When Santa's Little Helpers Get it Wrong

December 14, 2021

PRACTICES International Arbitration

Introduction

In the recent case of *Secretariat Consulting PTE Ltd & Ors* v *A Company* [2021] EWCA Civ 6, the English Court of Appeal considered the novel issue of whether expert witnesses may, in certain circumstances, owe fiduciary duties to those who appoint them. Although this case stemmed from construction arbitration proceedings, it is of general importance to anyone using experts in their disputes. The decision also has significant practical consequences for the drafting of expert witness instructions.

Background

The respondent was the developer of a large petrochemical plant, the cost of which was said to be in the billions of dollars. It engaged a project manager responsible for the engineering, procurement and construction management services for the project. The value of the project manager's contract with the respondent was itself almost $2 billion.

The respondent entered into two sub-contracts relating to the construction of certain facilities at the plant. The sub-contractor responsible for both sub-contracts commenced arbitral proceedings against the respondent, who in response appointed Secretariat Consulting Pte Ltd ("SCL") to provide arbitration support and expert services. The respondent's project manager then commenced a second, separate arbitration against the respondent and approached Secretariat International UK Ltd ("SIUL") to provide similar services. SCL and SIUL were both part of the Secretariat group, so the respondent sought an urgent interim injunction to restrain SIUL from acting for the project manager in the second arbitration. The basis for the injunction was said to be a breach of fiduciary duty by SCL, alternatively a breach of a contractual obligation to avoid conflicts of interest.

At first instance, O'Farrell J found that SCL owed the respondent a fiduciary duty that prevented SIUL from providing similar expert services to the project manager in a different arbitration against the same respondent arising out of the same or similar subject matter. The judge therefore issued the injunction, which prevented SIUL from doing any further work for the project manager in the second arbitration. SCL and SIUL (together "Secretariat") appealed the decision, arguing that the overriding duty that an expert owes to the court or arbitral tribunal would conflict with or negate any fiduciary duty to the client. They contended that an expert could not put the respondent's interests first as a fiduciary because they were obliged to put the interests of the court, or of justice, first.

© 2026 Haynes Boone

Expert fiduciary duties?

Lord Justice Coulson, giving the lead judgment of the Court of Appeal, set out four issues which had to be resolved:

1. Did SCL owe a fiduciary duty of loyalty to the respondent?

2 If not, did SCL owe a contractual duty to the respondent to avoid conflicts of interest?

3 If so, was that duty also owed to the respondent by other Secretariat entities?

4 If so, was there a conflict of interest as a result of SCL's engagement in the first arbitration and SIUL's subsequent engagement in second arbitration?

Was there a fiduciary duty of loyalty?

On the first issue of whether SCL owed a fiduciary duty to the respondent, Coulson LJ began his analysis by observing that there is no English authority on whether an expert witness owes a fiduciary duty to their client. He therefore went back to first principles to determine whether the threshold was met in this case. This task was made difficult because there is no generally accepted definition of a fiduciary. Fiduciary duties normally arise in settled categories, such as between a solicitor and client, and it is exceptional for fiduciary relationships to arise outside of those limits.

Coulson LJ considered the comments of Leggatt LJ in *Sheikh Al Nehayan* v *Kent* [2018] EWHC 333 (Comm) to be the best starting point to determine what constituted a fiduciary:

> "*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 [1998] Ch 1 at 18, described as the "distinguishing obligation of a fiduciary". Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests. To promote such decision-making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal.*"

A fiduciary duty is therefore essentially one of loyalty. According to the editors of *Jackson & Powell on Professional Liability*, the duty can also be viewed as an inhibition:

> "[A fiduciary duty] *is sometimes described as a 'duty of loyalty', but in effect it amounts to an inhibition: a professional should not put himself in a position in which his duty to act in his client's interests is in conflict with his own interests, let alone prefer his own interests to those of his client should there be a conflict.*"

© 2026 Haynes Boone

Coulson LJ took time to point out that a high degree of mutual trust and confidence between parties is not sufficient in itself to give rise to fiduciary obligations. Something more akin to loyalty was, in addition, required. Having said that, professional people had often been found to owe a fiduciary duty of loyalty to their client. It did not follow from the lack of authority on expert witnesses being fiduciaries that no such duty could exist. Nevertheless, the lack of prior authority was a factor the court would take account of.

As stated above, Secretariat's principal objection to the finding of a fiduciary duty in this case was that, because of the overriding duty that an expert had towards the court or arbitral tribunal, any such duty would conflict with or negate any fiduciary duty of loyalty. Coulson LJ firmly rejected this proposition. There was no such conflict for a barrister in court, who owes duties to their client but has the same overriding obligation to the court as an expert witness.

In fact, Coulson LJ went further than this. In his view the duties of an expert to their client and the court went hand in hand. An expert who complies fully with their duty of independence and objectivity to the court or arbitral tribunal is an expert who provides their client with the best possible service. Evidence that is seen to be independent and unbiased will carry far greater weight than if the expert is seen to be lacking in objectivity.

Despite rejecting Secretariat's principal argument against a fiduciary duty being imposed, Coulson LJ said that he was reluctant to conclude an expert witness normally owed a fiduciary duty to their client. This was primarily because of the "… *good deal of legal baggage*" associated with the term fiduciary, which was inappropriate to import into the client expert relationship.

No purpose was served by using such a label in this case, given that there was a contract between the parties which dealt with conflicts of interest. Nothing would be gained by framing the issues in fiduciary terms. Coulson LJ's last word on the issue was that the court would leave the door open for fiduciary duties between an expert and client in future cases where answering that question would be necessary to resolve the dispute.

The remaining issues fell to be considered on the assumption that SCL did not owe a fiduciary duty to the respondent.

Was there a contractual duty to avoid conflicts?

On the second issue, namely whether SCL owed the respondent a contractual duty to avoid conflicts of interest, the contract was clear. The relevant clause in the contract between the parties was the following:

> "*Under no circumstances shall [SCL] at any time, without the prior written approval of [the respondent's solicitors] acknowledge to any third party what is or is not a part of the Confidential Information, nor shall [SCL] acknowledge to any third party the execution of*

© 2026 Haynes Boone

> *this Agreement, the terms and conditions contained herein or the underlying discussions with [the respondent's solicitors]*".

In Coulson LJ's view, this placed SCL under an obligation to ensure that there was no conflict of interest "*at any time*", which necessarily included an undertaking that SCL was unaware of any conflict of interest at the date of the agreement and that SCL would not create one in future.

Were group companies bound?

Given the Court of Appeal found that SCL owed the respondent a clear contractual duty to avoid conflicts of interest for the duration of their agreement, the third issue was whether that same duty was owed to the respondent by SIUL, which was a part of the same Secretariat group. Coulson LJ held that it was. One of the most important indicators was the scope of the conflict check carried out by SCL in respect of all the Secretariat entities. It specifically checked if those other entities were in conflict, begging the question of why this would be necessary if Secretariat believed that SCL and SIUL were separate entities for conflicts purposes.

On the face of it, therefore, SCL was giving the undertaking on behalf of all the Secretariat entities, because all the Secretariat entities had been the subject of the conflict check. In support of that proposition, Coulson LJ listed a number of other factors which pointed toward the conclusion that it was the Secretariat group who were regarded by its clients as their expert, not an individual entity within the Secretariat structure with a slight variant on the core name. Some of these factors included that all persons working at Secretariat had the same email address suffix, that Secretariat marketed itself as one global firm, and that the Secretariat group did not distinguish between different legal entities on its website or in any of its correspondence with prospective clients. For all these reasons Coulson LJ held that the conflict check having been carried out across the Secretariat group, the undertaking given by SCL in its agreement with the respondent bound all the companies in the group. They were all providing the same form of litigation support/expert services.

Was there a conflict?

The final issue was whether there was in fact a conflict in the current circumstances. In Coulson LJ's view, there were four reasons why there was a clear conflict of interest between SCL acting for the respondent and SIUL acting for the project manager against the respondent in the second arbitration.

First, the obvious point that SCL was, in relation to the first arbitration, giving commercial advice and acting as expert for the respondent. If SIUL was engaged by the project manager in the second arbitration, it would mean that it would be giving advice opposing the respondent.

Second, the scope of the project manager's role on the project. A project manager acts as the employer's agent or representative on site during the project. It was impossible to see how the same firm (no matter how many global offices it had) could act for the employer and simultaneously

© 2026 Haynes Boone

against the employer's representative in respect of the same or similar disputes on the same project.

Third, SCL had been engaged to give the respondent advice concerning the design and construction of the petrochemical plant project. If SIUL was engaged by the project manager, they would be giving the project manager advice about the design and construction of the same project.

Fourth, one of the critical issues in both arbitrations concerned the causes of delay in the design and construction of the project. SCL were giving advice to the respondent about those causes of delay. If SIUL was then engaged by the project manager, they too would be giving advice about the causes of the same delays to the project manager, and the extent to which such matters were or were not the project manager's responsibility.

It was these overlaps of parties, of role, of project, and of subject matter which, taken as a whole, indicated that there was a clear conflict of interest. As an aside, Coulson LJ pointed to another practical test found in the 6th edition of Conflicts of Interest by Hollander and Salzedo, which quoted a partner of a well-known English law firm who said:

> "*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.*"

Applying that test, that was precisely what had happened here. The respondent considered the position and decided that they did not like what the project manager had asked SIUL to do. Secretariat's appeal was therefore rejected and the injunction was continued.

At the end of his judgment Coulson LJ reiterated that he should not be taken to be saying that the same expert cannot act both for and against the same client. Of course, that was possible if, for example, the expert was working on the other side in relation to a dispute on another project. Whether there is a conflict of interest is a matter of degree, which would be decided taking account of all the relevant circumstances. He added that neither did his judgment mean that groups such as Secretariat could not, if it thought it commercially sensible to do so, make plain that its representations as to conflicts of interest were based solely on the entity involved, and not the wider group of companies. That was a matter that could be dealt with in the parties' contract, which the court would not interfere with.

Comment

The Court of Appeal's decision leaves open the possibility that an expert witness can be treated as if they are in a fiduciary relationship with their client. This is unlikely to occur, however, when the contract expressly sets out the limits of the parties' conflicts obligations.

With that in mind, care should be taken that agreements instructing experts are properly drafted.

© 2026 Haynes Boone

Where the relevant firm operates through various entities, the engagement should be clear as to whether the conflicts restriction applies to the group as a whole or just the specific entity being contracted with. While most firms will maintain a unified conflicts register across their group, this should be confirmed in writing.

© 2026 Haynes Boone