

International Arbitration Alert

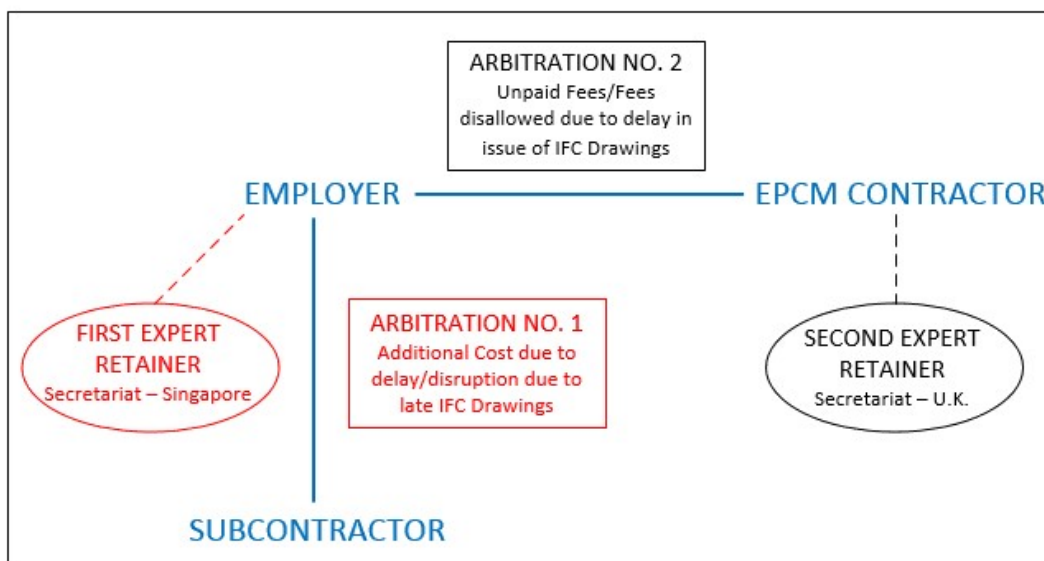
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STRAUSS HAUER & FELD

Experts on Conflicting Concurrent Retainers in International Arbitration – The Court of Appeal Moves Away from a Freestanding Fiduciary Duty of Loyalty

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In *Secretariat Consulting PTE Ltd & Ors v A Company*¹ the Court of Appeal of England and Wales considered whether two experts from the same organization could be properly appointed in respect of two international construction arbitrations where as shown below (i) one expert was first appointed by the employer in respect of a subcontractor dispute and the other expert was appointed by the engineering, procurement, construction and management (EPCM) contractor in respect of a second dispute against the employer heard in the second arbitration; (ii) the two arbitrations relate to the same overall construction project; (iii) there is subject-matter overlap between the two experts; and (iv) the first expert appointment contained an express provision dealing with conflicts of interest and incorporated the Chartered Institute of Arbitrators Expert Witness Protocol².



The Court of Appeal upheld the decision of the first instance judge granting an injunction to the employer to restrain Secretariat from acting for the EPCM. This is the

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first time the Court of Appeal has considered the duties on an expert witness appointed on two potentially conflicting concurrent appointments and whether such duties extended to all experts and entities within the expert organization. Put simply, the Court of Appeal decided:

- That it was not necessary to consider whether the first expert owed a freestanding fiduciary duty of loyalty (as had been held by the first instance judge). This was because there was a contract with an express clause dealing with conflicts of interest.
- The conflicts clause in the first retainer had two consequences: the expert entity confirmed that there was no conflict of interest at the time of the agreement, and it undertook that it would not create any such conflict of interest in the future. On that basis, the entity owed the employer a clear contractual duty to avoid conflicts of interest for the duration of the retainer.
- The conflict check having been carried out across the Secretariat group, the contractual undertaking given by the Singaporean entity in the first retainer bound all the companies in the group. There was a conflict of interest because there was an overlap of parties, role, project and subject matter.

The Court's emphasis on a contractual duty to avoid conflicts of interest is important. The judge at first instance had decided that Secretariat group was in breach of the fiduciary duty of loyalty and stated, "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." The Court of Appeal's focus on the terms of the appointment rather than a freestanding duty of loyalty will give experts and those appointing them an opportunity to better manage the undertakings around conflicts of interest. It is apprehended that expert firms will now seek to include express provisions in appointments dealing with precise measures to preserve confidentiality and privilege as well as limiting explicitly the scope of conflict checks and the extent or 'reach' of the contractual duty to avoid conflict of interest. Clients and instructing solicitors are likely to go the other way and seek to fortify contractual terms dealing with conflict checking, disclosure, conflicts of interest and the continuing duty to prevent a conflict of interest.

Fiduciary or contractual?

The question whether an expert witness is a fiduciary, owing a duty of undivided loyalty to the party that instructs him was not answered by the Court of Appeal. Males LJ at [104] stated, "Save perhaps in circumstances far removed from the present case, an expert witness is not a fiduciary and does not owe fiduciary duties to his client."³ The focus was on the terms of the appointment as Males LJ at [105]:

"A professional expert witness offers his services in return for payment and the relationship between the expert and his client is essentially contractual. It is therefore necessary to focus on the incidents of that relationship, concentrating on the terms of the expert's retainer and the role which he is required and expected to perform. In this case the contract by which the expert was engaged contained an express term dealing with conflicts of interest. It is therefore unnecessary to consider what the position may be if an expert is engaged without anything at all being said about conflicts. That would be unusual nowadays in any substantial commercial litigation or arbitration..."

Coulson LJ was also clear that the contract or appointment with the expert firm was more important than working out if a freestanding duty of loyalty exists, stating at [66]:

“...Depending on the terms of the retainer, the relationship between a provider of litigation support services/expert, on the one hand, and his or her client on the other, may have one of the characteristics of a fiduciary relationship, namely a duty of loyalty or, to put it another way, a duty to avoid conflicts of interest. That is not contradicted by the expert’s obligations to the court. But, unlike the judge [at first instance], **I do not consider that it is necessary or appropriate to find the existence of a freestanding duty of loyalty in the present case.**”
[emphasis added]

Should there be a case in the future where there is no contractual obligation or duty dealing with conflicts of interest and the Court is required to look at a freestanding duty of loyalty, it is noted that all three Justices of Appeal in *Secretariat Consulting PTE Ltd & Ors v A Company* indicated that arguments around the notion that the existence of a duty of loyalty on the part of the expert to the client would conflict with or negate the expert’s (overriding) duty to the court or arbitral tribunal will not work. For example, Lady Justice Carr at [125] stated “... Whilst in the event the outcome of the appeal does not turn on whether or not a fiduciary (as opposed to a contractual) duty of loyalty existed, I would simply emphasise that there is no such conflict, as identified by Lord Phillips in *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398 at [49] in particular...”.

Express Term on Conflicts

The express term regarding conflicts in the first expert’s appointment stated:

“You have confirmed you have no conflict of interest in acting for [A Co] in this engagement. You will maintain this position for the duration of your engagement.”

The Court of Appeal considered that the express term meant that the expert entity confirmed that there was no conflict of interest at the time of the first appointment and that the expert entity undertook that they would not create any such conflict of interest in the future. Put plainly, it was held that the expert firm in Singapore owed the employer a clear contractual duty to avoid conflicts of interest for the duration of the retainer. The Court of Appeal considered that there was a conflict of interest: despite the fact that there are two separate arbitrations, one between the sub-contractor and the employer and the second between the employer and the EPCM contractor, the Court found it material that they arise out of the same project and the issues, even if not identical, had a very substantial overlap. On the facts and circumstances the interests of A, the employer and the EPCM contractor were directly opposed.

The Extent of the Contractual Duty to avoid a conflict

The question for the Court of Appeal was whether the contractual undertaking given by the Singaporean entity, (Secretariat Consulting) at the time of the first expert retainer could extend to other experts or entities in the overall Secretariat group of entities or companies. It was submitted that Secretariat International, a separate company within the group based in a different jurisdiction, employed the second expert. Was the confirmation that it had no conflict of interest and would maintain that position given only by Secretariat Consulting (the Singaporean company) or was it given by that company on behalf of the group as a whole? In this regard, the Court of Appeal found

it notable that the exchange of emails in which the confirmation referred to in the contract was given was general, and did not mention any company by name. Males LJ at [122] sums up the Court's analysis⁴:

"... In considering what the parties would reasonably have understood, it is significant that companies within the group share the same name and are managed and marketed as a single global firm. They have a single website for the group as a whole, treating it as a single business in various jurisdictions, working as a team. It seems to me to be obvious that if an issue had arisen in the arbitration on which an employee in another company in the group had particular experience or expertise, both parties would naturally have expected that experience or expertise to be available to A Co as the client. Moreover, it is striking that when K [the first expert] first notified A Co that the third party was seeking to instruct M [the second expert], he said that "Our firm has received enquiry ...". That view of the group, as a single firm with offices in different cities, reflected the reality of the position. In these circumstances the undertaking given by Secretariat Consulting not to accept instructions which would give rise to a conflict of interest can readily – and in my judgment must – be understood as having been given on behalf of the group as a whole.

¹ [2021] EWCA Civ 6.

² The CIArb Expert Witness Protocol provides, amongst other things:

- (a) The expert shall be independent of the party appointing him (Article 4.1).
- (b) The expert's duty in giving evidence is to assist the Tribunal to decide the issues in respect of which expert evidence is adduced (Article 4.3).
- (c) The expert's opinion shall be independent, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party (Article 4.4).

³ Coulson LJ made an almost identical point at [65] where he stated:

"I consider that, in a case like this, no purpose is served by designating the relationship as a fiduciary one. There was a contract here with an express clause dealing with conflicts of interest. In my view, a fiduciary duty of loyalty would not add to or enhance the obligations arising from that clause. So considering the issue further is unnecessary for the disposition of the appeal."

⁴ Coulson LJ at [81] stated "...I conclude that, the conflict 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."