evidence to be provided in the arbitration with the EPCM Providers. Despite the aforementioned, the Defendants were engaged by the EPCM Providers.

On 20 March 2020, the Claimant urgently applied for an *ex parte* injunction to prevent the consulting firm, including X, Y and Z, from acting for the EPCM Contractor. The Claimant argued that engaging the consulting firm, X, to provide its expert services gave rise to a fiduciary duty of loyalty. Further, the Claimant contended that as a result of the similarity between the two arbitrations, the three Defendants were breaching its fiduciary duty by providing expert services to the EPCM Contractor. The Defendants disagreed and posited that an independent expert does not owe a fiduciary duty of loyalty to its client and in the alternative, an expert's "overriding duty to the court" supersedes its duties (if any) to the client.

DECISION OF THE HIGH COURT

The court granted the application for the continuation of injunctive relief. O'Farrell J held that a fiduciary relationship existed in circumstances where there was a "*clear relationship of trust and confidence*" and further that a "*paramount duty owed to the court is not inconsistent with an additional duty of loyalty to*

the client". O'Farrell J also held that the fiduciary duty of loyalty that the 1st Defendant owed extended to the broader consultancy group.

The court concluded that the Defendants were controlled by a common shareholder and share a common financial interest. Further, the Defendants are managed and marketed as one global firm and that there is a common way in which conflicts are identified & managed.

Concluding that the Defendants breached their fiduciary duties to the Claimant, O'Farrell J ordered that the Defendants were restrained from providing their expert services to the EPCM Providers against the Claimant.

CONCLUSION In Malaysia, it is the duty of experts to assist the Court on the matters within their expertise. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid. While Malaysian courts have not been confronted the same factual matrix, lessons can be extracted from the instant case. Companies in the business of providing expert analysis i.e. delay experts, must carefully assess its internal policies in respect to division & confidentiality between different entities within a corporate group.

A review of standard operating procedures in relation to appointments should be undertaken. If a conflict between parties is anticipated where expert firms have been approached to act for both parties in differing capacities, experts would be well advised to inform parties of the potential for a conflict of interest and to obtain consent of both parties before agreeing to the appointment. To avoid potential litigation risk, appointments where a conflict can be perceived to occur should be declined.

Expert firms should also carefully re-examine the terms of their engagement, especially clauses seeking to exclude liability arising from fiduciary duties of loyalty and clauses regarding express obligations of loyalty in an engagement letter. The scope and depth of advice the engagement is meant to encompass must be clearly and expressly stated to manage any litigation risk.

For more information, kindly contact the undersigned.

Authors

Idza Hajar Ahmad Idzam
idza.hajar@zulrafique.com.my

Mifzal Mohammed
mifzal.murshid@zulrafique.com.my

Zul Rafique & Partners
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