ADR | Partnership
Partners in Alternative Dispute Resolution

Digest

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Welcome

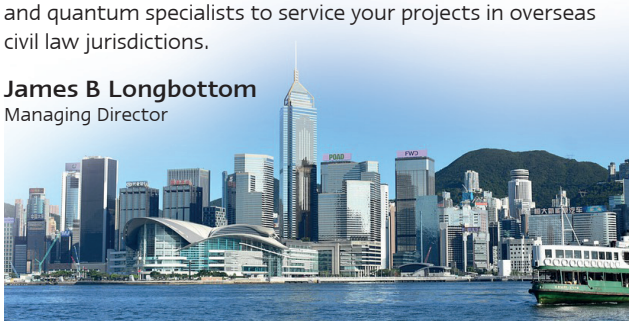
Expert evidence is a dominant feature of most construction disputes and the right expert evidence, given by the right expert, can greatly impact on the result of a case. However, expert evidence can equally go spectacularly wrong with experts falling into a number of familiar traps. We are very pleased to have Benjamin Piling QC, of 4 Pump Court as our guest writer who takes us through these traps and which give the opportunity for cross-examiners to discredit such evidence.

Clauses which prohibit oral variations aim to introduce certainty about when and how a contract can be amended. David Longbottom reviews a series of decisions where contracts have been amended orally or by conduct despite the inclusion of such clauses. He then considers the implications of the recent English Supreme Court's judgement in *MWB Business Exchange Centre Ltd v Rock Advertising Ltd* [2008] where the specified formalities of such a clause were enforced.

In our second guest article, Ian Cocking, Partner and Albert Wong, Associate of Cocking & Co LLP consider whether experts have a fiduciary duty of loyalty to their client and the ramifications of a recent case where it was held that a global firm of experts providing services to different parties in the same dispute gave rise to a conflict of interest and a breach of such a duty.

Finally, ADR is both pleased and excited to announce in the news section the formation of Nimble, a multi-disciplinary alliance of seasoned civil lawyers, contract managers, delay and quantum specialists to service your projects in overseas civil law jurisdictions.

James B Longbottom
Managing Director



Expert Witnesses / Evidence

By **Benjamin Pilling QC**
4 Pump Court

What is expert evidence?

The law student's answer will probably be that expert evidence is evidence of opinion rather than fact; that it is only admissible when the issue on which the opinion is given is not one that the court can form a view on based on its own knowledge and experience; that it must be given by a witness with relevant expertise; that the witness must be independent; and (in many jurisdictions) the permission of the court is required for any expert evidence.

There are many experts' reports which conform perfectly to this, but there are many which don't – particularly in construction cases. Here are three respects in which the reality often does not quite live up to the ideal:

First, experts' reports often contain a mixture of factual evidence and opinion evidence. For example, a report on construction defects will often involve a considerable amount of fact finding (identifying and describing the defects, identifying and exhibiting relevant background factual material) before stating an opinion on the basis of those facts. The law student might assume that all this factual material would be contained in factual witness statements, but the reality may be that it is the expert who has led the process of identifying and documenting the defects.

Secondly, (whisper it quietly) there are some expert reports which do not really contain any genuine opinion evidence, and there are certainly judges who are fond of saying that quantum and delay reports are just dealing with questions of fact. There may be reports of which this is true as a matter

The reason so much money gets spent on expert evidence is simple: the right expert evidence, given by the right expert, can win a case. But the corollary is that when expert evidence goes wrong, it can go spectacularly wrong, and lead to disaster for the client.

of strict analysis, but the reality is that the careful processing of large volumes of factual information in relation to quantum and delay is best managed by experts in those fields; and judges would not find it particularly helpful if the parties' cases on quantum and delay were contained solely in pleadings, factual witness statements and legal submissions, are not subjected to the process of without prejudice meetings and joint statements which normally results in a considerable narrowing of the issues.

Thirdly, there are degrees of independence. If an expert is only instructed after the court or arbitral process has begun, the parties are likely to appoint someone with no previous involvement in the case, or any link to the parties. But in many cases, an expert may have been brought into a project precisely because something has gone wrong. They may have done considerable work producing reports to support contractual claims which are then rejected by the Engineer. In subsequent litigation or arbitration, the contractor may legitimately retain that expert (with their accumulated knowledge of the case), even though it may be suggested that their prior involvement in some way impacts on their independence.

Expert evidence is a dominant feature of most construction cases, and the dominating feature of many, and in larger cases expert evidence may be required in many different disciplines. The expert evidence is likely to absorb a very significant proportion of the budget for a case, particularly because the production of a report normally involves a lot of time on the part of the party's lawyers, as well as the experts themselves.

The reason so much money gets spent on expert evidence is simple: the right expert evidence, given by the right expert, can win a case. But the corollary is that when expert evidence goes wrong, it can go spectacularly wrong, and lead to disaster for the client.

And so, if a party is well advised, a huge amount of care and effort will go into the expert process, beginning with the identification of the issues requiring expert evidence and the selection of experts, through to the moment the expert steps out of the witness box.

Counsel – including leading counsel – may be involved in all stages of the expert process, but their most prominent role is in the cross-examination of the expert.

Cross-examination ought to be an unequal battle. Counsel is likely to have conducted the cross-examination of experts many more times than the witness has been cross-examined. Counsel has the advantage of selecting the topics on which questions will be asked; can control the extent to which documents are shown to the witness (and when they are shown to the witness); and can carefully structure a sequence of questions designed to make the ultimate proposition difficult for the witness to resist without appearing unreasonable. An enormous amount of time and effort goes into the preparation of cross-examination which is very difficult for the witness to "match" with their own preparation.

But, despite this uneven playing field, there are experts who are incredibly tough to cross-examine. They tend to be temperamentally calm (not argumentative), and to speak clearly at a steady pace. (There is a lot of "craft" involved in being a successful expert, just as much as there is in being a successful advocate, and steady, clear delivery is an important part of that craft.) They tend to have a gift for explaining difficult concepts in language that a lay person can readily understand. (A senior silk that I used to work with as a junior used to tell experts that they needed to explain their opinion in language that could be understood by an intelligent eight year old.) They tend to be mentally agile; are able to pick up where a line of questioning is going; and able to see and evaluate the premise of an awkward question. They tend to confine their opinions to topics about which they are genuinely expert. They don't defend the indefensible. They have a clear understanding of the role of an expert and don't stray beyond it. They can put themselves in the position of the Tribunal, and understand what the Tribunal needs from them. They know their reports inside out, backwards and upside down, including the content of the most obscure appendix.

But more often, one finds that an expert has fallen into one of a number of familiar traps, either of his/her own volition, or because he/she was pushed into it by the legal team. I will focus on five traps which give the cross-examiner the opportunity to do some damage.

Trap 1: The Inverted Pyramid of Piffle

This is a memorable phrase coined by Boris Johnson which captures a situation where an expert has produced a huge edifice of a report which, on analysis, is based either on a vanishingly small data set, or a body of data which is intrinsically unreliable.

This is not something which an expert is likely to lay bare in the report – it's more likely that the point will be disguised (perhaps not concealed) by a certain amount of surrounding analysis and science. But it is something which the cross-examiner ought to be able to expose. Counsel are by nature pedantic and dogged and trained to follow an expert's train of thought through from beginning to end, and if the foundation of an opinion is insubstantial or non-existent, that will be revealed through a competent cross-examination.

To give a real life example, I cross-examined a corrosion expert whose evidence supported a claim for a £40m remedial scheme to deal with corrosion in an offshore installation. His report was impressive and detailed, but when you peeled away the layers of analysis, what was revealed was that the only evidence of corrosion was a single pit on a single test coupon.

Trap 2: Eureka!

We all experience those moments when a light bulb seems to illuminate in our brains, and we have a moment of clarity about how to unlock a problem which has seemed intractable for months.

We have probably also all experienced the sense of deflation, after about five minutes' conversation with a colleague, when

we realise that what had seemed like inspiration in fact has an obvious flaw.

The difficulty that an expert faces is that these moments of inspiration can strike at moments of extreme stress such as being in the witness box, where the expert can't have a quiet chat with a colleague to test whether the idea is as good as it sounds. That makes them very dangerous moments for the expert, who may quickly find themselves in a tangle or back tracking, which can make such a poor (and perhaps unfair) impression on a tribunal.

Trap 3: The Devil is in the Detail

It is common for an expert's report to identify a number of junior professionals who have assisted in the production of the report, but to say that the opinions expressed in the report are all those of the expert who is giving the evidence.

There is nothing wrong with this in principle, and it may be particularly necessary to take this approach where the report involves analysis of large volumes of data or other factual evidence. (Where the expert is very grand, it may be that the only basis on which he/she will accept the instruction is if there is a team of assistants in place to crunch the data and do the underlying analysis.) But there is a danger, particularly with very senior (and busy) experts, that they can go into the witness box without knowing the four corners of their report, which can lead to utter disaster.

Large spreadsheets tucked away in appendices are a particular danger. If an expert is asked to explain a particular formula in a spreadsheet, it will be completely obvious to the tribunal if he/she is having to work out how the formula works for the first time. Even worse, is the situation in which an expert is unable to explain what the source of a figure is, and then has to explain that a more junior member of the team produced this particular appendix and that he or she cannot explain it. That is one of the occasions when the witness box feels like a deeply lonely place.

This sort of evidence is very damaging. It undermines the particular spreadsheet or appendix (which may be more or less important), but risks tainting the whole report, and undermining the expert in the eyes of the Tribunal.

It seems almost unbelievable that an experienced expert can make themselves vulnerable to this sort of cross-examination, and yet – either through pressure of work or hubris – it happens surprisingly frequently.

Trap 4: Overreaching

Most readers will be familiar with instances where an expert is put under pressure by his or her own legal team to advance opinions on matters which are at the margins of his or her comfort zone, if not simply beyond his or her area of expertise.

It is easy to understand how this comes about. It is not always clear, at the stage when an expert is first instructed, exactly what the scope of the expert evidence is going to be. Sometimes the case takes a particular turn, and it becomes apparent that an opinion is required on a particular issue which isn't really within the existing expert's specialism. The lawyers now face a difficult choice. It may be procedurally difficult and expensive to bring in another expert; and easier to try to persuade the existing expert to stretch a point, and deal with the new issue even though it may strictly be beyond his or her area of true expertise.

There may be cases where it is reasonable for the expert to deal with such a point, provided the opinion is put in appropriate terms. But extreme care is required. In one of my cases, an expert structural engineer was giving evidence to support an allegation of negligence against the designers of foundations of offshore wind turbines. The case involved a very refined allegation in relation to a highly specialized area of engineering. The expert was undoubtedly a very experienced engineer, with a lot of experience of working as an expert, but five minutes of cross examination about his CV revealed that he had no personal experience at all of designing foundations for offshore wind turbines, rendering irrelevant his opinion about what was or was not reasonable practice within the profession.

This was an extreme case: the expert was lacking experience in relation to the central question on which he was giving evidence. It is more likely that an expert will be persuaded to give evidence on some more minor issues which are a bit beyond the scope of his or her expertise. But this can still be very damaging, since the impression that an expert is willing to stray from his or her core expertise may taint him or her in the eyes of the tribunal, and undermine other parts of the report which may, in substance, be sound.

Trap 5: Black is White

The final area I want to touch on is where the expert finds himself or herself trying to defend the indefensible in the witness box. In most of the cases I have seen this happen, I suspect it was the product of a stubborn client, a forceful solicitor or barrister and an inexperienced (or possibly weak) expert.

My educated guess is that what happened was that the expert wasn't comfortable supporting the client on a particular point, but was persuaded to "keep the point alive" for the time being. Somehow the point never got re-evaluated, and was still there in the report when the witness entered the witness box, with predictable consequences.

I want to make two points about this situation. The first, is that salvation for the expert may lie in the process of producing a joint statement. Significant concessions can be made in joint statements with surprisingly little fanfare or consequential cross-examination. Once a concession is made, most counsel will want to focus their cross-examination on areas which remain in dispute, rather than worry away at points which have been conceded, just to score points. If they do cross-examine on concessions, they are likely to irritate the tribunal.

The second point is about the difficulties of hot tubbing when an expert is maintaining an indefensible point. A thick-skinned expert may be able to brazen out a difficult cross-examination without blushing too much. But the same expert may find it surprisingly difficult to maintain the same composure in the hot tub with a colleague smiling wryly alongside.

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Clauses Which Prohibit Oral Variations – Are They Worth the Paper on Which They Are Written?

By **David Longbottom** Director
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Variation clauses in construction contracts are commonplace. However, limits on ordering variations are sometimes put in place (especially in Hong Kong), such as 'no variation' and 'anti-oral variation' clauses; see for example, *GCC for Civil Engineering Works*, 1999 Edition, Clause 60(2) which provides:

> *"No variation shall be made by the Contractor without an order in writing by the Engineer...."*

The aims of such clauses are to introduce certainty, about when and how a contract can be amended, and to avoid false or frivolous claims by a party that a contract may have been amended.

Whether, and to what extent, 'no variation' and 'anti-oral variation' clauses are effective (i.e.: whether they ensure that a contract can only be amended after the specified requirements are complied with) is important in contracts intended to apply over a significant duration such as construction contracts.

In *C&S Associates UK Limited v Enterprise Insurance Company Plc* [2015] EWHC 3757 (Comm) exchanging e-mails signed-off by persons with the relevant authority was found to be compliant with a variation clause which stated:

> *" Any variation of this Agreement shall not be effective unless made in writing and signed by or on behalf of each of the Parties to this Agreement."*

It would not be amiss therefore, to consider that such a clause, requiring something "in writing", requires exactly that – something in writing; however, the effectiveness of these clauses, which are designed to add certainty, was uncertain. This uncertainty stems from the view that it is still possible for parties to vary a contract orally, and so circumvent the 'anti-oral variation' mechanism, on the basis of the principle of freedom of contract (i.e. parties should be free to reach agreements with one another as they wish).

"The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct."

Lord Justice Beatson

Recent decisions showed that contracts can be amended orally or by conduct despite such clauses; then, in 2018, came the Supreme Court's judgement, seemingly turning the situation around and reversing the Court of Appeal's previous decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*.

Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396

TRW Lucas Varity Electric Steering Ltd ("Lucas"), produced electric power-assisted steering systems for cars. Globe Motors Inc ('Globe') designed and manufactured component parts for these systems.

In June 2001, Lucas entered into a contract with Globe to purchase electric motors. Globe Motors Portugal (the second respondent) was not a named party to the Agreement, but supplied 'Gen 1' motors to Lucas.

On 23 February 2003, Lucas appointed a third party, Emerson, as the sole supplier for the development and production of second generation motors, 'Gen 2' motors. From around 2005, Lucas purchased around three million 'Gen 2' motors from Emerson.

In 2011, Globe commenced proceedings for breach of contract against Lucas.

In 2014, HHJ Mackie QC in the High Court considered that Lucas's purchase of 'Gen 2' motors from another manufacturer (Emerson) was a breach of the exclusivity agreement between Lucas and Globe.

Six issues were raised by Lucas on appeal. Relevant here is the issue of whether the Agreement was varied by conduct so that Globe Motors Portugal (not a named party to the Agreement) became a party to the Agreement and therefore had a right of action against Lucas. Hence where the Agreement expressly required that any agreement had to be recorded in writing and signed by the parties became a relevant consideration.

Article 6.3 of the Agreement provided that:

> *"6.3 Entire Agreement; Amendment: This Agreement, which includes the Appendices hereto, is the only agreement between the Parties relating to the subject matter hereof. It can only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties."*

Lucas argued that the requirement in Article 6.3 meant that any amendment had to be in writing and signed by both parties and that parties could not amend the Agreement orally. Lucas also submitted that an 'anti-oral variation' clause *"promotes certainty and avoids false or frivolous claims"* of an oral agreement and that such clauses also set an evidential threshold. Lucas, however, was unable to point to a common law principle that restricted the freedom of the parties to agree the terms of a contract and/or one which precluded an oral agreement where it was subject to another Agreement which contains an 'anti-oral variation' clause.

Although ultimately the Court of Appeal was not obliged to deal with the 'anti-oral variation' provision, the Court accepted that there was conflicting authority on the effect of such clauses and Beatson LJ made obiter comments designed to clarify the position:

> *"The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that the parties' contract contains*

a clause such as Article 6.3 does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct."

The Court of Appeal adopted the approach in the *World Online Telecom v I-Way Ltd* [2002] EWCA Civ 413 and decided that inclusion of Article 6.3, intended to prevent variation of the contract other than in writing, would not prevent future variation of a contract orally or by conduct.

The Court had found that Article 6.3 was waived as it was *"overwhelmingly clear"* on the basis of *"open, obvious and consistent"* dealings that the parties acted for a long period of time as if Globe Motors Portugal was a party to the Agreement. Whether or not it is possible for parties to vary an agreement, such as that in Article 6.3 is fact-sensitive, and *"to decide otherwise would be inconsistent with the principles of freedom of contract"*.

Hence, the comments reaffirm the principle of freedom to contract, that parties attempts to prevent themselves from being able to vary or waive contractual terms, may be insufficient to override the principle of party autonomy (i.e.: it is always open to parties to renegotiate irrespective of terms in the contract). That includes the ability to vary or waive the requirements of a variation clause, even without fulfilling them, by in essence forming a new contract varying the original.

Accordingly, if the parties intend to vary the contract, this should be properly documented to avoid the potential for later disputes.

The Court of Appeal (in particular Lord Justice Underhill) held that such a flexible approach to interpretation was more important and better supported by the authorities than arguments based on the potential difficulty and inconvenience of parties and courts having to address ill-founded allegations of variation. The Court of Appeal emphasized that it does not follow that clauses like Article 6.3 have no value at all. In many cases, parties would be unable to rely on informal communications or course of dealings in order to modify their obligations.

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553

Following the decision in Globe, a further case came before the Court which required a decision on the effectiveness of an 'anti-oral variation' clause.

In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, Rock Advertising ('Rock') licensed office space from MWB. The licence agreement contained the following clause dealing with variations:

> *"This licence sets out all of the terms as agreed between MWB and the licensee. No other representations or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."*

Hence, the contract provided there could be no oral variations.

Rock suffered financial difficulties and had trouble making the licence payments. Representatives from Rock and MWB (Rock's managing director and MWB's credit controller) came to an oral agreement to vary Rock's payment plan in such a way that for the first few months Rock would pay less than the amount originally agreed but thereafter it would pay more. In doing so, Rock's arrears would eventually be cleared.

On the same day following the oral agreement on 27 February 2012, Rock paid the first instalment of the new payment plan.

... the Supreme Court held that the 'anti-oral variation' clause is to be given full force and effect. Attempts to vary a contract by ignoring the formalities required by the 'anti-oral variation' clause would therefore be ineffective.

Following payment, MWB informed Rock on 29 February 2012 that the payment made was less than the licence fee due. With no further payments being made by 30 March 2012, MWB exercised its contractual right to exclude Rock from the building and initiated proceedings claiming arrears and other charges, as well as compensation. Rock counterclaimed for what it asserted to be its wrongful exclusion from the premises arguing that the licence had been orally amended on 27 February 2012. MWB were successful at first instance. Rock appealed.

Rock alleged that the contractual provisions on payment had been varied by oral agreement. MWB contended that Rock could not rely upon the oral variation, as the agreement contained a clause rendering variations ineffective unless set-out in writing.

The Court took the view that an 'anti-oral variation' clause could be varied so that not all variations need be in writing. Kitchin LJ endorsed the obiter remarks made in Globe, namely that an oral variation is permitted for various reasons. Lord Justice Kitchin commented that for him, the most powerful consideration was that of party autonomy, which entitles the parties to a contract to agree the terms they choose (freedom of contract) and where *"the evidence on the balance of probabilities established such variation was indeed concluded"*. An 'anti-oral variation' clause does not therefore prevent an oral variation.

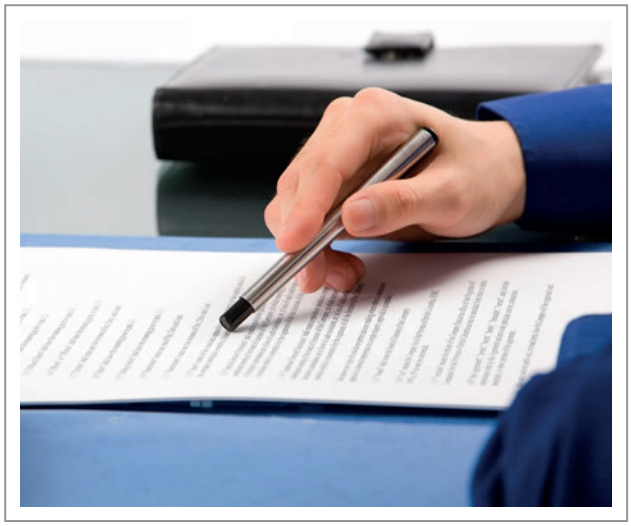
ZVI Construction Co LLC v The University of Notre Dame (USA) In England [2016] EWHC 1924 (TCC)

The theme of 'anti-oral variations' continued with the ZVI Construction case. Similar to Globe and MWB, the agreement between ZVI Construction and The University of Notre Dame contained an 'anti-oral variation' clause.

In this case, the Court addressed the issue of whether the conduct of the parties amounted to a variation and whether this would waive the variation clause in their agreement. The central issue of the case was whether the claimant had waived a right to object to the expert's jurisdiction in an adjudication.

The agreement contained a dispute resolution procedure at clause 17.1 which provided for the resolution of disputes by an expert.

In 2014, the Defendant alleged that the works were defective and referred the issue to the expert determination procedure. Submissions were served on behalf of both parties. The submissions did not dispute the jurisdiction of the expert.



The Claimant lost the case and took steps to resist the determination. The Defendant contended that the Claimant had waived its right to object to the expert determination process and/or was estopped from doing the same and/or there was an implied agreement to this effect.

The Court held that a party to a contract containing a clause providing for disputes to be decided by an expert can expressly or impliedly, by words or conduct, confer jurisdiction to the expert where otherwise there would be none. Here, there was a course of conduct arising out of the Claimant's active participation in the process, through correspondence and submissions, failing to challenge the use of the process, and through which the Claimant impliedly agreed that the expert would have jurisdiction.

The Court found that the agreement had been varied via the conduct of the parties. The particular point was that the parties had both submitted to the jurisdiction of the expert and in doing so, their actions waived any right of objection under the expert determination clause within the agreement.

To the extent that there is doubt regarding the applicability of contractual obligations (for example in a dispute resolution process, as in the ZVI case), parties would be well advised to reserve their position before taking any steps.

Summary

The upshot of the above three decisions was that no matter how carefully a clause is drafted, oral and informal amendments to a contract may still be possible. These clauses were not entirely without effect though and there remained a point of including 'no variation' or 'anti-oral variation' wording in contracts. The tighter such clauses are drafted, the stronger the evidential threshold would be to demonstrate that the parties have varied or waived it.

The premise behind these recent decisions was that the rule of freedom of contract must be preserved, i.e., that parties should be free, insofar as is possible, to reach agreement with one another as they wish.

Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited (Appellant) [2018] UKSC 24

Then came the appeal judgement in *Rock Advertising Limited v MWB Business Exchange Centres Limited*. This appeal judgement handed down on 16 May 2018 by the Supreme Court held that the 'anti-oral variation' clause is to be given full force and effect. Attempts to vary a contract by ignoring the formalities required by the 'anti-oral variation' clause would therefore be ineffective. Lord Sumption stated:

> "*In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation*".

In the 2016 Court of Appeal decision, Kitchin LJ observed that the most powerful consideration in favour of his decision was "*party autonomy*", however Lord Sumption considered this:

> "*... a fallacy. Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows.*"

His Lordship considered that there are at least three legitimate commercial reasons for agreeing an 'anti-oral variation' clause including:

1. preventing attempts to undermine written agreements by informal means, a possibility which is open to abuse.
2. oral discussions can easily give rise to misunderstandings and crossed purposes, an 'anti-oral variation' clause avoids disputes not just about whether a variation was intended but also about its exact terms.
3. requiring a measure of formality in recording variations which makes it easier for organisations to adhere to internal rules restricting the authority to agree them.

When parties agreed to an oral variation despite the 'anti-oral variation', Lord Sumption considered:

> "*The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.*"

However, it is not all doom and gloom for a party being unable to enforce an invalid varied contract which they acted on, as the safeguard against injustice lies in the various doctrines of estoppel. Given this, Lord Sumption gave some guidance considering:

> "*At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself*".

This would mean that a party may, in some cases, be precluded by his conduct from relying on an 'anti-oral variation'clause to the extent that the other party has relied upon that conduct.

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Does an Expert Have a Fiduciary Duty of Loyalty to Their Client?

By **Ian Cocking** Partner
and **Albert Wong** Associate, Cocking & Co

Introduction

The UK Technology and Construction Court recently granted the continuation of an injunction restraining three group companies which belong to the same global expert services group ('the Expert Group') from providing expert services to a third party in an arbitration, on the ground that they owe fiduciary duties of loyalty to an existing client of the Expert Group.

For confidentiality reasons, the Court did not disclose the identities of the parties to the injunction proceedings.

In essence, the injunction proceedings concern two arbitrations in relation to the same project. In the first arbitration, Defendant X (based in Asia), as part of the Expert Group, was acting for the Employer against a Contractor. In the second, Defendant Y (based elsewhere), also a part of the Expert Group, was acting for the EPCM Contractor against the Employer. Defendant Z was another group company, but its role is unclear from the judgment.

This decision has major ramifications for experts providing expert services to their clients, particularly for large international organizations, and for clients engaging expert and arbitration support services.

The Facts

The claimant ('the Employer') was a developer of a petrochemical plant ('the Project') and entered into:

(i) two contracts with a contractor ('the Contractor') for the construction of facilities relating to the Project; and

(ii) a separate contract with another contractor ('the EPCM Contractor') for engineering, procurement, and construction management services in relation to the Project.

Disputes arose between the Contractor and the Employer, and the Contractor commenced an arbitration ('the Works Package Arbitration') against the Employer, claiming for additional costs incurred by reason of delays to its work. One of the alleged causes of these delays was the late issue of drawings prepared by the EPCM Contractor. The Employer intended to pass on those claims to the EPCM Contractor if it was liable to pay additional sums to the Contractor as a result of the EPCM Contractor's late issue of drawings. The Employer engaged Defendant X to provide delay expert services for the Works Package Arbitration. It is particularly important to note that Defendant X was also engaged to provide arbitration support services. An individual expert was assigned by Defendant X to provide these services.

Later, disputes also arose between the EPCM Contractor and the Employer, and the EPCM Contractor commenced an arbitration ('the EPCM Arbitration') against the Employer, claiming sums due and owing under the EPCM contract. The Employer counterclaimed delay and disruption, including any additional sums payable by the Employer to the Contractor caused by the EPCM Contractor's alleged failure to manage and supervise the Contractor.

Subsequently, the Employer was notified that the EPCM Contractor had approached the Defendants for the provision of quantum and delay expert services in connection with the EPCM Arbitration. The Employer was told that the Defendants did not consider there was a conflict because the disputes related to different contracts and that the Defendants could arrange separate teams by setting up electronic and physical barriers. The Employer disagreed and, most significantly, did not consent to the engagement of Defendants by the EPCM Contractor in the EPCM Arbitration.

The Employer was later told that the EPCM Contractor had engaged Defendant Y to provide expert services in the EPCM Arbitration. The Employer thus applied for an injunction to restrain the Defendants from providing expert services for the EPCM Contractor. Interim relief was granted. The Employer thereafter applied for the continuation of the injunction.

One of the major issues that the court had to deal with was whether independent experts, who are engaged by a client to provide advice and support in arbitration or legal proceedings, in addition to providing expert evidence, can owe a fiduciary duty of loyalty to their clients.

The Court's Ruling

The Court held that:

(a) In 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 this case, Defendant X was engaged to provide expert services for the Employer in connection with the Works Package Arbitration and it was also engaged to provide extensive advice and support for the Employer throughout the arbitration proceedings. In those circumstances, a clear relationship of trust and confidence arose, such as to give rise to a fiduciary duty of loyalty.

(b) An independent expert owes duties to the court that may not align with the interests of the client but the expert's paramount duty to the court is not inconsistent with an additional duty of loyalty to the client. Therefore, the Defendant's argument that an expert does not owe a fiduciary duty of loyalty to its client because that would be inconsistent with the expert's independent role was not accepted.

(c) The fiduciary duty of loyalty is not limited to individuals.

Parties who wish to engage experts should also be cautious, especially when engaging an expert who belongs to a global firm with a large team of experts.

Instead, such duty extends to the firm or may even extend to a wider group. Even though the Defendants tried to argue that there were physical and ethical separations in place, the Court was of the view that there is still a risk that confidential information might be shared inappropriately.

d) Further, the fiduciary obligation of loyalty is not satisfied simply by putting in place measures to preserve confidentiality and privilege. Rather, such a fiduciary must not place himself in a position where his duty and his interest may conflict.

(e) Since both arbitrations were concerned with the same delays and there is a significant overlap in the issues, there was plainly a conflict of interest for the Defendants in acting for the Employer in the Works Package Arbitration and against the Employer in the EPCM Arbitration.

(f) The Defendants owed a fiduciary duty of loyalty to the Employer arising out of the engagement to provide expert services in connection with the Works Package Arbitration, and therefore the Defendants were in breach of that fiduciary duty of loyalty by accepting an instruction to provide services for the EPCM Arbitration.

In light of the above, the Court granted a continuation of the injunction, restraining the Defendants from providing expert services to the EPCM Contractor against the Employer in the EPCM Arbitration.

Insights

In modern practice, it is common to find individual experts working under the same firm or group. Where a fiduciary duty of loyalty arises, it is not limited to the individual concerned. It extends to the firm or company and may extend to the wider group. Further, the Court held that the duty and obligation owed by the expert to the client cannot be satisfied simply by separation of teams and physical and electronic barriers being put in place.

Expert service providers should, therefore, not just conduct a comprehensive search to ensure that there is no direct or potential conflict of interest before accepting any appointment, they should also consider whether they have any fiduciary relationships with existing clients that preclude the engagement. Parties who wish to engage experts should also be cautious, especially when engaging an expert who belongs to a global firm with a large team of experts.

Since English decisions remain persuasive precedents in Hong Kong courts, the above decision is relevant in Hong Kong. However, it is understood that the decision may go to appeal.

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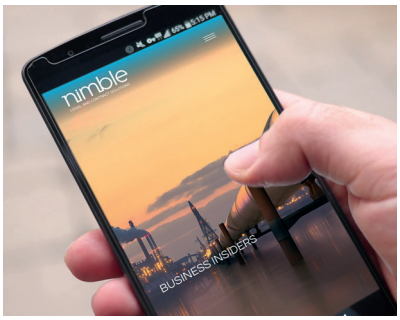

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11 Nov	*Society of Construction Law Hong Kong: Pre-conference Cocktails*
13 Nov	*Society of Construction Law Hong Kong: International Annual Conference*
24 Nov	*The Lighthouse Club: Health & Safety Awards*
TBA	*ADR Cocktails Evening*

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