AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000123

O'Donnell J.
Dunne J.
O'Malley J.
Baker J.
Woulfe J.

Between/

SHAY SWEENEY AND THE LIMERICK PRIVATE LIMITED

Appellants

-and-

THE VOLUNTARY HEALTH INSURANCE BOARD IRELAND

Respondent

Judgment of Mr. Justice O'Donnell delivered the 9th day of September, 2021.

I – Introduction

A. Background

1. Over the course of several years beginning in 2006, the appellants, Shay Sweeney and The Limerick Private Limited, a company in which Shay Sweeney acted as director, were involved in negotiations with the Voluntary Health Insurance Board Ireland ("the VHI" or "the respondent") regarding the provision of cover to customers of the respondent at a future private hospital to be built by the second

named appellant in Limerick City. The VHI eventually refused to provide such cover and the negotiations between the parties ceased in 2014. One of the VHI's primary reasons for refusing to provide cover was its assessment that new hospital beds were not necessary in the region.

2. This appeal arises not from the substantive proceedings between the parties, but instead from a motion issued by the respondent on November 26th, 2018, seeking the use of the Court's inherent jurisdiction to prevent Professor Moore McDowell, former Professor of Economics at University College Dublin, from giving expert evidence on behalf of the appellants in the substantive action. The VHI's basis for such an application was Professor McDowell's involvement in two other similar proceedings on behalf of the VHI since 2010 in which they are, similarly to the instant proceedings, accused of abusing a position of dominance in relation to plans for the construction of two different private hospitals in Cork and Dublin. Of these two proceedings (*RAS Medical Ltd. t/a Auralia/Park West Clinic v. The Voluntary Health Insurance Board* (Record No. 2010/5731 P) ("*RAS*") and *CMC Medical Operations (In Liquidation) t/a Cork Medical Centre v. The Voluntary Health Insurance Board* (Record No. 2012/1101 P) ("*CMC*")), only the *CMC* proceedings are still live, though Professor McDowell's last involvement in either case was on May 29th, 2012. In the *CMC* proceedings, the Court of Appeal refused the VHI's application for security for costs in 2015 ([2015] IECA 68). Since then, a notice of intention to proceed was filed on December 16th, 2019, and there has been no further action since.

3. On May 26th, 2015, the appellants issued proceedings in the High Court alleging an abuse of a dominant position by the VHI contrary to Article 102 of the Treaty on the Functioning of the European Union ("TFEU") and s. 5 of the Competition Act 2002.

4. Some two years after the commencement of the substantive proceedings, the appellants first consulted Professor McDowell on October 6th, 2017. A month later, on November 17th, 2017, McCann FitzGerald, the firm which had represented the VHI in the earlier proceedings as well as the present proceedings, were informed of Professor McDowell's involvement on behalf of the appellants, and a solicitor in the firm contacted Professor McDowell directly that same day in relation to this. On December 11th, McCann FitzGerald wrote to the appellants' solicitor, Ms. McCarthy, expressing surprise at Professor McDowell's retainer given his previous involvement in two cases "where claims directly analogous to those advanced by your client were made against the VHI". The following day, the proceedings were in for mention on the competition list in the High Court and counsel for the respondent raised this issue with the judge presiding over the list as had been adverted to in the previous day's letter.

5. Further letters were sent by McCann FitzGerald to Ms. McCarthy on March 1st, 2018, and April 9th, 2018, again querying Professor McDowell's work on their behalf. The letters – as did that of December 2017 – went unanswered. The exchange of pleadings in the substantive proceedings continued during the first half of 2018, and on October 9th, 2018, counsel for the respondents informed the High Court that a motion seeking to prevent Professor McDowell from giving expert evidence on behalf of the appellants would issue within six weeks. That motion did eventually issue on November 26th, 2018, and is now the subject matter of this appeal.

B. <u>High Court</u>

6. The motion was heard by Barrett J. on May 24th, 2019, with a judgment delivered a few days later, on May 28th, 2019 ([2019] IEHC 360).

7. In his judgment, Barrett J. refused the application though ordered the giving of an undertaking by Professor McDowell that he would not disclose any confidential or privileged information which he had received during his previous work for the respondent in the *CMC* and *RAS* proceedings.

8. The Court considered an extract from an English textbook, T. Hodgkinson & M. James, *Expert Evidence: Law and Practice* (2014: Sweet & Maxwell, 4th ed.) ("Hodgkinson & James"), which stated that the test for the exclusion of an expert was whether it was likely that the expert would be unable to give their evidence without reliance on privileged information. This test had been applied in two cases from the courts of England & Wales, *Meat Corporation of Namibia Ltd v. Dawn Meats (UK) Ltd.* [2011] EWHC 474 (Ch.) ("*Meat Corporation*") and *A Lloyd's Syndicate v. X* [2011] EWHC 2487 (Comm.), [2012] 2 Lloyd's Rep 123 ("*Lloyd's Syndicate*"), where the judges had in turn relied on the earlier case of *Harmony Shipping Co. v. Saudi Europe* [1979] 1 W.L.R. 1380 ("*Harmony Shipping*") in which Lord Denning M.R. had commented that there was "no property" in a witness. Barrett J. noted that these remarks had been cited with approval in *McGrory v. ESB* [2003] IESC 45, [2003] 3 I.R. 407 ("*McGrory*"), and thus had been adopted into Irish law, and applied in subsequent cases such as *Payne v. Shovlin & Ors* [2004] IEHC 430 (Unreported, High Court, Dunne J., December 17th, 2004) ("*Payne*") and *Power v. Tesco Ireland* [2016] IEHC 390 (Unreported, High Court, Barrett J., July 11th, 2016) ("*Power*").

9. Though the respondents urged the Court to adopt the test advanced in a different English case, *Prince Jefri Bolkiah v. KPMG* [1999] 2 A.C. 222 ("*Bolkiah*") – namely, a test of whether there was a real risk of reliance on the privileged information – Barrett J. declined to apply this test as he considered that that test

required the same standard to be applied as to the relationship of a solicitor and client, which relationship, he found, was different to that of an expert witness and their client. Citing *Lloyd's Syndicate*, the Court noted that the burden of proving the likelihood of disclosure was on the moving party, and Barrett J. found that the VHI had not met this threshold. Further, relying again on *Harmony Shipping*, the Court held that it could not have been an implied term of Professor McDowell's contract with the VHI in the earlier proceedings that he would not give evidence against the VHI in similar cases which may arise in the future.

10. Finally, the Court noted the "remarkable delay" between the initial phone call in November 2017 which had notified McCann FitzGerald of Professor McDowell's retainer on behalf of the appellants and the motion to exclude him from giving evidence on their behalf which issued just over a year later, in late November 2018. Refusing the application, Barrett J. however ordered Professor McDowell, "with an abundance of caution", to undertake not to disclose any information which he had received in his previous work for the respondent.

C. <u>Court of Appeal</u>

11. The VHI appealed this decision to the Court of Appeal which, in a judgment of Collins J. (Faherty and Power JJ. concurring), allowed the appeal ([2020] IECA 150).

12. Analysing the decision in *Harmony Shipping*, Collins J. found that the comments of Lord Denning M.R. in relation to there being "no property" in a witness were *obiter* remarks, as were the remarks of Keane C.J. in *McGrory*. Therefore, and contrary to Barrett J. in both this case and *Power*, the Court of Appeal found that it was incorrect to state that *Harmony Shipping* had been adopted into Irish law.

13. Considering the authorities from England & Wales dealt with in the judgment of the High Court, in addition to other authorities from Australia and Canada, Collins J. concluded that the test in *Bolkiah* was more appropriate to apply in this case than that in *Meat Corporation* or *Lloyd's Syndicate*, given the privileged and confidential nature of the information which had been provided to Professor McDowell in his previous work for the VHI. Therefore, the applicable test was not whether there was a likelihood of disclosure but whether there was a real risk of such. Given the amount of privileged and confidential information which had been disclosed to Professor McDowell by both parties in the different proceedings, Collins J. found that there was a real risk of accidental disclosure of such information, and thus that the application excluding Professor McDowell from giving evidence should be granted. Speaking *obiter*, Collins J. noted that even if the test in *Meat Corporation* had been applied, Professor McDowell would still have been excluded as he considered that, on the facts, there was a likelihood of disclosure.

14. Dealing with two other points raised in the case, Collins J. held that neither the undertaking which Professor McDowell was prepared to give as to non-disclosure nor the purported delay by the respondent in bringing the application acted to defeat the application. In relation to the alleged delay, Collins J. noted that counsel for the respondent had raised the issue at the first available opportunity before the High Court on learning of Professor McDowell's involvement in November and that correspondence had been sent (and not replied to) in early 2018 seeking to address the issue before the motion had ultimately been issued later that year. In light of these matters, the Court held that if there had been any delay on the part of the respondents, such delay did not amount to acquiescence to Professor McDowell's

retainer. Finally, Collins J. held the undertaking to be insufficient as it could not remove the risk of accidental disclosure, which was the basis of the application.

15. The appellants sought leave to appeal to the Supreme Court following the decision of the Court of Appeal, which leave was granted in a determination dated April 8th, 2021 ([2021] IESCDET 36).

D. Issues

i. The Admission of New Evidence

16. Between the decision of the Court of Appeal and the hearing in this Court, an additional issue arose between the parties as to certain factual assumptions purported to have been made by Collins J. at paras. 23-24 of his judgment as to the prior knowledge which the appellants had of Professor McDowell's engagement by the VHI in the *CMC* and *RAS* proceedings before engaging him in the present proceedings, and the availability or otherwise of alternative experts. Further submissions on this issue were directed at a case management hearing on May 17th, 2021.

17. After correspondence between the parties, the respondent dropped its opposition to the appellants filing affidavits on these factual issues pursuant to O. 58, r. 30 of the Rules of the Superior Courts, which affidavits were duly filed with the Supreme Court Office. The respondent commented that they considered the new affidavits "inappropriate and unnecessary", but did not object to their filing. They did, however, note that they reserved the right to address this evidence in oral submissions.

18. In the affidavits, the first named appellant avers that he contacted five other economists prior to Professor McDowell but that, of the three who replied, none

were able to work on the case for various reasons. Both he and his solicitor, Ms. McCarthy, also aver that though they were aware of Professor McDowell's previous involvement with the VHI, they were unaware of any current involvement at the time of his retention by the appellants. It appears that Ms. McCarthy was – unsurprisingly – aware of the *RAS* and *CMC* proceedings. For his part, Professor McDowell avers that he disposed of the materials used in the *CMC* proceedings in late 2012 although he cannot recall whether that was by returning the papers to the instructing solicitors or by destroying them himself.

ii. The Applicable Test

19. In its determination granting leave, this Court identified the issue arising on this appeal to be the correct approach to take when a Court is asked to exercise its inherent jurisdiction to exclude an expert witness from appearing in proceedings, particularly where that expert witness retained by one party has previously been engaged by another party to the proceedings.

20. In their submissions, the appellants argue that *Harmony Shipping* was adopted by *McGrory* and that the test in *Bolkiah* is inappropriate as the facts in the instant case differ starkly from those of *Bolkiah*, which involved an accountancy firm providing litigation services and who were thus held to the same standard as solicitors. Further, the appellants maintain that the Court of Appeal judgment appears to wrongly confine *Meat Corporation* to cases in which it is improbable that the expert witness has previously had access to confidential or privileged information. However, they note that *Meat Corporation* expressly envisaged cases where the expert witness may have had access to such information and would still not be prevented from giving evidence.

21. In response, the VHI submits that *Harmony Shipping* was not adopted by *McGrory*, as the latter case did not involve any issue as to expert witnesses. Analysing the extract from Hodgkinson & James relied upon by the High Court in this case, the respondent highlights that the passage containing the likelihood test is immediately followed by the real risk test as applied in *Bolkiah*. Arguing that the appellants fail to provide any rationale for the use of the likelihood test, the respondent cites numerous Australian and Canadian cases where the real risk test has been applied, in addition to *Secretariat Consulting PTE Ltd. & Ors. v. A Company* [2021] EWCA Civ. 6, [2021] 4 W.L.R. 20 ("*Secretariat*"), where the Court of Appeal of England & Wales – having considered the Court of Appeal judgment in the present case, among other jurisprudence – held both that *Meat Corporation* was decided on its specific facts and that the existence of a conflict of interest alone is sufficient to exclude an expert witness from giving evidence. They further distinguish *Meat Corporation*, *Lloyd's Syndicate* and *Harmony Shipping* from the present case on various bases, including the lack of confidential information involved in the cases, the lack of recollection by the expert witness of such confidential information or the determination of the Court, having reviewed the information supplied, that it was not of significance in the context of the case.

22. The appellants also underline the independence of expert witnesses, citing *Ikarian Reefer* [1993] 2 Q.B. 68, which was adopted in Ireland in *Payne*. Additionally, they highlight the comments of MacMenamin J. in *O'Leary v. Mercy University Hospital Cork and Khalid M Ali Chiad Al-Safi* [2019] IESC 48 (Unreported, Supreme Court, MacMenamin J., May 31st, 2019) as to the obvious differences between expert witnesses and witnesses as to fact. In light of the independence of expert witnesses and their overriding duty to the Court under O. 39, r. 57(1) of the Rules of the

Superior Courts, the appellants cite *Wheeldon Brothers Waste Ltd. v. Millennium Insurance Company Ltd*. [2017] EWHC 218 (TCC) ("*Wheeldon Brothers*") as authority for the proposition that this overriding duty to the Court mitigates the strictness of the *Bolkiah* test.

23. The respondent emphasises that they are not claiming that Professor McDowell is not independent, but are merely pointing to the conflict of interest which arises in this case, citing *Highberry v. Colt Telecom Group* [2002] EWHC 2815, [2002] All E.R. D. 347 ("*Highberry*") as an example of where a conflict of interest ought to have precluded an expert witness from giving evidence. In addition, they rely on comments in *Secretariat,* where the Court commented that an expert witness is, for all intents and purposes, perceived as being part of the relevant legal team. Further, they point out that, though the appellants cite a comment in *Wheeldon Brothers*, the actual test applied in that case was one of real risk.

24. Additionally, the appellants argue that the strictness of the *Bolkiah* test impedes the constitutional right of access to the courts as established in *McCauley v. Minister for Posts & Telegraphs* [1966] I.R. 345 and similarly frustrates the equality of arms which is a fundamental part of the right to a fair trial under Article 6 of the ECHR by allowing one wealthy party to consult all experts in the field and thus prevent the less wealthy party from relying on any expert. In this regard, the appellants cite a number of ECtHR cases, including *Steel & Morris v. UK* [2005] 18 B.H.R.C. 545.

25. In response, the VHI argue that none of the cases cited by the appellants held that access to expert witnesses was part of the constitutional protection of the right of access to the courts. They also underline that the cases cited by the appellants in relation to the concerns that wealthy parties might use up all available experts in an area precede the amendments to the Rules of the Superior Courts, which limited

parties to one expert per field. Consequently, they contend that the *Bolkiah* standard of real risk of disclosure does not impact on the constitutional right of access to the courts.

iii. Related Issues

26. Additionally, the appellants submit that the VHI should not succeed on the facts. It is their contention that it is unclear whether the VHI succeeded in the Court of Appeal on the basis of potential misuse of privileged information or confidential information, but that in either scenario they should not have succeeded. They argue that the VHI have failed to specify which particular pieces of information Professor McDowell had access to and on that basis submit that Professor McDowell cannot then state whether or not he recalls the information when there is no indication as to which information is concerned.

27. The respondent counters that it is entitled not to specify which particular information it claims is privileged, and that this argument on behalf of the appellants is a new point. On the facts, the VHI submit that it is highly unlikely that Professor McDowell will be able to dissociate himself from the information and it is instead likely that he will accidentally rely on confidential information. Added to this is a difficulty which the respondents will face in cross-examining the witness, as they maintain there is a strong possibility that certain questions could accidentally elicit this confidential information from Professor McDowell, and cite *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235 ("*MacDonald*") in support of their contention that he will be unable to compartmentalise the information which he is entitled to rely on from that which he is not entitled to rely on.

28. Added to this are issues with the lapse of time since Professor McDowell worked for the respondent, which lapse, the appellants say, would naturally lead to him not remembering some or all of the information. On this point, the respondent highlights the fact that Professor McDowell has not averred that he does not remember the confidential information to which he was privy while working for the VHI in the other proceedings. They also endorse the comments in the Court of Appeal judgment to the effect that Professor McDowell's recollection of this information would be triggered by his involvement in this case.

29. Also, the appellants highlight that Professor McDowell was not on a retainer with the VHI and thus that there was no contractual relationship between the two. By way of reply, the respondent argues that there is nothing in *Secretariat* to the effect that a conflict of interest is not possible in the absence of a retainer.

30. Finally, the appellants also submit that the Court of Appeal failed to have due regard to the VHI's delay in moving the motion after learning of Professor McDowell's involvement and to the undertaking which Professor McDowell is prepared to give. On the delay point, the respondent relies on the comments of Collins J. in the Court of Appeal in this regard, while they cite *Australian Leisure and Hospitality Group Pty Ltd. v. Dr. Judith Stubbs* [2012] NSWSC 215 ("*Australian Leisure and Hospitality*") as authority for the proposition that such an undertaking provides insufficient protection against the danger of accidental disclosure.

E. <u>Preliminary Observations</u>

31. As is apparent from the foregoing, the arguments in this case have ranged over a number of issues to authorities from a number of common law courts. However, the central issue has been helpfully identified by counsel for the appellant as relating

both to the test that should be applied and the nature of the evidence necessary to satisfy any such test. It is argued by the appellant that the Court of Appeal was wrong to adopt a test from *Bolkiah* and the Australian authorities of a real and sensible risk of disclosure of confidential information. It is argued that the correct test is that identified in the extract from Hodgkinson & James which, it is said, requires a party to establish a likelihood of disclosure of privileged or confidential information, meaning that the party seeking to restrain a person from acting as an expert witness should establish on the balance of probabilities – that is, that it is more likely than not – that confidential and privileged information would be disclosed. Second, it is argued that the evidence falls short of the standard required to establish this. In particular, it is said that there is a requirement of specificity in relation to the confidential information which is repeated in a number of the Australian cases and it is argued that it is essential to specifically identify the information in any claim to exclude a witness or to restrain the disclosure of such information.

32. The appellants' counsel has taken a realistic approach to this case by accepting that: first, there is a jurisdiction to make the order sought; second, that confidential and privileged information was supplied by the VHI to Professor McDowell; and third, that, if the test is the lower test contended for by the VHI, namely, that it is necessary merely to establish a real risk of disclosure, then the evidence adduced was sufficient to satisfy that lower threshold. The core issues on this appeal appear therefore to be:

(1) The threshold which must be surmounted by an applicant;

(2) The nature of the evidence necessary to surmount such a threshold.

33. While this is the central issue for determination in the appeal, the arguments and the authorities relied upon have touched on a number of different and related concepts, such as: the possibility that an expert owes a fiduciary duty to his or her client, or

duties analogous to those of a fiduciary; the question of conflict of interest; the possibility of a contractual duty to avoid such a conflict whether express or implied; whether such a duty arises from the overriding obligations of the expert to the Court; and, finally, whether public policy could preclude any obligation – contractual or otherwise – which could result in a Court being deprived of the evidence of the relevant witness.

34. It is not surprising that all these issues have been canvassed. There is a dearth of Irish authority on the area and only a limited number of cases from other common law countries which deal with a number of distinct fact situations, both in relation to the nature of expertise involved, and the extents of engagement between the expert and the respective parties. Moreover, it should be recognised that these areas are not necessarily self-contained and mutually exclusive. There is a continuum and, for example, the questions of confidential and privileged information are closely related to, and often involved in, any question of a broader duty or any question of a conflict of interest. It is also the case that, while the issue arises most acutely in the context of evidence to be given by a witness, the issue can arise more generally, since there is the possibility of disclosure of confidential or privileged information or a possible conflict of interest in the context of the preparations for a case, and before the question of any evidence arises. Indeed, it might be said that this raises different problems since any evidence is given in public, in the presence of the other party and under the supervision of a judge, whereas any possible disclosure in the course of preparation for trial would occur in private and with no way of monitoring the exchange or proving the content of any conversation.

35. For present purposes, however, it is important to identify that the claim here made and upheld by the Court of Appeal is focussed on the contention that the order sought

is justified on the basis that the performance by Professor McDowell of the function of expert witness on behalf of the appellants involves a real and sensible risk of disclosure of information imparted to him in confidence, and some of which is also privileged from disclosure. The claim is focussed, therefore, upon the nature of the information supplied, rather than the relationship between the parties or the status of the recipient. Any person who receives confidential and privileged information in circumstances which do not amount to a waiver of privilege, or give rise to any justification for disclosure, is bound to maintain that confidence and to not breach the privilege. In this regard, the status of Professor McDowell as an expert witness for the VHI in the *CMC* and *RAS* cases, only insomuch as it makes it more likely, indeed indisputable, that he received sensitive, confidential and privileged information, and similarly his status as an expert witness for Mr. Sweeney and the Limerick Private, is relevant to the degree of apprehension of possible disclosure. While it is undoubtedly important to the VHI in this case that the possible disclosure is to a party in litigation against the VHI, and may indeed occur in that litigation, the core obligation contended for relates to the maintenance of the confidentiality and privilege of the information disclosed.

36. It is also clear from the cases discussed that the issue raised is one which is fact sensitive to a significant degree. Indeed, the cases surveyed illustrate the risk of seeking to deduce and apply a broad principle which can apply more generally than the facts of the particular case demands. It is accordingly necessary to identify the relevant facts in this case in the context of which this Court is required to determine and apply the law.

37. First, Professor McDowell is a distinguished economist who, it is proposed, will provide advice as to economics and evidence in relation thereto in the context of a

competition claim made under the provisions of the Competition Act 2002, and/or Article 102 TFEU. In my view and, insofar as it is relevant, in my experience, the evidence of an economist is central to the prosecution and defence of any such claim. It has correctly been said that competition law is an example of an area which was once at least almost exclusively the province of economics, but which now, in certain contexts, has also become a legal issue. The obligations contained in the Competition Act and in the TFEU not to abuse a dominant position and not to engage in anti-competitive activity involve the legalisation of economic concepts. In this case, the principal claim is that the refusal of the VHI to provide cover to the Limerick Private amounts to the abuse of the VHI's alleged dominant position in the provision of healthcare insurance in the State. In simple terms, such a claim involves identifying a relevant market, establishing that VHI is dominant in it, and that the actions of the VHI in refusing to provide cover were not objectively justified, but rather amounted to an abuse of its dominant position. Each of these components require to be established if the Limerick Private and Mr. Sweeney are to succeed in their case, and the evidence of an economist is normally central – indeed almost indispensable – to making such a case. While it is conceivable that there may be some dispute about the primary facts upon which the opinions of an economist may be based, the central feature of any claim is the evidence-in-chief and cross-examination of the respective economic witnesses on these issues. If the Limerick Private's case proceeds to trial and if Professor McDowell or any other economist gives evidence in support of the claim then success will, to a large extent, involve the Court being persuaded that the economist's analysis of the situation is correct.

38. It follows from the foregoing that the role of a witness in a competition claim normally involves a high degree of interaction between the witness and the clients,

and between the witness and the legal team. The claim will often be shaped and perhaps reshaped, and the defence set and perhaps adjusted, on the basis of the interaction between the economist and the legal team, often with reference to facts and information sought from and supplied by the client. In this case, for example, it is said that the solicitors acting for the VHI in the *RAS* case provided Professor McDowell with a 14-page letter of instruction to counsel and that he was also asked to comment upon the VHI's defence. This illustrates the extent to which there is an intertwining of economic and legal issues, and expertise. Furthermore, the VHI have exhibited an invoice submitted by Professor McDowell's company in respect of his services in the "[c]laim against Vhi for abuse of a dominant position by Auralia", setting out the services supplied as including attendance at consultations and commentaries on the statement of claim and defence, and the preparation and supply of a memorandum on defence issues. This relates to a claim which had only proceeded to a relatively preliminary stage. It would be expected that the demands on the time and input of the witness as the trial approached would, if anything, be greater.

39. Insomuch, therefore, as there are a range of situations in which expert evidence may be sought in relation to litigation, then, in the apt phrase of Collins J. in his judgment in the Court of Appeal, the identification of the relevant market (and other factors in a competition claim) is not the ascertainment of an independent observable fact like, for example, the operation of a piece of machinery in the context of a personal injuries claim, but rather is a "forensic construct" and, furthermore, the economic witness is central to its construction (and, perhaps, its attempted demolition). That task, which is central to the case, also involves a high degree of engagement with the lawyers, and, normally through them, with the client, and that engagement can be

expected to be ongoing and iterative. The position is explained particularly well in a passage in the judgment of Collins J. which merits quotation in full:-

> "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)." (Emphasis in original).

40. Second, while some effort was made by the plaintiff's solicitors to draw a distinction between the subject matter of the *RAS* and *CMC* claims on the one hand, and that of this case on the other, and Professor McDowell does state that he does not agree that the cases can be considered to be to have a high degree of similarity, I consider that this case must be approached on the basis that there is indeed a high degree of overlap between the relevant cases, in relation to the legal issues involved, the factual claims made, and the time period in respect of which they are made. The appellants did seek to argue that paras. 13-19 of the statement of claim deal with the issue of "substitution" which is not specifically pleaded in either the *RAS* or *CMC* claim. This relates to an allegation made by the plaintiff that the VHI had a policy requiring the closure of another acute bed within the system before a new one was allowed to open. Indeed, counsel pointed out that at one point the Minister for Health had been a defendant in these proceedings because of the contention that this policy emanated from the department. While it is perhaps understandable that the appellants would

seek to highlight any differentiation between these proceedings and the *RAS* and *CMC* proceedings, I agree with Collins J. at para. 20 of his judgment that these were matters of form and terminology as much as matters of substance. As he said, in each case it appears the VHI's refusal of approval appears to have been based on substantially similar considerations. Namely, that its existing capacity was sufficient for its members that the provision of cover for new and – in the view of the VHI – unnecessary hospital bed capacity would result in increased costs to the VHI and its members. Furthermore, the appellants are not able to say, still less do so persuasively, that this distinction has the effect that the confidential and privileged information supplied to Professor McDowell in the context of the *RAS* and *CMC* cases would not be relevant to the Limerick Private's claim such that there would be no appreciable risk of disclosure. This case must be approached, therefore, on the basis that the information supplied to Professor McDowell relevant to the *CMC* and *RAS* cases, to allow him to advise upon them, is highly likely also to be relevant to these proceedings and the issues upon which Professor McDowell was asked to advise by the appellants.

41. It is also possible, I consider, to clear away some matters as were touched upon in the course of these proceedings. It is not possible to resolve this case on the basis of the application of some general rule of thumb such as that there is no property in a witness, or that there is no relevant difference between a lay witness and an expert witness, or that public policy would always preclude any contractual term requiring a person not to give evidence against that party, or, finally, that the order sought here should be refused on the basis that it interferes with the constitutional right of access to the courts. These statements are framed at such a level of generality that they are

too crude and clumsy a device to permit the Court to resolve the fine-grained issues that are raised in this or similar cases.

42. Finally, in these preliminary observations, it is worth considering why this issue is a novel one for an Irish Court and why there is no clear current authority in the common law world. It seems likely that in most, if not all, cases in which an expert finds themselves in a situation where there are issues in related litigation which are uncomfortably close to each other, the issue will be resolved by the individual expert in consultation with the parties. It is relatively unusual to have the matter reach the point of a judicial resolution. However, even if these matters are normally best left to the advisors and the relevant expert, it is still important to identify the precise legally enforceable obligations which are involved. This is so for a number of interlocking reasons. First, any order by a Court as to the persons who may give evidence in the proceedings, or the nature of the evidence which may be given, is an interference with the parties' choice of witnesses (and, in some cases, their choice of solicitor or barrister) and may give rise to a sense of grievance if the party is deprived of their witness or advocate of choice by order of the Court; second, applications of this nature create satellite litigation which is particularly undesirable when it becomes focussed on the professionals and witnesses involved in the litigation, rather than any issue in the litigation itself. Even to bring an application of this nature has the capacity to distract the party and significantly disrupt its preparations for a case. Third, litigation is often a bare-knuckle contest and, for some litigants at least, the desire to cause such disruption to an opponent's preparation may be irresistible. Fourth, most independent witnesses whose evidence is found persuasive by the courts are anxious to maintain their reputation for integrity and independence and do not relish becoming the centre point of a contentious

application. This, in turn, may lead to a tendency, therefore, to seek to avoid any possible dispute. But the obligation of independence should carry with it a commitment to robust rejection of any ill-founded application. Fifth, and on the other hand, if, however, an expert witness whose evidence may be decisive in a case is permitted too readily to assist one party in one case, and then another party whose interest is opposed to the first party in another case, in circumstances where the first party has a suspicion that information or strategies may be even unwittingly disclosed to its opponent, the party affected may have an understandable sense of grievance about a system which permits such an outcome and may consider that any proceedings conducted in such a way fall short of the proper administration of justice. For all these reasons it is important, therefore, that there should be maximum clarity as to the obligations of an expert witness. Moreover, any test should provide proper protection to a party that has disclosed confidential and sensitive information to an expert in the course of preparation for a case while at the same time providing little encouragement for purely tactical objections which might have the effect of depriving a party of a witness whose evidence might be decisive. As Collins J. observed, while a Court has jurisdiction to make orders in relation to whether a person can act as an expert witness in a case, it is a jurisdiction to be sparingly and cautiously exercised. That requires a clear understanding of the test to be applied and the reasoning underpinning it.

43. The question of whether an applicant must establish a likelihood on the balance of probabilities of disclosure of confidential and privileged information, or whether it is sufficient to establish a real risk of such disclosure is, at one level, an issue of principle which could be approached in the abstract, but is perhaps best addressed through a consideration of a range of decided cases which are discussed in the

judgment of the Court of Appeal and one subsequent decision, *Secretariat Consulting PTE Ltd v. A Company*, a decision of the Court of Appeal of England & Wales, which was decided after the decision of the Court of Appeal in this case, and which considers it in turn. These cases illustrate the wide range of different facts and legal analyses which can arise, and provide a useful backdrop against which to determine the issues arising in this jurisdiction. The case law is comprehensively reviewed in the lucid judgment of Collins J. in the Court of Appeal and it is only necessary, therefore, to set out some salient aspects of the jurisprudence relevant to the arguments as they developed on this appeal.

II – The Jurisprudence

44. *Harmony Shipping* concerns circumstances familiar to anyone involved in litigation. An expert, in this case on handwriting, a Mr. Davis, was waiting to give evidence in a case. He was approached outside court by the solicitor and counsel for the plaintiff in the *Harmony Shipping* litigation and asked to give his opinion on some documents which he was shown. He expressed a view as to the authenticity of the letter. He discussed a fee and, in the discussion with counsel, he said that it was not his practice to accept instructions from one side after being consulted by the other. From these matters and others, it may be inferred (and was inferred) that his opinion was unfavourable to the plaintiffs. In any event, the plaintiffs did not retain him to act as an expert witness in the case.

45. A little while later, he was involved in another case and was in consultation with the partner of a firm of solicitors. He was asked if he could also look at some documents for a partner in the same firm who was acting for the defendant in the *Harmony Shipping* proceedings and did so. Later in the conversation, however, he realised that

he had seen the documents before and, having checked, he informed the partner of this, and that he could not accept further instructions because of his prior involvement with the other party. Again, it is to be inferred that his opinion was favourable to the defendants, who then issued a *subpoena* to compel his attendance at the trial. The plaintiff (and not, it is to be noted, the expert, Mr. Davis) objected and sought to set aside the *subpoena*. The trial judge refused to do so and adjourned the trial to allow the issue to be immediately appealed to the Court of Appeal.

46. The Court of Appeal was unanimous in upholding the trial judge. The judgment of Lord Denning M.R. is relied on by the appellants in these proceedings, and was central to the decision of the High Court judge here in refusing the order sought by the VHI. While the factual circumstances were narrow, some of the observations made by Lord Denning M.R. are broad, and capable of covering the situation in this case. Thus, he described the issue as "a question of principle" (1384G). As far as witnesses of fact were concerned, the law was plain that there was no property in a witness. The question was whether or not that principle also applied to expert witnesses. Such witnesses "may have been told the substance of a party's case. They may have been given a great deal of confidential information on it. They may have given advice to the party". Lord Denning M.R also observed that many of the communications between the solicitor and the expert witness may be privileged. They were protected, however, by legal professional privilege and could not be communicated to the Court and, similarly, a judge would exclude any questions infringing the rule protecting information given in confidence. Subject to these qualifications, Lord Denning M.R considered that an expert witness fell into the same position as a witness of fact. Insomuch as it was argued that there was an express or implied contractual obligation not to accept instructions from the other

side, Lord Denning M.R. considered that while it was a proper statement of professional practice that Mr. Davis would not accept instructions from one side after having been instructed by the other, it could not be said to be a contractual term. In any event, he considered that any contract under which a witness agreed not to give evidence before a Court would be contrary to public policy. Accordingly, he upheld the trial judge's refusal to set aside the *subpoena*.

47. While on the facts of the case no confidential or privileged information had been provided to Mr. Davis by the solicitors for the plaintiff, and there was therefore no question of a real risk – still less probability – of disclosure, Lord Denning M.R.'s statement of principle is clearly broad enough to cover such a case and seems authority for the conclusion that such considerations ought not preclude a witness from giving, or being required to give, evidence relevant to the case. The case was not one where an application was brought to seek to protect privileged or confidential information. Accordingly, Lord Denning M.R. did not address the test to be applied in such circumstances. Rather, it appears that he considered that the power of the Court to exclude any evidence relating to privileged or confidential information, and accordingly to rule out any question tending to do so, was sufficient protection for any privileged and confidential information that might have been communicated to the expert.

48. Notably, however, the members of the Court of Appeal concurring in the decision adopted a narrower approach. Waller L.J. referred to the submissions made on behalf of the expert by counsel who said that Mr Davis had addressed those considerations which might have led to him seeking to have the *subpoena* set aside himself. One such consideration was the question of whether it would be difficult for Mr. Davis to disentangle those matters which had been given to him as a matter of confidence

by the plaintiff from those which were not. He had concluded that it was quite impossible to sustain any such ground. This was obviously so on the facts of the case, since it did not appear that any privileged or confidential information had been communicated to him. Waller L.J. observed that this was not surprising since Mr. Davis was required in the main to give evidence about his examination of four documents and, as it seemed to Waller L.J., "that is not a matter which depends on confidential information at all". Cumming-Bruce L.J., for his part, observed that there were different kinds of experts and that this case was concerned with a particular function, namely, the responsibilities and activities of a handwriting expert. That gave rise to very special facts in the particular proceedings, and it was not necessary for the determination of the appeal to consider a situation of any other kind or of an expert in any other kind of situation. What the Court was deciding was that the obligation arose from "the very peculiar facts that have been described in the evidence in this case".

49. *Bolkiah v. KPMG* is a case at almost the opposite end of the spectrum from *Harmony Shipping.* The defendant was a well-known firm of chartered accountants who acted as auditors for an investment agency ("the agency") which held and managed the extensive external assets of the government of Brunei. The plaintiff, Prince Jefri Bolkiah, was the youngest brother of the Sultan of Brunei and was the chairman of the agency. The agency made a number of transfers and the auditors were obliged to accept the certificate of the agency in relation to such transfers. During 1996 to 1998, Prince Jefri retained KPMG to undertake a substantial investigation into a major piece of litigation, in which he was personally involved, connected to the transfers. The project was undertaken by the forensic accountancy department of the London office of KPMG and, in the course of the investigation, the team was supplied with

and acquired extensive confidential information about the extent and location of Prince Jefri's personal assets, the legal structure involved and the corporate vehicles used in the acquisition and management of the assets. In total, Prince Jefri paid KPMG more than £4.6 million and the project was formally discontinued in May 1998.

50. In June 1998, the government of Brunei appointed a task force to carry out an investigation into the affairs of the agency and the forensic accounting department of KPMG was approached to participate. The firm decided that there was no conflict of interest as KPMG had ceased to act for Prince Jefri. The firm did not inform Prince Jefri of its conclusion in this regard. The firm established information barriers, popularly known as Chinese walls, within the forensic accounting department to protect the confidentiality of any information obtained from or in relation to Prince Jefri's affairs. It was held that it was obvious, and it was not disputed, that at least some of the confidential information obtained by KPMG while acting for Prince Jefri was itself relevant to the investigation then being carried out on behalf of the government of Brunei.

51. When Prince Jefri discovered that KPMG were acting, he sought an injunction restraining them from continuing to act for the agency. KPMG offered an undertaking not to use or disclose any information about Prince Jefri's assets received or acquired during the investigation carried out on his behalf. The High Court nevertheless granted the injunction. The Court of Appeal of England & Wales by a majority reversed this decision and the House of Lords unanimously reversed and reinstated the injunction.

52. The principal judgment in the House of Lords was that of Lord Millett. He observed that the litigation support services supplied by KPMG were akin to the services

provided by a solicitor, albeit that any information was not covered by legal advice privilege, although some, at least, may be covered by litigation privilege. *Harmony Shipping* was not cited or discussed. Lord Millett drew a clear distinction between a challenge by an existing client, and a situation which arose when a former client sought to restrain a solicitor or a firm providing litigation support services from acting in an adverse interest. In the former case, he considered that the fiduciary could not act at the same time for and against the same client in the same or a related manner. He continued:- "[h]is 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". In the case of a former client, however, Lord Millett rejected US authority that adopted an absolute rule that precluded a solicitor or a person in an analogous situation from acting for a client with an adverse interest to a former client in the same or a connected matter. He considered the jurisdiction of the Court in such a case was founded "not on the avoidance of any perception of possible impropriety but on the protection of confidential information".

53. In this regard, Lord Millett accepted, however, that the test contained in the Court of Appeal decision of *Rakusen v. Ellis Munday Clarke* [1912] 1 Ch. 831 – that a solicitor may be restricted from acting against a client when there was a "reasonable probability of real mischief" in relation to the disclosure of misuse of confidential information – was an insufficiently strict test. He concluded that the onus was on the former client to show: (1) that the solicitor or person in an analogous position was in the possession of confidential information and, (2) that such information was, or might be, relevant to a new matter in respect of which the new client's interest was adverse to that of the former client. If so, then the solicitor should be restrained from acting unless the Court was satisfied that there was no risk of disclosure. There was

no reason why the former client should be subjected to any avoidable risk. It was of the highest importance to the administration of justice that solicitors or other persons in possession of confidential information should not act in a way that puts that information at risk of coming into the hands of someone with an adverse interest. A duty to do no more than to take reasonable steps to protect the information "would run counter to the fundamental principle of equity that a fiduciary may not put his own interest or those of another client before those of his principal".

54. As already noted, KPMG had put in place information barriers to protect the confidentiality of the information gathered from disclosure in the course of the separate inquiry being conducted on behalf of the government of Brunei. This involved selecting staff to ensure that no one who had been in receipt of confidential information from Prince Jefri was engaged in the investigation on behalf of the Brunei government. Any work in London was to be done in a separate project room with restricted access. Separate computer file servers were used and all electronic information related to the project carried out on behalf of Prince Jefri was deleted. Notwithstanding these precautions, the House of Lords considered that the measures did not satisfy the test set out. The starting point was that information moved within firms unless special means were taken to preclude such movement. The means in that case were *ad hoc* and involved a single department. To be considered effective, Chinese walls needed to be an established part of the organisational structure of the firm and not created *ad hoc*, or dependent on evidence sworn by staff engaged in the work. It is clear both from the language used and the application of the test in the particular case that the standard required was a strict one. All that was required was proof that confidential information had been supplied. If so, the onus was on the recipient to prove a negative – that there was no risk of disclosure. If this could not

be done, then the only solution was that the party should be disqualified from acting. The relative ease in satisfying the first step and the difficulty of disproving the possibility of disclosure may have encouraged applications in subsequent cases where the facts were less clear-cut.

55. At this point, it is worth observing that, although an analogy is drawn between the work carried out by KPMG and that regularly carried out by a firm of solicitors, the investigation at issue here was not immediately connected to litigation. It was not suggested that the case should be approached on the basis that KPMG would become a witness in any proceedings, although that could not be ruled out. Also, the application, while framed as one designed to protect specific information, sought an order that KPMG be restrained from acting in the investigation on behalf of the government into the agency. Finally, while the basis of the jurisdiction was stated to be the protection of confidential information from disclosure, the judgment also appeared to consider that it was relevant that any disclosure would be made to a party with an interest adverse to the plaintiff and that the question of the appearance of propriety also had some relevance. While the case was dealt with on the basis of a claim to protect confidential information, the question of the principles applicable to a fiduciary were touched upon.

56. Most of the remaining cases cited can be located somewhere on the spectrum between the points marked by *Harmony Shipping* on the one hand, and *Bolkiah* on the other, although one case, *Secretariat*, perhaps goes a little further.

57. *Highberry v. Colt Telecom* involved a hotly contested position for administration of a telecommunications firm. Evidence was given on behalf of the petitioner by an expert accountant, who Jacob J. criticised for failure in his duty to the Court where the expert had acted for the petitioner in circumstances where the Court considered

that the firm had a clear conflict between the interests of the petitioner and that of a client. While the case is perhaps no more than an illustration of the circumstances in which such a conflict can arise, it cannot, in my view, be distinguished, as it was in the High Court, as being of no relevance because it involved an insolvency matter which, it was considered, was not analogous to an adversarial proceeding.

58. *Meat Corporation of Namibia v. Dawn Meats* appears to be the first time a Court was required to address and, if possible, reconcile the decisions in *Bolkiah* and *Harmony*, which in that case were relied upon by the opposing parties. The Meat Corporation was involved in a dispute in respect of any agency agreement with the defendants. An executive of Meat Corporation who had previously worked for the defendant approached an individual, Ms. Burt-Thwaite, and requested that she act as an expert in the case. She was reluctant to do so. He had a number of conversations with her in which he tried to persuade her to act, and sent her a number of emails headed "In confidence – expert witness". Ms. Burt-Thwaite gave evidence that she was on vacation in France after a family bereavement and, for her part, was trying to keep the conversation short. Initially, she declined to act because of time pressure and also because she was possibly about to engage in a consultancy arrangement with the defendant. At that point, the executive accepted her decision but said that he relied on her complete confidentiality in relation to the discussions and that the information divulged to her involved views and opinions which were highly confidential and of a critical nature and "we now need you to treat this in complete confidence".

59. In the event, the trial was adjourned, and the defendant sought to retain Ms. Burt-Thwaite as an expert. The plaintiffs objected. The arbitral panel before whom the dispute was to be determined expressed its view that there was no difficulty in Ms.

Burt-Thwaite giving evidence. An application was brought to the High Court seeking an injunction.

60. Mann J. was provided, with the consent of the parties, with the information sent to the expert. He described the information having been "[t]o some extent…pushed upon her" when seeking to retain her services as an expert witness. He also expressed the view that much of the information was irrelevant to her function as an expert, and also fundamentally uninteresting to the defendant.

61. The plaintiff, however, relied on *Bolkiah*, contending that the expert had clearly been provided with confidential information and should accordingly be restrained from acting unless it could be shown that there was no risk of disclosure. Mann J. held that, in the circumstances, the risk of disclosure, such as it was, was adequately dealt with by the undertaking offered by Ms. Burt-Thwaite not to rely on or disclose the information supplied to her. However, Mann J. also dealt with the argument advanced by the defendant that *Bolkiah* was distinguishable, and that it concerned the duty owed by a firm supplying litigation services essentially akin to those as supplied by a solicitor which was inapplicable in the case of an expert witness, where *Harmony Shipping* was the appropriate authority. Mann J. observed that *Harmony Shipping* was a narrow case concerning only the question of whether an expert was compellable. Nevertheless, he was persuaded that the full rigours of the *Bolkiah* test did not apply merely because privileged information may have been provided to a party. He pointed to the significant distinctions of fact between *Meat Corporation* and *Bolkiah* and, in particular, that in *Bolkiah*, KPMG was acting in a role akin to that of a solicitor whereas the relevant communication took place in the *Meat Corporation* case when the company had been attempting, unsuccessfully, to persuade an expert to act as a witness. Expressing the view that if the principles in

Bolkiah had been applied in *Harmony Shipping*, the result would have gone the other way, he concluded that the principles did not apply simply because an expert was provided with some confidential information.

62. While I consider that the *Meat Corporation* case would be decided in the same way in this jurisdiction, I agree with Collins J. that the conclusions in relation to the potential impact of *Bolkiah* on *Harmony Shipping* are perhaps questionable at least as a matter of Irish law. In *Harmony Shipping*, it had been held that no confidential or privileged information had been provided to the expert, and it is noteworthy that Mann J., even applying the principles in *Bolkiah*, was able to hold that Ms. Burt-Thwaite was not precluded from acting. It is correct, however, that there is a tension and potential conflict between the decision in *Bolkiah* and the broader observations of Lord Denning M.R. insomuch as he suggested that an expert can properly give evidence in a case even if they have been supplied with a lot of privileged and confidential information. However, for the reasons already discussed, that was not the *ratio* of the *Harmony Shipping* case. It is also doubtful that the distinction sought to be drawn in respect of *Bolkiah* is entirely persuasive. If indeed it is the case that the law imposes more demanding duties on a solicitor in such a situation, that cannot be because of the nature of the information supplied. It must be because of the status of the person receiving the information which raises the question of the status of an expert witness and the duties they may owe to their client.

63. *A Lloyd's Syndicate v. X* was decided shortly after *Meat Corporation*, and Teare J. followed the approach of Mann J. in distinguishing *Bolkiah*. In this case, an expert had been retained by the plaintiff syndicate in respect of a reinsurance dispute which I will call the first dispute. In the course of that engagement, an issue arose in which the opposing expert for the reinsurers had provided a report which raised an issue in

respect of a clause known as the interlocking clause, and expressed a view as to its interpretation. The solicitors for the Syndicate discussed the matter with the expert, who expressed his agreement with the opinion expressed by the opposing expert. There followed a discussion with the solicitor and the client, who sought to persuade the expert that his view was incorrect. Ultimately, having considered the matter, the expert maintained his view. He gave evidence in the arbitration which was limited to other matters and did not address the interlocking clause.

64. In a second arbitration (the second dispute) two years later, the expert was retained on behalf of other reinsurers in respect of a dispute with the claimant. In those proceedings, the reinsurers eventually raised and relied upon the interlocking clause (which had not been pleaded when the expert was originally retained). It was proposed that the expert would give evidence on behalf of the reinsurers which would involve the repetition of the view he had expressed privately to the solicitors and client in the context of the first dispute. The claimant contended, however, that the expert had acted as a "consulting expert to assist in developing our client's litigation strategy and tactics" (an apparent reference to the discussion in which the claimant and solicitor had sought to persuade the expert to change his view) and sought an injunction, relying on *Bolkiah*. The reinsurers relied on the decision in *Meat Corporation*. Teare J. agreed, and refused to restrain the expert from giving evidence or assisting the reinsurer.

65. The judge considered that the service provided in the case was quite different in scope and breadth from the services typically provided by a solicitor. To the extent that factual and hypothetical scenarios had been put to the expert in the discussion in question, this could be said to be privileged information, but the Court was persuaded that it was not likely that the expert would misuse privileged confidential

information given to him. It was argued that the claimant was somehow disadvantaged because the expert now had advanced knowledge of lines of possible cross-examination. Teare J. discounted this on the basis that if it was applicable at all, it was, if anything, to the benefit of the Court to have the considered opinion of the expert rather than one given on the hoof.

66. *Wheeldon Brothers Waste Ltd v. Millennium Insurance Co Ltd* involved quite a different situation. In this case, a waste factory suffered a fire and sought to recover on foot of its insurance policy. The insurers retained an expert to investigate the accident who expressed a view that the cause of the fire was a spark from heated metal emanating from the conveyor which had ignited combustible material under the conveyor. The insurers declined cover on the basis that the maintenance of the combustible material was in breach of the policy. The company then sought the insurers' consent to approach the expert to assist it in a possible claim against the manufacturers of the conveyor on the basis that it might be contended that a defect had led to the spark issuing and causing the fire. The expert expressed his view, which was essentially consistent with the view already expressed in the context of the insurance claim. However, the plaintiff company then reversed direction and commenced proceedings against the insurers, contending that liability had been wrongly declined. The plaintiff also then sought to contend that the expert was precluded from giving any assistance or evidence on behalf of the insurers.

67. Coulson J. rejected the application. It would, he considered, be contrary to the interests of justice if the inquiry as to the cause of the fire could be conducted without the evidence of an expert who had undertaken the contemporaneous investigation of the fire. The Court should not ignore the clear view of the parties at the time the expert was retained on behalf of the plaintiffs that there was no conflict of interest

or difficulty in relation to confidentiality. The overriding duty of the expert to the Court modified the strict application of the principles in *Bolkiah*. There was, in any event, no evidence to support a mere general assertion that the expert had been given privileged and confidential information, much less anything which could have an impact on his opinion as to the cause of the fire.

68. These three cases at first instance involved consideration of the decision in *Bolkiah*, but by reference to facts which were at some distance from the facts in that case. In each case, the degree of engagement with the expert by the parties objecting to their acting in the case was much closer to the limited involvement of Mr. Davis with the plaintiffs in *Harmony Shipping*. A different fact situation, however, arose in *Secretariat Consulting PTE Ltd & Ors v. A Company*, which was decided after the Court of Appeal decision in this case, and which discusses it.

69. Secretariat Consulting PTE ("SCL") was a Singaporean company within a worldwide group providing expert consulting services in respect of construction matters. The plaintiff was the developer of a very substantial petrochemical plant, the cost of which was measured in billions of dollars. The plaintiff engaged a project manager described as "the third party" responsible for the engineering, procurement and construction management services for the project, and the value of the contract between the claimant and the third party was itself almost $2 billion. The developer entered into two subcontracts in relation to the development at a price of $117million. There was a dispute between the developer and the subcontractor which was brought to arbitration and SCL were approached to provide arbitration support and expert services in connection with the causes of delay and disruption in relation to the subcontracts. A confidentiality agreement was executed by SCL with the solicitors for the respondent developers which provided that:-

> "under no circumstances shall [SCL] at any time without the prior written approval of [the respondent's solicitors] acknowledge to any third party what is or is not part of the confidential information nor shall [SCL] acknowledge to any third party the execution of this agreement, the terms and conditions contained herein or the underlying discussions with [the respondent's solicitors]".

The developer's solicitors wrote to the individual at SCL who was going to be the lead expert (but who had not signed the confidentiality agreement) asking him to confirm that he was not conflicted to act as an independent witness. He replied that they were asking for details of the project so that they could run a conflict check. The individual's email address was "Secretariat International" and every individual working within the broader group had an email address that ended with the words "secretariat-intl" and the conflict check itself was carried out across all the entities in the Secretariat group. The individual confirmed that there were no conflicts and was then engaged. The task involved assessing the operation of the contract and identifying the cause of the delay to report on it, to meet the subcontractors' expert to the extent required by the tribunal, to provide *ad hoc* support to the developer and professional team in the arbitration and to give oral evidence.

70. The letter of engagement expressly recorded that SCL had confirmed that the individual had no conflict of interest in acting for the developer and would maintain the position for the duration of his engagement.

71. Subsequently, the project managers commenced arbitration proceedings against the developers claiming unpaid fees including a claim for fees which they contended had been wrongly disallowed by the developers, in part because of the delay in the issuance of drawings, *et cetera*. The project manager then approached another entity

in the Secretariat group, Secretariat International UK Ltd ("SIUL"), to act as experts in the arbitration. SIUL ran a conflict check which revealed the engagement of SCL by the developers. SCL wrote to the developers indicating that they did not consider that working on two matters in different offices on different continents would constitute a "strict" legal conflict, and furthermore that the firm had the ability to set the engagements up in a manner that ensured the required physical and electronic separation between the teams.

72. The High Court judge found that SCL was in breach of a fiduciary duty of loyalty to the developer and that SIUL could not act in the second arbitration. This was the first time it had been held that an expert witness owed a fiduciary duty to the party retaining them. It was in this context that the decision of the Court of Appeal in this case fell for discussion in the judgment of Coulson L.J. It appears that SCL had sought to rely upon the judgment of Collins J. insomuch as he had expressed the view that while an expert undoubtedly owed some duties to the client akin to the fiduciary duties, to hold that an expert witness was a fiduciary would be inconsistent with the overriding duty of an expert to the Court. Coulson L.J. also considered that an expert owed duties to the client but he too was reluctant to hold that an expert was a fiduciary:-

> "[T]he expression 'fiduciary' is freighted with a good deal of legal baggage and I can certainly see an argument that it might be inapt to import all of that baggage into the relationship between a client and an expert."

The need, for example, for a fiduciary to be always on the client's side was not an accurate description of the role of an expert. He did not, however, agree that the expert's obligation to the Court was fundamentally inconsistent with the existence of a fiduciary duty: the duty to the client should presuppose that the expert owed an

overriding duty to the Court to give independent evidence. To that extent, Coulson L.J. disagreed with the *obiter* observations of Collins J. in the present case that the expert's duty to a Court was fundamentally incompatible with the existence of a fiduciary duty.

73. Although the appellant sought to rely on this difference of view, as casting doubt on the conclusions of Collins J. in this case, I do not think, in truth, there is a significance difference between the two judgments in this regard. Both were reluctant to find the existence of a fiduciary duty with all that that implied, and neither considered it was helpful to the resolution of the issue before each Court. In the respective cases, both Courts considered, correctly in my view, that there was nevertheless a tension between any obligation of loyalty owed to the client and the duty the expert owed to the Court. It may be correct to say that there remains a possibility of a novel fiduciary duty owed to the client consistent with the duty owed to the Court, but the very novelty of the concept makes it desirable to leave the resolution of that issue to a case where it is apparent that a decision on the issue is necessary in order to determine the case.

74. Coulson L.J. in *Secretariat* preferred to approach the issue as one of contract and to hold that SCL had undertaken a contractual obligation not to put itself in a position of conflict of interest. The position of a delay and quantum expert was to gather together and collate much material and information and was quite different to the role of a simple testifying expert merely proffering an opinion on objectively ascertainable facts. A delay and quantum expert provided wide-ranging support and advice to a party in the hope indeed that the dispute would settle, and would not require a Court or arbitral hearing. There was, he considered, a basic conflict of interest. The overlap was all pervasive. There was an overlap of parties, role, project

and subject matter. None of this was to say that the same expert cannot act both for and against the same client. Large multinational companies often engage experts in one project and see them on the other side in relation to a dispute on another project. This, he considered, was inevitable:-

> "[b]ut a conflict of interest is a matter of degree. In my judgment, the overlaps to which I have referred – of parties, of role, of project, of subject matter – make it plain that in the present case, there was a conflict of interest".

Perhaps the most noteworthy aspect of the case was not the finding that SCL owed a contractual duty, or indeed that there was a conflict between the roles of SCL and SIUL, but the conclusion that SIUL was bound by the contractual obligation entered into by SCL. Coulson L.J. pointed out that SCL's argument necessarily meant that, if correct, SCL could act for one party in the same arbitration and SIUL for another with an opposed interest. This, he considered, was so commercially unrealistic it could not have been in the contemplation of the parties. Accordingly, the High Court order was upheld, albeit on different grounds.

75. While *Secretariat* was concerned with the question of a conflict of interest arising from a contract, as interpreted by the Court, it contains a number of observations useful in this case, as well as perhaps illustrating that the legal analyses of breach of confidence or privilege, fiduciary duty, conflicts of interest whether arising from contract or from the position of an expert and his or her duty to the Court, are not hermetically sealed units, but rather shade into each other. The judgment quotes para. 1-003 of C. Hollander & S. Salzedo, *Conflicts of Interest* (2020: Sweet & Maxwell, 6th ed.), on the question of "existing client conflict":-

> "The first type of conflict is an *existing client conflict*. The professional who acts for two clients at the same time will normally owe fiduciary duties to both.

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

Coulson L.J. noted that the passage does not distinguish between different types of professional people, solicitor, advocate or expert, and that the passage appears to be a general acceptance that a fiduciary duty may, depending on the facts, be owed by a professional to his or her client.

76. Coulson L.J. considered that the decision in *Harmony* was "of limited utility" in the context of the dispute of the nature arising in *Secretariat*. He emphasised Cumming-Bruce L.J.'s description of the facts in that case as "very peculiar". He considered

Jones v. Kaney [2011] UKSC 13 as being much more relevant. In that case, the UKSC had decided that an expert witness could not claim any immunity from a duty of care to a lay client:-

> "The expert witness must give evidence honestly, even if this involves concessions contrary to the client's interest. The expert witness has far more in common with the advocate than he does with the witness of fact."

Thus, as the advocate does owe a duty of care to the client, so too should the expert witness. For present purposes, the acknowledgement that an expert witness is closer to an advocate than to a witness of fact significantly undermines the rationale of Lord Denning M.R.'s judgment in *Harmony Shipping* which treated the expert as indistinguishable from a witness of fact. It seems clear that in more complex cases a more nuanced analysis is necessary.

77. Males L.J. delivered a concurring judgment and observed that, notwithstanding the expert's duty of independence and objectivity, the professional expert witness will normally be viewed as part of the client's litigation team:-

> "[t]here may be exceptions, for example if the discipline in question represents a minor and discrete part of the case. Handwriting experts will sometimes fall into this category. Again, it is worth noting that the expert in *Harmony Shipping* was such an expert and that, despite the wide terms in which Lord Denning M.R. expressed himself, Cumming-Bruce L.J…was careful to confine the decision to 'the particular functions, responsibilities, and activities of a handwriting expert' and to point out the 'very unusual and peculiar facts of the case'. The same may apply to experts in foreign law".

However, Males L.J. considered that the general rule, particularly where the relevant discipline was of a technical nature, was that the expert is an important resource for

the lawyers and others responsible for the conduct of the case. The expert would often be involved in instructing the lawyers as to the technical issues in the case, discussing and liaising with the client's personnel, advising as to the way in which the case should be formulated, attending meetings at which strategy is discussed and advice is given, attending hearings at which the expert will sit as part of the client's team, assisting counsel on the cross-examination of the opposing expert and so on. All of this required, perfectly properly, the development of a close working relationship between the expert the lawyers and the client. This approach is almost the inverse of that of Lord Denning in *Harmony Shipping.* There, he had proposed a general rule that expert witnesses, even if provided with a great deal of confidential and privileged information, should be treated as the same as witnesses of fact: in *Secretariat*, the *Harmony Shipping* situation is seen as an exception to a general rule that experts are normally seen as part of the litigation team.

78. The Canadian and Australian cases can be dealt with more briefly. *MacDonald Estate v. Martin* concerned an application that a law firm acting for the defendant in an action should be disqualified from continuing to act by reason of the fact that an associate who had recently joined the firm had previously been engaged in the litigation on behalf of the plaintiff. There was no suggestion that the associate had any involvement or contact with the litigation since she joined the firm. The majority of the Canadian Supreme Court refused to follow the decision in *Rakusen v. Ellis Munday Clarke*, which they considered set too low a standard of protection for the lay client. The Court should proceed on the basis that lawyers who worked together will share information unless the Court could be satisfied by clear and convincing evidence that all reasonable measures had been taken to ensure that there could be no communication of information. The minority argued for an even stronger rule

that would have adopted an irrebuttable presumption of passage of information meaning that, in such circumstances, the defendant would have had to seek new representation.

79. *Charlebois v. SSQ Life Insurance Company Inc*. (2015) ONSC 2568 was a decision on an application for leave to appeal from a decision of a motion judge that the lawyer for the plaintiff was not disqualified from acting in the case on behalf of a client, by reason only of the fact that he had retained as witnesses two healthcare professionals who had reviewed the plaintiff for the defendant health insurance company. The plaintiff had been injured in an accident while visiting a hospital. She was insured through her employment and referred by the insurance company to an occupational therapist and psychologist who reported on her condition. The lawyer then sought to retain them as witnesses both for private litigation against the hospital and also in a claim against the insurance company. The motion judge found that no privileged or confidential information had been supplied to the witnesses. The Court considered that the application of the *MacDonald* test in the case of an expert required some modification. The role of an expert witness who did not participate in litigation planning or strategy did not lend itself to that analysis. Accordingly, the moving party had the burden of showing that privileged or confidential information had been received by the witness, and, if so, the respondent was required to rebut the inference that such information was imparted to the lawyer. It is of some interest that the application here was brought in respect of the lawyer, although the effect of any order would be to preclude the expert from giving evidence or assistance to the party.

80. The Court was also referred to two Australian cases illustrating the application of similar principles in the state courts. Both cases concerned applications brought against the expert themselves to restrain them from assisting the party in litigation.

In *Protec Pacific Pty v. Cherry* [2008] VSC 76 ("*Protec*"), the Court considered that there was a real and sensible risk of disclosure of confidential and privileged information and restrained the expert from speaking to the other party, although that party could still retain the capacity to call the expert as a witness, and in that way the principle in *Harmony Shipping* was maintained. It should be said that in the nature of any complex litigation, such a course appears a more theoretical possibility than real, and in cases where O. 39, r. 37 of the Rules of the Superior Courts apply, almost – if not entirely – impossible.

81. In *Australian Leisure and Hospitality Group v. Stubbs*, an injunction was granted restraining the defendant expert from assisting the opposing party in litigation in circumstances where she had been consulted by, and supplied a report to, the plaintiff company in relation to the issues in the case. The plaintiff company owned liquor stores and sought planning permission to open another one in a particular area. It had obtained a report from the plaintiff as to the potential social impact of an additional liquor store in the area but, as the report was not favourable to its plans, had not sought to use it in the planning application. Permission was refused, and the plaintiff sought to challenge the local authority's decision. The local authority sought to rely on evidence from the expert in the proceedings. The Court applied the general test in respect of a claim for breach of confidence, including that the information should be identified with specificity. This was because of the necessity to define an injunction with some precision. The Court also applied a test of whether there was a real and sensible possibility of the misuse of confidential information. In the circumstances, the Court was satisfied that there was a possibility of subconscious or inadvertent disclosure and ordered that the expert be restrained from any pre-trial involvement with the defendant as an expert witness or otherwise.

III – Discussion

82. A survey of the case law shows, therefore, that there are many different approaches and analyses, and, in some cases, remedies. While a central component of the claims is the possibility of use of privileged information or information supplied in confidence, other influences can be detected. If it was the case, as was said in *Bolkiah*, that the only basis for a claim was the protection of confidential information, it would not be particularly logical to distinguish between the recipients of such information as was done in *Meat Corporation* and *Lloyd's Syndicate*. In principle, the obligation to protect privileged information supplied in confidence attaches whatever the status of the recipient. It is difficult, therefore, not to think that some question of professional obligations, duties owed by the expert, and a conception of conflict of interest have all played some part in the case law.

83. However, viewed from perhaps a higher vantage point, the cases, while exhibiting a number of differences of details and legal analysis, do provide a fairly consistent pattern. What appears to distinguish cases in which relief is granted from those in which it is refused is the scope and degree of involvement of the person in the trial preparation and the extent of their exposure to privileged and confidential information, and the thinking of the client and its advisors. It is obvious that a solicitor or other legal professional involved in a case will be so exposed to the detail, information and attitude of a client that it would be unrealistic to think that confidential or privileged information could be separately identified and isolated, or that it would be realistic to expect the individual concerned to put the information out of their mind, and, as importantly, for the former client to believe that this was being done. To take only one example, not too distant from the facts of the present case, if discovery is being sought in contentious proceedings, a party may often

consult with their economic or other experts, with a view to considering what information might usefully be sought. An expert who, because of their prior involvement with the other party, knows what the information might reveal cannot contribute to that exercise without being influenced by their knowledge. If, however, they refrain from assisting in that exercise, they are not performing their function for the new client. If a request is made which the new client maintains is derived from an entirely independent source, but nevertheless seeks information which can be said to damage the case of the first client, that client is unlikely to believe that this was a lucky chance and, more importantly, that the process was entirely fair.

84. There is a reasonably clear distinction in decided cases, therefore, between a situation where the scope and extent of a person's involvement in a case and the information disclosed in relation to the thinking and approach of the party is so extensive that an order is granted (*Bolkiah*, *Secretariat*, *Protec*, *Australian Leisure and Hospitality*), and those cases where the involvement of the expert is little different from the involvement from a witness of fact, and where the only relevant information brought to bear is the expert's own experience and expertise, and where no, or minimal, confidential information has been provided, and where provided can be identified and protected by an undertaking and the possibility of restricting questions at the trial (*Harmony Shipping*, *Meat Corporation*, *Lloyd's Syndicate*, *Wheeldon Brothers*). It is obvious that in most, if not all, cases a lawyer's involvement will be such that they necessarily fall into the first category, and the same will normally be the case where it can be said, in the words of Males L.J. in *Secretariat*, that an expert's involvement is such that they are part of the litigation team.

85. No formula of words can reliably distinguish between all those cases in which an order ought to be granted and those in which it should not. Inevitably, an element of judgement and experience must play its part. However, the test to be applied should, so far as possible, assist a Court in making this distinction. For the reasons which are set out in the judgment of Collins J., with which I fully agree, the test proposed by the appellant in this case, said to be derived from an extract in T. Hodgkinson & C. James, *Expert Evidence: Law and Practice*, (2020: Sweet & Maxwell, 5th ed.) is wholly insufficient. The suggestion that a moving party ought to prove on the balance of probabilities that there is a likelihood of the misuse of privileged and confidential information is a significant under-protection of the existing party which has disclosed privileged and confidential information. If this test were to be applied in theory, it would mean that an expert would only be restrained from acting if it could be shown that there was at least a 51% chance of disclosure of privileged or confidential information. There is no reason why a party should be required to run a 49% risk of disclosure of information which is privileged and confidential. Put another way, if there were 100 cases in which there was an identical risk of disclosure, it would meant that 49 clients would have privileged and confidential information disclosed, not merely generally, but to an adverse party. I agree fully with Collins J. that such a test would be, to a significant degree, an under-protection to a client.

86. However, it is I think possible that the language of *Bolkiah* expresses the test in a fashion that makes it too easy to be deployed by a party seeking merely to disrupt an opponent's preparation by arguing that a witness had been provided with some confidential information and that that in itself was enough to preclude an expert from assisting another party or giving evidence in court. The language of that case

suggests that if it is established that a defendant is in possession of confidential information which *might be relevant* to the matter, then the Court should intervene *unless* the defendant could satisfy the Court that there was no real risk that information confidential to the plaintiff might unwittingly or inadvertently come into the possession of the new client. It seems unlikely that the applications in *Lloyd's Syndicate* and *Wheeldon Brothers* would have been pursued if the standard set was not so demanding. Accordingly, I would prefer the formulation found in the Australian cases of a "real and sensible risk" of disclosure, and that the onus of showing this should be on the moving party. In an appropriate case, that should not be a difficult burden to discharge and, once again, the scope and extent of the person's involvement in the case will significantly influence a Court's conclusion in this regard, if not indeed determine it. This is, I consider, sufficient in cases where it is alleged that what was disclosed in prior or separate proceedings precludes the engagement of an expert for an opposing interest in separate proceedings. If a higher test is to be required in the case of lawyers (and I do not exclude that possibility), it must depend on their status as lawyers and the obligations said to flow from that. Similarly, if an expert witness is to be required to satisfy a more demanding test, that would involve the assertion of obligations over and above those which apply to anyone in possession of confidential or privileged information. Again, I would not exclude that possibility, but it would require a more comprehensive and detailed analysis of the duties owed by an expert by reason of their engagement than has occurred in the case law to date.

87. The appellant, while arguing against the Australian test on disclosure, nevertheless urges this Court to adopt the approach in the Australian cases cited, requiring that the confidential information be identified with specificity, and argues, moreover, that

the VHI have failed to do so in this case, and points out that even when a party claims privilege over documentation and discovery it is obliged to identify the documentation in the schedule. Strictly speaking, this argument does not arise on the facts here in the light of my conclusions on the applicable test, as it was accepted that if the test was a real risk of disclosure there was sufficient evidence to satisfy a Court in that regard. However, it may be useful to consider the issue here.

88. I agree that where the basis of an application is confidential and privileged information, it is desirable that, insomuch as it can be identified with relative precision, that this should be done. However, I do not think that it should be treated as an absolute requirement, or a fatal objection in a case such as the present. First, it should be recognised that this is a requirement stemming from the general law of breach of confidence, and is related to the requirement of a Court in framing an injunction to be able to identify with precision the documentation or information which should not be used or disclosed, and perhaps to assess the adequacy of any undertaking offered by the person in receipt of the information. However, the jurisdiction invoked in this case is to restrain an expert from being retained or giving evidence in litigation at all. If it were possible to identify a specific and limited category of information which could not be disclosed, then it is likely that such an application would not succeed because the legitimate protection of the party possessing the information could be achieved by an appropriate undertaking, or, if necessary, an injunction. An application to exclude an expert as a possible expert witness can only be sustained when it is established that the involvement of the expert is to such an extent, and is so pervasive, that the expert can properly be said to be a member of the litigation team, and equally that it is not possible to disentangle the information which has been provided. It is in the nature of litigation that it is

stressful and often a low point in the life of the individuals involved, and to deal with the litigation people are often required to make disclosure, and divulge matters, to their lawyers (which necessarily extends to anybody a part of the litigation team) in a way that can be deeply uncomfortable. The degree of interaction, both direct and indirect, between the lawyers and the clients and witnesses, will mean that information will be transmitted formally and informally, and which cannot simply be identified in a list of documents. For example, the attitude of the client to the case, the degree of fortitude they express, their amenability to settlement, and their sensitivity on certain issues is not something that may ever be written down but which can be communicated to, or simply perceived by, a person participating in discussions. While, therefore, I agree that, where an application is grounded upon the necessity to protect confidential or privileged information, it is necessary that that information be identified with some specificity, I consider that the degree of specificity may depend upon the nature of the case and, once again, the degree of involvement of the person with the case.

89. It is said here that the VHI provided Professor McDowell with "a detailed brief of documents including privileged and highly sensitive confidential information". Documents provided included a copy of a detailed letter of instruction addressed to counsel, which letter addresses over 14 pages the legal aspects of the Auralia proceedings (the *RAS* case), including the claims as to the alleged dominance and abuse of its alleged dominant position on the part of VHI. Professor McDowell was specifically requested to advise "in respect of the allegations of dominance and abuse of dominance including the appropriate market for the assessment of dominance". It is then specifically stated that "[t]he instruction letter includes highly sensitive, privileged and confidential material related to the proceedings and their defence". It

is noteworthy that no issue is taken with any of this by the appellants or Professor McDowell. Instead, Professor McDowell specifically refers to the statement that he was furnished with highly confidential, privileged and highly sensitive commercial information and merely confirms that he no longer has a hard copy of any such information and has not used any information, confidential or otherwise, obtained from the VHI in the preparation of his report in this case. In those circumstances, and given that the allegation in this case does not concern any particular piece of information but rather a general and comprehensive disclosure of the VHI's approach to the litigation, I do not think it is a fatal objection that any such information was not specified in more detail. The VHI also argue, with some merit, that too detailed a provision of information would become a roadmap for discovery, and that, in attempting to protect their confidential and privileged information, they should not be required to concede some litigious advantage to the defendant, unless that is unavoidable. However, in cases where the degree of involvement is less and where reliance is placed on the provision of specific information, such as in the *Meat Corporation* case, where, it should be noted, the witness was never retained to act on behalf of the company and was not therefore involved in any more general discussion, it will become more important to identify with precision any privileged and confidential information which it is said the witness has acquired.

90. Returning to the facts of this case, counsel for the Limerick Private and Mr. Sweeney argued forcefully that this Court should not adopt the position of other common law jurisdictions because it was said that the role and function of an expert witness was different here than in other jurisdictions. In this regard, he relied on the *dicta* of MacMenamin J. in *O'Leary v. Mercy Hospital Cork Ltd and Khalid M Ali Chiad Al-Safi*, where he said, at para. 40:-

> "[a]n expert witness however, should err on the side of maintaining his or her independence and objectivity. He or she should avoid conduct which renders them open to an allegation that they have become an advocate or 'part of a legal team'".

It is argued, therefore, that any test derived from the circumstances such as those in *Secretariat* where an expert was described as a member of the litigation team, should not be applied in this jurisdiction. However, this quotation must be read in context. In that case, the appellant sought to set aside a decision of the High Court and Court of Appeal in a medical negligence case, in part because it was said that the expert witnesses involved were "objectively biased". In that regard, reliance was placed on the scale of fees charged by those witnesses, the manner in which they were agreed, and the provision of overnight transcripts to the expert and evidence of consultation with legal advisors during the course of the case. All of this information had emerged in the course of the delivery of a bill of costs. The judgment of MacMenamin J. for this Court rejected the contention that the concept of objective bias which applied to decision-makers could be applied to expert witnesses, and concluded that there was no objection to the provision of overnight transcripts to an expert who was both likely to give evidence, and also required to provide assistance in the cross-examination of opposing witnesses. Similarly, there could be no objection to contact between an expert and legal advisors on an ongoing basis. However, MacMenamin J. properly cautioned against witnesses allowing "a situation to evolve where they put themselves, or are put in, the position of being seen as advocates rather than as independent witnesses" or, as he put it in the passage cited above, they should avoid being seen as "part of a legal team". In these passages, MacMenamin J. was emphasising not so much the distinction between an expert witness and a barrister

or advocate before the Court (who, after all, owes an obligation to the Court as well as to their client) or a solicitor (who is an officer of the Court) all of whom owe duties to the Court, but the distinction between an expert giving evidence in a dispassionate and independent fashion and one whose objectivity is in question because he or she appears to be a spokesperson on behalf of the client.

91. An expert can properly be considered part of the litigation team, but only as an expert, obliged to give their independent opinion, and owing a duty to the Court to do so. While this is easy to state in the abstract, the nature of litigation is such that it is possible for an "us and them" situation to develop, with a consolidation of and reinforcement of approach and attitude on either side, and a development of "groupthink". Inevitably, an expert witness in his or her involvement in the litigation will run the risk of being exposed to what might be described as the corporate views of those involved in the litigation, and it is human nature to seek agreement and avoid contention. MacMenamin J. was, in my view, merely emphasising the fact that an expert witness must retain their independence at all times, even while they are engaged fully in the proper prosecution or defence of the proceedings. I do not consider that there is any relevant distinction between the role and function of an expert in litigation in Ireland, and any other common law jurisdiction, and in any event, if there is any such distinction, it is not such as to lead to the application of a different test when it is alleged, as here, that the expert witness has received confidential and privileged information.

IV – Conclusion

92. Applying the test set out above to this case, I have no doubt that Collins J. in the Court of Appeal was entirely correct in his assessment of this matter. It is no

reflection on either the status of Professor McDowell or his instinct to assert a robust independence, and still less of his honesty or truthfulness, to so conclude. However, as a starting point it is not irrelevant that any lawyer or counsel provided with the 14 page letter of instruction would not have been able to accept instructions to act against the VHI in these proceedings. As Collins J. observes, the frank and common sense acceptance that there would be no reality to Professor McDowell continuing to act for the VHI in the *CMC* litigation is telling. The logic of the appellants' arguments in this case ought to have led to the argument that there ought to be no difficulty for Professor McDowell to continue to act for the VHI and give evidence on the question of dominance and abuse by refusal of cover. Indeed, as Collins J. pointed out, if the appellants' argument is correct, then it ought to lead to the conclusion that Professor McDowell could properly assist both parties in this litigation advising each in turn, and excluding from his researches and advice, in turn, any information received from the opposing party. In a sense, this is what occurred in *Harmony Shipping.* In the circumstances of this case, given the nature of an economist's involvement in competition claims, I do not think anyone would doubt that such an arrangement would be impossible and would undoubtedly give rise to a real and sensible risk of cross-contamination of information. If Professor McDowell was allowed to continue to act in these proceedings, there would, in my view, be a similar and real and sensible risk of disclosure of information obtained by him in circumstances of confidence while acting for the VHI in the *CMC* and *RAS* litigation.

93. In so concluding, I have considered the case only through the perspective of the claim to restrain the use of privileged and confidential information by precluding the recipient from acting as an expert witness in the case. It is clear, however, that there

are broader considerations in this case, including questions of conflict of interest, whether contractual or arising from the duty of an expert, and further questions of the duty owed by an expert witness to the party, and to the Court. However, the international case law referred to the Court suggests caution in determining any broader propositions than are necessary to determine this case, and while it is apparent, therefore, that in an appropriate case it may be necessary to consider these issues in greater detail, I do not propose to address those issues here, save to observe that they arise. This case is decided in the context of a distinguished economist requested to advise and give evidence in relation to a claim for abuse of a dominant position in respect of which he had previously been engaged to advise and give evidence on claims made with a very high degree of similarity, both in terms of the facts and matters alleged in respect of the market, and the conduct alleged to constitute dominance, and also where there was a very significant overlap in the relevant time period during which it was contended that the dominant position in the relevant market existed, and had been abused. In those circumstances, and for the reasons set out in the judgment of Collins J., the decision of the Court of Appeal must be upheld, and this appeal dismissed.