



Neutral Citation Number: [2021] EWCA Civ 6

Case No: A1/2020/0693

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND
AND WALES
TECHNOLOGY AND CONSTRUCTION
COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2021

Before:

LORD JUSTICE COULSON
LORD JUSTICE MALES
and
LADY JUSTICE CARR

Between

SECRETARIAT CONSULTING PTE LTD
SECRETARIAT INTERNATIONAL UK LTD
SECRETARIAT ADVISORS LLC

Appellants/
Defendants

- and -

A COMPANY

Respondent
/Claimant

Charles Hollander QC and Max Evans (instructed by Fox Williams LLP) for the **Appellants**
Roger Stewart QC and Shail Patel (instructed by King & Spalding LLP) for the **Respondent**

Hearing date: 24th November 2020

Approved Judgment

“Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Monday 11th January 2021.”

LORD JUSTICE COULSON :

1 INTRODUCTION

1. At their request, the parties to the underlying arbitrations have not been identified although, in a case where no criticism has been or is made of any such party, the adherence to secrecy is perhaps to be regretted. Neither have any individuals been identified from within the defendant companies. However, anonymisation of the names of the defendant companies themselves has proved impossible because it renders unintelligible some of the points that need to be made about the close connection between them. Since they are not themselves parties to the arbitrations, the same considerations of privacy and confidentiality do not apply.
2. The issues that arise on this appeal are, in one sense, novel and potentially significant, although – as will become apparent – I have concluded that they fall to be resolved on their own particular facts, and by reference to the terms of the relevant retainer. In the judgment below, O’Farrell J (“the judge”) found that Secretariat Consulting Pte Ltd (“SCL”), an entity within the Secretariat group, all of which provide litigation support services and act as delay and quantum experts in construction arbitrations, owed its client (the respondent) a fiduciary duty of loyalty. She held that this in turn meant that Secretariat International UK Ltd (“SIUL”) could not provide similar expert services to a third party, who was making a claim in another arbitration *against* the same respondent arising out of the same project and concerned with the same or similar subject matter. The remaining defendant, Secretariat Advisors LLC (“SAL”), was involved in some of the correspondence. This was the first time in the English jurisdiction that an expert had been found to owe a fiduciary duty to its client.
3. One of the features of this case was that, although plenty of authorities were cited to the court, very few of them were – as Leading Counsel frankly conceded - of any real assistance. No English case has addressed head-on a dispute in which there are two existing litigation support/expert retainers, which each client wished to maintain, relating to two live arbitrations, where what the respondent says is the same expert organisation will be supporting, advising and giving evidence for and against the same client about the same project and the same or similar subject matter. However, counsel can hardly be blamed for the absence of authority, and we are grateful to them for the excellence of their written and oral submissions.

2 THE FACTUAL BACKGROUND

4. The respondent is the claimant in these TCC proceedings. It is the developer of a large petrochemical plant (“the project”). The cost of the plant is measured in billions of dollars. The respondent engaged a project manager (“the third party”) responsible for the engineering, procurement and construction management (“EPCM”) services for the project. Amongst its responsibilities as the project manager was the provision of Issued For Construction Drawings (“the IFC Drawings”) which tell the contractors what to build. The value of the third party’s contract with the respondent was itself almost \$2 billion.
5. In 2013, as part of the project, the respondent let two sub-contracts relating to the construction of certain facilities at the plant for a price of \$117 million. They were known as Package A and Package B. Disputes arose between the respondent and the sub-contractor responsible for Packages A and B, and the sub-contractor brought the claims in Arbitration 1 against the respondent. One of the principal elements of the sub-

contractor's claim is the additional costs due to delay and disruption, which the sub-contractor alleges was the result of the late release of the IFC Drawings.

6. SCL is based in Singapore. In March 2019, the respondent's solicitors approached SCL to provide arbitration support and expert services in Arbitration 1, in connection with the causes of delay and disruption to packages A and B.
7. The first stage of the proposed retainer was the completion of a Confidentiality Agreement, entered into between the respondent's solicitors and SCL dated 15 March 2019. The important provision was clause 4:

“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 this Agreement, the terms and conditions contained herein or the underlying discussions with [the respondent's solicitors]”.
8. The second stage was a conflict check. Having received the Confidentiality Agreement on 18 March 2019, the respondent's solicitors wrote to K (the individual at SCL who was going to be the lead expert and who had signed the Confidentiality Agreement) asking him to “confirm by return that you are not conflicted to act as an independent expert witness in this matter”. K replied asking for details of the parties and the project, so “we may run a conflict check...I am conscious that we are sometimes approached by both sides, so it is probably better to run that as soon as possible”.
9. K's e-mail address was “Secretariat International”. The evidence showed that every individual who worked for the Secretariat group, no matter which individual entity they actually worked for, had an email address that ended with the words “secretariat-intl”.
10. It was common ground that:
 - (a) The conflict check was carried out across all the entities in the Secretariat group. In other words, it was not a check that was confined to SCL: it also encompassed SIUL and SAL.
 - (b) This was confirmed by the witness statement of N, SAL's Chief Financial Officer, at paragraph 11. In that paragraph, and in other places in his evidence, N uses the catch-all name “Secretariat” to describe all the companies in the group.
 - (c) The breadth and scope of the conflict check was known to the respondent. Furthermore, not only is it common practice for international consulting firms to carry out a conflict check across all their various entities, but it also happened again in this case when SIUL ran a conflict check following the subsequent approach to them by the third party.
 - (d) On 20 March 2019, in another e-mail from the Secretariat International address, K confirmed to the respondent's solicitors that “there are no conflicts”.
11. The engagement of SCL by the respondent is evidenced in two letters of May 2019, addressed to SCL, for the attention of K. The letter of 13 May 2019 came from the respondent itself. It was “pleased to confirm that it would like to engage you as an expert witness in the arbitration referenced above.” The scope of the works to be carried out was then set out in the following terms:

“Scope of Works

As set out in the RFP, your scope of works comprises the following:

- Familiarise yourself with the Project and the reference materials that [the respondent’s solicitors] or [the respondent] will send to you from time to time;
- Propose a fit-for-purpose methodology for the determination of the delays to the Works under each of Package A and Package B;
- Identify and analyse each of the delay events that gave rise to delays to the Works, allocate a delay period to each delay event, and calculate the total delay under each of Package A and Package B;
- Identify and analyse the root cause for the delays;
- Reflect your opinions and analysis in a report;
- Meet with [the subcontractor]’s expert to the extent directed by the Tribunal and prepare any joint statements that may be required;
- Provide ad-hoc support to [the respondent] and its professional team in the arbitration; and
- Give oral evidence at the hearing.”

12. The letter of 13 May went on to say that the respondent “is engaging you to provide expert services, led by [K]. It is agreed that [K] shall retain full responsibility for the work products for the duration of this engagement. In particular [K] shall be responsible for the accuracy of the report and [K] shall be the testifying expert at the hearing... You agree that [K] will supervise and review all work carried out by others and take full responsibility for the end product, including the report.”
13. Under the heading “CONFLICTS OF INTEREST”, the letter of 13 May expressly recorded that SCL had “confirmed you have no conflict of interest in acting for [the respondent] in this engagement. *You will maintain this position for the duration of your engagement*” (Emphasis supplied). There was a reference in the body of the letter to “rates as established by Secretariat...”, but no reference to any individual entities.
14. The other letter, dated 26 May 2019, was from the respondent’s solicitors, again to SCL, again marked for the attention of K. This repeated much of the earlier letter. It set out the same scope of works, but qualified it as being the scope “in the first instance”. It also included the following:

“DUTIES OF AN EXPERT

Acting as an expert witness, you have a duty to exercise reasonable skill and care in carrying out instructions and shall comply with any relevant professional code of practice. Your overriding duty as an expert is to the tribunal. Your primary function is to assist the tribunal and, in this capacity, you must provide your unbiased opinion as an independent witness in relation to those matters which are within your expertise.

Your duties as expert are more fully set out in the CIArb Expert Witness Protocol (“Protocol”) enclosed. You should ensure that you comply with the duties and all other requirements set out in the Protocol and all other relevant reference materials.

YOUR REPORT

To be used in evidence before the tribunal, your report shall comply with the requirements of the Protocol. You will find a checklist of the points which must be covered in your report in the Protocol.

You shall immediately notify K&S [the respondent’s solicitors] if, at any time after producing your report, you change your views. You shall equally promptly notify K&S if you need to update your report after it has been served, for example because new evidence has come to light, so as to consider whether an amended version of your report or a supplementary report should be served.”

15. The CIArb Expert Witness Protocol referred to 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).
16. It is common ground that these two letters and the documents referred to in them constituted the contract between the respondent and SCL. On that basis, K and his team of SCL’s employees in Singapore began work on the delay issues in about June 2019.
17. In August 2019, the third party commenced Arbitration 2 against the respondent claiming unpaid fees under the terms of its management contract. This included a claim for fees which they said had been wrongly disallowed by the respondent, in part because of the delay in the issue of the IFC drawings. The respondent counterclaims in Arbitration 2, claiming (amongst other things) the cost consequences of what it alleges was the third party’s failure to manage/supervise the sub-contractor, and for the delays in the issue of the IFC drawings. A firm providing arbitration support and expert services acting for the third party in Arbitration 2 would therefore be acting against the respondent.
18. In about October 2019 SIUL was approached by the third party to provide arbitration support and expert services in respect of quantum in Arbitration 2. SIUL ran a conflict check which, as I have said, involved all the entities in the Secretariat group. That second conflict check revealed the engagement of SCL by the respondent.
19. Accordingly, on 8 October 2019, K wrote to the respondent’s solicitors saying:

“Our firm has received enquiry from lawyers representing [the third party] on its potential dispute against [the respondent]... they have asked for quantum and delay experts (outside Asia) to assist them on the matter and have requested us to run a conflict check in relation to the same.

We have informed them that we (in Asia) are currently engaged by [the respondent] on a separate dispute on the same project (without revealing any further details) and they do not seem to consider it as a conflict. We told them that we would be speaking to you regarding the same as well.

Since [the third party's] contract with [the respondent] is for EPCM works for the full complex, and our engagement is in relation to the evaluation of delays on the construction sub-contract for non-process buildings, our view is that working on the two matters (in different offices) would not constitute a 'strict' legal conflict. Our firm also has the ability to set the engagements up in a manner that there is the required physical and electronic separation between the teams.

I was hoping to have a chat regarding this. Would you be available any time today?"

20. In his witness statement dated 26 March 2020, at paragraph 25, K confirmed that he spoke to the respondent's solicitors later on 8 October 2019. Whilst he reiterated his view that there was no conflict, he confirmed that, in that conversation, the respondent's solicitors indicated that they considered that there was a conflict. He said that Secretariat would discuss the matter internally and revert back. Although he emailed again on 9 October to say that, following a further internal discussion, "we... do not consider it to be a true conflict", nothing more happened. The respondent's solicitors never resiled from their view that the third party's potential engagement of SIUL was a conflict of interest.
21. Unhappily, it appears that, not only did K and his team at SCL continue to work on behalf of the respondent in connection with Arbitration 1, but that also, without any further reference back to the respondent or its solicitors, M (the lead consultant at SIUL) began to do the same for the third party in Arbitration 2. In the light of the respondent's solicitor's unequivocal statement that the proposed engagement of SIUL by the third party constituted a conflict of interest, this was a risky decision. The degree of risk was revealed when the particulars of claim were served by the third party, because it became apparent that the pleading was supported by 26 detailed schedules, all of which had been prepared by SIUL. There is no explanation in the papers of how or why SIUL felt that it could go ahead and accept the appointment without having first resolved the debate about the alleged conflict of interest.
22. On 5 March 2020, the respondent's solicitors wrote to K to say that they "would like to expand the scope of your instructions to include expert witness services in the matter of an arbitration in which [the respondent] is defending claims brought by [the third party]". Then, on 10 March, the third party wrote to the tribunal in Arbitration 2 to confirm that M "of Secretariat has been engaged as [the third party's] quantum expert and is already working". On 12 March, the respondent's solicitors wrote to SCL to say that there was a conflict which could give rise to a risk that SIUL might use the respondent's confidential information.
23. For reasons which are unclear it was SAL, a third company in the Secretariat group, which responded on 19 March to say that there was no conflict and no risk of confidential information being disclosed. That letter said that "Secretariat fully recognises the need for a formal Ethical & Physical Screen across our entire organisation". It dealt in detail with the barriers between K and his team "and the rest of Secretariat", and talked about specific project folders for electronic documents "within the Secretariat system".

24. On 20 March 2020, the respondent issued an urgent *ex parte* application for an interim injunction against SCL, SIUL and SAL. The claim focused on two separate grounds, namely a breach of fiduciary duty and a breach of confidence. The judge granted interim relief on 23 March 2020. On the return date on 31 March 2020, the respondent abandoned its claim that there had been an actual breach in respect of confidential information. In this way, the argument before the judge was concerned solely with the alleged existence of a fiduciary duty.
25. It is important to note that the respondent's particulars of claim plead a separate claim, albeit to the same ultimate effect, that SCL owed the respondent a contractual obligation to avoid conflicts of interest, and that SCL entered into this part of the agreement as agents for all the Secretariat entities: see paragraphs 25(1), 25(4) and 39 of the Particulars of Claim. This argument did not form the focus of the debate before the judge. It loomed rather larger on appeal.

3 THE JUDGMENT

26. Following the hearing on 31 March, the judge handed down a written judgment on 3 April. The neutral citation number is [2020] EWHC 809 (TCC).
27. Having set out the factual background and various preliminary matters, the judge dealt at [31] – [37] with a dispute as to jurisdiction, which no longer arises. At [38] – [53] the judge dealt with the principles relating to fiduciary duty. She referred to all the authorities to which reference was made on appeal. She summarised the law in the following paragraphs:

“52. The general principles that can be drawn from the above authorities in respect of expert witnesses are as follows:

- i) In principle, an expert can be compelled to give expert evidence in arbitration or legal proceedings by any party, even in circumstances where that expert has provided an opinion to another party: *Harmony Shipping*.
- ii) When providing expert witness services, the expert has a paramount duty to the court or tribunal, which may require the expert to act in a way which does not advance the client's case: *Jones v Kaney*.
- iii) Where no fiduciary relationship arises, having regard to the nature and circumstances of the expert's appointment, or where the expert's appointment has been terminated, the *Bolkiah* test based on an ongoing obligation to preserve confidential and privileged information does not necessarily apply to preclude an expert from acting or giving evidence for another party: *Meat Traders; A Lloyd's Syndicate; Wimmera*.

53. None of the authorities cited by the defendants supports their proposition that an independent expert does not owe a fiduciary obligation of loyalty to his or her client. As a matter of principle, the circumstances in which an expert is retained to provide litigation or arbitration support services could give rise to a relationship of trust and confidence. In common with counsel and solicitors, an independent expert owes duties to the court that may not align with the interests of the client. However, as with counsel and solicitors, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client. As explained by Lord Phillips in *Jones v Kaney*, the terms of the expert's appointment will encompass that paramount duty to the court. Therefore, there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court.”

28. At [54] – [59] the judge dealt with the existence of a fiduciary duty in this case and the relationship between the companies in the Secretariat group. She said:

“54. In this case, the first defendant [SCL] was engaged to provide expert services for the claimant in connection with the Works Package Arbitration. The first defendant was instructed to provide an independent expert report and to comply with the duties set out in the CI Arb Expert Witness Protocol as part of the engagement. However, it was also engaged to provide extensive advice and support for the claimant throughout the arbitration proceedings, as explained by S in his witness evidence. In those circumstances a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty.

55. Where a fiduciary duty of loyalty arises, it is not limited to the individual concerned: *Bolkiah* (above) per Lord Millett at p.234H. It extends to the firm or company and may extend to the wider group: *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741; *Georgian American Alloys v White & Case* [2014] EWHC 94 (Comm).

56. The organisation of the defendant group is explained by N in his witness statement and illustrated in the organogram attached as an exhibit:

- i) The first defendant and the second defendant [SIUL] are wholly owned subsidiaries of P Inc.
- ii) P Inc. and the third defendant [SAL] are both owned in part by individual shareholders and in part by Q LLC.

57. Thus, there is a common financial interest by Q LLC (and the un-named shareholders) in the defendants. The defendant group is managed and marketed as one global firm. There is a common approach to identification and management of any conflicts, as explained by N in his letter dated 19 March 2020.

58. Ms Day submits that barristers are in this position – with common funding, marketing and an interest in each other's success – but they act on opposing sides in litigation as a matter of course. I do not consider that the comparison is apt for at least three reasons. Firstly, unlike the defendant companies, barristers do not share profits and therefore do not have a financial interest in the performance of their colleagues. Secondly, barristers are frequently required to represent unpopular clients or causes. They do not have the luxury of considering a case and then deciding not to accept instructions because the client or case does not fit their corporate image. Thirdly, and perhaps most importantly in the context of this case, it is common knowledge that barristers are self-employed individuals working from sets of chambers and that different barristers from a set of chambers may act on opposing sides. In this case, the defendants did not inform the claimant that they might take instructions to act both for and against the claimant in respect of the dispute. If they had done, the claimant would not have instructed the defendants. That is clear because when the defendants asked whether the claimant objected to it acting for the third party on this dispute, the claimant objected.

59. In those circumstances, I accept Mr Stewart's submission that it is unrealistic to conclude that any duty of loyalty is limited to the first defendant; it is owed by the whole of the defendant group.”

29. The judge went on at [60] – [61] to find that SCL, SIUL and SAL, all being part of the Secretariat group, were in breach of the fiduciary duty of loyalty. She distinguished the issue of confidential information and said that “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.”
30. The judge dealt with the existence of the conflict at [61]. She noted that SCL was advising and assisting the respondent in the formulation and presentation of its defence to the sub-contractor’s claims in Arbitration 1, including the provision of advice, analysis and opinions as to the cause of the delays to the project. She noted that in Arbitration 2, the respondent was seeking to pass on to the third party the claims for delay and disruption arising from the late provision of the IFC Drawings. She concluded:

“The arbitrations are concerned with the same delays and there is a significant overlap in the issues. There is plainly a conflict of interest for the defendants in acting for [the respondent] in [Arbitration 1] and against [the respondent] in [Arbitration 2].”

The judge therefore continued the injunction, which has prevented SIUL from doing any further work in Arbitration 2.

4 THE ISSUES

31. As a result of the careful refinement of the issues by Mr Hollander QC and Mr Stewart QC up to and during the course of the appeal hearing, the issues are now rather different to those canvassed before the judge. I would summarise them as follows:
- (a) Issue 1: Did SCL owe a fiduciary duty of loyalty to the respondent?
 - (b) Issue 2: If not, did SCL owe a contractual duty to the respondent to avoid conflicts of interest?
 - (c) Issue 3: If so, was that duty also owed to the respondent by other Secretariat entities?
 - (d) Issue 4: If so, was there a conflict of interest as a result of SCL’s engagement in Arbitration 1 and SIUL’s subsequent engagement in Arbitration 2?
32. As noted above, as the parties asked her to do, the judge considered first whether SCL owed a duty of loyalty to the respondent and then went on to analyse whether or not, in those circumstances, SIUL and SAL owed a similar duty. In his written skeleton argument Mr Hollander, who did not appear below, said that this looked at the issue through “the wrong end of the telescope”. He maintained that, since it was the third party’s engagement of SIUL which had triggered the debate, the primary question was whether or not it could be said that SIUL owed the respondent any relevant duty.
33. Mr Hollander is quite right to say that it is the position of SIUL which will, ultimately, be of significance in the resolution of this dispute. However, it seems to me sensible to follow the general course adopted by the parties and the judge below. After all, if SCL did not owe a relevant duty to the respondent, then, on any view, it follows that SIUL

and SAL could not owe such a duty. It is axiomatic that the injunction can only be sustained if, in the first instance, this court concludes that SCL owed a relevant duty to the respondent.

5 THE LAW

5.1 No Direct Authority

34. The parties are agreed that there is no English authority on the issue of whether an expert owes a fiduciary duty of loyalty to his client. Accordingly, I summarise briefly the authorities which may be of some relevance under four headings below, namely those concerned with fiduciary duties (section 5.2 below); confidential information (section 5.3 below); conflicts of interest (section 5.4 below); and experts generally (section 5.5 below). Before doing that, however, I note the two cases (one Australian, one Irish) in which the issue of an expert owing a fiduciary duty arose tangentially.
35. The Australian case is *Wimmera Industrial Minerals Pty v Iluka Midwest* [2002] FCA 653. The case is of very limited assistance in the present appeal. The claimants in a patent dispute sought to restrain the other side from conferring with or using an expert in subsequent litigation because the expert had previously done some consultancy work for them in what they said was a fiduciary capacity. The judge looked at the relevant contract and found no provisions which suggested “a duty of loyalty such as that applicable to solicitors”. There was no provision or undertaking in connection with conflicts of interest. Furthermore the judge found that no duty could be implied on the facts, because the expert and his firm “were independent contractors performing specific work” and that the claimants knew that he was doing work for the respondent in the very area of research in which he was also working for them.
36. The Irish case is *Sweeney v The Voluntary Health Insurance Board* [2020] IECA 150. In that case, the plaintiffs challenged the refusal by the defendant, VHI, to approve a proposed new hospital. The plaintiffs engaged as an expert a Professor McDowell. VHI objected on the basis that Professor McDowell was and continued to be retained by them as an economic expert in two other competition law actions brought against VHI relating to the non-approval of private hospitals. The uncontested evidence was that Professor McDowell “obtained significant insight into the operations of the VHI... and that highly sensitive, privileged and confidential material related to the proceedings and their defence” was provided to him in connection with the related proceedings. In those circumstances, the court concluded that there was a significant conflict of interest, and VHI accepted that, in consequence, if he continued to work for the plaintiffs, Professor McDowell could no longer work for them: see [91]-[93] of the judgment of Maurice Collins J.
37. The judge dealt briefly with the possibility of Professor McDowell owing VHI a fiduciary duty, even though neither side were alleging the existence of any such duty. He said:

“95. In this context, it will be recalled that, in *Bolkiah*, Lord Millett suggested that, if the plaintiff was still a client of KPMG, KPMG would have been disqualified from acting for the BIA “*based on the inescapable conflict of interest which is inherent in the situation.*” Such disqualification, Lord Millett explained, would have had “*nothing to do with the confidentiality of client information*” but would have followed directly from KPMG’s fiduciary position. As the Plaintiffs point out, the fiduciary character of the relationship

between solicitor and client also appears to have been a critical part of the analysis of the Canadian Supreme Court in *Strother* also.

96. The Plaintiffs submit that a fiduciary relationship does not exist between an expert and a client. The VHI does not in fact contend that there is such a relationship. It may be that the relationship between client and expert witness has certain characteristics of such a relationship (for instance, it would be surprising if an expert witness could properly use information provided to them to make a secret profit). But any finding that the relationship between an expert witness and principal is fiduciary in character would have far-reaching implications. It would put an expert witness in an impossible position: torn between their fiduciary obligations to their principal and their overriding duties to the court. That point is made by the Plaintiffs and, in my opinion, it is a compelling one.”

38. Again, it does not seem to me that these observations advance matters very far, particularly as the possibility of a fiduciary duty of loyalty was not argued by either side. There was no conflict of interest term in either of the professor’s retainers. I would however agree with the judge’s observation that the relationship between a client and an expert witness does have at least some characteristics of a fiduciary relationship (in particular an obligation of loyalty), even if it is not itself a fiduciary relationship.
39. One final point should be made about *Sweeney*. It is one of only two authorities – the other being *Akai*, referred to at paragraphs 51-53 below – in which the court grappled with the problem of two live expert retainers which gave rise to a conflict of interest. It was accepted by both the respondents and the judge that Professor McDowell could not act for both sides in two separate but overlapping disputes. As we shall see in *Akai*, although the position was rather more complicated, a similar result eventuated there. In the present case, the respondent submits that, contrary to the approach adopted in *Sweeney* and *Akai*, Secretariat was, until restrained by the injunction, acting both for and against the respondent in different arbitrations concerned with the same project and the same or similar subject matter.

5.2 Fiduciary Duties

40. Fiduciary duties normally arise in certain settled categories of relationship, such as between a trustee and a beneficiary, or a solicitor and his client or the agent and his principal. It is exceptional for fiduciary duties to arise other than in those settled categories: see Leggatt LJ in *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [157]. Whilst fiduciary duties may exist outside such established categories, the task of determining when they do is not straightforward because there is no generally accepted definition of a fiduciary. In the same case at [159], Leggatt LJ said:

“159. Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party’s decision-making: see Lionel Smith, “Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another” (2014) 130 LQR 608.) 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. They are also liable to account for any profit obtained for themselves as a result of their position.”

41. An argument that has arisen in some of the authorities is whether there is a fiduciary relationship because there is a high degree of mutual trust and confidence between the parties. However, Leggatt LJ was at pains to point out at [163] that the existence of trust and confidence is not sufficient by itself to give rise to fiduciary obligations. He went on at [165] to emphasise the particular kind of trust and confidence that was characteristic of a fiduciary relationship. He said it was “founded on the acceptance by one party of a role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes trust and confidence in the loyalty of the decision-maker to put aside his or her own interests and act solely in the interests of the principal.”
42. Although we were referred to a number of other authorities on the question of fiduciary relationships, such as *Glenn v Watson* [2018] EWHC 2016 (Ch), and *Ranson v Customer Systems* [2012] EWCA Civ 841, they did not seem to me to add anything material. I note that this court in *Ranson* at [25] – [26] also stressed the importance of the terms of the contract in identifying whether there is a fiduciary relationship, a point picked up by the learned editors of *Jackson and Powell on Professional Liability*, 8th Edition, at paragraph 2-146.

5.3 Confidential Information

43. A number of the authorities concerned the alleged risk that confidential information gained in the past due to a professional’s retainer by his original client might then be utilised much later when the same professional is retained by somebody else (what is sometimes called “former client conflict”). Unlike the present appeal, they are not cases where the focus was on a conflict of interest, because they were not cases of simultaneous engagement. For these reasons, they are not of direct relevance to the present dispute. I note the headline authorities below.
44. The leading case is *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222. The House of Lords concluded that where accountants providing litigation services were in possession of information confidential to a former client which might be relevant to a matter in which they were instructed by a subsequent client, the court should intervene to prevent the information from coming into the hands of anyone with an adverse interest, unless it was satisfied that there was no real risk of disclosure. Lord Millett noted at 234 H that the case was concerned with an intervention by a former client; “it is otherwise where the court’s intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position”.
45. In *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch), both sides tried to instruct the same expert. The claimant tried first and failed;

the defendant tried later and succeeded. The confidential information which formed the basis of the claimant's action had been conveyed when the claimant had first tried to instruct her. On the facts, Mann J concluded that the full rigours of the *Prince Jefri* test did not fall to be applied ([33]). A similar result eventuated in *A Lloyds Syndicate v X* [2011] EWHC 2487 (Comm) where the complaint was again put by reference to confidential/privileged information and a distinction was drawn between the limited nature of the expert's task, and the much broader support services being provided by the defendant in *Bolkiah*.

46. Slightly closer to the present situation (albeit concerning solicitors and therefore a clear fiduciary relationship) is *Georgian American Alloys Inc v White & Case LLP* [2014] EWHC 94 (Comm). The New York office of White & Case acted for the claimant group of companies (owned and controlled by K and B) and carried out far-reaching investigations into them and their businesses. London and Moscow offices of White & Case were instructed by P in connection with his claims against K and B in the Commercial Court in London. White & Case concluded that there was no conflict of interest. The judge disagreed, and an injunction was granted to prevent White & Case from acting in the Commercial Court proceedings. Field J held:

“81...The *Bolkiah* test is satisfied if, *inter alia*, the interest of the other client in the new matter is, *or may be*, adverse to the client seeking the injunction, and the burden of proof on the claimant is not a heavy one. Thus, bearing in mind that the duty on White & Case was an unqualified one to keep the information confidential and not, without the consent of the Claimants, to make any use of it or to cause any use to be made of it by others otherwise than for the Claimants' benefit, I conclude that the Claimants' interests are adversely affected for the purposes of the *Bolkiah* test by reason of their joint majority shareholders being adversely affected by the action. If this approach be wrong, I would hold that White & Case owed to Mr Bogolyubov and Mr Kolomoisky the same duty to keep the information identified in paragraph 79 confidential as they owed to the Claimants and that, for the purposes of the *Bolkiah* principles, Mr Bogolyubov and Mr Kolomoisky are to be treated as White & Case's clients on the Optima Engagement together with the Claimants...

87. Accordingly, I conclude that White & Case have failed to discharge the evidential burden on them as to risk and in consequence I find that there is a real risk that: (i) the confidential information in issue came into the possession of some of the Pinchuk Team in the period April 2011 to 13 March 2013; and (ii) accordingly, use of that information (at least inadvertently) has been or will be made in the Commercial Court action.”

5.4 Conflicts of Interest

47. We were referred to a number of authorities concerned with conflicts of interest, and Mr Stewart took us to extracts from *Conflicts of Interest* by Hollander and Salzedo, 6th Edition. I found those helpful, particularly the section dealing what the learned authors call 'existing client conflict'. At paragraph 1-003, they say:

“The first type of conflict is an *existing client conflict*. The professional who acts for two clients at the same time will normally owe fiduciary duties to both. The precise scope and extent of the fiduciary duty may depend upon the terms of the retainer, but the most notable feature of the fiduciary duty is an obligation of loyalty. Where the professional is asked to act at the same

time for two clients whose interests conflict in relation to the subject-matter of the retainer, the fiduciary obligations of loyalty owed to each will clash, and there is an existing client conflict. If he accepts instructions for both, he will then be in breach of fiduciary duty to one or both clients and unable to carry out his obligations to both. The conflict is a conflict of the firm, partnership or company and not merely of the individual partner. For this reason, the conflict extends beyond the individuals within the firm who act for the client to the firm itself. It follows that to accept instructions for a second client where there is a conflict of interest gives rise to an automatic breach of fiduciary duty unless both clients have consented. Even when both clients have consented, there will be circumstances in which the professional cannot act, or continue to act, because he would be professionally embarrassed in doing so. These principles are nothing to do with whether the professional has obtained relevant confidential information. They are based on the fiduciary obligation of loyalty.”

48. It is to be noted that this passage does not distinguish between different types of professional people (solicitor, advocate, expert) and the relationship they may have with their client. There appears to be a general acceptance in the above passage that a fiduciary duty may – depending on the facts - be owed by a professional to his or her client.
49. *Marks and Spencer Group PLC v Freshfields* [2004] EWCA Civ 741 was a case in which the Court of Appeal upheld the grant of an injunction against Freshfields from acting as solicitors for a consortium of organisations that were making an offer to acquire Marks and Spencer, in circumstances where Freshfields had acted in the past for Marks and Spencer in connection with a number of unrelated transactions. The court concluded that an objectionable conflict of interest could arise even though different transactions were involved. The court had to consider whether in all the circumstances there was a conflict of interest which prevented Freshfields from acting for the consortium. The court concluded that, on the facts, there was sufficient evidence for the judge to be able to conclude that there was a conflict of interest, such that the retainer was inappropriate.
50. Although the principal issue in *Rowley v Dunlop* [2014] EWHC 1995 (Ch) was also concerned with an alleged conflict of interest, the debate arose in a different context and much later in the litigation. The defendant sought to strike out the claim on the basis that the claimant’s expert’s report was inadmissible as a result of an alleged conflict. David Richards J (as he then was) made clear that such an issue went to the weight to be given to the expert evidence, but did not give rise to a legitimate ground to strike out the entire claim.
51. Finally in this run of authorities, we were referred to *Akai Holdings Limited v RSM Robson Rhodes LLP* [2007] EWHC 1641 (Ch). There, Akai engaged Robson Rhodes to act as their experts and provide litigation support in connection with a claim against their former auditors, Ernst & Young. There was a provision in the contract concerned with conflicts of interest set out at paragraph [4] of the judgment of Briggs J (as he then was). The material part read as follows:

“4. ...Conflicts.

We confirm that we have undertaken searches and are not aware of any conflicts that will prevent us from undertaking this assignment. Notwithstanding clause 17 of the terms [that is a reference to the standard terms] we will not undertake any

act or enter into an engagement that would or might put us in a position of actual or perceived conflict.”

52. Ernst & Young subsequently retained Grant Thornton to provide the same litigation support services in defence of the claim (although the proposed expert himself was an individual unconnected to Grant Thornton). The difficulties arose because there was then a proposed merger between Robson Rhodes and Grant Thornton. Akai objected and refused to allow Robson Rhodes to resign. The alleged conflict of interest between the two separate support teams threatened the merger. Briggs J concluded that there would be a clear conflict of interest between the support teams, saying at [46]:

“46 ...It is true that the standard clause 17 is on its faced (sic) concerned with the double employment type of conflict. By drawing attention to the risk of it arising and setting out a procedure for dealing with it, it assumes that the conflict between two clients arises after Robson Rhodes has begun acting for both. It does not permit Robson Rhodes to accept a retainer from a client whose interests already conflict with those of an existing client. By clause 17’s silence about conflict between interest and duty does not, in my judgment, mean that a duty on Robson Rhodes to avoid that type of conflict was not to be implied in the retainer, especially in a retainer which prohibited Robson Rhodes from early termination without Akai’s consent save in circumstances not of Robson Rhodes’ making.”

53. In my view, this makes it plain that Briggs J construed the contract as preventing the sort of conflict which arose inadvertently in that case but (at least on the respondent’s case) arose rather more deliberately here.

5.5 Experts Generally

54. Two out of the many authorities cited in relation to experts generally should be noted, together with two construction cases addressing particular issues relating to delay. First, reference was made to the decision of the Court of Appeal in *Harmony Shipping v Saudi Europe Line Ltd* [1979] 1 WLR 1380. In that case, a handwriting expert had had a consultation with those advising the plaintiffs and was subsequently approached by solicitors acting for the defendants. He did not realise that he had already given an opinion and he gave them an opinion too. When he realised what had happened, he informed the defendants’ solicitors that he could not accept further instructions. The defendants issued a subpoena and the plaintiffs sought to have it set aside.
55. The Court of Appeal agreed with the defendants. They said there was no property in a witness; that there was no contract between the plaintiffs and the handwriting expert to the effect that he would not voluntarily assist the defendants; and that accordingly the defendants were entitled to a subpoena. In his judgment, Cumming Bruce LJ was at pains to point out the “very peculiar facts of the case”. I respectfully agree with that. Furthermore, given that there was no contract, and no point taken as to either conflict of interest or confidential information, it seems to me to be an authority of limited utility.
56. Of much greater relevance is the decision of the Supreme Court in *Jones v Kaney* [2011] UKSC 13. That was the case in which the expert’s immunity from suit was abolished. In the course of his judgment, Lord Phillips drew a close comparison between expert witnesses and advocates. He said:

“46. In *Hall v Simons* at p 698 Lord Hoffmann, when comparing the position of an expert witness to that of an advocate, said that a witness owes no duty

of care in respect of the evidence that he gives to the court. His only duty is to tell the truth. That statement may be true of a witness of fact, but it is not true of an expert witness. Lord Hoffmann was wrong to distinguish between the expert witness and the advocate on the basis that the latter is the only person who has undertaken a duty of care to the client.

47. In some circumstances the difference between an immunity from suit and an absence of legal duty can be readily appreciated. Diplomatic immunity, which can be waived, is an example. In this case the distinction is more elusive. There was a time when it might have been possible to argue that there was a difference between the duty owed by an expert witness to the client who retained him and a conflicting, and overriding, public duty owed by the expert when giving evidence in court; that the former obliged the expert to put forward the best case for his client whereas the latter involved a duty to be candid, even at the expense of his client. The existence of such a difference is implicit in the provision of CPR 35.3 which states that it is the duty of experts to help the court with matters within their expertise and that this duty *overrides* any obligation to the person from whom the experts have received their instructions or by whom they are paid. Such a distinction lends force to the argument that, once the expert is providing evidence to the court, or preparing to do so, he is no longer bound by a duty to his client and thus cannot be held liable for breach of such duty.

48. In *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818 Laddie J, at p 841, quoted from an article, "The Expert Witness: Partisan with a Conscience", in the August 1990 Journal of the Chartered Institute of Arbitrators by a distinguished expert who suggested that it was appropriate for an expert to act as a "hired gun" unless and until he found himself in court where

"the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the 'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and other constraints begin to close up on him."

49. Laddie J was rightly critical of the approach of this expert. There is no longer any scope, if indeed there ever was, for contrasting the duty owed by an expert to his client with a different duty to the court, which replaces the former, once the witness gets into court. In response to Lord Woolf's recommendations on access to justice the CPR now spell out in detail the duties to which expert witnesses are subject including, where so directed, a duty to meet and, where possible, reach agreement with the expert on the other side. At the end of every expert's report the writer has to state that he understands and has complied with his duty to the court. Where an expert witness is retained, it is likely to be, as it was in the present case, on terms that the expert will perform the functions specified in the CPR. The expert agrees with his client that he will perform the duties that he owes to the court. *Thus there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court.* Furthermore, a term is implied into the contract under section 13 of the Supply of Goods and Services Act 1982, that the expert will exercise reasonable skill and care in carrying out the contractual services. (Emphasis added)

50. Thus the expert witness has this in common with the advocate. Each undertakes a duty to provide services to the client. In each case those services include a paramount duty to the court and the public, which may require the advocate or the witness to act in a way which does not advance the client's case. The advocate must disclose to the court authorities that are unfavourable to his client. The expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests. The expert witness has far more in common with the advocate than he does with the witness of fact.”

57. Given that the subject matter of Arbitrations 1 and 2 concerned delay, a word should be said about delay experts. Delay experts are usually construction professionals with a quantity surveying background. The line between time and money is notoriously blurred and, in construction arbitrations, it can disappear altogether. Rather like accountants in some types of commercial dispute, it is not always easy to discern what specialist expertise, if any, they bring to bear on the issues in dispute. But that usually does not matter very much because delay experts have a very different function to that of more conventional experts. They are there to collate the myriad information relating to delay and quantum during the preparation of the case and, as a key component of the client's arbitration support team, to focus on the particular factual matters which are going to be important to any consideration of the delay claims and cross-claims. By the time they produce the reports themselves, a long way down the line, the subject matter of those reports will reflect the detailed sifting and assessment exercises which have gone before. In *Van Oord v All Seas UK Limited* [2015] EWHC 3074, I observed, a little unfairly perhaps, that delay experts' reports “are simply vehicles by which the parties reargue the facts”.
58. Finally, I should mention *Beumer Group UK Limited v Vinci construction UK Limited* [2016] EWHC 2283 (TCC). Although that was not a case about experts, it was a case where one party - there, the claimant sub-contractor – was ‘looking both ways’ in two simultaneous delay adjudications. The claimant was defending himself in one adjudication against allegations of delay by the defendant main contractor, whilst making contradictory delay allegations against its own sub-sub-contractor in the second adjudication. The same adjudicator was appointed in both adjudications but he failed to tell the main contractor about his subsequent engagement in the claim involving the sub-sub-contractor. Fraser J held that there was a real possibility of bias, with the defendant being unaware that the claimant was advancing factually inconsistent cases on delay at the same time in front of the same adjudicator. A similar feeling of unease arises in the present case, and for the same reasons.

6. ISSUE 1: DID SCL OWE A FIDUCIARY DUTY OF LOYALTY TO THE RESPONDENT?

59. The fact that fiduciary duties are usually found to arise in settled categories of relationship, which have not hitherto been held to encompass the relationship between a professional expert and his or her client, does not mean that the possibility that a fiduciary duty of loyalty was owed in the present case should automatically be rejected. Professional people have often been found to owe a fiduciary duty of loyalty to their client: see paragraph 47 above. It does not follow that, simply because there has never been a case in which such a duty was asserted and found, no such duty can exist. However, the lack of any prior authority is a factor which this court must bear in mind.
60. Mr Hollander's principal objection to the finding of a fiduciary duty in this case was that, because of the overriding duty that an expert undoubtedly had towards the court

or arbitral tribunal, that duty would conflict with or negate any fiduciary duty of loyalty. He said that an expert could not put the respondent's interests first, because he or she was obliged to put the interests of the court, or of justice, first.

61. I accept the expert's overriding duty to the court or tribunal: see *Wheeldon Brothers Waste Ltd v Millennium Insurance Co Ltd* [2017] EWHC 218 (TCC). But I do not accept that such a duty means that the expert cannot in law owe a fiduciary duty of loyalty to his client. As Lord Phillips explained in *Jones v Kaney*, there was no such conflict for an advocate. An advocate owes duties to the court but that does not prevent him from fulfilling his obligations to the client. Lord Phillips was clear that there was no similar conflict for an expert.
62. I would go further. On a proper analysis, the expert's overriding duty to the court could be said to be one of the prime reasons why the expert may indeed owe a duty of loyalty to his client. In many cases, the client instructs an expert to provide extensive pre-trial services and then to give expert evidence at the trial. The client wants a frank and honest appraisal of his case by the expert at the earliest possible opportunity. There is no point in the client spending a good deal of money pursuing or defending a claim if his underlying position is hopeless, but none of his other advisors is prepared to tell him so. The client knows that, because an expert has to stand up before the judge or the arbitrators and say that his report is true to the best of his knowledge and belief, and represents his honest opinion, the expert will only be prepared to do that if he or she has first ensured that the pre-trial work has led to the formation of a position which the expert can support. None of that is contrary to any duty of loyalty: on the contrary, complying with the overriding duty to the court is the best possible way in which an expert can satisfy his professional duty to his client.
63. To that extent, therefore, I respectfully disagree with what was said by the judge in *Sweeney* about the expert being "torn between" two obligations: to the client on the one hand, and the court on the other. That approach is contrary to *Jones v Kaney*: see paragraph 56 above. However, I note that those observations were *obiter* and not based on any argument from either party which suggested that a fiduciary relationship had arisen.
64. However, although I reject Mr Hollander's primary reason for objecting to the finding of a fiduciary duty owed by the expert to his or her client, I would be reluctant to conclude that there was such a duty, which may have many unseen ramifications, unless it were necessary for the disposition of this appeal. That is because the expression "fiduciary" is freighted with a good deal of legal baggage and I can certainly see an argument that it might be inapt to import all of that baggage into a relationship between a client and an expert. The close nature of a fiduciary's relationship with the other party – the need for the fiduciary to be "on his side" (as per *Glenn v Watson*) – does not seem to me the most accurate way of describing what a litigation support professional/expert does and should do when instructed in litigation or a commercial arbitration. It also gives rise (as this case has shown) to an academic distraction which is immaterial to the real issues.
65. 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.

66. For those reasons, I would leave Issue 1 in this way. 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, I do not consider that it is necessary or appropriate to find the existence of a freestanding duty of loyalty in the present case.
67. The remaining issues therefore fall to be considered on the assumption that SCL did not owe a fiduciary duty to the respondent.

7. ISSUE 2: DID SCL OWE THE RESPONDENT A CONTRACTUAL DUTY TO AVOID CONFLICTS OF INTEREST?

68. The relevant terms of the contract are set out at paragraphs 11-15 above. For present purposes, I leave aside the separate question as to whether the clause and the undertaking were binding on all the Secretariat entities or just SCL: that is addressed under Issue 3 below.
69. In my view, the conflicts clause in SCL's retainer had two consequences. By this provision, SCL confirmed that there was no conflict of interest at the time of the agreement, and they also undertook that they would not create any such conflict of interest in the future. On that basis, SCL owed the respondent a clear contractual duty to avoid conflicts of interest for the duration of their retainer.
70. Mr Hollander said that this was not the sort of wide-ranging clause that arose in *Akai* (paragraph 51 above). Although I accept that the clauses here are less wordy, I consider that they have broadly the same meaning and effect as the provision under consideration in the contract in *Akai*.
71. Mr Hollander also argued that the clause in SCL's retainer contained "nothing unexpected" and that it did not add to the obligations that might exist anyway (although he did not indicate what those might be). I was not sure I fully understood the first submission, but I do not agree with the second. Whatever the position at common law, this contractual agreement made it plain that SCL would not *in the future* be involved in or create any conflict of interest until the retainer came to an end.
72. Accordingly, I conclude that SCL owed the respondent a contractual duty to avoid any conflict of interest from May 2019 onwards.

8 ISSUE 3: WAS THAT DUTY ALSO OWED BY THE OTHER SECRETARIAT ENTITIES?

73. The third issue is whether or not the undertaking given by SCL bound all the other Secretariat entities which (on the evidence) all provide the same or similar litigation and arbitration support/expert services.
74. I have identified at paragraphs 7-16 above the background to the conflict of interest clause in the retainer. There was a highly restricted Confidentiality Agreement. Moreover, the clause itself was based on what was known to have been a conflict check carried out in respect of all the Secretariat entities. The wide scope of the conflict check points plainly towards the respondent's construction of the relevant provision. On the face of it, therefore, SCL was giving the undertaking on behalf of all the Secretariat entities, because it was all the Secretariat entities who had been the subject of the conflict check.

75. In support of that conclusion, as the judge noted, there was a good deal of other evidence which confirmed that the entities within the Secretariat group market themselves under that brand name, and that it is “Secretariat International” who are regarded by its clients as their expert, not an individual entity in the Secretariat structure with a slight variant on the basic name and a different limited liability designation. In particular:
- (a) It was ‘Secretariat International’ that appeared on all their email addresses, irrespective of which company in the group the individual worked for. The same brand name – “Secretariat International” - appears in large letters at the top of SCL’s invoices to the respondent, and on the covering letters enclosing them. SCL’s name is in much smaller type at the bottom.
 - (b) Secretariat International markets itself as one global firm, with numerous regional offices round the world. No mention is made in their literature of the different legal entities or any different legal obligations. The opposite impression is given.
 - (c) Thus, when K joined SCL from another international delay litigation support/expert group, the press release said that he would “lead Secretariat’s charge into Asia whilst also contributing to the firm’s ongoing success in the Middle East...Secretariat International is recognised as a global leader in project management and dispute resolution services... Secretariat’s team of experts has extensive experience managing construction projects and resolving disputes of all types and sizes. Our professionals have given testimony on delay, disruption and quantum matters in most major international dispute forums. Secretariat has offices in Atlanta, Hong Kong, London, Los Angeles, New York and Washington DC...”
 - (d) The emphasis in all the Secretariat material is on one international group or company with different offices round the world, not a variety of different companies who were free to act as if they were unconnected one with another.
 - (e) K and M are both part of what the Secretariat International website calls “the Secretariat International team”. They are listed together on that website as “key professionals”. No reference is made to the different entities for which each works, nor is any distinction drawn between them. Again the individuals – who will ultimately be the people giving expert evidence - are presented as being part of one global team.
 - (f) K used the expression “our firm” when referring to SIUL in his letter of 8 October 2019: see paragraph 19 above. The different entities were obviously of no relevance to him on a practical day to day basis. Since “our firm” conducted the conflict check by reference to all its different entities, that was hardly surprising.
76. Just standing back from the evidence, and considering the matter in the round, it would be very surprising if SCL could say that its undertaking to avoid conflicts of interest in the future only bound one particular “office” within the Secretariat “global firm”, and that there was therefore nothing to stop SIUL from accepting instructions which would put it in conflict with SCL. If nothing else, such rigid demarcation between the different entities would have put SCL in breach of the terms of the Confidentiality Agreement, because the Secretariat conflict check of October 2019 and its aftermath told at least SIUL and SAL that SCL had been engaged by the respondent, and even that was prohibited by the Confidentiality Agreement.
77. Indeed, Mr Hollander was obliged to accept that, on his case, there would be nothing to stop SIUL from accepting a retainer from the sub-contractor in Arbitration 1, so that representatives from Secretariat would be acting for and against the respondent in the

same arbitration, despite the respondent's objection. He also suggested that SCL's representation that there was no conflict of interest in March or May 2019 would not have been false, even if SIUL had *already* been engaged by the subcontractor in Arbitration 1. In my view, these are such commercially unrealistic positions that I balk at any suggestion that it could be what the parties intended by the inclusion of this clause in the retainer.

78. Mr Hollander also suggested that, in some way, to find that SCL's undertaking bound SIUL and SAL amounted to 'piercing the corporate veil'. I do not agree. It is a question of contract construction, informed by the factual background. It also reflects the reality of the scope of the conflict check actually undertaken.
79. Finally, although I do not accord it any particular weight, I note the RICS guidance document, *Conflicts of Interest*, dated March 2017. This document was produced and relied on by the Secretariat defendants in the hearing before the judge. Commentary note 3 (which is said to be advisory in nature) has a section headed 'Related Firms'. This points out that, if firms are related, there is an increased risk of a conflict of interest. It goes on to say that conflicts of interest are unlikely to arise if the following criteria are all satisfied:
- “(i) the firms are separate legal entities
 - (ii) there are no directors, partners or employees in common between the firms
 - (iii) there is no direct or indirect fee sharing between the firms and
 - (iv) there is no access to information or common internal data sharing arrangements relating to the area of conflict”.
80. It was originally the Secretariat defendants' case that, adopting these criteria, there was no conflict. Specific denials that they fell into any of these four categories were set out in N's witness statement. But N was obliged formally to amend that statement when it became apparent, by reference to criterion (ii), that there were indeed directors in common. Furthermore, I note that SCL and SIUL are owned by the same company, Secretariat International Inc. The respondent's solicitor's second statement states at paragraph 10 that “fee sharing between the regional entities is done through Secretariat International Inc”, which would suggest that Secretariat have not established criterion (iii) either. It is also likely that (iv) has not been established either, since, simply by way of example, the conflict checks were carried out across all the entities in the Secretariat group.
81. For all these reasons therefore, 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.

9 ISSUE 4: WAS THERE A CONFLICT OF INTEREST IN THIS CASE?

82. In order to address this issue, it is first necessary to identify more precisely the relevant services being provided. In his submissions, Mr Hollander sought to draw a distinction between what he called “a testifying expert”, on the one hand, and a “roving expert” on the other. The gist of his submission was to the effect that SCL (in the person of K) was a testifying expert, and therefore not one with a wider advisory role. He relied on this limited role, both as pointing away from the existence of a fiduciary duty of loyalty, and also away from the possibility of a conflict of interest arising between SCL and

SIUL, who were dealing with quantum issues as well as delay, and who prepared parts of the third party's pleadings.

83. I am not sure that the alleged difference between a testifying expert and a roving expert is a valid distinction in any event but, to the extent that it is, it points up the fact that an expert with a wider advisory role is much more likely to run a risk of creating conflicts of interest than one who just gives evidence at trial or at the arbitration hearing. If the expert is involved in numerous aspects of the preparation of a client's case long before it is presented, then that increases the risk that there will be a conflict of interest with an expert employed by another party to carry out the same or similar wide-ranging role, but this time against the interests of that client.
84. SCL's scope of work is set out in the retainer letters. That makes it clear that K and his team were doing far more than simply 'testifying' at a hearing: of the bullet points outlining the scope of works in the retainer letter at paragraph 11 above, numbers 1, 2, 3, 4 and 7 are not concerned with the giving of evidence but with the wider arbitration support role commonly undertaken by delay/quantum experts.
85. SIUL's scope of work can be illustrated by the fact that long before the pleadings were closed and the issues identified, and therefore long before there was any question of preparing an expert's report, they produced 26 schedules to be read with the third party's particulars of claim. The width of their duties was confirmed by a later letter dated 24 August 2020 in which the third party's solicitors said that SIUL looked at a wide range of documents (although they could not say which) in order to produce the schedules¹. These included the quantum of the delay issues, although they doubtless included many other matters too. On that basis, to use Mr Hollander's terms, both SCL and SIUL could fairly be described as the freest of 'roving experts', and the risk of a conflict of interest was thereby exacerbated.
86. Moreover, that is entirely consistent, in my experience, with what delay/quantum experts are usually engaged to do. They are retained at an early stage to sift through the reams of factual material, looking for particular events on which to focus. The delay expert collates that material and can often save a huge amount of time and resources by focusing the client's litigation support team on the factual issues as to delay which are really going to matter. In construction arbitrations, it would be rare for a delay expert to merely be a testifying expert. The whole purpose of having such an expert, along with his team, is to provide wide-ranging support and advice, in the hope that, ultimately, the case settles and there is no hearing at all.
87. I then turn to consider whether, in the light of the services being provided by SCL and SIUL, there was a conflict of interest between SCL acting for the respondent and SIUL acting for the third party. In my view, for four reasons, there was a clear conflict of interest.
88. First, SCL was advising the respondent in relation to its commercial position in Arbitration 1 as well as giving expert evidence to support that position to the extent that it could. Within the necessary restrictions of its duty to the tribunal, it would be acting for the respondent. If SIUL was then engaged by the third party in Arbitration 2, it would mean that, again within those restrictions, it would be giving advice opposing the respondent.

¹ The application by the respondents to rely on this letter was allowed, even though it post-dated the hearing before the judge, because the letter confirmed beyond doubt what the evidence before her had suggested as to the scope and breadth of SIUL's retainer.

89. Secondly, there is the scope of the third party's role on the project. A project manager acts as the employer's agent or representative on site during the project (indeed the older forms of building contract called the architect 'the employer's agent' and the newer forms call the architect or project manager 'the employer's representative'). As far as any on-site contractor on this project was concerned, the third party was, to all intents and purposes, the employer client. In the evidence, the third party is rightly called the respondent's 'alter ego'. It is impossible to see how the same firm (no matter how many global offices it had) could act for the employer and simultaneously against the employer's representative/agent/alter ego in respect of the same or similar disputes on the same project.
90. Thirdly, 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 third party, they would be giving the third party advice about the design and construction of the same project.
91. Fourthly, one of the critical issues in both Arbitrations 1 and 2 concerns the causes of delay in the design and construction of the project. SCL are giving advice to the respondent about those causes of delay. If SIUL was then engaged by the third party, they too would be giving advice about the causes of the same delays to the third party, and the extent to which such matters were or were not the third party's responsibility.
92. In my view, the overlaps in this case are all-pervasive. There is an overlap of parties, role, project, and subject matter. Take a perfectly plausible scenario. Using Secretariat delay analysis tools, K of SCL could advise the respondent that the third party had been woefully negligent in the issue of the IFC drawings, and the respondent is obliged to settle Arbitration 1 for millions of dollars. That advice from Secretariat then forms the basis of the counterclaim in Arbitration 2. But, purporting to use the same tools, M of SIUL might advise the third party that the counterclaim was fundamentally unsound, and the respondent would incur further millions fighting a Secretariat-backed claim which was wholly at odds with the advice that Secretariat had given to the respondent.
93. Another way to test the conflict of interest that arises in this case is this. If SCL had been approached to act by the third party, then the conflict of interest would have been manifest and SCL would have been in breach of contract if it had allowed itself to be engaged by the third party; for the reasons I have given, the position is not radically different merely because the approach was made to another Secretariat entity instead. Although I have approached these issues by reference to the contractual obligation as to conflicts, I do not consider that this makes any discernible difference to the outcome on this point.
94. A number of further tests of the proposition that this situation gave rise to a conflict of interest, some by reference to external guidance, may also be illuminating. The Solicitors Regulation Authority's current Code of Conduct defines, at rule 6, a client conflict occurring in a situation "where your separate duties to act in the best interests of two or more clients in relation to the same or related matters conflict". The present case concerns the same or related matters, so would qualify as a conflict for a solicitors' firm (see also *White & Case*). There is no reason to reach a different conclusion on the facts here.
95. Another practical test can be found in the 6th edition of *Conflicts of Interest*, by Hollander and Salzedo at paragraph 1-005, footnote 4. The learned authors quote a partner of a well-known city 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, as the judge noted at [58], that is precisely what happened here. The respondent considered the position and decided that they did not like what the third party had asked SIUL to do. That was a reasonable reaction.

96. There is finally the attitude of the Secretariat defendants themselves. They seemed to accept that there was, or might be perceived to be, a conflict of interest here, but sought to downplay it by saying that such a conflict was not “strict” or “true” or “legal”. I do not accept that, in a case like this, it is legitimate to conclude that there was a conflict of interest, but that it was somehow of technical significance only.
97. In all the circumstances, therefore, I consider that there was a conflict of interest.
98. None of this should be taken as saying that the same expert cannot act both for and against the same client. Of course, an expert can do so. Large multinational companies often engage experts on one project and see them on the other side in relation to a dispute on another project. That is inevitable. But a conflict of interest is a matter of degree. In my judgment, the overlaps to which I have referred – of parties, of role, of project, of subject matter - make it plain that in the present case, there was a conflict of interest.

9. BREACH

99. Mr Hollander conceded that if the court found a relevant duty and a conflict of interest, then that would be sufficient to dispose of the appeal. This was not one of those cases which turned on establishing, to the appropriate standard, that there was a risk of confidential information leaking out. There was a breach of the conflict of interest obligation and that was an end of it.

10. CONCLUSION

100. For these reasons, I would dismiss this appeal. I take some comfort from the fact that, in its result, it is consistent with what Lord Millett said in *Bolkiah* in respect of those providing litigation support services; consistent with the results in *White & Case* and *Marks & Spencer*; and supported by the approach to experts (and litigation support teams) in *Akai* and “the reality” (as it was described) in *Sweeney*. It also decides the issue by reference to the terms of the retainer, which is, in my view, a much more satisfactory method than by reference to the more nebulous concept of fiduciary duties.
101. Finally, I should say that I do not consider that this conclusion will have the sort of wide-ranging effects that Mr Hollander hinted at. The result is a reflection of the terms of the original retainer. It is perfectly possible for a group like Secretariat, if it thought it commercially sensible to do so, to make plain that its representations as to conflict of interest and its undertakings for the future were based solely on the entity involved, and that, despite the scope of the conflict check that they had undertaken, no such representations or undertakings were given in relation to any other entity in the Secretariat group.

LORD JUSTICE MALES:

102. I agree with the judgment of Coulson LJ but, because of the interest and novelty of the issue, on which there is no direct authority, I add this judgment of my own.

Arbitral confidentiality

103. In the court below the names of the parties to the arbitrations and the identity of Secretariat were kept private on the ground of arbitral confidentiality. I am doubtful whether that was really necessary, as there has been no need to describe the issues in the arbitrations other than in the most general terms and it has not been suggested that there is anything inherently confidential about them. Be that as it may, however, there is in my judgment no good reason why the identity of Secretariat should not be made public and the interests of open justice require that it should be (cf. *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC at [6]). It would in any event be difficult to explain the issues in this appeal without doing so and fairness to other organisations providing expert services points in the same direction.

Fiduciary or contractual?

104. Much of the argument in this case – perhaps not surprisingly as this was the basis of the judge’s decision – was concerned with whether an expert witness is a fiduciary, owing a duty of undivided loyalty to the party which instructs him. To my mind, however, that issue misses the point. Although there are cases, for example in the context of secret commissions, where it has been said that the term “fiduciary” is used in a loose sense (e.g. *Prince Arthur Ikpechukwu Eze v Conway* [2019] EWCA Civ 88 at [42]), that usage runs the risk of emptying the term of meaning and creating a distraction from the real issue. That is equally true in the case of expert witnesses. 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. To say this, however, does not provide an answer to this appeal and does not tell us anything about the duties regarding conflicts of interest to which an expert may be subject.
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. It is worth noting, however, that the oft-cited case of *Harmony Shipping Co v Saudi Europe Line Ltd* [1979] 1 WLR 1380, famous for the observation that there is no property in an expert witness, was such a case. A handwriting expert was consulted by both parties, and the case was decided by all three judges on the basis that there was no contract dealing with conflicts of interest, either express or implied.

The duty of independence

106. Before coming to the terms of the parties’ contract in this case, I should deal with the submission that the duty which an expert owes to the court or arbitral tribunal effectively negates any duty of undivided loyalty which may be owed to his client. One aspect of an expert’s role in English court procedure is that the expert owes a duty to the court which overrides any obligation to the instructing client (CPR 35.3). What that duty involves is explained in a Practice Direction (CPR 35 PD paras 2 and 3). An expert’s report must comply with the Practice Direction and must contain a statement that the expert understands and has complied with his duty to the court (CPR 35.10). Moreover, the court will generally order the experts to meet after they have each produced a report (in TCC cases the meeting may be at an earlier stage) and to engage

in a constructive discussion with a view to narrowing the issues between them (CPR 35.12). That discussion must be uninfluenced by the wishes or interests of the instructing parties. Permission to rely on expert evidence is given on the basis that the experts will comply with this order and the court may decline to admit the evidence of an expert who has failed to do so (*Mayr v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3669 (Comm)).

107. The duties owed by an expert are further explained in Guidance issued by the Civil Justice Council in August 2014 at paras 9 to 15. The Guidance includes in addition a requirement, at para 16(e), that before an expert is instructed it should be established whether he has a potential conflict of interest. The concept that an expert should not accept instructions if he has a conflict of interest is therefore well recognised in English litigation. The corollary is that once he has accepted instructions, he must not accept fresh instructions from anybody else which will give rise to such a conflict. The principle of public policy to which Lord Denning MR (but not Waller or Cumming-Bruce LJ) referred in *Harmony Shipping*, that (subject to privilege) a contract not to give evidence on a matter within the expert's knowledge would be unenforceable, simply does not arise. If an expert does not accept instructions from a prospective client when he has a conflict, there will be no question of preventing him from giving evidence on matters within his knowledge as he will not acquire the knowledge in the first place.
108. The Civil Procedure Rules do not apply in arbitration and we must not assume that ICC arbitrators will follow English-style procedural rules, even in an arbitration with an English seat. The procedure to be followed in an arbitration, where the parties have not agreed, is for the arbitrators to determine. Nevertheless, it is common practice for international arbitrators to require that experts give independent evidence unaffected by any sense of loyalty or obligation to the party instructing them. For example, the widely used IBA Rules on the Taking of Evidence in International Arbitration (2010) provide that an expert report must include a statement of the expert's independence from the parties, their legal advisors and the arbitral tribunal, together with an affirmation of the expert's genuine belief in the opinions expressed in his report. Similarly, the Chartered Institute of Arbitrators Expert Witness Protocol, on the basis of which K was instructed in this case, contains provisions to essentially the same effect as the Civil Procedure Rules. These are designed to ensure that the expert's evidence is his own impartial, objective and unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to the arbitration.
109. This is not universal practice, even in arbitrations which follow, broadly speaking, English-style procedural rules. For example, when there is an issue of foreign law, some arbitrators prefer that the foreign law experts make submissions as advocates rather than giving evidence as experts. In such circumstances the experts have no duty to be objective and are merely subject to the same professional constraints as apply to counsel. But in this appeal we are concerned with experts whose evidence is required to be independent and objective and who are instructed on that basis. That requirement formed a substantial strand in the arguments before us.
110. However, as explained by Lord Phillips of Worth Matravers in *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398 at [47] to [50], there is no conflict between an expert's duty to the tribunal to give independent and objective evidence and the duty which he owes to his instructing client. On the contrary, it is clearly in the client's interest that the expert's evidence is and is seen to be independent and unbiased and it is typically (as in this case) a term of the retainer that it should be. Such evidence will carry far greater weight than if the expert is perceived to be lacking objectivity. An expert whose evidence is measured and objective, acknowledging the points which can be made on

both sides, and who is prepared to give ground when matters appear in a new light as a result of questioning, will enhance his credibility rather than undermine it. Indeed, a biased expert who is determined to stick to the party line come what may will generally be disastrous for the client's case. The duty to give independent evidence is therefore a duty which the expert owes to his client as well as to the court or tribunal.

Part of the litigation team

111. Typically, however, and notwithstanding the expert's duty of independence and objectivity, the professional expert witness will be viewed, and rightly so, as part of the client's litigation team. There may be exceptions, for example if the discipline in question represents a minor and discrete part of the case. Handwriting experts will sometimes fall into this category. Again, it is worth noting that the expert in *Harmony Shipping* was such an expert and that, despite the wide terms in which Lord Denning MR expressed himself, Cumming-Bruce LJ at 1388H and again at 1389F was careful to confine the decision to "the particular functions, responsibilities and activities of a handwriting expert" and to point out the "very unusual and peculiar facts" of the case. The same may apply to experts on foreign law.
112. In general, however, and particularly when the relevant discipline is of a technical nature, including delay and quantum experts such as we are concerned with here, the expert will be an important resource for the lawyers and others responsible for the conduct of the case. Thus the expert will often be involved in instructing the lawyers as to the technical issues in the case, discussing and liaising with the client's personnel, advising as to the way in which the case should be formulated, attending meetings at which strategy is discussed and advice is given, attending hearings at which the expert will sit as part of the client's team, assisting counsel in the cross examination of the opposing expert, and so on. All this requires, perfectly properly, the development of a close working relationship between the expert, the lawyers and the client.
113. It is, therefore, wrong to draw a sharp dividing line between an "independent" expert witness and a "consulting" expert as the appellants' written submissions seek to do (or between a "testifying" and a "roving" expert as it was put in oral argument: it is not entirely clear whether this is the same distinction, but it does not matter). That does not reflect what usually happens. The role of a professional expert witness will generally fall into both of these categories.

The terms of Secretariat's appointment

114. The terms of Secretariat's appointment in the present case reflect this expectation. Thus K's responsibilities include the provision of "*ad hoc* support to [the client] and its professional team in the arbitration". That support was expressly stated to include the provision of oral and/or written reports of his preliminary assessment of the case, and assistance in making and responding to disclosure requests. Mr Hollander submitted that such support was merely "ancillary" to the writing of an expert report and giving oral evidence at the hearing, but that understates its significance, as demonstrated by what has in fact occurred. Over a period of 10 months Secretariat has invoiced A Co for some US \$700,000 in respect of such litigation support in the relatively early stages of the arbitration.
115. Moreover, the letter of appointment made clear that its description of the expert's anticipated role was given "in the first instance", so that it could be expected to develop as the arbitration progressed. That too is entirely normal. Arbitration is a dynamic process and the scope of an expert's role is not set in stone at the outset. It was, for

example, readily foreseeable by both parties that if A Co had a potential liability for delay as a result of the late release of drawings, it would seek to pass that liability on to the third party who was responsible for producing the drawings, in which event it was also highly likely to instruct Secretariat in any dispute with the third party. To have to instruct a new expert in an arbitration with the third party would involve unnecessary duplication of effort and cost.

116. This is the background to the express term regarding conflicts in the expert's appointment in this case. That term, to which Secretariat signified its agreement, was that:

“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.”

117. At the very least, this meant that Secretariat was not acting for an interest opposed to the client's interest and agreed not to do so in the future while the engagement continued. That duty was independent of any confidential information which it might learn in the course of the engagement. The client was entitled to and did stipulate for Secretariat's exclusive services in the matter for which it was engaged.

118. The real issue in this appeal is how far Secretariat's duty to avoid a conflict extended. It is clear that it extended beyond K himself, the expert who was to give evidence at the arbitration. The terms of the letter of appointment acknowledged that although K was to be responsible for the work undertaken and that this work would not be delegated or sub-contracted, nevertheless it might be necessary or cost-effective to delegate some aspects of the work, in which case K was to inform the solicitors and client and would supervise and review all work carried out by others and take full responsibility for the end product, including the report. Hourly rates were set out for a range of personnel who were expected to work on the case. Consistently with this approach, the letter of appointment was addressed to Secretariat Consulting (i.e. the Singapore company) and was accepted on behalf of that company by K's signature in his capacity as its managing director. It is clear, therefore, that Secretariat Consulting could not accept instructions which would give rise to a conflict of interest.

Was there a conflict?

119. It is submitted by the appellants that the appointment of Secretariat International and M by the third party did not give rise to any such conflict because (1) M was to be instructed in a separate arbitration, (2) he was an expert in a different discipline (quantum as distinct from delay), and (3) he was employed by a different company within the Secretariat group. In my judgment, however, these points carry no real weight in the circumstances of this case.

120. It is true that there are two separate arbitrations, one between the contractor and A Co and the second between A Co and the third party. Both are ICC arbitrations and we were told that there are no arbitrators common to both tribunals. But they arise out of the same Project and the issues, even if not identical, have a very substantial overlap. Indeed, if this were litigation in court, there would be a single set of proceedings. It is clear in those circumstances that the interests of A Co and the third party are directly opposed. Moreover, it was always within the parties' reasonable contemplation that there would or might be a dispute between A Co and the third party and that A Co would wish to expand its instruction of Secretariat to cover any arbitration with the third party. When it accepted instructions to act in the arbitration with the contractor on

the basis that it had no conflict of interest and would maintain this position for the duration of its engagement, Secretariat must be understood as having given this confirmation by reference to the Project as a whole and to have had regard to all those who might reasonably be contemplated as having interests opposed to or inconsistent with the interests of A Co. In other words, it agreed in effect not to accept instructions in any dispute between the client and the third party arising out of the Project.

121. I cannot see that it makes any difference that K is a delay expert while M is a quantum expert. The two issues are closely connected. But even if they were not, Secretariat could not possibly have given the confirmation that it had no conflict of interest in acting for A Co if it had already accepted instructions to act for the third party. That would be an obvious conflict of interest.
122. Finally, therefore, there is the submission that M is employed by Secretariat International, a separate company within the group which is based in a different jurisdiction. In those circumstances the issue is whether the confirmation that it had no conflict of interest and would maintain that position was given only by Secretariat Consulting (the Singapore company) or whether it was given by that company on behalf of the group as a whole. In this regard it is notable that the exchange of emails in which the confirmation referred to in the contract was given was entirely general, and did not mention any company by name, although it did refer to the previously executed Confidentiality Agreement. 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 first notified A Co that the third party was seeking to instruct M, 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.

The consequences

123. Mr Hollander submitted that to construe the contract in this way amounted to piercing the corporate veil and would have serious ramifications for those offering litigation support services as expert witnesses. He suggested that it would be greeted by them with some alarm. Like Coulson LJ, I do not agree. Our decision depends on the way in which this particular group chooses to present itself to present and potential clients, without regard to any corporate veils but rather as a global firm providing expert witness services in a variety of offices in different jurisdictions. But if this is a concern, the solution is simple, as Coulson LJ points out at [101] above. An expert witness group which operates on a global scale with separate subsidiaries in a variety of jurisdictions can, if it wishes, make clear that any conflicts search which it carries out and any undertaking which it gives is limited to the particular company being instructed and does not extend to other companies in the group, which remain free to act for parties opposed to the client in the same or related disputes. Whether, if it does so, it will secure the instruction, is another matter.

Conclusion

124. For these reasons in addition to those explained by Coulson LJ, I consider that the judge reached the right conclusion and would dismiss the appeal.

LADY JUSTICE CARR:

125. I also agree that, for the reasons given by Coulson LJ and Males LJ, the appeal should be dismissed. A central plank of the argument advanced for the Secretariat entities was 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. 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. As Coulson LJ explains at [62] above, an expert who complies fully with his duty of independence and objectivity to the court or arbitral tribunal is an expert who provides his client with the best possible service.