ENGLISH COURT RESTRAINS EXPERTS FROM ACTING IN ARBITRATION PROCEEDINGS FOR CONFLICT OF INTEREST

A Company v X, Y and Z [2020] EWHC 809 (TCC)

INTRODUCTION

By a decision handed down on 3 April 2020 in *A Company v X, Y and Z* [2020] EWHC 809 (TCC), the Technology & Construction Court continued an injunction to restrain the defendant global consultancy group from acting as experts in an arbitration against the claimant in circumstances where one subsidiary within the group was already engaged for the claimant in a separate but related arbitration. The names of the parties are anonymised as a matter of practice in Arbitration Act 1996 cases unless the public interest requires otherwise.

BACKGROUND

The claimant, in the course of its development of a petrochemical plant, engaged third parties as engineering, procurement and construction management services providers ("EPCM Providers) and as Contractors. Two disputes arose (and were referred to ICC arbitration) between the claimant and the Contractors and between the claimant and the EPCM Providers.

The first defendant in the instant proceedings was the Asian subsidiary of a global consultancy firm, and it was engaged by the claimant as experts in the ICC arbitration with the Contractors. In that regard, the first defendant signed a confidentiality agreement and a formal letter of engagement was executed, in which the first defendant confirmed that it had no conflict of interest and would not put itself in a position of conflict of interest during the arbitration.

Subsequently, the defendants were also approached, in the ICC arbitration with the EPCM Providers, to provide expert services to the EPCM Providers (i.e. against the claimant).

The defendants explained to the claimant that there was no conflict of interest in them acting in that way on both matters as they would do so from different offices and with the putting in place of strict information barriers between the relevant teams. Notwithstanding the claimant's position that there would be a conflict, the defendants were engaged by the EPCM Providers.

The claimant then wished to expand the scope of the first defendant's instructions so as to include expert services for both of the ICC arbitrations. The claimant wrote to the first defendant that its engagement by the counterparty in the arbitration with the EPCM Providers breached the terms of its engagement by the claimant. The claimant applied for and was granted urgent

injunctive relief, and then applied for the continuation of that relief on the grounds that the defendants had breached a fiduciary duty of loyalty to the claimant.

DECISION

The Technology & Construction Court (O'Farrell J) upheld the application for the continuation of injunctive relief.

The defendants had argued that experts in arbitration owe their overriding duty to the tribunal and, as a consequence, that meant that expert witnesses did not owe fiduciary obligations of loyalty to their instructing party. O'Farrell J held, however, that that "*paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client*". A fiduciary relationship existed in circumstances where there was a "*clear relationship of trust and confidence*". In the instant case, the first defendant had (in relation to the ICC arbitration concerning the Contractors, in which it was initially instructed) been engaged, in addition to providing an independent expert report, to provide extensive advice to the claimant as part of the claimant's broader 'team' working on the arbitration.

O'Farrell J also held that the fiduciary duty of loyalty that the first defendant was imbued with extended to the broader consultancy group of which it was a part, carrying out an assessment of the structure of the whole group, and noting that the group was marketed as a single global firm.

Turning to whether the fiduciary duty had been breached, O'Farrell J rejected the argument that the information barriers put in place to protect against inappropriate sharing of confidential information was determinative of the matter, noting that a person owing a fiduciary duty of loyalty "*must not place himself in a position where his duty and his interest may conflict*".

In the instant case, O'Farrell J held that there was "*plainly*" a conflict of interest where the defendants acted for the claimant in one arbitration and against the claimant in another. The arbitration were related and had "*significant overlap*" in terms of the issues at play in each.

Accordingly, O'Farrell J ordered that the defendants were restrained from providing their expert services to the EPCM Providers against the claimant.

CONCLUDING REMARKS

Experts often form a crucial part of a team engaged by a client involved in a commercial arbitration. However, in much the same way that clients must be aware of the potential for conflicts of interest concerning their lawyers, so too must clients be mindful of conflicts occurring through the expert's offering of services as part of large global consultancies. The court's judgment provides useful guidance in this regard.

POSTSCRIPT

The court's judgment was handed down remotely according to the COVID-19 Protocol implemented by the UK judiciary. Under this protocol there is a strong emphasis on parties making use of technology to allow hearings to proceed remotely (rather than being adjourned) wherever possible. Indeed, in *Re One Blackfriars Ltd (in liquidation)* [2020] EWHC 845 (Ch),

the court refused to adjourn a five-week trial just because of the COVID-19 health crisis, ordering the parties to explore the technological options available to facilitate a remote trial.

In similar vein, on 9 April 2020, the ICC produced guidance on possible measures aimed at mitigating the effects of the COVID-19 situation – with great emphasis placed on proactive communication between tribunals and parties to identify possible procedural issues, and on the use of technology to facilitate hearings.

In accordance with the principles of effective and expeditious dispute resolution, both courts and arbitral institutions are keen to show, both to litigating parties and their counsel, that they remain open for business, even in these difficult times.