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## King & Spalding Secures Injunction in English High Court Preventing Expert from Acting in Arbitration

A business (“**the Defendants**” or “X”, “Y” or “Z”) that provides expert and litigation support services cannot, simultaneously, act for a party (“**the Claimant**”) in one arbitration and against the Claimant in a separate arbitration concerning the same Project, so said the Mrs. Justice O’Farrell in her judgment in the case of *A Company v. X, Y and Z* in which the High Court of Justice in London granted a permanent injunction preventing the Defendants from continuing to act in an arbitration against the Claimant.

The judgment of the Court is a welcome acknowledgement of the law relating to duties experts have to their clients and to a Court. The judgment also determined that a company may not provide expert and litigation support services that are adverse to an existing client by providing those services through a different office.

### THE FACTS

The Claimant is the developer of an energy project. As developer, the Claimant entered into a series of contracts including a contract with a contractor for the construction of facilities (“**the Facilities Contractor**”) and a contract with a company (“**A**”) for engineering, procurement and construction management (“**EPCM**”) services.

The Facilities Contractor referred disputes with the Claimant to an ICC arbitration (the “**Contractor Arbitration**”) which required the Claimant to engage an independent delay expert. Those disputes concerned, amongst others, the late issue of “Issue for Construction” (IFC) drawings that were provided by A.

The Claimant engaged the Defendant X (“**X**”) as an independent delay expert. X was also required to provide arbitration support. The letter of engagement between the Claimant and X included provisions relating to ensuring that confidential information should be kept in strict confidence and an express acknowledgement, by X, that X had “*no conflict of interest*”



*in acting for [the Claimants] in this engagement [and that the Claimants] would maintain this position for the duration of your engagement".* At the time of judgment, X had been paid a significant sum for the services provided.

Separately, A commenced ICC arbitration proceedings against the Claimant ("**the EPCM Arbitration**"). In the EPCM Arbitration, A claims sums due and owing under certain agreements, and the Claimants have brought counterclaims against A in respect of, amongst other things, delays and disruption. The Claimant was seeking to pass certain claims in the Contractor Arbitration onto A in the EPCM Arbitration.

Following the commencement of the EPCM Arbitration, A approached Defendant Y ("**Y**") based in London, to provide quantum and delay expert services in connection with the EPCM Arbitration. Y is a company forming part of the same group of companies as X. Upon being notified of this approach, the Claimant objected to the appointment of Y on the basis that there would be a conflict of interest with its appointment of X if Y accepted the appointment. Ignoring the Claimant's objection, A pressed ahead with appointing Y.

The Claimant commenced proceedings to injunct Y from acting for A.

## THE CENTRAL ISSUES

The Court was asked to consider three relevant issues, namely:

1. First, 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 client
2. Second, whether, on the evidence before the Court, the Claimant is entitled to a fiduciary obligation of loyalty from the Defendants; and
3. Third, whether there has been, or may be, a breach of any duty of loyalty or confidence.

## THE JUDGMENT

### *The First Issue*

The Defendants' position was that an expert witness does not owe a fiduciary obligation of loyalty to his client because "*... such a duty would be inconsistent with the independent role of the expert*". After reviewing various authorities, the Court dismissed the Defendant's arguments. The Court determined that, as a matter of principle, duties that an expert may owe to the court are not inconsistent with an additional duty of loyalty to a client. In the Court's view, "*... there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court*".

### *The Second Issue*

The Court determined that it was unrealistic to conclude that a duty of loyalty was limited to X alone. The organisation of the Defendants as a group of companies was such that the Defendants owed a fiduciary obligation of loyalty to the Claimant because there was a common financial interest between the Defendants and that the Defendants managed and marked itself as one global firm. Furthermore, the Court determined that there was a common approach to identification and management of any conflicts throughout the defendant group.

### *The Third Issue*

The Claimant argued that the Defendants' engagement in 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, act for a second client in a manner which is inconsistent with the interests of that of the Claimant.



The Court agreed and determined that there was “*plainly a conflict of interest*” in X being engaged by the Claimants in the Contractor Arbitration and, at the same time, Y engaged adverse to the Claimants in the EPCM Arbitration. The conflict of interest arose because there was a significant overlap in the issues between the two engagements.

### CONCLUDING REMARKS

We, at King & Spalding, are glad to have prevailed in these proceedings for the Claimant. The judgment is a necessary clarification on the law that regulates fiduciary duties and conflicts of interests applicable to expert firms providing services to litigants. The judgment will assist law firms and consultancies who provide expert and litigation services, and clients in selecting which experts to retain.

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<sup>i</sup> [2020] EWHC 809 (TCC)