EXPERTS BEWARE!

By Philip Boulding QC

Philip Boulding QC considers the historical roots of expert witnesses and subsequent developments in caselaw in this article, which was in June published by the Society of Construction Law in Hong Kong.

The expert witness – historical beginnings and subsequent developments

Expert witnesses are now an accepted part of criminal and civil trials. However, the modern law of expert evidence proceeds upon the basis of an assumption that, in so far as the expert may express opinions or draw inferences, he or she does so by way of an exception to the rule that witnesses may only give evidence of what they have themselves perceived. This approach was articulated by Lord Mansfield in two eighteenth century cases, *Carte v Boehm*[1] and *Folkes v Chadd*[2]. In *Folkes v Chadd*, Lord Mansfield described the evidence of *"men of science"* as being admissible before the court, since which time the use of expert witnesses and the admissibility of their science has developed very substantially.

Folkes v. Chadd, which is also known as the Wells Harbour Case, is considered to have laid down the first rules on the admissibility of opinion evidence in the Common Law.

The case was first heard in 1782, though a written report of the proceedings was not produced until 1831, well after Lord Mansfield's death. Different experts had been heard about whether the position of an artificial embankment had caused the silting up of the harbour at Wells by the Sea, a town in Norfolk, England, and thus constituted a nuisance. Most of the experts had seen the harbour, but not the famous scientist Mr. Smeaton, whose evidence was thus initially deemed inadmissible.

On appeal with respect to the evidence of Mr. Smeaton, Lord Mansfield stated:

> *It is objected that Mr. Smeaton is going to speak not to facts, but to opinion. That opinion, however is deduced from facts which are not disputed – the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all the facts is, that mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbours, the causes of their destruction and how remedied. In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskill-fully navigating ships. The question depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is whether a defect arises from natural or an artificial cause, the opinions of men of science are not to be received. Handwriting is proved every day by opinion, and for false evidence on such questions a man may be indicted for perjury. Many nice questions may arise as to forgery and as to the impression of seal, whether the impression was made from the seal itself or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not taken. I have myself received the opinion of Mr. Smeaton respecting wills, as a matter of science. The cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, men such as Mr. Smeaton alone can judge. Therefore we are of the opinion that his judgment, formed on facts was very proper evidence".*

Thus, Lord Mansfield laid down the rules for opinion evidence that have influenced Common Law jurisdictions, including Hong Kong, ever since. Opinions based on the facts of other people were considered several times in the 19th century and were deemed admissible. For example, in *Beckwith v. Sydebotham*[3], a case involving the seaworthiness of a ship called the *"Earl of Wycombe"*, Lord Ellenborough stated:

> *"Where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits. As the truth of the facts stated to them was not certainly known, their opinions might not go for much; but it was admissible evidence."*

More recently, in England the courts have approved Lord Mansfield's opinion in *Folkes v. Chadd* on several occasions. For example, in *R. v. Turner*[4] it was stated:

> *"The foundation of the rules was laid by Lord Mansfield CJ in Folkes v. Chadd (1782): 'The opinion of scientific men upon proven facts may be given by men of science within their own science'. An expert opinion is admissible to provide the court with scientific information which is likely to be outside of the experience of a judge or jury. If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is dressed up in scientific jargon it may make the judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion any more helpful than that of the jurors themselves; but there is a danger that they may think it does."*

Further, what constituted novel science was analysed by the English Court of Appeal in R. v. Robb by Bingham LJ as follows:

> *"The old academically established sciences such as medicine, geology or metallurgy and established professions … present no problem. The field will be regarded as one in which expertise may exist and any qualified member will be accepted without question as an expert. Expert opinions may be given of the quality of commodities, or the literary, artistic, scientific or other merit of works alleged to be obscene. Yet while receiving this evidence the courts would not accept the evidence of an astrologer, soothsayer, a witch-doctor or an amateur psychologist and might hesitate to receive evidence of attributed authorship on stylometric analysis."*

So far, so good!

Jones and Kaney – the 'tide turns' against experts

Almost 10 years ago, expert witness immunity was removed by the Supreme Court in the 'landmark' decision of *Jones v Kaney*[6,7]. The facts were stark. Mr Jones was claiming for the psychological after-effects of a road accident and instructed Dr Kaney as his expert. Her two reports were positive. In accordance with standard practice, the court ordered her and the other side's expert to agree a joint report. The joint statement was damaging to Mr Jones' claim because:

- It recorded the experts' agreement that his psychological reaction to the accident was no more than an adjustment reaction and did not reach a level of a depressive order or a post-traumatic stress disorder ('PTSD').
- It stated that Mr. Jones was deceptive and deceitful in his reporting and that the experts agreed that his behaviour was suggestive of "conscious mechanisms".
- It raised doubts as to whether Mr. Jones' subjective reporting was genuine.

Given the contents of the joint report, Mr Jones had to settle his claim at a lower amount than he had been expecting. When taxed by Mr Jones' solicitors as to why she had changed her position, Dr. Kaney admitted that:

- She had not seen the reports of the other side's expert at the time of her telephone conference with the other side's expert.
- The joint statement had been drafted by the opposing expert and did not reflect her views, but she had felt under pressure to sign it.
- Her true view was that Mr Jones had suffered from PTSD that had now resolved and that he had been evasive rather than deceptive.

Unfortunately, an attempt to get permission to put in evidence from a different psychiatrist failed and Mr Jones sought to sue Dr. Kaney for negligence. Dr Kaney relied in her defence on the centuries-old policy of protecting expert witnesses from being sued.

The Supreme Court's decision (by a majority of 5/2) was that expert witnesses are not immune from claims in respect of matters connected with their participation in legal proceedings, and the decision reversed authority dating back over 400 years and as to which the court expressed its surprise that the matter of immunity had remained unchallenged for so long.

FOOTNOTES

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The court, no longer convinced that experts would become unwilling to act for fear of being sued, held that the removal of immunity *"would tend to ensure a greater degree of care"*. Although the possibility was raised of treating the position of expert witnesses engaged in civil litigation differently from those engaged in criminal and family litigation, it is clear that the reasoning of Lords Phillips, Brown, Collins and Kerr admits of no such distinction or difference. Consequently, and unlike lay witnesses who have maintained their immunity, expert witnesses are now liable in negligence and/or for breach of contract and may be sued by disgruntled instructing parties. This followed the loss of immunity of barristers a decade prior in *Hall v Simons*[8].

As to the important question of who was an 'expert' from the perspective of immunity, Lord Brown made it clear that immunity from suit for negligence was only being withdrawn from an expert witness *"selected, instructed and paid by a party to litigation for his expertise and permitted on that account to give opinion evidence in the dispute"*. This type of witness was to be distinguished from the professional witness such as a treating doctor or forensic pathologist who may be called to give factual evidence in the case as well as being asked for their professional opinions upon it without having been formally retained by either party to the dispute. It would seem that this latter breed of professional (but still expert) witnesses retain immunity, the apparent logic therefor being that such professional witnesses do not voluntarily undertake responsibility to their employer/client since, in general, they are not paid any fee to attend court as a witness but are obliged to do so as part of their job.

As to the potential liability of a single joint expert, a direction for which is increasingly finding favour with judges in the Construction and Arbitration List in Hong Kong, as he or she voluntarily assumes duties to both parties (almost invariably for reward), the logic of the majority decision in *Jones v Kaney* would seem to be that either party (but in reality, the losing party) may sue such an expert for negligence and/or breach of the implied contractual duty to take reasonable care.

The Supreme Court in reaching its decision also considered both the duties owed by an expert to the court and his or her client, saying that whilst an independent and unbiased opinion falling outside a range of reasonable expert opinion would not be a breach of duty to the court, it could clearly be a breach of the duty owed to the expert's client. As to what fell within the *"range of reasonable expert opinion"*, in accordance with established principle this matter will be judged by reference to the standard of a reasonably competent practitioner of the relevant discipline.

The Supreme Court judges also identified other benefits to abolishing the immunity:

- The wronged client will enjoy, rather than have denied to it, a proper remedy.
- Abolition of the immunity should lead to *"a sharpened awareness of the risks of [experts] pitching their initial views of their client's case too high or too inflexibly"*.

Experience and the decided authorities show that there are two types of claim where the expert is likely to be particularly exposed in terms of breaching his or her duty to the client, namely where the expert is alleged to have:

- Failed to review a joint report so as to ensure that it reflected his or her views prior to signing it, so that significant concessions were inadvertently made in the litigation, as in *Jones v Kaney*; and/or
- Fundamentally changed his or her position.

Assuming that an expert is found to have breached his or her duty to the client, the claim to loss and damage will mirror to a great extent a claim against lawyers for negligent litigation advice, comprising damages for:

- Costs which would not otherwise have been incurred.

- The lost opportunity to obtain a better outcome.

Notably, notwithstanding concerns that the decision in *Jones v Kaney* would make expert witnesses reluctant to give frank evidence or act at all, there is little evidence of any such reluctance.

On the contrary, a leading firm of London professional negligence solicitors with a presence in Hong Kong has reported recently that a survey they were involved in of over 750 experts revealed that whilst just over 25% said they had considered giving up expert work, fear of being sued was a minor consideration after levels of pay and time restraints. Their experience, like mine, is that claims by a client against its expert are infrequent.

Where an expert has failed to read a joint report before signing it, which is surely going to be a rare occurrence, obviously such a palpable and significant error will result in the expert being liable for damages for the costs of the remedy and/or lost opportunity. However, where the claim is in respect of allegedly negligent concessions, there will inevitably be significant conceptual and evidential difficulties for a claimant to overcome. So, whilst *Jones and Kaney* type of claims against experts are of recent origin, expert witnesses can take comfort from the fact that such claims are likely to remain unusual.

By way of contrast, it is settled law that a witness of fact enjoys immunity from suit from any action by the party that calls them (or the opposing party) for anything said or done in court (whether in the form of oral testimony, in a witness statement or by adopting anything in a written statement as testimony). The reasons for this immunity are:

- To encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say.
- To avoid repeated litigation on the same issue.
- Absent immunity, witnesses would be reluctant to assist the court.

A Company and (1) X, (2) Y and (3) Z – even rougher seas

The background facts are important and warrant careful consideration.

The claimant in the High Court proceedings was the developer and owner of a petrochemical plant ('the Developer'). The Developer had contracts with various groups of companies for engineering, procurement and construction management services ('the EPCM Contractors'), and two contracts with another contractor ('the Works Contractor") for two contract packages for the construction of facilities for the plant.

Unfortunately, disputes arose out of delays to the construction works and the Works Contractor commenced an ICC arbitration seated in London with an English choice of law clause against the Developer for costs incurred by reason of delays to its works, caused in part by the late release of construction drawings from the EPCM Contractors ('Works Arbitration'). The Developer's position was that if it was liable to pay additional sums to the Works Contractor under their contracts as a result of the EPCM Contractors' late issue of the drawings, the Claimant would seek to pass on those claims to the EPCM Contractors.

The Developer approached the first defendant, X, an Asian subsidiary of a global consultancy firm which included the second and third defendants, Y and Z who were based in different countries, with a view to engaging it to provide delay expert services in connection with the Works Arbitration and on 15 March 2019 the first defendant, X, signed a confidentiality agreement with the Developer. The confidentiality agreement was subject to the laws of England and Wales and contained an exclusive jurisdiction clause for disputes or claims to be dealt with in the court of the Abu Dhabi Global Market.

By a formal letter of engagement dated 13 May 2019 which was signed by both parties, the Developer engaged the first defendant, X, to provide delay expert services in connection with the Works Arbitration. Importantly, this letter: was addressed to the first defendant, the Asian subsidiary referred to above, and identified the individual expert that would lead the team, be responsible for the report and testify at the hearing ('K'); stated that the scope of the engagement included providing ad-hoc support to the Developer and its professional team in the Works Arbitration; and, confirmed that the first defendant had no conflict of interest and would maintain that position for the duration of the engagement.

In the summer of 2019, the EPCM Contractors commenced ICC arbitration proceedings against the Developer, seated in London with an English choice of law clause ("the EPCM Arbitration"). In the EPCM Arbitration, the EPCM Contractors claimed sums due and owing to them under their EPCM agreements with the Developer. The Developer counterclaimed against the EPCM Contractors in respect of delay and disruption to the project.

The EPCM Contractors approached the three defendants (i.e. the same group of consultancy firms engaged by the Developer in the Works Arbitration) to provide expert services outside of Asia in quantum and delay in the EPCM Arbitration.

FOOTNOTES

The defendants notified the EPCM Contractors that they were already engaged by the Developer (albeit acting through another office) in another dispute on the same project; and notified the Developer that the EPCM Contractors were seeking to appoint them in the EPCM Arbitration. The Developer considered this created a conflict of interest contrary to the terms of its engagement with the first defendant. Further correspondence ensued but ultimately the second defendant company accepted the engagement and started work for the EPMC Contractors, working out of a different office and through another individual expert, 'M'.

On 20 March 2020, the Developer applied for urgent injunctive relief restraining the defendants from acting for the EPCM Contractors and on 23 March 2020 the matter came before the Court as an urgent *ex parte* application by the Developer but with informal notice given to the defendants.

The key issue for the court was to decide whether independent experts, who are engaged by a client to provide advice and support in arbitration or legal proceedings, in addition to expert evidence, can owe a fiduciary duty of loyalty to their clients, and whether such a fiduciary duty arose (and had been breached) in this case.

Having heard argument from leading counsel for the parties, but with limited evidence before the Court, interim relief was granted until 31 March 2020, the return date. An application was then made to continue the interim injunction, the basis therefor being that the provision by the defendants of services to the EPCM Contractors in connection with the EPCM Arbitration was a breach of the rule that a party owing a fiduciary duty of loyalty to a client must not, without informed consent, agree to act (or actually act) for a second client in a manner which is inconsistent with the interests of the first.

The defendants opposed the continuation of the interim injunction on the grounds *inter alia* that the Developer's application was misconceived as independent experts do not owe a fiduciary duty of loyalty to their clients, there was no conflict of interest and there was no risk that confidential information had been or would be disclosed to the EPCM Contractors.

The hearing was held in private because the judge considered it was necessary to do so to secure the proper administration of justice. This was because the application concerned two ongoing arbitrations and as such raised issues of confidentiality, not just of the parties before the Court but also of others who were not parties to the claim and consequently not before the Court.

The judge extended the interim injunction to restrain the defendants from acting as independent experts in separate, although related, arbitration proceedings against the Developer. Further, in extending the interim injunction, the Court held that:

(i) The expert firm's subsidiary engaged by the Developer owed a fiduciary duty of loyalty to its client but, in addition, that fiduciary duty extended to the defendant group (i.e. the second and third defendants) as a whole.

(ii) Putting in place information barriers did not satisfy the defendant group's fiduciary duty of loyalty as such measures sought only to preserve confidentiality and privilege and to address the risk that confidential information might be shared inappropriately, whereas a fiduciary with a duty of loyalty must not place himself in a position where his duty and his interest may conflict.

(iii) The defendant group had breached its fiduciary duty by accepting instructions to provide expert services in connection with the second arbitration without first obtaining the Developer's consent. Further, the Court's finding that the two arbitrations were concerned with the same delays, and that there was a sufficiently significant overlap in the issues, underpinned its conclusion that the defendants had breached their duty to the Developer.

Importantly, the court held that the first defendant, X, owed the Developer a fiduciary duty of loyalty because a clear relationship of trust and confidence had arisen because:

(i) The first defendant, X, was engaged to provide expert services for the Developer in connection with the Works Arbitration.

(ii) The first defendant had been instructed to provide an independent expert report and to comply with the duties set out in the CIArb Expert Witness Protocol as part of its engagement.

(iii) The first defendant was also engaged to provide extensive advice and support for the Developer throughout the arbitration proceedings.

The parties were in agreement as to the principles governing fiduciary relationships. In determining whether the defendants owed a fiduciary duty of loyalty, the judge considered the definition of a fiduciary as set out in *Bristol & West Building Society v Mothew*[9], a case concerning the fiduciary obligations owed by a solicitor acting for both parties to a property transaction. In this cases Millett LJ had stated [p.18]:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; …he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal …*
>
> *A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other … This is sometimes described as "the double employment rule." Breach of the rule automatically constitutes a breach of fiduciary duty …"*

"A fiduciary with a duty of loyalty must not place himself in a position where his duty and his interest may conflict."

Prior to this case, the recognised classes of fiduciaries were limited to trustees, guardians, executors, administrators, agents, doctors and lawyers – so the addition of experts to that list might be considered somewhat unusual and it is understood that the defendants are seeking permission to appeal.

As to the question of whether the individual expert's fiduciary duty extended to the whole defendant group, the Court referred to previous cases that established that where a fiduciary duty of loyalty arises it is not limited to the individual concerned, but rather it extends to the firm or company, and may extend to the wider group: *Prince Jefri Bolkiah v KPMG*[10]; *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer*[11] ; *Georgian American Alloys v White & Case*[12].

In this latter context the court also considered and was no doubt influenced in its decision by the organisational structure of the defendant group, noting the common financial interest of the parent company and its shareholders in the defendants, that the defendant group was managed and marketed as one global firm, and that there was a common way in which conflicts were identified and managed.

The defendants' submission that an expert witness did not owe a fiduciary obligation of loyalty to his or her client as such a duty of loyalty was excluded by the expert's overriding duty to the tribunal by reference to cases such as: *Prince Jefri Bolkiah v KPMG*[13]; *Harmony Shipping Co SA v Saudi Europe Line Ltd*[14]; *Wimmera Industrial Minerals Pty Ltd v Iluka Midwest Ltd*[15]; *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited*[16]; *A Lloyd's Syndicate v X*[17]; and, *Jones v Kaney*[18] was rejected on the basis that such authorities could be distinguished. Notwithstanding, and helpfully in terms of explaining and clarifying an expert's duties and functions, the Court distilled the following general principles from the authorities referred to by the defendants:

(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 an expert's appointment, or where the expert's appointment has been terminated, the 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*.

The Court then went on to note that none of the authorities referred to by the defendants supported the proposition

that an independent expert does not owe a fiduciary duty of loyalty to his or her client. Indeed, no fiduciary duty of loyalty existed in those cases because either there was no retainer (at all, or because the retainer had been terminated), or the particular facts of any retainer did not give rise to such a relationship. Further, as to the defendants' reliance on their independent role, the Court noted that merely because experts owed duties to the Court or tribunal that may not align with their client's interests, such fact did not provide a principled basis to support the general rule contended for by the defendants.

The Court dismissed the defendants' submission that the defendant group was analogous to barristers who *"act on opposing sides in litigation as a matter of course"* pointing out, by way of example, that unlike a firm of experts barristers do not share profits and 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"*. In dismissing this aspect of the defendant's submission, the Court also stated that it is *"common knowledge"* that barristers are self-employed individuals and that counsel from the same chambers may, and often do, act on opposing sides of the same case.

"Importantly, the defendants did not inform the Developer at the time of accepting the engagement that they might take instructions to act both for and against the Developer in respect of the dispute".

The implication of this aspect of the judgment seemed to be that there is no such *"common knowledge"* in respect of expert witnesses, and informed consent is required in circumstances such as those under consideration in the case – which was not forthcoming. Importantly, the defendants did not inform the Developer at the time of accepting the engagement that they might take instructions to act both for and against the Developer in respect of the dispute. If they had done, the court reasoned, the Developer would not have instructed the defendants (as evidenced by the fact that when the defendants asked whether the Developer objected to them acting for the third party, the Developer objected).

Whilst the judge did not decide that *all* experts owe their client a fiduciary duty in all circumstances, the Court confining its decision to the circumstances in which an expert is retained could give rise to such a duty, nevertheless the implications are clear – *a fortiori* given that the judge went on to find not only that the first defendant owed such a duty to Developer but that the defendant group owed such a duty thereby potentially precluding employees of other companies within that group from acting for anyone against the Developer. That is obviously very broad-reaching and as expert services firms have become much more multi-disciplinary in nature, it is likely to present real hurdles in practice.

The case of *A Company v X, Y & Z* will not be welcomed by consultancy firms providing multi-disciplinary expert witness services. Notwithstanding, it contains a very helpful guide to the duties and obligations of expert witnesses to their clients in circumstances where such witnesses regularly give evidence in construction cases on matters concerning technical issues, programming and quantum to name but a few and form a crucial part of a team engaged by a client.

Importantly, in circumstances where expert witness services are increasingly provided by large, very commercial global entities in a very competitive 'industry', this case serves to emphasise just how important it is for a provider of expert services to investigate thoroughly the matter of conflicts of interest at the very outset of any expert appointment (including across global affiliates) and for a client seeking expert services to give very careful consideration to the terms on which it appoints its experts. The case is also a salutary reminder for lawyers and experts to deal with conflict issues conclusively as soon as they arise, and perhaps more cautiously than they did before, not least to see whether sensible discussions can result in an agreement that everyone can live with.

It is also important that providers of expert services take legal advice on their terms and conditions of engagement to ensure that they deal adequately and expressly with the issue of conflicts and the circumstances in which any fiduciary duty of loyalty, which is a very serious matter, comes into existence. For example, whilst experts will have undertaken appointments on the basis of owing a duty of confidentiality to their appointing party, prior to this decision it is unlikely that they will have considered owing a duty of loyalty to such party which goes well beyond the ordinary criticism that could be levied at an expert for a lack of independence.

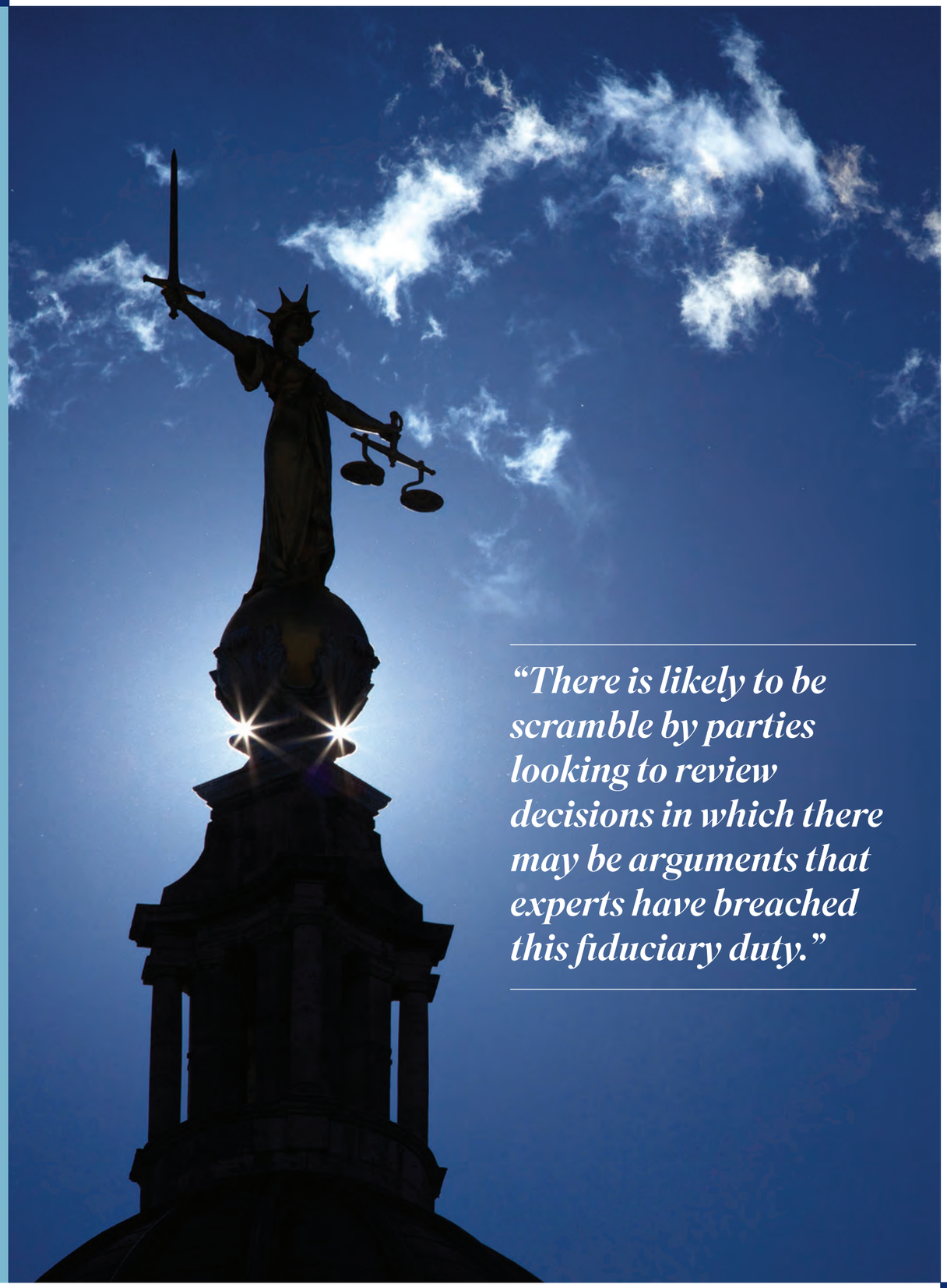
It also bears emphasis that where an expert owes a fiduciary duty of loyalty, the implementation of measures such as information barriers, which are aimed at preserving confidentiality and privilege will not serve to satisfy such a duty. Where such a duty is owed, and if an expert is considering acting for a party which may give rise to a conflict between his duty and his interest, the expert must obtain the informed consent of both parties before agreeing to act.

The Court's decision also raises important practical implications for experts and, in particular, global consultancies providing such services in that once an expert or consultancy undertakes any substantial work for a party, they need to very carefully consider the fiduciary duty of loyalty that they owe to that party and refuse to accept other instructions that would be in conflict with that duty. Obviously, that would include, as in this case, instructions from another party in proceedings against the instructing party concerning the same project and may even have broader implications.

It also follows that expert firms should carefully consider whether there is any degree of overlap between related, although independent, arbitrations before accepting instructions in a related matter when they already act for one relevant party.

The practical implications of this decision is that once a consultancy undertakes any substantial work for a party, it needs to very carefully consider the fiduciary duty of loyalty that it owes to that party and not accept other instructions that would be in conflict with that duty. That would obviously include, as here, instructions from another party in proceedings against the instructing party concerning the same project and may even have broader implications.

Notably, being subject to a fiduciary duty is a very serious matter. Experts will have undertaken appointments on the basis of owing a duty of confidentiality to their appointing party and will not have considered owing a duty of loyalty which goes well beyond ordinary criticism that could be levied at an expert for a lack of independence. This will result in uncertainty and excessive cautiousness going forwards and likely a state of panic in ongoing proceedings that involve experts that could be said to be in breach of that duty. There is likely to be scramble by parties looking to review decisions in which there may be arguments that experts have breached this fiduciary duty.



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