

## A Company v X, Y, Z

*Nicholas Gallina MELBOURNE TEC CHAMBERS*

In this case,<sup>1</sup> the England and Wales High Court found that an expert witness owed a fiduciary duty of loyalty to its client.<sup>2</sup> In summary, the fiduciary duty arose because the defendant acted for a party in one arbitral proceeding, but against the same party in another related arbitral proceeding regarding the same underlying facts and claims.<sup>3</sup>

The case involved a claimant, the developer of a petrochemical project, a third party and a contractor. The claimant entered into:

- two engineering, procurement and construction management (EPCM) agreements with a third party and
- two construction facility agreements with a contractor

The contractor brought a works package arbitration against the claimant, seeking additional costs arising from project delays, including the late issue for construction drawings by the third party pursuant to the EPCM agreements. The claimant engaged the first defendant to provide delay expert services. The claimant sought to pass on to the third party, any costs it might be ordered to pay.

The third party brought an EPCM arbitration against the claimant, seeking monies owing under the EPCM agreements. The claimant counterclaimed for delay and disruption for the third party's failures under the EPCM agreements, and sought to pass on to the third party, any amounts the claimant might be ordered to pay to the contractor (under the works package arbitration). The third party engaged the defendants to provide quantum expert services.

O'Farrell J identified<sup>4</sup> three general principles from the authorities in respect of expert witnesses:

- An expert can be compelled to give expert evidence in arbitral or legal proceedings by any party, even if the expert has provided an opinion to another party (ie, there is no property in an expert witness).
- Expert witnesses have a paramount duty to a court or arbitral tribunal which may require them to give evidence which does not advance their client's case.

- Where a fiduciary duty does not arise, the obligation to preserve confidential information does not prevent an expert witness from acting or giving evidence for another party.

She said none of those principles precluded expert witnesses from owing a fiduciary duty of loyalty to their clients. She concluded<sup>5</sup> that as a matter of principle, a relationship of trust and confidence could arise depending on the circumstances of the retainer.

She held<sup>6</sup> that a clear relationship of trust and confidence arose, giving rise to a fiduciary duty of loyalty. This was because the first defendant:

- was engaged to provide expert services to the claimant in relation to the works package arbitration
- was instructed to provide an independent report and comply with the duties set out in the CI Arb Expert Witness Protocol, and
- was engaged to provide extensive advice and support to the claimant throughout the arbitration proceedings

O'Farrell J also found<sup>7</sup> that the duty of loyalty was owed not only by the first defendant, but by the whole of the defendant group. This was because the defendant group shared profits and hence had a financial interest in each member, the defendant group was managed and marketed as one global firm, and there was a common approach to identify and manage any conflicts.

The defendants relied on physical and ethical screens between members of their group. Her Honour gave little weight to this because, as she explained,<sup>8</sup> the fiduciary duty of loyalty is not satisfied simply with measures to preserve confidentiality and privilege. Instead, the fiduciary must not place himself in a position where his duty and his interest may conflict.

The first defendant advised and assisted the claimant in formulating and presenting its defence to the contractor's claims in the works package arbitration, including the provision of advice as to the cause of project delays. In the EPCM arbitration, the claimant sought to pass on to the third party any claims arising from the late provision for construction drawings by the third party.

Hence, the arbitrations were concerned with the same delays and there was a significant overlap in the issues. Her Honour concluded<sup>9</sup> that there was plainly a conflict of interest for the defendant in acting for the claimant in the works package arbitration, and against the claimant in the EPCM arbitration.

### Is a fiduciary duty at odds with an expert's duty to the court in Victoria?

The Victorian Supreme Court Expert Witness Code of Conduct provides that an expert witness “has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness”.<sup>10</sup>

The decision of the England and Wales High Court suggests that an expert witness' overriding duty to the Court under that code of conduct would not conflict with a fiduciary duty owed by the expert to their client. The High Court stated:

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.<sup>11</sup> [Emphasis added.]

The Civil Procedure Act 2010 (Vic) (CPA) imposes several overarching obligations on litigants and their legal representatives. Some of those overarching obligations also apply to expert witnesses, for example, the overarching obligations to act honestly, to cooperate in the conduct of civil proceedings, not to mislead or deceive, to narrow the issues in dispute, and to minimise delay.<sup>12</sup> Section 10(4) of the CPA provides that the overarching obligations that apply to expert witnesses are “in addition to, and not in derogation of, any existing duties applying to expert witnesses”. It remains to be seen what a court would make of a scenario where “any existing duties” included a fiduciary duty.

### Practice tips

- A fiduciary duty on the part of an expert witness is probably unlikely to arise where an expert witness is retained to provide an expert opinion/report for one party in one proceeding.
- The chance of a fiduciary duty on the part of an expert witness arising increases when the circumstances of the retainer start to resemble those in

this decision — related litigation between the same parties regarding the same underlying facts and claims, with two or more parties sourcing an expert witness from the one company (or group of companies).

- Expert witnesses could consider trying to contract out of any fiduciary duty. However, this could be difficult because a contractual provision purporting to exclude a fiduciary relationship may not be conclusive, for the parties' contract, when considered as whole, may create a fiduciary relationship “even if they do not recognise it themselves and even if they have professed to disclaim it”.<sup>13</sup> The general position is that to vary a contract so as to reduce the scope of fiduciary obligations, a fiduciary must obtain the fully informed consent of the person to whom the duty is owed.<sup>14</sup> On a practical level, would litigants, when fully informed about the nature of the fiduciary duty expert witnesses could owe them, be willing to put the duty to one side?



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### Footnotes

1. *A Company v X, Y, Z* [2020] EWHC 809 (TCC).
2. Above, at [66(i)].
3. Above n 1, at [61].
4. Above n 1, at [52].
5. Above n 1, at [53].
6. Above n 1, at [54].
7. Above n 1, at [55]–[57].
8. Above n 1, at [60].
9. Above n 1, at [61].
10. Supreme Court (General Civil Procedure) Rules 2015 (Vic), para 1.
11. Above n 1, at [53].
12. Civil Procedure Act 2010 (Vic) ss 10(3), 17, 20, 21, 23 and 25.
13. *Garnac Grain Co Inc v HMF Faure & Faircloud Ltd* [1967] 2 All ER 353 at 358.
14. J D Heydon, M J Leeming and P G Turner *Meagher, Gummow & Lehane Equity: Doctrines & Remedies*, 5th ed, LexisNexis, Australia, 2015, p 148.