THE HIGH COURT

2015 No. 4210 P

Between:

SHAY SWEENEY AND THE LIMERICK PRIVATE LTD

Plaintiffs

– AND –

THE VOLUNTARY HEALTH INSURANCE BOARD IRELAND, THE MINISTER FOR HEALTH AND THE ATTORNEY GENERAL

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 28th May, 2019.

1. VHI seeks an order, to be made pursuant to the court's inherent jurisdiction, excluding Professor Moore McDowell as an expert witness for the plaintiffs in these competition law proceedings. VHI has retained Professor McDowell non-exclusively in various contentious matters since at least 2003. These include *CMC Medical Operations Ltd (in liq.) t/a Cork Medical Centre v. VHI and RAS Medical Ltd t/a Auralia/Park West v. VHI* (together the 'Other Proceedings'). The *CMC* proceedings remain live. The claims asserted by the plaintiffs in the Other Proceedings, are similar to those made in these proceedings, *viz*. that VHI abused an alleged dominant position in deciding not to provide insurance cover. However, the Other Proceedings and these proceedings are not identical. In passing, the court notes that it is (rightly) not disputed that: (i) a duty of confidentiality arises as regards private/commercially sensitive information previously communicated by VHI to Professor McDowell in his capacity as their witness; (ii) Shanley J.'s observations in *National Irish Bank v. RTÉ* [1998] 2 IR 465, 474, as affirmed on appeal, accurately describe that duty.

2. Professor McDowell has filed an affidavit in which he avers, inter alia: **a**. "*I am fully cognisant of my duties…as an independent expert pursuant to*, inter alia, *O.39, r.57(1) of the Rules of the Superior Courts and it is my duty to assist the court as to matters within my field of expertise*"; **b**. "*I was retained by the VHI in respect of…the Analogous Proceedings* [the shorthand term invented by VHI for the 'Other Proceedings']. *However…I disagree that the issues in these proceedings are the same as the within proceedings*"; **c**. "*Prior to my retention by the VHI in the Analogous Proceedings, I had acted for a plaintiff against the VHI in competition law proceedings*"; **d**. "[A solicitor for McCann FitzGerald has averred that] *I was furnished with highly confidential, privileged and highly sensitive commercial information in the context of the Analogous Proceedings. I confirm that I have no hard copy documentation in my possession or procurement relating to those proceedings. I have searched my computer system and can find no confidential information relating to same*"; **e**. "*I have not consulted or utilised any documentation or information, confidential or otherwise, provided to me on behalf of the VHI, and any statistical information used has been only such as is a matter of public record, in respect of the provision of my professional opinion to the Plaintiff in the within proceedings"; **f**. "I was retained by the plaintiffs in the within proceedings…and had an initial consultation on the 6th of October 2017. I confirm that I have prepared a draft report….I have not used any information, confidential or otherwise, obtained from the VHI in other matters in the preparation of this report*."

3. In terms of chronology, a number of dates of interest might be mentioned:

> May 2012 This was the date of the last involvement of Professor McDowell in the *RAS* or *CMC* proceedings.
>
> 26.05.2015 Plenary summons issues in the within proceedings.
>
> 06.10.2017 First consultation by plaintiffs in the within proceedings with Professor McDowell.
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> 17.11.2017 Professor McDowell receives phone call from McCann FitzGerald querying his representation of the plaintiffs herein.
>
> 23.11.2018 Within motion issues.

4. Notably there is: (i) a 5½ year period between May 2012 (the date of the last involvement of Professor McDowell in the *RAS/CMC* proceedings and November 2017 (the date of the first consultation between Professor McDowell and the plaintiffs in these proceedings); (ii) a (striking) just over one-year period between the telephone call of November 2017 and the issuance of the motion grounding the within proceedings.

5. As to the law applicable to this application, the following points might be made:

> (1) Hodgkinson and James in *Expert Evidence: Law and Practice*, 4th ed. (2015) observe, at para. 8-006, and the court considers this a good statement of applicable Irish law, that "*Where an individual expert has accepted instructions to act for party B but previously received confidential and privileged information while being considered for the role of expert witness or while actually instructed as an expert for Party A, the court may grant an injunction, or make a procedural direction, restraining the expert from acting for Party B. The test is whether it is likely that the expert would be unable to avoid having resort to privileged material.39*" Such avoidance is possible here. Moreover, the court notes the comfort to be drawn by VHI in this regard from the above-quoted averments of Professor McDowell at **d-f**. The court notes also the 5½ year period referenced in the previous paragraph. Expert witness though Professor McDowell may be (and is), his memory of matters from several years past doubtless fades to much the same extent as the rest of us. (Footnote 39 in the last-quoted text refers the reader to *Meat Corporation of Namibia Ltd v. Dawn Meats (UK) Ltd* [2011] EWHC 474 (Ch.) and *A Lloyd's Syndicate v. X* [2011] EWHC 2487 (Comm), both of which draw on the earlier decision of the Court of Appeal in *Harmony Shipping Co. v. Saudi Europe* [1979] 1 WLR 1380. These cases are considered below).
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> (2) So far as is relevant to this application, in *Meat Corporation* the claimant challenged the defendant's choice of expert on the grounds that the expert had received confidential and privileged information from the claimant when discussing whether to accept engagement as an expert for same. The claimant sought to rely on *Prince Jefri Bolkiah v. KPMG* [1999] 2 AC 222. However, *Prince Jefri* was a case in which accountants were found essentially to have occupied the same role as solicitors (*Meat Corporation*, para.25). In *Meat Corporation,* Mann J. did not consider that *Prince Jefri* fell to be applied merely because an expert was given some privileged and confidential information (*Meat Corporation*, para.32). Here too, the relationship between Professor McDowell and VHI is not like that of solicitor and client. Mann J accepted that the claimant's confidentiality and privilege had to be maintained but was satisfied to accept an undertaking from the expert

not to disclose any of the information she had received (*Meat Corporation*, para.33). A like undertaking has been offered in these proceedings.

(3) *Lloyd's Syndicate* is concerned with the burden of proof in an application such as the within. It follows from Teare J.'s observations in that case that, in an application such as the within, the burden of proof rests on the applicant to show that the expert will misuse confidential or privileged information. Here that burden has not been discharged. Professor McDowell has made the averments quoted above, and the court has been presented with no reason to doubt his *bona fides*, nor does it.

(4) VHI contends that it is an implied term of its contract with Professor McDowell that he would not act as an expert witness for any party to litigation against VHI in respect of the same or similar matters in respect of which he was instructed by VHI. This line of argument failed before the Court of Appeal of England and Wales in *Harmony Shipping*, and the court respectfully accepts as correct as a matter of Irish law, the observation of Lord Denning MR in that case (at 1386) that "*If there was a contract by which a witness bound himself not to give evidence before the court on a matter on which the judge said he ought to give evidence, then I say any such contract would be contrary to public policy and would not be enforced by the court. It is the primary duty of the courts to ascertain the truth….This duty is not to be taken away by some private arrangement or contract by him with one side or the other*." Without prejudice to the foregoing: (i) the court struggles with the notion that it could safely imply a term into a contract when it has not seen any written version of same and has little enough evidence as to the substance of whatever may have been agreed orally; (ii) the judgment of Lord Hoffmann in *Attorney General of Belize v. Belize Telecom* [2009] 1 WLR 1988, para.21, appears to contemplate that one would have some basis by reference to which to gauge what a contract provides: here the court has precious little on which to proceed; (iii) the court does not see that, to borrow from Bowen LJ in *The Moorcock* (1889) 14 PD 64, 68, (a) the exclusion of the consequences of *Harmony Shipping* is what must have been intended by VHI and Professor McDowell or (b) such exclusion falls to be effected by the court in order to give business efficacy to the transaction between them.

(5) In *Harmony Shipping*, a handwriting expert, who had a consultation with those advising the plaintiffs in an action concerning a charterparty, was later approached by the solicitors for the defendants. After giving them an opinion on certain documents, the expert realised that the documents concerned the matter in which he had been consulted by the plaintiffs. He then informed the defendants' solicitors that he could not accept further instructions from them. The defendants, anxious to secure the expert's evidence, served him with a subpoena. The plaintiffs sought to have the subpoena set aside and the expert excluded from giving evidence for the defendants. This application was refused and a failed appeal followed, Lord Denning MR observing, *inter alia*, as follows, on appeal, at 1384-85:

"So we have before us a question of principle. If an expert witness has been consulted by one side and has given his opinion to that side, can he thereafter be consulted and subpoenaed by the other side to give his opinion on the facts of the case? That is the issue which this court has to decide.

So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena. That was laid down by the Law Society in 1944 and published in the 'Short Guide to Professional Conduct and Etiquette.' It was affirmed and approved in 1963 by the then Lord Chief Justice and the judges and republished in The Law Society's Gazette *for February 1963. It says:*

'… the Council have always held the view that there is no property in a witness and that so long as there is no question of tampering with the evidence of witnesses it is open to a solicitor for either party to civil or criminal proceedings to interview and take a statement from any witness or prospective witness at any stage of the proceedings, whether or not that witness has been interviewed or called as a witness by the other party.'

That principle is established in the case of a witness of fact: for the plain, simple reason that the primary duty of the court is to ascertain the truth by the best evidence available. Any witness who has seen the facts or who knows the facts can be compelled to assist the court and should assist the court by giving that evidence.

The question in this case is whether or not that principle applies to expert witnesses. They 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. Does the rule apply to such a case?

Many of the communications between the solicitor and the expert witness will be privileged. They are protected by legal professional privilege. They cannot be communicated to the court except with the consent of the party concerned. That means that a great deal of the communications between the expert witness and the lawyer cannot be given in evidence to the court. If questions were asked about it, then it would be the duty of the judge to protect the witness (and he would) by disallowing any questions which infringed the rule about legal professional privilege or the rule protecting information given in confidence — unless, of course, it was one of those rare cases which come before the courts from time to time where in spite of privilege or confidence the court does order a witness to give further evidence.

Subject to that qualification, it seems to me that an expert witness falls into the same position as a witness of fact. The court is entitled, in order to ascertain the truth, to have the actual facts which he has observed adduced before it and to have his independent opinion on those facts. It is interesting to see that it was so held in Canada in McDonald Construction Co. Ltd. v. Bestway Lath & Plastering Co. Ltd. *(1972) 27 D.L.R. (3d) 253. In this particular case the court is entitled to have before it the documents in question and it is entitled to have the independent opinion of the expert witness on those documents and on those facts — excluding, as I have said, any of the other communications which passed when the expert witness was being instructed or employed by the other side. Subject to that exception, it seems to me (and I would agree with the judge upon this) that the expert witness is in the same position when he is speaking as to the facts he has observed and is giving his own independent opinion on them, no matter by which side he is instructed."*

Harmony Shipping has been cited with approval in *McGrory v. ESB* [2003] 3 IR 407, *Payne v. Shovlin & ors* [2004] IEHC 430 and *Power v. Tesco Ireland* [2016] IEHC 390, with that last decision effectively incorporating key points from *Harmony Shipping* into Irish law. Even were it not for those authorities, the court considers the above observations, emanating from a most illustrious source (and

which point, *inter alia*, to VHI enjoying 'no property' in Professor McDowell) to represent the position pertaining under Irish law.

(6) The Court has been referred to various cases concerning the importance of expert independence and the lack of a perception of a conflict of interest. These cases are briefly addressed in the table that follows. By way of general commentary, the court notes that: (i) it is a recognised duty of an expert witness (and this is recognised by Professor Mc Dowell in the above-quoted averments) that he should provide independent assistance to the court by way of objective, unbiased opinion; (ii) by law, the expert's duty to the court overrides any obligation to any party paying the expert's fees (O.39, r. 57(1)/RSC); (iii) there is no suggestion that Professor McDowell cannot properly be regarded as independent by virtue of some pre-existing relationship with the plaintiffs. As to the cases aforesaid, once one takes a closer look at them they can readily be distinguished:

Case	**Ground of Distinction**
O'Driscoll v. *Hurley* [2015] IECA 158, para.68.	Concerned with whether an expert witness could be cross-examined re. fees
Whitehouse v. *Jordan* [1981] 1 WLR 246.	Concerned with whether a court could prefer own findings over that of expert.
Toth v. *Jerman* [2006] 4 AER 1276, paras.102, 112, 119.	Concerned whether properly independent by virtue of pre-existing relationship
EXP v. *Barker* [2015] EWHC 1289, para.57.	Concerned whether properly independent where defendant and expert previously worked in same hospital.
Highberry Ltd v. *Colt Telecom* [2002] EWHC 2815 Ch, para.80.	Petition of insolvency; not analogous to adversarial proceedings
Kenneally v. *De Puy International Ltd* [2016] IEHC 728, para.42.	Concerned potential for expert's enrichment in US if case in Ireland went a particular way.
Donegal Investment Group v. *Danbywiske* [2016] IECA 193, para.55	Concerned alleged over-influence of respondent's experts.
WBLI v. *Abbott and Haliburton* [2015] 2 SCR 182	Concerned want of impartiality of forensic accountant employed by defendants' current auditors.

(7) A constitutional right of access to justice has been recognised since *McCauley v. Minister for Posts and Telegraphs* [1966] IR 345. There is a clear overlap between that right and giving expert evidence. Indeed, the Superior Courts have repeatedly expressed concern as to the difficulties in terms of complexity/cost that can present if numerous experts require to be and/or are engaged. (See *Weavering Macro Fixed Income Fund Ltd v. PNC Global Investment Servicing (Europe) Ltd* [2012] IEHC 25, and *Condron v. ACC Bank plc* [2013] 1 ILRM 113). The court notes and accepts in this regard the averment of a solicitor for the plaintiffs, that "[T]*he pool of economic experts in this jurisdiction is relatively small*….[R]*equiring the Plaintiffs to engage another expert would likely mean that the Plaintiffs would have to engage an expert from abroad, which would greatly add to the costs of the within proceedings, meaning that the Plaintiffs would suffer prejudice".*

(8) The court does not see in the conclusions to which the law directs it in these proceedings any breach of that "*basic procedural fairness*" referred to in *Re Parkin* [2019] IEHC 56, para.125. Lord Denning MR is quite clear in *Harmony* as to the important issues of principle and public policy that inform the conclusions reached by the Court of Appeal in that case and which likewise inform this judgment.

(9) There is a remarkable delay between the phone call of November 2017 and the commencement of the within application over a year later. If this had been a closer-run application that delay could have counted against VHI in terms of securing the relief sought: there is, after all, a duty on parties to prosecute their claims with due expedition, including any interlocutory applications. However, this is not a close-run application. On each point arising, the court has reached conclusions favouring the plaintiffs. So it is not necessary to consider in detail the issue of delay and any consequential prejudice arising for the plaintiffs.

(10) This case appears to the court to offer a variant of that public policy concern which Lord Denning MR touched on in *Harmony Shipping* when he observed as follows, at 1386:

> *"I would add a further consideration of public policy. If an expert could have his hands tied by being instructed by one side, it would be very easy for a rich client to consult each of the acknowledged experts in the field. Each expert might give an opinion adverse to the rich man – yet the rich man could say to each. 'Your mouth is closed and you cannot give evidence in court against me.' We are told that in the Admiralty courts, where there are a very limited number of experts, one side may consult every single one of them. Does that mean that the other side is debarred from getting the help of any expert evidence because all the experts have been taken up by the other side? The answer is clearly No. It comes back to the proposition which I stated at the beginning. There is no property in a witness as to fact. There is no property in an expert witness as to the facts he has observed and his own independent opinion on them."*

6. Given the various factors considered above, the court will refuse the application now brought. However, in an abundance of caution, it will direct Professor McDowell to give the form of undertaking mentioned by counsel for the plaintiffs at the hearing of this application.