THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2020] IECA 150

Court of Appeal Record No 2019/329

Faherty J.

Power J.

Collins J.

BETWEEN

SHAY SWEENEY and THE LIMERICK PRIVATE LIMITED

Plaintiffs/Respondents

AND

THE VOLUNTARY HEALTH INSURANCE BOARD LIMITED

Defendant/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 9 June 2020

INTRODUCTION

1. The Voluntary Health Insurance Board Limited ("*the VHI")* appeals against the Judgment and Order of the High Court (Barrett J) refusing its application to exclude

Professor Moore McDowell from acting as an expert witness for the Plaintiffs in these proceedings. That Order was made on 4 June 2019, following on the High Court's considered judgment of 28 May 2019.

2. The broad circumstances in which that application comes to made may be stated relatively briefly, though it will be necessary to look more closely at the facts in due course. The Plaintiffs (the First is a director of the Second) have long had plans to develop a private hospital in Limerick City. In 2006, the Plaintiffs first approached the VHI - the State's largest provider of private health insurance ("*PHI*") – requesting that it would approve the hospital and agree that the cost of providing medical services to VHI members in it would be covered by the VHI. In 2014, after what appears to have been a protracted process of engagement/negotiation, the VHI refused to approve cover.

3. In these proceedings – commenced in May 2015 – the Plaintiffs challenge the lawfulness of that refusal. The Statement of Claim asserts that the VHI is in a dominant position in the market for the provision of PHI in the State and that it also holds a dominant position in the related market for the purchasing of private medical services. The refusal to approve their hospital is, the Plaintiffs say, an abuse by the VHI of this position(s) of dominance for which there is no objective justification. Accordingly, the Plaintiffs say, the VHI is in breach of the provisions of section 5 of the Competition Act 2002 and/or Article 102 TFEU. The Plaintiffs seek damages and various declaratory reliefs, including a declaration that they are entitled to have their hospital approved by the VHI.

4. All of these claims are denied by the VHI.

5. In October 2017 Professor McDowell was retained on the Plaintiff's behalf as an independent economic expert. Professor McDowell is a former lecturer in economics in University College Dublin who has acted as an economic expert and witness in many actions before the Irish courts, including a significant number of competition law claims. The VHI's legal advisers first became aware of Professor McDowell's retainer in November 2017 and objected to it. The essential basis of that objection – which forms the basis for the application now before this Court – is that Professor McDowell was and continues to retained by the VHI as an economic expert in two other competition law actions brought against the VHI arising from decisions made by it not to provide PHI cover to other private hospitals elsewhere in the State.[1] Professor McDowell was also retained by the VHI in respect of other contentious matters but the focus of debate before this Court (and before the High Court) was on his engagement in those two actions.

[1] The first in time is High Court Record No 2010 No 5713P, *RAS Medical Limited t/a Auralia/Park West Clinic v The Voluntary Health Insurance Board* (the "*RAS Proceedings"*). The RAS proceedings – commenced in 2010 – relate to a private hospital in Parkwest Business Park in Dublin. The second action is High Court Record No 2012 No 1101P, *CMC Medical Operations Limited (In Liquidation) t/a Cork Medical Centre v The Voluntary Health Insurance Board* (the "*CMC Proceedings"*). The CMC proceedings – commenced in 2012 – relate to a private hospital at CityGate, Mahon Point, Cork.

6. The VHI says that this is a case where the Court should exercise its inherent jurisdiction – one which it accepts is "*undoubtedly .. rare"* – to exclude Professor McDowell from acting as expert witness for the Plaintiffs.[2] It says that it would be unfair if the expert witness that it retained to assist in its defence of the RAS and CMC Proceedings – and to whom in that context it provided a significant amount of privileged and commercially confidential material – should be permitted to act as an expert witness against it in these proceedings which, the VHI says, involve very similar, if not substantially identical, issues. It also says that its ability to instruct Professor McDowell in the RAS and CMC Proceedings would be undermined if he is permitted to continue to act for the Plaintiffs in these proceedings.

7. I should record immediately that Professor McDowell has stated on affidavit that he is fully cognisant of his duties as an independent expert, that he does not retain hard or electronic copies of the material provided to him on behalf of the VHI and that he has not relied on any information provided to him by on behalf of the VHI, confidential or otherwise, in the preparation of the draft report which he has apparently provided to the Plaintiffs. None of this is contested. Professor McDowell has also offered an undertaking not to disclose any confidential information provided to him by the VHI. Professor McDowell's *bona fides* are not in question, as Counsel for the VHI, Mr

[2] In the High Court, it was also argued that it was an implied term of Professor McDowell's retainer by the VHI that he would not act as an expert witness against it in matters the same or similar to the matters in which he was retained by the VHI. This argument was rejected by the High Court and, while canvassed in the VHI's notice of appeal and written submissions, it was effectively abandoned at the hearing.

Gallagher, made clear in his submissions to this Court. The VHI does not suggest that Professor McDowell would intentionally misuse the privileged and/or confidential information previously provided to him. Nonetheless, it says that Professor McDowell cannot "*unknow*" that information or compartmentalise it so as to prevent its inadvertent or unwitting use or disclosure in these proceedings and that the only effective remedy in the circumstances is an order excluding him from continuing to act as an expert witness for the Plaintiffs.

8. For the reasons set out in its written judgment of 28 May 2019 ([2019] IEHC 360), the High Court (Barrett J) refused the VHI's application, though "*in an abundance of caution"* the Judge directed Professor McDowell to give the undertaking that had been offered in the course of the hearing before him. The High Court Judge considered that the applicable test in the circumstances presented here was that set out in Hodgkinson & James, *Expert Evidence: Law and Practice* (4th ed; 2015) ("*Hodgkinson & James*"), at para 8-006, namely "*whether it is likely that [Professor McDowell] would be unable to avoid having recourse to privileged material*" previously provided to him by the VHI.[3] The Judge considered that such avoidance was "*possible*"[4] and in this context he attached significant weight to the averments of Professor McDowell referred to above and to the fact that Professor McDowell's last involvement in the RAS or CMC

[3] At para 5(1).

[4] As the VHI observes, a finding that it was "*possible*" for Professor McDowell to avoid having resort to privileged material does not directly address the test set out in Hodgkinson & James. A finding that such avoidance was *possible* does not necessarily lead to the conclusion – one way or the other – as to its *likelihood.*

Proceedings had been in May *2012*, some 5½ years before his initial consultation with the Plaintiffs in these proceedings. The Judge appears also to have been of the view that the principles and policy considerations identified by Lord Denning MR in *Harmony Shipping Co v Saudi Europe* [1979] 1 WLR 1380 weighed – and, it seems from his judgment, weighed significantly – against granting the relief sought by the VHI.[5] Finally, the Judge was critical of what he considered to be the "*remarkable delay"* on the part of the VHI in bringing the application.[6]

9. For the reasons set out in this judgment, I conclude that the High Court erred in refusing the VHI's application and accordingly I would allow this appeal.

[5] At para 5(5) & 5(10)

[6] Para 5(9).

THE FACTS

10. There is little or no factual controversy. However, it is clear from the authorities opened to the Court that close attention to the facts is essential to a proper assessment of the issues raised by this appeal and, accordingly, it is appropriate to set out the relevant factual framework in a little detail.

11. The fact and scope of Professor McDowell's engagement by the VHI to act as expert witness in, and assist in the defence of, the RMS and CMC Proceedings is not in dispute.[7] It is clear that Professor McDowell was engaged by the VHI in relation to other contentious matters also. Professor McDowell's engagement by the VHI, in relation to a range of matters, long pre-dated his engagement by the Plaintiffs in these proceedings.

12. The second significant fact is that the unchallenged evidence of VHI is that, pursuant to his retainer, Professor McDowell was provided with a significant volume of privileged and confidential information. The VHI (through the affidavits sworn by Mr Quigley of McCann FitzGerald, the solicitors for the VHI) says that, over the course

[7] Professor McDowell was not the only economic expert retained by the VHI in relation to the CMC Proceedings, a fact on which the Plaintiffs rely to argue that the loss of Professor McDowell as a witness in those proceedings would not significantly prejudice the VHI. However, it is not unusual in competition law actions to have more than one economic expert, each addressing different aspects of the claim and it does not follow that one may readily be substitutable for the other.

of its relationship with Professor McDowell, he has *"obtained significant insight into the operations of the [VHI]."* Mr. Quigley says that "*highly sensitive, privileged and confidential material related to the proceedings and their defence*" was provided to Professor McDowell in connection with each of the RAS and CMC Proceedings, including in each case a lengthy and detailed letter of instruction from McCann FitzGerald. Mr Quigley explains that, in connection with his retainer, Professor McDowell attended consultations with the VHI and its legal representatives, in person and by phone and also (in relation specifically to the CMC action) participated in a video conference with McCann FitzGerald and another economic expert. Professor McDowell produced written memoranda addressing "*issues concerning what constituted the relevant geographic and product markets and also dominance and abuse of dominance*". Professor McDowell has – quite properly – sought and received payment for his services from the VHI. Amongst the material before the Court is an invoice from Professor McDowell in the relation to the RAS Proceedings which indicates that he had spent a total of 80 hours on the RAS Proceedings in the period between July 2010 and May 2011, which appears to reflect a significant level of engagement on his part.

13. This evidence goes well beyond the type of generalised (and often disputed) assertions found in some of the cases to the effect that a given witness has been provided with confidential and/or privileged information. It is not challenged either as to its substance or its detail. In his affidavit, Mr McDowell refers to these averments by Mr Quigley without contradiction or qualification. He says, however, that he has no hard copy documentation relating to the RAS or CMC Proceedings in his possession and

also says that he has searched his computer system and can find no "*confidential information*" relating to those Proceedings. However – and the VHI lays some emphasis on this point – Professor McDowell has not suggested that he does not recall the material provided to him.

14. The position here is therefore materially different from that presented in some of the authorities opened to the Court. In *Harmony Shipping*, the expert's "*engagement*" by the plaintiff involved a fleeting meeting outside court during which he was shown a small number of documents, none of which was confidential, less still the subject of any form of legal privilege. It also differs significantly from the position in another decision referred to by the High Court which also loomed large in the debate before this Court, *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch). The claimant in *Meat Corporation of Namibia* had sought to engage a particular expert and, in the course of preliminary discussions with her, provided her with some privileged information (Mann J commenting that the information was *"to some extent … pushed upon her.")*. No solicitor was involved in the engagement. Furthermore, the expert was never actually engaged by the claimant – a fact emphasised by Mann J in his judgment – and the information provided was, the court found, of no interest or use to her in preparing a report on the issues within her expertise.

15. More remote still is the position here from the spectre raised by Lord Denning MR in his judgment in *Harmony Shipping*, where he expressed concern at the possibility that a rich client might consult all the experts in the field and then rely on that fact to

exclude them giving evidence against him. Professor McDowell was not approached or engaged by the VHI in any such circumstances. I will come back to this point as it appears to have had a significant influence on the High Court Judge's approach to the application.

16. It seems that no steps have been taken to prosecute the RAS Proceedings for some time but, although inactive, the action remains live. As regards the CMC Proceedings, in March 2015 this Court allowed the plaintiff's appeal against an order of the High Court directing it to provide security for costs ([2015] IECA 69). The VHI subsequently applied – unsuccessfully - for leave to appeal to the Supreme Court. The Proceedings seem to have become becalmed at that point but at the hearing of the appeal the Court was informed by Counsel for the VHI that CMC had served a notice of intention to proceed in December 2019 and had suggested mediation and the Court was told that it was likely that such a mediation would take place.

17. There are differences between the parties as to the degree of overlap or identity that exists between the issues in these proceedings and those in the RAS Proceedings and the CMC Proceedings. Mr Quigley exhibits an analysis of the three actions which, he says, demonstrates such a degree of overlap as to make the claims "*identical*". In response, Ms McCarthy, the Plaintiffs' solicitor, suggests that the similarities are "*overstated*" and asserts that the claims in these proceedings are "*materially different*" to the claims made in the RAS and CMC Proceedings. In particular, it is suggested that an important aspect of these proceedings – relating to the specific basis given for the VHI's refusal to approve the Plaintiffs' hospital – does not feature in the RAS or

CMC Proceedings. For his part, Professor McDowell also disagrees that the issues in these proceedings are the same as in the RAS or CMC Proceedings, though he does not elaborate on his reasons for that disagreement and does not identify what he perceives to be the differences or explain the significance – if any – of those differences to the resolution of the VHI's application.

18. I am not convinced that anything material turns on the fine detail of this dispute. On any view, the claims made and issues arising in all three proceedings are very similar. In each, it is alleged that the VHI is in a dominant position and has abused that position by declining to extend private insurance cover to the hospital operated, or intended to be operated, by the relevant plaintiff(s). The essential product market(s) asserted in each appears to be substantially the same. While there may be differences between the claims as to the geographic market relied on, insofar as sub-national/local markets may be asserted (the VHI's position being that there are no such sub-markets), any such differences do not seem to me to be significant for the purposes of this application. Obviously, the issue whether the relevant geographic market is national or local may have real significance in the context of the substantive claims against the VHI but that issue is likely to arise in all of the claims.

19. While there may also be differences between the precise terms of the justifications offered by the VHI as between the three proceedings, these seem to be as much a matter of form or terminology as of substance. These proceedings may be the only one to involve an explicit invocation of a so-called policy of "*substitution*" – whereby (so it is said) the VHI requires the closure of an acute hospital bed before a new acute bed

will be approved. However, as Mr Gallagher submitted, in the RAS Proceedings and CMC Proceedings the VHI's refusal of approval appears to have been based on substantially similar considerations, namely that existing capacity was sufficient for its members and that the provision of cover for new and (in the VHI's view) unnecessary hospital bed capacity would result in increased costs to the VHI and its members.

20. The affidavits sworn by Ms McCarthy and Professor McDowell are not especially forthcoming as to the circumstances in which the latter came to be retained by the Plaintiffs or the precise scope of his retainer. It is not apparent from the papers whether the Plaintiffs had retained an expert prior to their engagement of Professor McDowell. Prior to his retainer (in October 2017) the Plaintiffs had instituted the proceedings and delivered a statement of claim (May 2015) and had delivered lengthy replies to particulars (April 2016) and replies to rejoinders (May 2017). In a competition law claim, one might normally expect that such pleadings and particulars would have been prepared with expert economic input but that may not have been the case here. In any event, it seems that Professor McDowell was asked - at least initially - to prepare a report "*as to the precise nature of both the geographic and product markets in which dominance of the VHI has been asserted*".[8] It also appears from Professor McDowell's

[8] This is stated in a document exhibited to an affidavit sworn by Ms McCarthy in November 2017, in the context of an application by the VHI seeking to compel the delivery of further and better particulars. The affidavit sworn by Ms McCarthy in the application before the Court does not address these issues.

affidavit that he has – unsurprisingly - expressed views on the merits of the Plaintiffs' claim against the VHI.[9]

21. The nature of the geographic and product markets by reference to which the issue of dominance is to be assessed is, of course, a fundamental common element of all of the claims that have been brought against the VHI and it is clear from the evidence of Mr Quigley that obtaining Professor McDowell's views on those issues was central to his retainer by the VHI in the RAS and CMC Proceedings. Therefore, in preparing a report on those issues for the Plaintiffs, Professor McDowell was effectively covering the same ground as he had previously covered – though of course on the VHI's behalf not on behalf of the parties suing it – in the RAS and CMC Proceedings. Equally, Professor McDowell's views on the "*merits*" of the Plaintiffs' claim – presumably views as to whether a dominant position in a relevant market was likely to be established and, if so, the prospects of a court being persuaded that the VHI's refusal of cover amounted to an abuse of that position within the meaning of Section 5 and/or Article 102 – would seem to involve issues overlapping to a significant degree with the issues previously considered by him on behalf of the VHI. In particular, any consideration of the "*merits*" of the Plaintiffs' claim here would seem to necessarily involve consideration of the validity or otherwise of the VHI's justification for refusing cover, a justification that appears to be in substance, even if not in every detail, the same across all three actions.

[9] Para 5 of that affidavit.

22. In his judgment, the High Court Judge acknowledges that the claims made by the plaintiffs in what he referred to as the "*Other Proceedings*" (they had been referred to by the VHI as *"the Analogous Proceedings*" but the Judge appears to have found that shorthand objectionable and I have chosen to avoid it) "*are similar to those made in these proceedings"* but were not, he added, "*identical*." The actual overlap between the various proceedings and/or the extent to which the privileged and confidential material provided to Professor McDowell for the purposes of his retainer in the RAS and CMC Proceedings would or might be relevant to the subject matter of his retainer by the Plaintiffs in these proceedings would seem to be issues of central importance to the determination of the VHI's application. However, those issues were not actually considered further by the High Court Judge.

23. It is not apparent from the papers whether, when the Plaintiffs first approached Professor McDowell to act as expert witness, they were aware of Professor McDowell's involvement in the RAS and CMC Proceedings, though it might perhaps be surprising if they were not. In any event, if they were not already aware of the position, they were presumably informed of it by Professor McDowell. The Plaintiffs are notably silent on these points. In any event, even though at the time of his retainer – in October 2017 – it had been a number of years since Professor McDowell had last had contact with McCann FitzGerald about the RAS or CMC Proceedings, it is not suggested that he overlooked his involvement in those proceedings, that he mistakenly understood that the proceedings had concluded or that he believed that his retainer had been terminated. In the absence of any suggestion to the contrary, therefore, it seems reasonable to assume that when, in October 2017, Professor McDowell was asked to

act as the Plaintiffs' economic expert in these proceedings, and agreed to do so, all concerned were aware of Professor McDowell's involvement on the VHI's behalf in the RAS and CMC Proceedings.

24. The Plaintiffs' affidavit evidence is also uninformative about the steps taken by them to identify and engage a suitable expert and/or whether they experienced any difficulty in doing so. This is relevant because, in the affidavit sworn by her opposing the VHI's application, Ms McCarthy seeks to suggest that, if Professor McDowell is excluded from acting for the Plaintiffs, this would have the effect of impeding the Plaintiffs' access to an expert and would impede their access to justice.[10] She also expresses concern that, if the Plaintiffs are required to engage another expert, it would likely mean that they would have to engage an expert from abroad which would add to their costs.[11] In the absence of any concrete evidence that Professor McDowell was the only available expert in Ireland as of October 2017 or any evidence that efforts to identify an alternative Irish expert at this stage have been and/or are likely to be unsuccessful – and there is no such evidence beyond the speculative and general assertions made by Ms McCarthy – I do not think it appropriate to give any material weight to these stated concerns. Professor McDowell is by no means the only economic expert in the State with experience of acting as an expert witness in competition law actions. Furthermore, it is not uncommon for expert witnesses in such actions to be retained from abroad (and, more generally, foreign-based experts commonly give evidence in

[10] At para 16.

[11] At para 20.

Irish courts) and, in the absence of any concrete evidence to that effect, there appears to me to be no reason to believe that such would give rise to any material prejudice to the Plaintiffs. I therefore respectfully differ from the view expressed by the Judge at paragraph 5(7) of his judgment.

25. There is, in any event, a rather one-eyed character to these expressions of concern on behalf of the Plaintiffs. While inviting the Court to give weight to the adverse consequences for them should they lose the services of Professor McDowell, the Plaintiffs accept that, if the VHI's application is refused, then "*there is no reality to the VHI seeking to retain him or Professor McDowell continuing to act on their behalf in the other cases."* The loss to the VHI of its chosen expert (or one of its chosen experts) in the RAS and CMC Proceedings is, it seems, *nihil ad rem* so far as the Plaintiffs are concerned. Furthermore, the acknowledgement that there is "*no reality*" to Professor McDowell continuing to act for the VHI in the event that the VHI's appeal is unsuccessful seems to point very clearly to the conclusion that there is in fact a fundamental conflict of interest between Professor McDowell's position as expert witness for the VHI in the RAS and CMC Proceedings and his position as expert witness for the Plaintiffs in their action against the VHI.

26. Proceeding with the factual narrative, on 17 November 2017 Ms McCarthy telephoned McCann FitzGerald for the purpose – so it appears – of informing the firm of Professor McDowell's engagement on the Plaintiffs' behalf. That resulted in Mr Quigley contacting Professor McDowell directly, following which McCann FitzGerald wrote to Ms McCarthy on 11 December 2017 expressing surprise that Professor McDowell

should have accepted instructions in circumstances where he had been engaged by the VHI in relation to *"claims directly analogous to those advanced by your client against [VHI]",* referencing the fact that "*a large quantity of highly confidential and legally privileged material*" had been provided to Professor McDowell and indicating an intention to raise the matter before the court on the following day and to *"object to the retention of Professor McDowell by the plaintiffs in these proceedings."*

27. The proceedings were in for mention in the Competition list in the High Court on 12 December 2017 and Mr Quigley confirms that the VHI's concerns about the involvement of Professor McDowell were raised on that occasion.

28. McCann FitzGerald did not receive any open reply to its letter of 11 December 2017 (a *without prejudice* reply seems to have been sent which, for obvious reasons, the Court has not seen). McCann FitzGerald wrote again on 1 March 2018. That letter sought confirmation (*inter alia*) that the Plaintiffs would retain a different expert and indicated that the VHI reserved its right to apply to have Professor McDowell excluded. This letter was met with silence, as was a further letter from McCann Fitzgerald of 9 April 2018. The Plaintiffs' failure to respond to this correspondence is not referred to in the affidavit sworn by Ms McCarthy and Mr Cush (for the Plaintiffs) was not in a position to offer any explanation for that failure at the hearing of this appeal, other than to suggest that McCann FitzGerald (and their client) could infer the Plaintiffs' position from their silence. In litigation such as this, I find it surprising that correspondence that, on any view raised a significant issue should apparently be ignored.

29. On 9 October 2018, Counsel informed the High Court that an application for the exclusion of Professor McDowell as a witness for the Plaintiffs would issue within six weeks, the application then issued on 26 November 2018 and ultimately came on for hearing before Barrett J in the High Court on 24 May 2019 with judgment being given very shortly afterwards.

30. In the period between November 2017 (when the VHI first learned of Professor McDowell's retainer by the Plaintiffs) and November 2018 (when the application issued) further particulars of the Plaintiffs' claim were provided (in February and April 2018) and the VHI delivered its Defence (in June 2018). The action is clearly some way from being heard.

DISCUSSION

Preliminary

31. While the parties disagree as to how such jurisdiction is to be exercised, that the Court has, in principle, a jurisdiction to make the orders sought by the VHI is not in dispute.

32. Clearly, such a jurisdiction falls to be exercised sparingly and with caution. While the courts play an increasingly significant role in the management of court proceedings – including an important role in determining the extent to which expert evidence should be permitted and the manner in which such evidence is presented[12] – the entitlement of a party involved in litigation to select and engage the expert of its choice is nonetheless an important constituent element of the right to litigate and the right of access to the courts, rights that in this jurisdiction enjoy constitutional status and protection. As the Judge observes (at para 7), a constitutional right of access to justice has been recognised in this jurisdiction since *McCauley v. Minister for Posts and Telegraphs* [1966] IR 345 and I agree that there is "*a clear overlap between that right and giving expert evidence.*"

[12] See Order 39, Rule 56 and following of the Rules of the Superior Courts (inserted by the Rules of the Superior Courts (Conduct of Trials), 2016 (SI No 254/2016)), considered in *Kenneally v DuPuy International Limited* [2016] IEHC 728, [2017] 2 IR 487.

33. However, that operates both ways. The Plaintiffs' interest in having the services of Professor McDowell as expert witness in these proceedings is not the only constitutional value engaged here. The VHI has an equivalent interest in having the services of Professor McDowell as regards the RAS and CMC Proceedings. Constitutional rights to litigate and to have access to the courts, and to engage and rely on expert witnesses in that context, are not the monopoly of the Plaintiffs, or of plaintiffs as a category. Such rights apply, in principle, to the *defence* as well as the *prosecution* of claims.[13]

34. Furthermore, the VHI has a significant interest in the protection of its confidential and/or privileged material. It was entitled to provide such material to Professor McDowell for the purposes of his retainer in the RAS and CMC Proceedings and, in this jurisdiction, the protection of such material from unauthorised disclosure - particularly material that is both confidential and privileged (as much if not all of the material provided to Professor McDowell seems to have been) - goes beyond a mere rule of evidence. As has been said on many occasions, legal professional privilege is a fundamental condition on which the administration of justice rests and, in this jurisdiction, has been recognised as having constitutional status: see for instance the decision of the High Court (Laffoy J) in *Martin v Legal Aid Board* [2007] 2 IR 759.

[13] See by way of illustration (in the context of costs) the decision of the Supreme Court (per McKechnie J) in *Godsil v Ireland* [2015] IESC 103, [2015] 4 IR 535.

35. As already mentioned the High Court here endorsed the test formulated by Hodgkinson & James – citing *Meat Corporation of Namibia* and *A Lloyd's Syndicate v X* [2001] EWHC 2487 (Comm) - namely "*whether it is likely that the [Professor McDowell] would be unable to avoid having recourse to privileged material*". The VHI says that such a test is not the correct test, though it also says that it meets that test on the facts here in any event. According to the VHI, given the nature of its interaction with Professor McDowell and the "*pivotal role*" played by expert economic witnesses in competition law claims, it should not have to demonstrate a *likelihood* – in the sense of a *probability* - of its privileged and confidential information being used; *any* appreciable risk is sufficient to warrant the Court's intervention and, it says, it is evident here that there is a significant risk of that information being inadvertently used or disclosed.

36. In response, the Plaintiffs say that the High Court's test is the correct test and submit that, having regard to the evidence, particularly the fact that Professor McDowell's last involvement in either the RAS or CMC Proceedings was in May 2012, the High Court Judge was entitled to refuse the VHI's application.

Expert Evidence

37. The widespread deployment of expert evidence in virtually every area of litigation is a feature of modern litigation both in this jurisdiction and elsewhere. As long ago as 1960, it was observed that:

> *"This is the age of experts qualified to give opinions in every field of human knowledge - whether science, medical or other, in accountancy, finance, handwriting and technical matters in every aspect of manufacturing process and so on. "*[14]

38. The proliferation of expert witnesses gives rise to many issues in terms of the cost and complexity of litigation, the independence and objectivity of such witnesses and issues about the capacity of courts to understand and adequately assess the reliability of complex expert evidence.[15] However, it is important to recognise that, in the words of Cumming-Bruce LJ in *Harmony Shipping*: "*the different kinds of expert are various*."[16] Certain experts do what the handwriting expert in *Harmony Shipping* was engaged to do, that is to say, they bring their expertise to bear on the examination of some object or another. An engineer inspecting a piece of machinery and expressing an opinion on the adequacy of its safety mechanisms in a personal injuries action, or inspecting the locus of a road traffic accident and expressing an opinion on where the precise point of collision was, performs essentially the same function, as does a doctor who examines the plaintiff in such a case and then gives evidence as to their injuries and likely recovery. The forensic engineer who examined the scene of the fire in

[14] *AG (Ruddy) v Kenny* (1960) 94 ILTR 185, per Lavery J at 189.

[15] Discussed in a number of a number of decisions of Charleton J in the High Court, including *James Elliott Construction Limited* [2011] IEHC 269 and *Weavering Macro Fixed Income Fund Limited (in liquidation) v PNC Global Investment Servicing (Europe) Limited* [2012] IEHC 25. The amendments to Order 39 introduced in 2016 were clearly prompted by the sort of concerns expressed by Charleton J in these decisions.

[16] At page 1388H.

Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited [2017] EWHC 218 (TCC) falls into this category also. In the words of Denning MR in *Harmony Shipping*, their role is to observe "*facts*" and express their "*independent opinion*" on those observed facts (even if, as in the case of the doctor in the example just given, there is an element of prediction involved).

39. Such experts typically do not need to be provided with any or any significant privileged and/or confidential information in order to form a view on the issue they have been asked to address and will not normally have any or any significant involvement in making decisions as to how litigation is conducted or how a claim (or defence) should be framed (though, of course, their evidence may be of great consequence in this context, as was the case in *Harmony Shipping*).

40. On the other hand, there are experts whose role will typically require the provision to them of significant levels of privileged and/or confidential information and much greater interaction with and/or involvement in the strategic decision-making in litigation. Thus, a doctor retained as an expert witness in a medical negligence case will typically have a significantly different role to that of a doctor giving evidence of injury in a personal injuries action. It is much more likely that there will be significant – and privileged - information flowing between client (and legal adviser) on the one hand and expert witness on the other in such a case and the expert is much more likely to gain insight into the claim or defence strategy.

41. While not concerned with expert *witnesses* as such, *Bolkiah v KPMG (a firm)* [1999] 2 AC 222 nonetheless provides a useful illustration of this point. KPMG (a firm of accountants) had provided services to the plaintiff, in the context of complex litigation that had been brought against him. In many cases, the role of an expert chartered accountant in litigation may be quite limited – as for instance in giving evidence of loss in a run-of-the-mill contract claim. Here, however, KPMG had provided what was described in the speeches of Lord Hope and Lord Millett as *"litigation support services"*.[17] In the unanimous view of the House of Lords, the nature of that engagement and the extent to which highly confidential information relating to the affairs of the plaintiff had been made available to KPMG for the purposes of it, was such as to warrant the firm being equated with solicitors for the purposes of considering whether they should be permitted to accept a related engagement adverse to the interests of the plaintiff. [18]

[17] Described in more detail at page 229C-E. KPMG had, in effect, performed many functions which would ordinarily be carried out by solicitors, including interviewing witnesses, reviewing pleadings, drafting *sub-poenas*, taking part in conferences with counsel in the absence of solicitors, preparing notes for cross-examination of witnesses and so on.

[18] In his speech, Lord Millett noted that information relating to a client's affairs in the possession of a solicitor is usually privileged as well as confidential. While that was not so as a general rule in relation to accountants, he noted that some of the information obtained by KPMG was likely to have attracted litigation privilege, though not solicitor-client (legal advice) privilege. Here, in contrast, it seems likely that at least some of the information exchanged between Professor McDowell and McCann FitzGerald would attract legal advice privilege as well as litigation privilege. Thus for instance to the extent that McCann FitzGerald shared with Professor McDowell legal advice given by that firm or by Counsel to the VHI, it would remain subject to solicitor-client/legal advice privilege.

42. As *Bolkiah* also illustrates, experts may be involved in litigation other than, or in addition to, involvement *qua* expert witness. An expert may be engaged to advise in circumstances where their primary role is not to give evidence or where it is not intended to call them as a witness at all. Their engagement may nonetheless involve the provision of privileged and/or confidential information to the expert and, as in *Bolkiah*, similar issues concerning conflicts of interest/apprehended disclosure of such information will arise in such a scenario.

43. In these circumstances, it appears to me that a "*one size fits all*" approach – one that treats all expert witnesses as if they were in the same position and which does not have careful regard to their actual role in litigation – may not be appropriate in this context.

44. Here we are concerned with an expert economist engaged to give evidence for a plaintiff in a competition law action. Such actions inhabit the interstices between law and economics. Those who have been involved in such an action – whether as party, practitioner or judge – will know the critical significance of economic evidence in its preparation, presentation and ultimate determination. Where – as here – the claim is one of abuse of a dominant position, the court will generally hear expert economic evidence as to the identity of the product market, the extent of the geographic market, whether the defendant undertaking is in a dominant position in the identified market and whether the conduct of that undertaking amount to an "*abuse*" of any position of dominance (an issue which in turn may involve several further questions and issues, including whether the conduct complained of is objectively justified) and the court's

conclusions on those issues will normally be informed by such evidence to a significant extent.

45. An economic expert retained for a defendant undertaking in a competition law claim – particularly, perhaps, one involving an abuse of dominance claim – will typically be given access to a significant volume of information concerning the market in which that undertaking is operating, its position on the market and the reasons/justification for its conduct on the market. Much of this information will be commercially confidential. In addition, a close interaction between the expert and the undertaking's legal advisers will normally be a feature of such a retainer. Competition law markets are not "*facts*" to be observed; they are forensic constructs, that are not visible to the naked eye and that cannot be examined in the manner of the documents at issue in *Harmony Shipping* or photographed and analysed in the manner of the scene of the fire in *Wheeldon Brothers Waste Limited.* Parties and their advisors (including their economic experts) consider and decide what market(s) can properly be proposed as constituting the relevant market(s) in any given case. The issue of abuse also requires strategic decision-making as to how to frame and justify the conduct of the undertaking for the purposes of the prosecution or defence of the litigation. The expert economic witness will usually be centrally involved in this process, which necessarily involves the two-way flow of privileged and confidential information between expert and legal advisers (and client).

46. Mr Quigley's evidence makes it clear that Professor McDowell played just such a role (on behalf of the VHI) in relation to the RAS and CMC Proceedings and it seems from

the evidence that he is now playing such a role (on behalf of the Plaintiffs) in these proceedings.

47. Mr Quigley's evidence suggests that at least some of the information exchanged between Professor McDowell and McCann FitzGerald would attract legal advice privilege as well as litigation privilege. Thus for instance to the extent that McCann FitzGerald shared with Professor McDowell legal advice given by that firm or by Counsel to the VHI, it would remain subject to solicitor-client/legal advice privilege. The position differs from that in Bolkiah to that extent.

The Authorities Opened to the Court

48. With those observations in mind, I turn to the authorities. I start with *Harmony Shipping*. I have already said something of its facts. They were, as it was put by Cummings-Bruce LJ, "*very unusual and peculiar*".[19] The handwriting expert, Mr Davis, had been shown carbon copies of a particular letter by a solicitor acting for the plaintiff while waiting outside court to give evidence in another case. The issue was whether the letter was genuine – that being an issue of great significance in the action which was an action on a charterparty. Mr Davis expressed an opinion on that issue on the spot which, it seems, was not helpful to the plaintiff. He heard no more from the plaintiff's solicitors. A number of weeks later, while being consulted about a different case (Mr Davis was, Lord Denning MR tells us, "*a very busy man*"), he was

[19] [1979] 1 WLR 1380, at 1388H.

asked on behalf of the defendants to the proceedings to give his opinion on some documents and did so. He did so without realising that he had already given an opinion on the same documents for the other side. As soon as he realised the position, he indicated that he could not accept any further instructions. However, his opinion was clearly helpful to the defendants and they issued a *sub-poena* to compel him to give evidence. The plaintiffs (though not Mr Davis himself) applied to have the *sub-poena* set aside and that application was heard by the trial judge (Lloyd J) who refused the application. The judge then adjourned the trial to allow the plaintiffs to appeal that ruling.

49. Each of the three members of the Court of Appeal considered that the trial judge was correct not to set aside the *sub-poena*. However, although there are a number of broad statements in the judgment of Lord Denning MR, it is critical to appreciate that in *Harmony Shipping* no confidential information appears to have been provided to Mr Davis, less still did it involve a situation where he had "*been told the substance of a party's case."* or "*been given a great deal of confidential information on it."* [20] Furthermore, while the judgment of Lord Denning MR is often cited (as it was by the High Court judge here) as authority for the related propositions that there is "*no property in a witness*" and that "*an expert witness falls into the same position as a witness of fact"*, his ultimate conclusion was expressed in materially more limited terms:

[20] At 1385C.

> *"In this particular case the court is entitled to have the independent opinion of the expert witness <u>on those documents and on those facts</u> – excluding as I have said, any of the other communications which passed when the expert witness was being instructed or employed by the other side. Subject to that exception, it seems to me (and I would agree with the judge upon this) that the expert witness is in the same position <u>when he is speaking to the facts he has observed and is giving his own independent opinion on them</u>, no matter by which side he is instructed."* (Page 1385F-G; my emphasis)

To the same effect is the following passage from page 1386G-H:

> "*There is no property in an expert witness <u>as to the facts he has observed and his own independent opinion on them</u>*." (again, my emphasis)

The "*facts"* that Mr Davis had "*observed*" were, of course, the documents presented for this examination and the "*his own independent opinion on them"* was his opinion as to whether they were genuine documents are not. That opinion depended entirely on his forensic expertise and was not dependent on or derived from on any confidential or privileged material disclosed to him by the plaintiff or its solicitors.

50. In his judgment, Waller LJ agreed generally with the Master of the Rolls though noting that it was "*clearly undesirable*" that expert witnesses should be involved with both sides. The "*safeguard"* against a witness giving evidence for both sides was the existence of professional privilege. Waller LJ did not explain further how that

safeguard might operate in practice, presumably because the issue that Mr Davis had been called to address was "*not a matter which depends on confidential information at all. It depends entirely upon an examination by somebody expert in those matters looking at the documents* …."[21]

51. Cummings-Bruce LJ also agreed, though noting that "*the different kinds of expert witnesses are various, and this case is only concerned with the particular functions, responsibilities and activities of a handwriting expert..*" In his view, the court was deciding "*only the obligations that arise from the very peculiar facts.*"

52. That latter observation of Cummings-Bruce LJ appears to me to be a sound one. I do not accept, as was urged on the Court by Mr Cush, that the decision in *Harmony Shipping* can or ought to be read as laying down any principle of general application and, in my view, the decision provides only limited assistance as to the resolution of the issues in this appeal. As already explained, Professor McDowell is in a very different position to that of the expert in *Harmony Shipping*. In my view, the objections raised by the VHI cannot properly be dismissed by recourse to the adage that "*there is no property in a witness*" and I do not find that especially useful in the circumstances here.

53. No doubt, some of the statements made by Lord Denning MR in *Harmony Shipping* are capable of being read as suggesting that it might be permissible for an expert

[21] Page 1387H.

witness engaged by the plaintiff in an action to be engaged by, and to give evidence for, the defendant in the same action, even in circumstances where that expert witness has "*been told the substance of"* the plaintiff's case and/or had " *been given a great deal of confidential information on it",* subject only to the protection (which, curiously, was formulated by Lord Denning in terms of the protection of the *witness*) that questions which "*infringed the rule about legal professional privilege or the rule protecting information given in confidence*" might be disallowed by the trial judge.[22] But that was not the case before the court in *Harmony Shipping* (and thus any such statements would appear to be *obiter*). I would be slow to read Lord Denning's judgment (which as already noted was not the only judgment delivered) as setting up any such supposed general principle and, although the Plaintiffs relied significantly on that judgment, I did not understand them to urge such an approach on the Court.

54. I doubt whether the Plaintiffs here would accept that the VHI might now be free to retain Professor McDowell as its economic expert in these proceedings and to call him as its witness at trial, on the basis that the interests of the Plaintiffs would be adequately protected by them being able to seek the disallowance of questions which "*infringed the rule about legal professional privilege or the rule protecting information given in confidence*". Presumably, the Plaintiffs would say – correctly, so it seems to me – that there would "*no reality*" to Professor McDowell being retained by the VHI in these proceedings, any more than there is any "*reality*" in him continuing to act for the VHI in the RAC and CMC Proceedings in light of his retainer by the Plaintiffs here and for

[22] At page 1385D-E.

the same reason, namely the manifest and palpable conflict of interest that such retainer would involve.

55. In any event, to the extent that *Harmony Shipping* is properly to be understood as authority for any such principle, I would not be prepared to follow it. In my view, the approach of Lord Denning MR in *Harmony Shipping*, if it were to be applied as a general principle, would not provide adequate protection for the legitimate interest of parties in the preservation and protection of confidential and/or privileged information supplied to expert witnesses for the purposes of litigation.

56. As for the public policy considerations referred to by the Master of the Rolls at the conclusion of his judgment (and which were also referred to by Waller LJ), no doubt the courts should, in general, be wary of any attempt by one litigant to exclude another from retaining an expert on the basis of previous engagement by the first litigant and should, in general, be slow to make orders the effect of which would be to curtail the *prima facie* entitlement of a litigant to engage the expert(s) of their choice (and the entitlement of the expert(s) to provide their services to that litigant). I readily agree that an expert witness should not be "*tied up*" – in the sense of being excluded from acting as a witness for party B – by virtue only of the fact that the witness was previously engaged by party A in connection with other, unrelated, litigation. But that is not the basis on which the VHI brings its application. It does not assert any "*property*" in Professor McDowell such as would preclude him from ever giving evidence against it. Its application is based on the fact that the litigation at issue here raises common issues and that Professor McDowell was provided with a significant

volume of privileged and/or confidential information by the VHI that is highly relevant to the proceedings brought against it by the Plaintiffs and to Professor McDowell's engagement in the proceedings and the resultant risk that such information may be used and/or disclosed in these proceedings.

57. Furthermore, the Plaintiffs do not (and, in my view, could not) contend that granting the relief sought by the VHI would be inherently contrary to public policy. Rather, the Plaintiffs accept that the Court has jurisdiction to grant such relief but say that the threshold for intervention has not been established on the facts. Finally, there can be no suggestion here that the VHI retained Professor McDowell to order to "*close his mouth*" as a witness against it and there is no evidence (beyond the generalised and speculative assertions of the Plaintiff's solicitor) that the exclusion of Professor McDowell would have the practical consequence of debarring the Plaintiffs from "*getting the help of any expert witness*".

58. *Harmony Shipping* has been considered in a number of Irish decisions, though none that involved any issue similar to the issue before the Court here. *McGrory v ESB* [2003] 3 IR 407 establishes that a defendant in a personal injuries action is entitled to access to a plaintiff's treating doctors (and their medical records) to obtain relevant information regarding that plaintiff's medical condition (though not to any privileged medical reports). In his judgment, Keane CJ cited a lengthy passage from the judgment of Denning MR in *Harmony Shipping* which, he noted, was "*a somewhat unusual case*". It is clear that the *ratio* of McGrory was not based on *Harmony Shipping*. No issue about expert witnesses was before the Supreme Court in *McGrory;* the issue was

access to a plaintiff's treating doctors to obtain information about their medical condition (as well as access to medical records). That information was not privileged (and Keane CJ was careful to *exclude* access to any privileged information) but was subject to medical confidentiality. However, Keane CJ was of the view that a plaintiff who sues for personal injuries *"necessarily waives the right of privacy which he would otherwise enjoy in relation to his medical condition."* [23]

59. *Harmony Shipping* was also referred to by the High Court (Barrett J) in *Power v Tesco Ireland Limited* [2016] IEHC 390. *Power* involved an application for the discovery of medical records and the judge refers extensively to *McGrory* and, indirectly, to *Harmony Shipping*, setting out a number of observations concerning "*interviewing opponents witnesses*". No issue relating to the interviewing of "*opponents witnesses*" in fact arose in *Power* and Barrett J's observations on the topic were clearly *obiter*. That being so, the suggestion in the judgment under appeal that *Power* effectively incorporated "*key points from Harmony Shipping into Irish law*"[24] is, in my view, mistaken. The *obiter* endorsement in one judgment of *obiter* observations in another is not how the common law is made or precedent established. In any event, the judge's observations in *Power* appear to me to overstate significantly the extent to which Keane CJ in *McGrory* endorsed the judgment of Lord Denning MR in *Harmony Shipping*.

[23] At page 414

[24] At paragraph 5.

60. I turn next to *Bolkiah.* Briefly, the plaintiff had previously engaged KPMG in connection with litigation against him in relation to certain of his assets. As already explained, the services provided by KPMG were in many respects akin to the sort of services that would ordinarily be provided by a firm of solicitors. In the course of its engagement, KPMG learned a great deal of confidential information about the financial and business affairs of the plaintiff. KPMG had also acted as auditors to the Brunei Investment Agency (BIA) for many years and also provided consultancy services to it. The plaintiff had been chairman of the BIA and obviously was aware of KPMG's relationship with it. KPMG's retainer by the BIA predated its retainer by the plaintiff and it seems that the plaintiff had retained KPMG because of its existing relationship with the BIA. The plaintiff was later removed from his position as chairman amid concerns that he may have been involved in unauthorised transfers from the BIA. BIA then sought to engage KPMG to assist it in investigating those dealings. The plaintiff brought proceedings against KPMG to restrain it from acting in relation to that investigation (though not from continuing to act as auditors to BIA) and sought an injunction to that effect.

61. KPMG had established "*information barriers"* (more commonly referred to as "*Chinese walls")* which - it said - meant that no-one acting on the BIA engagement had or would have access to any confidential information of the plaintiff obtained during the firm's engagement by him.

62. The High Court (Pumfrey J) made an order restraining KPMG from acting for the BIA.[25] That order was reversed by the Court of Appeal (Waller LJ dissenting),[26] Woolf MR giving the principal judgment. The principal factors which led the majority of the Court of Appeal to conclude that KPMG ought not to be restrained from acting for the BIA – the fact that all reasonable steps had been taken to minimise/avoid the disclosure of the plaintiff's confidential information through the adoption of information barriers, the fact of KPMG's long-standing (and pre-existing) relationship with the BIA and the consequent impact on the BIA's investigation if it were deprived of KPMG's services and that the plaintiff was aware of that relationship when he instructed KPMG – have no obvious counterpoints on the facts here. Professor McDowell obviously cannot erect Chinese walls within himself. His relationship with the VHI long predates his relationship with the Plaintiffs, not *vice versa*, and he and the Plaintiffs were aware of that relationship at the time (or at latest very shortly after) his retainer by the Plaintiffs.

63. The plaintiff appealed to the House of Lords which unanimously allowed the appeal and restored the High Court order. The principal speech is that of Lord Millett, with a short concurring speech from Lord Hope. Lord Millett explained the jurisdiction invoked as one founded on the protection of confidential information.[27] That was because the plaintiff was no longer a client of KPMG. The position, Lord Millett

[25] Reported at [1999] 1 BCLC 1.

[26] Ibid, page 19 and following.

[27] At page 234G

continued, would be "*otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time for and against the same client, and his firm is no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."* [28]

64. Lord Millett then addressed the position where the court's intervention is sought by a former client. In such a situation, the fiduciary relationship between solicitor and client has terminated and the only surviving duty "*is a continuing duty to preserve the confidentiality of information imparted during its subsistence."*[29] Where a former client seeks to restrain their former solicitor from acting for another client, they must show (i) that the solicitor is in possession of information which is confidential to them and to the disclosure of which they have not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the new client is or may be adverse to that of the former client. [30] The former solicitor's duty to preserve the confidentiality of such information is unqualified – the duty is to keep the information confidential, not merely to take all reasonable steps to do so.

[28] Page 234H – 235A.

[29] Page 235D.

[30] At page 235D-E.

65. Addressing the degree of risk that must be shown to warrant the court's intervention, Lord Millett rejected the threshold test of "*reasonable probability of real mischief*" that had been adopted by the Court of Appeal in *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831. That test imposed an unfair burden on the former client, exposed them to a potential and avoidable risk to which they had not co consented and failed to give them a sufficient assurance that their confidence would be respected. He continued:

> *"It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.*

> *Many different tests have been proposed in the authorities. These include the avoidance of "an appreciable risk" or "an acceptable risk." I regard such expressions as unhelpful: the former because it is ambiguous, the latter because it is uninformative. I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial."*[31]

66. That, as Lord Millett noted, was effectively the test that had been applied by Pumfrey J in the High Court. In his view, the balancing exercise undertaken by the Court of Appeal was inappropriate. Once the plaintiff had established that the defendant firm was in possession of information imparted in confidence and that the firm was proposing to act for another party with an interest adverse to his in a matter to which the information was or might be relevant, the evidential burden shifted to the defendant firm to show that, even so, there was "*no risk that the information will come into the possession of those now acting for the other party."*[32] On the evidence, Lord Millett considered that the "*heavy burden*" of showing that there was no risk that the confidential information might unwittingly or inadvertently come to the notice of those working on the BIA assignment had not been discharged by KPMG.[33]

[31] At page 236F – 237B. All emphasis is mine.

[32] At page 237G.

[33] At page 239H.

67. Lord Hope agreed that the nature of the work that had been carried out by KPMG required the court to take the same approach as it would in the case of a solicitor. A solicitor is under a duty not to communicate any confidential information relating to a former client to another person but that duty *"extends well beyond that of refraining from deliberate disclosure."* Their duty was to ensure that the former client is not put at risk that any such confidential information would be used against him. Where a solicitor agreed to act for a new client whose interests were or might be adverse to the interests of a former client, in circumstances where the solicitor had been in receipt of relevant confidential information from that former client, the former client was "*entitled to insist that measures be taken by the solicitor which will ensure that he is not exposed to the risk of careless, inadvertent or negligent disclosure of the information to the new client.."* He continued:

> *"As for the circumstances in which the court will intervene by granting an injunction, it will not intervene if it is satisfied that there is no risk of disclosure. But if it is not so satisfied, it should bear in mind that the choice as to whether to accept instructions from the new client rests with the solicitor and that disclosure may result in substantial damage to the former client for which he may find it impossible to obtain adequate redress from the solicitor. It may be very difficult, after the event, to prove how and when the information got out, by whom and to whom it was communicated and with what consequences. In that situation everything is likely to depend on the measures which are in place to ensure that there is no risk that the information will be disclosed. If the court is not satisfied that the measures*

> *will protect the former client against the risk, the proper course will be for it to grant an injunction.*"[34]

He agreed that KPMG had been unable to demonstrate that there was no risk of disclosure.

68. *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch) was the subject of extensive discussion before us. I have already given an account of its facts. The plaintiff had engaged with an expert on the meat industry, a Mrs Burt-Thwaites, in order to retain her as an expert in the proceedings. There was a dispute as whether she had agreed to the retainer. In any event, she was never formally engaged. She was subsequently retained on behalf of the defendant who sought permission for her to be called as its expert at trial. The plaintiff sought to have her excluded as a witness on the basis that she had received privileged and confidential information during a conversation with the plaintiff's managing director.[35] The plaintiff argued that, in those circumstances, the court should apply the approach adopted in *Bolkiah*.

[34] At page 227D-F. Again, the emphasis is mine.

[35] A separate ground of objection, based on a contention that Mrs Burt-Thwaites lacked the necessary independence to act as an expert witness because of connections with the defendant and/or with possible involvement in the transactions in dispute, was also advanced. This objection was also rejected by Mann J.

69. It is apparent from the judgment of Mann J that he did not consider it appropriate to apply *"the full rigours*" of the *Bolkiah* test. The fact that "*some privileged and confidential information*" had been given to Mrs Burt-Thwaites was not, in itself, enough to trigger "*the strict test in, and the strict requirements in" Bolkiah*. *Bolkiah* had concerned the protection of "*a quasi-solicitor/client relationship and all the disclosure that went with it*." The relationship between the plaintiff and Mrs Burt-Thwaites was *"not of that order*" and Mann J did not think that "*the mechanistic approach, based on the privileged nature of the information is appropriate"* so as to require her position to be equated with that of a solicitor. However, the confidentiality and privilege had to be maintained but, on the facts, Mann J was satisfied that it was "*likely to be maintained*", based on two factors, the first being Mrs Burt-Thwaites' undertaking to do so and, secondly, the nature of the information that had been given to her (none of which would be of assistance to her in preparing a report and "*virtually none of which"* would be of interest to the defendant or its advisers).

70. Mann J then went on to consider the defendant's analysis, based on *Harmony Shipping*. Though noting that *Harmony Shipping* was concerned with whether an expert witness was compellable (and noting later that it was not "*directly in point*"), "*its thrust*" was contrary to the application of *Bolkiah* to expert witnesses merely because they are in receipt of privileged information. If the principles from *Bolkiah* were to apply to expert witnesses, the resolution of *Harmony Shipping* (according to

Mann J) would have involved the answer going the other way.[36] *Harmony Shipping* thus fortified the judge's conclusion that *"the [Bolkiah] principles do not apply merely because privileged information has been given to the expert witness, even if it has been given in significant quantity."*[37] A court should not bar an expert simply because he or she had acted for both sides and still less should it do so where the expert had not acted for the first side but had merely discussed the case.[38]

71. As to what was the threshold for intervention in cases where the *Bolkiah* test did not apply, the judgment of Mann J is not entirely clear. No test is expressly articulated as such. However, referring to two authorities in which an expert having been consulted by one side was then not permitted to act for the other, Mann J stated that those cases "*demonstrate that on certain facts an expert should not be permitted to act because it is likely that the expert will be unable to avoid having resort to privileged material that he should not resort to. Stopping him from acting was therefore seen to be necessary in order to protect the privilege. Where the use of privileged material is inevitable the court will intervene."*[39]

[36] With respect, I do not see how this would be so, given the facts of *Harmony Shipping* (which of course pre-dated *Bolkiah* in any event) and, in particular, the fact that Mr Davis' evidence was based on his own examination of documentary material that was neither confidential or privileged.

[37] Para 38.

[38] Para 40.

[39] Paragraph 39.

72. In *A Lloyd's Syndicate v X* [2011] EWHC 2487 was decided shortly after *Meat Corporation of Namibia*. The claimant sought an injunction restraining the defendant from giving expert evidence in an arbitration between the claimant and a reinsurer in relation to a disputed reinsurance claim. The defendant – an expert on reinsurance – had acted for the claimant in relation to another reinsurance claim. In that other claim (which also proceeded by arbitration) an issue arose about the meaning and effect of a particular clause, referred to in the judgment as "*the Interlocking Clause*". In the course of preparing for the hearing of that claim, X expressed a view on that issue which was adverse to the claimant's position. He prepared an expert report and gave evidence for the claimant but his report and evidence did not address the Interlocking Clause.

73. X was subsequently instructed by the reinsurer in the later claim to provide expert evidence in relation to the Interlocking Clause. The claimant objected to his retainer but the arbitral tribunal held that there was no impediment to him giving evidence. Proceedings were then issued and the matter came on for hearing before Teare J in the Commercial Court.

74. Again, the claimant argued that the test was that set out in *Bolkiah*. In response, the defendant argued that the facts were not similar to *Bolkiah* but were similar to the facts of *Meat Corporation of Namibia* and that the appropriate test was that an injunction should be granted only if the claimant could establish that it was "*inevitable*" that the defendant would misuse confidential and privileged information. No such information, it was said, had been provided to the defendant.

75. Teare J did not consider the facts to be analogous to those in *Bolkiah*. The defendant had been asked to give a view on the meaning of the Interlocking Clause and, while a solicitor might be asked by a client to give a view as to the meaning of a clause, the service provided by the defendant to the claimant *"was not of the same scope, breadth or depth as the services typically provided by a solicitor*". Like Mann J in *Meat Corporation of Namibia*, Teare J considered that *Harmony Shipping* suggested that a less stringent test than that applied in *Bolkiah* was appropriate. He interpreted the judgment of Mann J as authority for the proposition that "*an expert should not be permitted to act where it was likely that the expert would be unable to avoid having resort to privileged material."* In his view, Mann J did not intend that "*inevitability*" should be the test – that was simply an example of where the court would intervene. While accepting that the scenarios and arguments that had been put to the defendant in the course of two conversations two years previously as to the meaning of the Interlocking Clause amounted to privileged information, it did not appear that the defendant had any detailed recollection of those discussions and the judge therefore was not persuaded that it was likely that this information would be misused. In any event, all of the claimant's arguments would be deployed in the arbitration and any loss of forensic advantage to the claimant (by being able to examine the reinsurer's expert in circumstances where he did not have any advance notice of the issues likely to be raised) would not justify interference with the arbitral tribunal's management of the arbitration.

76. *Meat Corporation of Namibia* and *A Lloyd's Syndicate v X* are, as I have already noted, cited as authority for the test formulated at para 8-006 of *Expert Evidence: Law and Practice* which was in turn cited with approval by Barrett J in his judgment. The approach taken in *Bolkiah* is referenced in the same paragraph, though without any discussion of where the dividing line between the two might fall to be drawn or of the circumstances (if any) in which the stricter approach in *Bolkiah* might be applicable to expert witnesses. I shall return to that issue after I have considered the other authorities opened on the appeal.

77. The facts in *Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited* [2017] EWHC 218 (TCC) were again a little unusual. The claimant sued the defendant insurers arising from its declinature of cover for fire damage to its waste processing plant. On being notified of the fire, the defendant insurers instructed a forensic engineer, Mr Braund, to examine the scene. In due course he issued a report in which he identified the cause of the fire as ignition of combustible materials caused by one of a number of potential sources of ignition. The defendant denied cover, based on a number of policy conditions. The claimant then approached Mr Braund (with the permission of the insurers) to assist in a proposed recovery action against third parties arising from the cause of fire that he had identified. In that context, he prepared another report in which he expressed the same conclusions regarding the cause of the fire. The claimant then changed tack and brought proceedings against the insurers and, when the insurers indicated an intention to rely on Mr Braund as a witness in defence of those proceedings, the claimant objected.

78. Unsurprisingly, this objection was rejected by Coulson J in the Technology and Construction Court. He thought that it would be "*absurd*" if Mr Braund, who was in *"best possible position*" to assist the court on the background issues surrounding the fire, was prevented from providing the necessary assistance on those issues to the court. While the evidence of Mr Braund might be challenged and might not be adopted by the court, it would be contrary to the interests of justice for the court's inquiry to be carried out without the assistance of the expert who undertook the contemporaneous investigation. Secondly, Coulson J did not see any overlap or conflict between what Mr Braund had been instructed to do by the insurers and what he was subsequently instructed to do by the claimant. No conflict had been perceived at the time because the issue that the claimant was interested in exploring – whether it had a claim against a third party or parties arising from the circumstances in which the fire had started – was one in which the insurers had no interest. Furthermore, there was no evidence that any confidential information had been provided to Mr Braund by the claimant and there was "*certainly no risk*" that any such information would be passed on to the insurers.

79. One further aspect of Coulson J's reasoning warrants mention. At paragraph 16 of his judgment, he referred to the fact that the issue was one about instructing an expert pursuant to Civil Procedure Rules Part 35. Such an expert had an overriding duty to the court (in this context Coulson J cited *The Ikarian Reefer* [1993] 2 Lloyds Rep 68, which has been frequently cited in this jurisdiction). That duty trumped "*everything else*". It was not a relevant factor in *Bolkiah* (because that was not about expert evidence) but was a factor in *Meat Corporation of Namibia* and, in Coulson J's view,

"the existence of that overriding duty also modifies the strict application of the rule in [Bolkiah]." I will return to this issue later.

80. A number of Australian and Canadian decisions were also opened by the parties.

81. The Canadian cases are principally concerned with the position of lawyers and for that reason are of less assistance than the Australian cases. In both jurisdictions, it seems, the threshold standard of "*probability of mischief*" established by *Rakhusen v Ellis* [1912] 1 Ch 831 has – at least as regards solicitors – been rejected as insufficiently protective of the interests of clients: see *MacDonald Estate v Martin* [1990] 3 SCR 1235 (a decision of the Supreme Court of Canada) and *Farrow Mortgage Services Pty Ltd (in Liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1 (a decision of the Supreme Court of Victoria). *Rakhusen v Ellis* was, of course, disapproved by the House of Lords in *Bolkiah*.

82. The VHI places significant reliance on *Protec Pacific Pty Ltd v Cherry* [2008] VSC 76 and *Australian Leisure and Hospitality Group Pty Ltd v Stubbs* [2012] NSWSC 215.

83. In *Protec Pacific Pty Ltd* (another decision of the Supreme Court of Victoria) the plaintiff sought an interlocutory injunction restraining the defendant from having any further contract with a third party, Steuler, who Protec was suing in separate proceedings. Professor Cherry was an expert materials engineer who had previously been retained by Protec in related proceedings and, the court found, had been provided

with confidential and privileged information in the course of that retainer. Granting the injunction sought, Habersberger J referred to the test formulated in *Farrow Mortgage Services Pty Ltd (in Liq) v Mendall Properties Pty Ltd*, where, in the context of a solicitor and client relationship, the court had held that it should intervene by way of injunction *"if there is a real and sensible possibility of the misuse of confidential information*." The judge could not see any reason why that principle should not also apply to the relationship of expert witness and client.[40] On the evidence, he was satisfied that there was such a possibility. That was so even though the court did not doubt the *bona fides* of Professor Cherry or of Steuler's lawyers. Situations could occur where privileged or confidential information would be inadvertently or unwittingly disclosed.

84. The order made in *Protec Pacific Pty Ltd* did not, it should be noted, prohibit Professor Cherry from continuing to act for Steuler. Rather, it restrained him from having any contact with Steuler or its lawyers. The court clearly contemplated that Professor Cherry could be called by Steuler as an expert witness at the hearing of Protec's claim. In that way – so Habersberger J considered – the injunction did not infringe the principle that there was no property in a witness.[41] The witness could still be called and objection could be taken at the hearing if any breach of confidentiality or privilege appeared to arise.

[40] At para 67.

[41] At para 70.

85. *Farrow Mortgage Services Pty Ltd (in Liq) v Mendall Properties Pty Ltd* and *Protec Pacific Pty Ltd v Cherry* were both cited by Nicholas J in the Supreme Court of New South Wales in *Australian Leisure and Hospitality Group Pty Ltd v Stubbs*. The defendant was a consultant specialising in social and strategic planning who had been retained by planners acting for the plaintiff to support a development application to the local council in relation to a liquor store. She was provided with information, attending meetings and prepared a draft social impact report. She was subsequently told that her report would not be relied on and no further work was required of her. After the application was refused by the council, the plaintiff issued proceedings challenging the refusal. The defendant council then retained Dr Stubbs as an expert in those proceedings. The plaintiff objected to her acting for the council and brought proceedings to restrain her from continuing to act.

86. Following *Farrow Mortgage Services* and *Protec Pacific Pty,* Nicholas J considered that threshold for intervention was that of "*a real and sensible possibility of the misuse of confidential information."*[42] He emphasised the fact that disclosure may be inadvertent and continued:

> *"27. The risk of disclosure of confidential information extends beyond intentional disclosure to unintended or unconscious disclosure. The degree of risk is measured with regard to the particular circumstances of the case, including the nature of the relationship between the parties, the nature of the*

[42] At para 26.

> *information and the circumstances in which it was imparted, and the sufficiency of any proffered undertaking of non-disclosure…"*

87. It is evident from the judgment of Nicholas J that the hearing before him proceeded on oral evidence and it may be that it was the full hearing of the action. There were issues as to the scope of the information given to Dr Stubbs, whether any such information was given in circumstances of confidentiality and whether confidentiality had been waived. All of those issues – none present here – were resolved in favour of the plaintiff. On the "*crucial question*", the judge concluded that there was a risk of subconscious or inadvertent disclosure.[43] It was, in his view, realistic to recognise, without casting any doubt on the bona fides of Dr Stubbs, that she might have "*some practical difficulty*" in compartmentalising the confidential information she had received from the plaintiff.[44] While Dr Stubbs had offered an undertaking that she would not use or disclose any such confidential information, the judge was in all the circumstances "*unpersuaded that, however well-intentioned, such an undertaking would be a sufficient safeguard against the risk of inadvertent or subconscious breach."*[45]

88. Unfortunately, it is not entirely clear from the judgment of Nicholas J precisely what orders were made on foot of these conclusions. Paragraph 2 suggests that they

[43] At para 39.

[44] At para 40.

[45] Para 41.

extended to an order restraining Dr Stubbs from "*assisting the Council as an expert witness*" in the proceedings, whereas paragraph 41 suggests a narrower form of order, restraining her from "*any pre-trial involvement with the Council or its representative as an expert witness*", thus leaving open the possibility that she could still be called to give evidence on the council's behalf.

89. In his submissions, Mr Cush observed that these two decisions involved proceedings taken against the expert witness directly. That is clearly correct as a matter of fact. But there is no suggestion in the judgments – and Mr Cush did not contend – that the threshold test for intervention that they identified and applied were in any way contingent on that fact and/or that a different threshold test should apply where – as here - the issue arose in the course of the substantive proceedings.

90. Mr Cush also observed that the Australian cases "*did not end up in the order sought by the VHI in this case where the witness is to be excluded altogether*." That is certainly true of *Protec Pacific Pty Ltd v Cherry* and I shall take it to be true of *Australian Leisure and Hospitality Group Pty Ltd v Stubbs* also. However, the Plaintiffs did not argue that, in the event that this Court considered it appropriate to intervene in the circumstances here, it should do so by making an order in the terms of that made in *Protec Pacific Pty Ltd v Cherry* as an alternative to the broader order sought by the VHI. As Mr Cush explained, such an order would effectively preclude Professor McDowell from continuing in the case in any event, because it would not be feasible for the Plaintiffs to rely on him as their expert if not permitted to engage with him between now and the hearing of the proceedings. That, no doubt, would frequently

(if not usually) be the practical effect of such an order. Given that neither party here invites the making of such an order, it is not necessary to express a view on the circumstances (if any) in which it might be made. I would, however, observe that, were such an order were to be made in these proceedings, it would seem to follow inevitably that the Plaintiffs would not then be in a position to comply with the requirements of Order 63B, Rule 27(1) RSC as regards the evidence Professor McDowell and the VHI (and the trial judge) would therefore have no advance notice of his evidence. In a complex case such as this, that would not be satisfactory or just. More generally, it is not obvious to me why, in circumstances where a court considers that the risk of *pre-trial* disclosure of confidential information – even if sub-conscious or inadvertent – is such as to warrant its intervention by injunction, the risk of such disclosure *at trial* should apparently be discounted.

Analysis and Conclusions

Preliminary

91. In my opinion, the evidence before the Court points inexorably to the conclusion that Professor McDowell's retainer by the Plaintiffs in these proceedings gives rise to a significant conflict of interest.

92. In the RAS and CMC Proceedings – assuming that they were to proceed to a hearing – it is reasonable to suppose that Professor McDowell's evidence would, in broad terms, be to the effect that, from an economic perspective, the VHI's refusal to extend

PHI cover to the relevant hospitals *does not* constitute an abuse of dominance. Conversely, in these proceedings – provided that Professor McDowell continues as the Plaintiffs' expert – it is reasonable to suppose that his evidence will, in broad terms, be to the effect that, from the same economic perspective, the VHI's refusal to extend PHI cover to the proposed private hospital in Limerick *does* constitute such an abuse. The interests of the Plaintiffs and the VHI are, manifestly, directly in conflict but Professor McDowell has allowed himself to be put in a position where he is engaged to serve both.

93. Mr Cush's frank acceptance that, should Professor McDowell be permitted to continue as expert witness for the Plaintiff, there is "*no reality"* to him continuing to act in that capacity for the VHI in the RAS and CMC Proceedings, acknowledges the reality of that conflict and also recognises, in a very concrete way, the high degree of overlap between the RAS and CMC Proceedings and the proceedings here.

94. Citing in support another decision of the Supreme Court of Canada, *Strother v 3464920 Canada Inc* [2007] 2 SCR 177, the VHI argue that, in circumstances where Professor McDowell was and continues to be retained as their expert in the RAS and CMC Proceedings, he is *ipso facto* disqualified from acting as the Plaintiffs' expert in these proceedings, by analogy with the principle that a solicitor cannot at the same time act for and against a client. For their part, the Plaintiffs contend that such a principle does not apply to an expert witness such as Professor McDowell.

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.[46] 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.

97. It would also mean that experts witnesses would be excluded from acting against their principals, "*even if the two mandates are unrelated*". However, the VHI expressly

[46] At page 234H-235A.

disavows any contention that experts are, by reason only of a prior and ongoing engagement by a client, excluded from acting as expert against that client even in an unrelated matter. Thus, while citing *Strother*, the VHI shrinks from following its logic.

98. It appears to me that the essence of the VHI's complaint here is that Professor McDowell ought not to be permitted to act as expert in these proceedings, not because of his ongoing retainer in the RAS and CMC Proceedings *per se*, but because of the privileged and confidential information that has been provided to him by the VHI for the purposes of that retainer and the risk that such information could be disclosed in these proceedings. The invocation of *Strother* adds nothing to the VHI's case. If the RAS and CMC Proceedings concluded tomorrow, or if Professor McDowell elected to terminate his retainer in those Proceedings now, the VHI's core complaint would be unaffected. It is that complaint that is at the heart of this appeal and which must now be resolved.

The Test to be Applied – Likelihood or Risk of Disclosure?

99. Logically, the first issue that requires resolution is the test to be applied. I have already rehearsed the arguments of the parties in some detail. I am not persuaded by Mr Gallagher's arguments to the effect that *Meat Corporation of Namibia* and *A Lloyds Syndicate v X* are to be interpreted as mandating the exclusion of an expert where there is *any* risk of privileged or confidential information being disclosed. In the first place, I note that that is not how those decisions are interpreted by the editors of *Hodgkinson & James.* Secondly, if Mr Gallagher is correct, the approach adopted in those cases

was to all intents and purposes the same as that adopted by the House of Lords in *Bolkiah*. However, it is clear from the judgments of Mann J and Teare J respectively that they did not consider it appropriate to apply the *Bolkiah* test. To interpret those judgments in the manner suggested by Mr Gallagher would, in my view, effectively involve the rewriting of them.

100. I agree with Mr Cush that *Meat Corporation of Namibia* and *A Lloyds Syndicate v X* posit a different test, namely whether disclosure is "*likely*." That, Mr Cush says, requires it to be established that disclosure is more *probable* than not. "*Likely*" does not always import the concept of probability – see for instance the discussion in *Highberry v Colt Telecom Group* [2002] EWHC 2815 (Ch) – but here it was not suggested by the VHI that, if the test is indeed whether disclosure is "*likely*", that involves a threshold lower than that of probability.

101. Any standard of *probability* seems to me to be potentially problematic, however. The application before the Court is an interlocutory application, brought on affidavit. That is true of virtually all of the cases that have been opened to the Court, with the already-noted exception of *Australian Leisure and Hospitality Group Pty Ltd v Stubbs*, where the court clearly heard oral evidence, though whether that was by way of cross-examination on affidavit, a full plenary hearing or otherwise is unclear. Interlocutory applications typically do not involve the making of findings based on *probability* precisely because of the limitations inherent in the interlocutory procedure. While, in principle, cross-examination of affidavits is available, it happens rarely, for good reason. However, if a court on an application such as this is required to determine

whether disclosure is *likely*, in the sense of being more *probable* than not, then, in the event that is any evidential conflict on affidavit, it would appear to follow that cross-examination (or a full plenary hearing) would have to be directed: see the recent decision of the Supreme Court in *RAS Medical Limited t/a Park West Medical v Royal College of Surgeons* [2019] IESC 4, [2019] 1 IR 63.

102. The prospect of such satellite litigation – with its inevitable expense and delay, as well as the increased burden on finite court resources – is very unappealing. That such litigation would involve discussion of – and therefore itself risk the disclosure of – confidential and/or privileged material adds a further level of difficulty.

103. These considerations might be thought to point to the adoption of a threshold standard that would not require the court to make findings based on probabilities. That is, particularly so, perhaps, where – as here – that standard is applied to a future contingency rather than a past event. Courts are, of course, regularly called on to make findings about future events – as for instance in a personal injuries action where a court may be required to make findings about the likely trajectory and timing of a plaintiff's recovery – but the task is nonetheless an inherently difficult one. If, as Lord Hope observed in *Bolkiah*, "*it may be very difficult, after the event, to prove how and when the information got out, by whom and to whom it was communicated and what consequences",* how much more difficult is such an exercise when undertaken before the event? And how much more complex again is that exercise where – as here – the court's intervention is sought not on the basis of any apprehension of conscious disclosure but by reference to the risk of unconscious and inadvertent disclosure?

104. In these circumstances, it appears to me that to require a party to establish as a matter of *likelihood* (in the sense of *probability*) that, absent court intervention, its privileged and/or confidential information *will* be disclosed in the future creates a significant obstacle to the protection of such information. While of course there may be cases where a likelihood of disclosure can be demonstrated and/or inferred (and this is such a case in my view) there will be cases – perhaps many cases – where such a threshold is practically insurmountable.

105. The rationale for adopting such an approach – at least if applied across the board – eludes me. I respectfully share Lord Millett's view that it is difficult to discern any justification in principle for a rule that would clearly expose a party to a risk that information it has provided in confidence to an expert witness may come into the possession of the other side and/or be deployed on its behalf, to the first party's detriment. I also agree with him that where – as here – the information is not only confidential but also privileged, *"the case for a strict approach is unanswerable."* While those observations were made in the context of there having been a fiduciary relationship between Prince Bolkiah and KPMG, I do not believe that that alters the position. It was not argued – and in my opinion could not have been argued – that Professor McDowell's ongoing duty to maintain the confidentiality of the information provided to him by the VHI and not to disclose or use that information in any way whatever was diminished or diluted because of the absence of a fiduciary relationship between himself and the VHI.

106. As noted above, the Australian authorities opened to the Court reject a threshold for intervention based on "*probability of mischief*", both as regards solicitors and expert witnesses. According to those authorities, a showing of a *"real and sensible possibility of the misuse of confidential information*" is sufficient to require court intervention. That, it seems to me, is in substance the same standard as was applied by the House of Lords in *Bolkiah*.

107. However, the approach taken in *Bolkiah* was not applied in the subsequent decisions from England and Wales which were opened to the Court. While the Court is not bound by those decisions, they clearly warrant careful consideration.

108. An important question in this context (so it seems to me) is where is the line of demarcation between the approach taken in *Bolkiah* and that adopted in *Meat Corporation of Namibia* and the decisions following it and what the nature of that demarcation may be. Is there, as the arguments made by the Plaintiffs imply, a rigid divide between solicitors (and those in an equivalent position to solicitors, such as KPMG in *Bolkiah* itself) and expert witnesses as a category or class? Or is it a more porous and flexible division?

109. In addressing this question, it is perhaps useful to consider why, in *Bolkiah,* the House of Lords took the view that the position of KPMG was to be equated with the position of solicitors. KPMG were not solicitors. Accordingly, instructions/information provided to the firm, and advice given by the firm, was not protected by legal advice privilege. But the House of Lords clearly considered that the level of interaction

between the firm and Prince Bolkiah, and the extent of the firm's involvement in the litigation (by way of "*litigation support*"), was such that the legitimate interests of Prince Bolkiah in the protection of his confidential and privileged information could be adequately protected only by precluding KPMG from acting for the BIA unless it could be shown that there was no real risk that such information might be disclosed. KPMG were not, of course, retained as expert witnesses. However, if that had in fact been an aspect of its retainer, it could hardly be suggested that any less exacting approach would thereby have been applicable.

110. I do not read the *Meat Corporation of Namibia* line of authority as involving any *a priori* rejection of the application of the *Bolkiah* test to expert witnesses as a category. Such an approach would involve precisely the sort of "*mechanistic approach"* that Mann J appeared to deprecate. In each of the cases, there is a close analysis of the facts and each of them appears to proceed on the basis that, on their particular facts, the approach in *Bolkiah* was not appropriate. Thus, in *Meat Corporation of Namibia*, Mann J thought that the fact that "*some privileged and confidential information*" had been given to the prospective witness was not enough to trigger the application of the "*strict test*" in *Bolkiah*. The level of disclosure was in fact minimal and, as a matter of overall assessment, the relationship was not "*of the order*" of the relationship at issue in *Bolkiah*. That was clearly so as a matter of fact. Similarly, in *A Lloyds Syndicate v X*, Teare J appears to have had regard to "*the scope, breadth [and] depth*" of the services provided by witness in deciding whether to apply the *Bolkiah* test. In other words, that determination was fact-sensitive and not one that followed simply

from the application of the label of "*expert witness*". The approach of Coulson J in *Wheeldon Brothers Waste* was equally fact-dependent.

111. The facts here are, in my view, significantly different to the facts in those cases. The uncontested evidence of Mr Quigley is to the effect 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 each of the RAS and CMC Proceedings. As I have sought to explain, an economic expert in a competition law action is a paradigm example of a category of expert witness whose retainer necessitates the sharing of significant levels of confidential and/or privileged information and who is likely to have a significant involvement in strategic decision making in the litigation. Cases involving experts of that kind appear to me to be materially closer to *Bolkiah* than to *Meat Corporation of Namibia, A Lloyds' Syndicate v X* or *Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited*.

112. In the circumstances of this case, for this Court to apply the test in *Bolkiah* does not, in my view, necessarily involve the rejection of the *Meat Corporation of Namibia* line of authority. Nor does it necessitate electing between the approach adopted in that line of authority and the approach that has been adopted in Australia. There may well be a compelling argument to be made that, in certain categories of cases - cases where it is inherently improbable that an expert witness has had any or any significant privileged and/or confidential information imparted to them, and where their role as expert is not likely to have involved them in any strategic decision making in litigation – the

threshold applied in the *Meat Corporation of Namibia* line of authority sufficiently protects the former client. But this case is not in that category, in my view.

113. For the avoidance of any doubt, however, I should say that, lest it be that I have misread the *Meat Corporation of Namibia* line of authority, and if it is in fact authority for the application of a general "*likelihood of disclosure"* test in respect of *all* expert witnesses, irrespective of their actual role in litigation and regardless of the volume of privileged and/or confidential information provided to them, I would respectfully decline to apply that authority in cases such as the present one, as to do so would, in my view, significantly under-protect the legitimate interests of parties in the position of the VHI here.

114. The threshold therefore is whether there is, on the evidence here, a real risk (as opposed to a likelihood) of disclosure. Whether the onus is on the VHI to demonstrate such a risk or on the Plaintiffs to exclude it is not, in my view, an issue of any moment on the facts here. The VHI did not contend that there was any onus on the Plaintiffs. For their part, while the Plaintiffs of course submitted that the threshold was that of likelihood and that the risk/real risk of disclosure standard was too low, they did not contend that, in the event that the Court were to hold that the threshold test is that of a (real) risk of disclosure, the Court could or should find that there was no such risk or refuse the relief sought. That is understandable. There is, in my view, an obvious risk of disclosure here. That is not, I stress, to impugn the integrity of Professor McDowell. I accept without hesitation – as the VHI accepts – that Professor McDowell will not consciously or intentionally act in breach of his duties. But unconscious and/or

inadvertent disclosure and/or reliance appears to me to be a very real and obvious risk here, particularly in the pressurised environment of the witness box. That risk is recognised in the Canadian and (in particular) the Australian jurisprudence opened to the Court, though it was not addressed by the Judge. Professor McDowell has been provided with a significant volume of information about its affairs and business by the VHI. The Plaintiffs have, no doubt, provided other information and Professor McDowell is likely to have undertaken further research on their behalf. It would be very difficult for Professor McDowell to identify the source of any particular item of knowledge regarding the VHI and/or compartmentalise information from different sources in his mind. Even if any of the information provided by the VHI has faded in his mind (and, significantly, Professor McDowell has not suggested so), his ongoing engagement for the Plaintiffs (if permitted to continue) is likely to trigger its recall. [47]

115. For completeness, I would add that I am persuaded that, even if the threshold for intervention is that of a *likelihood* of disclosure, the correct inference from the particular evidence here is that there is a likelihood. It is clear from that evidence that a significant volume of privileged and confidential information was provided to Professor McDowell to equip him to advise and give evidence on the issues arising in the RAS and CMC Proceedings. He does not suggest that he has forgotten this

[47] In his dissenting judgment in the Court of Appeal in Bolkiah, Waller LJ noted that the confidential information provided to certain KPMG personnel " *may not even be consciously in their mind until reminded by some other factor when carrying out their investigations in Project Gemma."* (at page 48d of the report). The same applies here, in my view.

material, despite the period of time that has elapsed since his last engagement with the VHI and/or McCann FitzGerald. He has now been engaged by the Plaintiffs to advise and give evidence on effectively the same issues in these proceedings. I simply cannot see how, with the best will in the world, Professor McDowell could prevent his consideration of those issues from being influenced and informed by the material previously provided to him by the VHI.

116. As Mann J observed in *Meat Corporation of Namibia, "on certain facts an expert should not be permitted to act because it is likely that the expert will be unable to avoid having to resort to privileged material that he should not resort to."* In my view, the facts established by the detailed and unchallenged evidence that has been put before the Court by the VHI here (which I have set out above), as well as a consideration of the extent to which the issues Professor McDowell would be addressing in these proceedings overlap with the issues in the RAC and CMC Proceedings (to which the confidential and privileged material provided to Professor McDowell by the VHI related), lead to such a conclusion here.

Undertaking

117. Like Nicholas J in *Australian Leisure and Hospitality Group Pty Ltd v Stubbs*, I am not persuaded that the undertaking proffered on Professor McDowell's behalf would be "*a sufficient safeguard against the risk of inadvertent or subconscious breach"*. The offer of that undertaking does not, therefore, alter the position in my view.

The Duties of Experts and the Relevance of Pre-Trial Procedures

118. It will be recalled that, in *Wheeldon Brothers Waste Limited,* Coulson J expressed the view that *"the existence of [the expert witness' overriding duty to the court] also modifies the strict application of the rule in [Bolkiah]."* Coulson J did not explain the modification he had in mind and the issue was not addressed in argument on this appeal (though, as previously noted, the Plaintiffs did refer to the duty of the expert witness the court as a ground for rejecting any suggestion that such a witness could owe a fiduciary duty to the party who retained them).

119. In the absence of argument on the point, it is necessary to be cautious. There is no doubt but that the principles developed in cases such as *The Ikarian Reefer* [1993] 2 Lloyds Rep 68 (which has been cited with approval in many decisions in this jurisdiction) are very valuable. Those principles are now reflected in Order 39, Rule 57(1) of the Rules of the Superior Courts. However, the fact that an expert witness has an overriding duty to assist the court does not appear to me, of itself, to involve the abrogation of a client's entitlement to protect confidential and – especially – privileged information provided to an expert in the course of their retainer. An expert cannot be compelled to disclose privileged information, whether by reference to Order 39, Rule 57(1) or otherwise.

120. In an action such as this, the parties will exchange discovery and exchange experts' reports in advance of trial. Legal submissions will also be exchanged. That gives each party an insight into the position of the other and an indication of the evidence and

arguments that they intend to adduce. Again, however, this will not involve the disclosure of privileged information (and will not necessarily involve the disclosure of commercially confidential information either).

121. Where information provided to an expert would be disclosed on discovery in any event or where (as in *A Lloyds' Syndicate v X*) information provided to an expert relates to arguments that will, in any event, be deployed in a party's written submissions, that may indeed be relevant to any assessment in this context. However, it does not appear to me that consideration of the duties of expert witnesses and/or the availability of pre-trial disclosure procedures points away from the application of the *Bolkiah* test in case such as this. This is not a case where the VHI's complaint relates only to timing or where the prejudice it raises is simply the loss of a forensic advantage.

Delay on the part of the VHI

122. The Judge considered that there had been "*a remarkable delay*" on the part of the VHI in bringing the application. If the application had been "*close-run*", he explained, that delay could have counted against the VHI.

123. The Plaintiffs again invoke the VHI's delay on this appeal as a ground for refusing the relief sought by it. They say that, in the period between the VHI first raising the issue in correspondence and the bringing of the application, the VHI delivered a defence and "*extensive requests for particulars, rejoinders and clarifications were exchanged between the parties in the meantime."* That, it is said, amounted to acquiescence on

the part of the VHI. Reference is made in this context to the decision of this Court in *Millerick v Minister for Finance* [2016] IECA 206, which involved the exercise of the court's jurisdiction to strike out proceedings on the grounds of inordinate and inexcusable delay.

124. I am not persuaded that the analogy is useful on the facts here. Regardless of whether Professor McDowell was acting as the Plaintiffs' expert or not, the VHI was entitled (and obliged) to deliver a defence in the proceedings and was also entitled to seek further particulars of the Plaintiffs' claim against it. Doing so could not have given any "*reassurance"* to the Plaintiffs that the VHI had abandoned its objections to the retainer of Professor McDowell by the Plaintiffs. Furthermore – in contrast to the position in delay cases – it has not been suggested that these steps will be wasted in the event that the relief sought by the VHI is granted.

125. The VHI's objection to the Plaintiffs' retainer of Professor McDowell was made known in a timely way. The High Court was told of the VHI's concerns on 12 December 2017. McCann FitzGerald, on behalf of the VHI, engaged in correspondence with the Plaintiffs' solicitors which (with the exception of one *"without prejudice*" letter) did not meet with the courtesy of a response. If the Plaintiffs were surprised at the VHI's reaction, they have not said so. If, at any point between December 2017 and October 2018 (when the High Court was told that this application would issue), the Plaintiffs formed the opinion that the VHI had abandoned its objection to Professor McDowell's retainer, again they have not said so.

126. I do not consider that, in the circumstances here, there was any culpable delay on the part of the VHI. Given its long-standing relationship with Professor McDowell, it cannot, in my opinion, be criticised for seeking to resolve the issue that had arisen by way of correspondence or for an understandable hesitation about bringing a formal application to Court. While no doubt the application might have been brought more expeditiously, it has not been shown that any limited delay that may have occurred has prejudiced the Plaintiffs.

127. Accordingly, I would not on the facts here refuse the relief sought by the VHI on grounds of delay.

Standard of Review/Discretion

128. Finally, it is said by the Plaintiffs that the High Court Judge should be afforded a *"significant margin of appreciation"* on this appeal, reference being made in this context to the decision of this Court in *Ganley v Radio Telifis Eireann* [2019] IECA 18. On this basis – so it is said – it is not enough that this Court might have decided the VHI's application differently; some error of approach on the part of the Judge had to be established such that the order made by him should be considered "*unreasonable or unjust*".

129. *Ganley* involved issues relating to discovery and I do not think that Irvine J (who gave this Court's judgment) necessarily intended that her observations should be read as applicable, or applicable to precisely the same extent, in all interlocutory appeals. Not

all such appeals will involve discretionary orders or orders which are discretionary to the same degree.

130. But on the facts here it does not appear to me to be necessary to consider that question further. In my view, no margin of appreciation can save the judgment of the High Court here. For the reasons I have set out, I consider that the applicable test is not that applied by the High Court. On that basis alone, the High Court's judgment must be set aside. I have also determined that, on the basis of the affidavit material before the Court (which this Court is in as good a position to weigh as the Judge), the Judge was wrong to conclude that, even if the applicable threshold test was as stated by the Judge, VHI's application ought to be refused. As the VHI observes, the Judge did not in fact correctly address himself to that test. He also failed to engage appropriately with the uncontested evidence of Mr Quigley.

131. Finally, the Judge appears to have been unduly influenced by the spectre of the *"rich client*" cornering the market in expert witnesses, so to speak. But, as I have said, the facts of this case are remote from any such scenario. While the precise circumstances in which the Plaintiffs came to retain Professor McDowell have not been disclosed – because the Plaintiffs have elected not to disclose them – it is reasonable to suppose that the Plaintiffs were at all material times aware of Professor McDowell's prior retainer by the VHI in the RAS and CMC Proceedings. They could have decided to look for another expert at that stage but did not do so. Professor McDowell could have declined to act, but he did not. That was, in my view, an error of judgment on his part. By agreeing to his engagement by the Plaintiffs in these proceedings, Professor

McDowell put himself into a position of obvious conflict of interest, belatedly recognised before this Court when the Plaintiffs acknowledged that there would be *"no reality*" to him continuing to act for the VHI if permitted to remain as expert for the Plaintiffs. In these circumstances, and contrary to what appears to have been the view of the Judge, there is in my opinion nothing overbearing or inappropriate about the VHI's application here.

DISPOSITION

132. Accordingly, I would allow the VHI's appeal.

133. The parties should be given an opportunity to agree any consequential orders (including as to the costs in the High Court and in this Court). In the event that agreement cannot be reached, any outstanding issues will be determined by the Court.

In circumstances where this judgment is being delivered electronically, Faherty J and Power J have authorised me to indicate that they agree with it.