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Sweeney v VHI [2021] IESC 58: expert witnesses in possession of confidential or privileged information

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ABSTRACT

This case commentary reviews *Sweeney v VHI*,[1] where the Supreme Court of Ireland held that an academic economist could not be retained as an expert witness by one party to a competition law action, where he had previously acted for the other party in separate proceedings and had been in receipt of confidential or privileged information. The court held that the role of an economist in competition law actions required a high degree of interaction with the client and legal team, such that privileged or confidential information would be likely to be exchanged. Where there was a real risk that such information would be disclosed, the expert should be excluded from acting for the other side in other proceedings.

Keywords: expert evidence; expert witness; economist; competition law; confidential information; privileged information; conflict of interest; independence of expert; risk of disclosure of confidential or privileged information; 'real and sensible' risk of disclosure.

INTRODUCTION

The defendant in competition law proceedings sought an order to exclude a particular economist from acting as an expert witness for the plaintiff, where he had been retained by the defendant in a similar capacity in other proceedings during the previous 10 years and was alleged to have received some commercially sensitive information.

BACKGROUND

Professor Moore McDowell, an experienced academic economist ('the economist') had been retained by the defendant, the Voluntary

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1 [2021] IESC 58.

Health Insurance Board (VHI) in various contentious competition law proceedings since 2003. One such action remained live at the time of the instant application. However, he had not had any involvement in the proceedings since 2012.

In 2015, the plenary summons in the instant proceedings was issued by the plaintiff, a promoter of a private hospital. The claim was that the VHI had a dominant position in the Irish market for private health insurance and the market for the purchasing of private medical services. It was alleged that this dominant position had been abused in failing to approve the plaintiff's hospital, contrary to section 5 of the Competition Act 2002, and article 102 of the Treaty on the Functioning of the European Union.

In October 2017, the plaintiff had his first consultation with the economist. The following month, the economist received a telephone call on behalf of the defendant, querying his involvement in the plaintiff's case.

In November 2018, the defendant issued a motion to exclude the economist from acting as an expert witness for the plaintiff, alleging that he had been provided with a significant volume of privileged and confidential information. In response, the economist swore an affidavit that he did not hold any confidential information in hard copy or electronic form and offered an undertaking not to disclose any confidential information.

High Court decision

On 28 May 2019 the High Court[2] refused to exclude the economist from giving evidence.

It was held that it was open to a court to grant injunctive relief to restrain an expert from acting for a party if he was in receipt of confidential information. The test was whether it was likely that the expert would be unable to avoid having resort to the privileged information.[3] The burden of proof was on the applicant to demonstrate that the expert was likely to misuse confidential or privileged information.[4]

An expert witness had a duty to the court to give evidence as to the facts he had observed, and to give his own independent opinion on them. The duty was the same no matter which side had instructed the expert.[5]

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2 [2019] IEHC 360 (Barrett J).

3 *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch).

4 *A Lloyd's Syndicate v X* [2011] EWHC 2487 (Comm).

5 *Harmony Shipping Company SA v Saudi Europe Line Limited* [1979] 1 WLR 1380; *McGrory v ESB* [2003] 3 IR 407.

Where an expert was in receipt of privileged or confidential information, it was open to the court to accept an undertaking from the expert not to disclose any information received.[6] Accordingly, the economist could act as expert witness for the plaintiff, subject to an undertaking not to disclose any confidential information.

The defendant appealed the refusal to the Court of Appeal.

Court of Appeal decision

On 9 June 2020, the Court of Appeal[7] allowed the appeal and granted an order excluding the economist from giving evidence.

The court agreed with the High Court that the jurisdiction to exclude an expert witness should be exercised sparingly and with caution.

Although the economist in the instant case had averred that he did not hold any confidential information, he did not deny that he had received such information, or state that he did not recall it.

The protection of privileged information had been emphasised as having constitutional status.[8]

Depending on the type of case, expert witnesses might be provided with confidential or privileged information and might be considered to equate with solicitors for the purpose of considering whether they could accept a related engagement adverse to the interests of their original clients.[9] Furthermore, there was no general rule that an expert witness could be retained by either party to litigation.[10]

Unlike a company or firm providing expert evidence or other professional services, it was not open to the economist as an individual to erect a 'Chinese wall' or 'information barrier' to maintain confidentiality.[11]

Where the information involved was not only confidential but privileged, the case for a strict approach to the risk of disclosure was unanswerable.[12] It would be impractical for the court to adopt a test of whether disclosure of privileged information was 'likely' in the sense of being probable, so the 'strict approach' was preferable.[13]

An economic expert in a competition law action was a paradigm example of a witness whose retainer necessitated the sharing of significant levels of confidential or privileged information. Unconscious or inadvertent disclosure appeared a real and obvious risk, particularly

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6 *Meat Corporation of Namibia* (n 3 above).
7 [2020] IECA 150 (Collins J, Faherty J and Power J agreeing).
8 *Martin v Legal Aid Board* [2007] 2 IR 759.
9 *Bolkiah v KPMG* [1999] 2 AC 222.
10 *Harmony Shipping* (n 5 above) distinguished.
11 *Bolkiah* (n 9 above) distinguished.
12 Ibid.
13 *Meat Corporation of Namibia* (n 3 above) distinguished.

in the pressured environment of the witness box. Even adopting the test of a 'likelihood' of disclosure, it was clear that the economist had been provided with a significant volume of privileged and confidential information, and he did not suggest that he had forgotten it.

Given the risk, the provision of an undertaking by the economist would not be a sufficient safeguard against the risk of an inadvertent or subconscious breach.[14]

As the High Court had adopted an incorrect test, it would not be appropriate to allow a margin of discretion to the original decision.[15]

Accordingly, the appeal should be allowed, and an order should be granted restraining the economist from acting as an expert witness in the proceedings.

The plaintiff appealed the decision to the Supreme Court.

Supreme Court decision

On 9 September 2021, the Supreme Court[16] dismissed the appeal and affirmed the decision of the Court of Appeal to exclude the economist from giving evidence.

The court held that the core issues in the appeal were:

i) the threshold to be surmounted by the applicant; and

ii) the nature of the evidence necessary to surmount this threshold.

The central feature of any competition law claim such as the instant case was the evidence-in-chief and cross-examination of the respective economic witnesses on the relevant issues. It followed that the role of an expert witness in a competition law claim involved a high degree of interaction between the witness, the clients and the legal team. The claim would be shaped and re-shaped on the basis of such interaction.

There was a high degree of overlap between the issues in the instant case and those in the other cases involving the economist, and it would not be possible to say that the confidential and privileged information supplied in the other cases would not be relevant to the instant case.

The jurisdiction to prevent a person from acting as an expert witness should be sparingly and cautiously exercised. In considering the cases from other jurisdictions, what distinguished cases in which relief was granted from those where it was refused was:

i) the scope and degree of involvement of the expert in the trial preparation; and

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14 *Australian Leisure and Hospitality Group Property Limited v Stubbs* [2012] NSWSC 215.

15 *Ganley v Radio Telifis Eireann* [2019] IECA 18 distinguished.

16 [2021] IESC 58 (O'Donnell J, Dunne J, O'Malley J, Baker J and Woulfe J agreeing).

ii) the extent of their exposure to privileged and confidential information, and the thinking of the client and its advisors. A person should only be restrained from acting as an expert witness if there was a 'real and sensible' risk of the disclosure of confidential information.[17] The onus was on the moving party to establish that there was such a risk.

It was not always necessary to establish with precision what confidential or privileged information had been provided to an expert if there had been a high degree of interaction between the expert, the clients and lawyers. An expert could be considered part of the litigation team, but only as an expert, obligated to give an independent opinion and owing a duty to the court to do so.[18]

It was unrealistic to suggest that the economist could continue to act for the plaintiff in the instant case and for the defendant in the other pending case, given the nature of an economist's involvement in competition claims, and the consequent risk of disclosure of confidential or privileged information. Accordingly, there was a real risk of such disclosure of such information.

Therefore, it was not appropriate for the economist to continue to act for the plaintiff, and he should not be permitted to do so.

COMMENT

This unanimous judgment of the Supreme Court, affirming a unanimous judgment of the Court of Appeal, sits a little uncomfortably with much of the other case law concerning expert witnesses both in Ireland and in other common law jurisdictions. I shall address two aspects:

i) the independent role of an expert witness; and
ii) whether an expert witness should be in possession of confidential or privileged information.

The independence of an expert witness

It has long been established that an expert witness has a duty of independence, and an overriding duty to the court. This was put forcefully in the Canadian case of *White Burgess Langille Inman v Abbott and Haliburton Company Limited*:

> Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so.[19]

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17 *Protec Pacific Property v Cherry* [2008] VSC 76; *Australian Leisure and Hospitality Group* (n 14 above).

18 *O'Leary v Mercy Hospital Cork Limited* [2019] IESC 48 distinguished.

19 2015 SCC 23, [2015] 2 SCR 182, [2] (Cromwell J).

In Ireland, the duty of independence is now established in order 39, rule 57(1) of the Rules of the Superior Courts (RSC), as inserted in 2016: 'It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.'

The high watermark of an expert witness's independence is probably *Harmony Shipping*, where Lord Denning uttered the famous words: 'There is no property in a witness.'[20] In that case, a handwriting expert had previously advised one side to litigation and was permitted to give evidence on behalf of the other side.

The underlying distinction between the lawyer and the expert is that the duty of a legal team is to assist the client to obtain the best result in the litigation. The fundamental duty of an expert witness – like any witness – is to tell the truth to the court. The testimony should not be finessed in order to assist the expert's own client. In fact, if an 'expert' presents expertise to the court in a biased manner, the expertise is of limited value to the court.

Oddly, the Supreme Court made only passing mention of order 39, rule 57(1) in *Sweeney*. The Court of Appeal's judgment mentioned it only to disapply its application to the disclosure of confidential information:

> However, the fact that an expert witness has an overriding duty to assist the court does not appear to me, of itself, to involve the abrogation of a client's entitlement to protect confidential and – especially – privileged information provided to an expert in the course of their retainer. An expert cannot be compelled to disclose privileged information, whether by reference to Order 39, Rule 57(1) or otherwise.[21]

The suggestion in *Sweeney* was that, in competition law proceedings, the economist had to be involved in the preparation of the action from an early stage, in order to assist in identifying the relevant market, whether the defendant held a 'dominant position' and whether that position had been abused. As emphasised by O'Donnell J:

> [T]he 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.[22]

It would be difficult for an economist who has been involved in the litigation from such an early stage to be considered truly independent

20 *Harmony Shipping* (n 5 above).
21 *Sweeney* (n 1 above) [119].
22 Ibid [38].

of the instructing party. This is especially true if the economist is in possession of confidential or privileged information, and I shall return to this below.

In fact, it might be considered that an economist in that position is more in the position of an 'expert adviser' or a 'professional witness' than an 'expert witness' as envisaged by order 39, RSC.

Order 39, rule 58 makes provision in several types of action (including competition law proceedings) for the appointment of a 'single joint expert'. It may be the case, if an 'expert' has been advising a party from an early stage and is in possession of confidential or privileged information, that the court should then appoint a single joint expert – or an assessor – to give a more detached expert opinion to the court.

Possession by an expert witness of confidential or privileged information

It is questionable whether an independent 'expert witness' should be in possession of confidential or privileged information at all.

It is worth recalling the words of O'Donnell J himself (as he then was) in *Emerald Meats Ltd v Minister for Agriculture*, where he emphasised the obligation of expert witnesses to act independently and to meet to narrow their differences:

> It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the court's determination. If this process functions properly, there should not be wide and unbridgeable gaps between the views of experts. Where there are differences, those should be capable of identification along with the relevant considerations so that the particular issue or issues which require judicial determination should be capable of ready exposition.[23]

The rationale is that, where two experts with similar professional backgrounds examine the same facts, they should come to a broadly similar opinion – if they are not seeking to assist their own clients. If their opinions are different, it should be possible to explain by reference to the facts and the expert knowledge where the differences originate.

But where one of the experts is in possession of confidential information, this may colour that expert's opinion without that expert being able to explain to the other expert – or the court – why this is so.

It is now a rule of the courts of England and Wales that an expert witness should not have access to material that is not available to the experts retained by other parties. This was put succinctly in *Imperial Chemical Industries Limited v Merit Merrell Technology Limited*:

23 Ibid [28].

> Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number.[24]

Oddly, *Imperial Chemical Industries* was not cited either by the Court of Appeal or the Supreme Court.

While the RSC do not make similar requirements explicit, they do provide under order 39, rule 58(1–4) for written questions to be put by each side to the other's expert witness. They also provide for the experts to meet on a 'without prejudice' basis in order to identify 'such evidence as is agreed between them or among them and such evidence as is not agreed'.

If written questions raise matters that can only be answered by reference to confidential or privileged material, the courts will probably have to address how that balance is to be struck. Similarly, the experts meeting on a 'without prejudice' basis will be constrained in their full and frank discussions if they are not able to make reference to some of the information informing their opinion.

CONCLUSION

These difficulties identified above are not insurmountable. But any examination of the case law on expert evidence will demonstrate that a large number of the professionals giving evidence on an 'expert' basis do not properly understand their duties to the court. It is common for them to act as 'guns for hire' and to tailor their evidence to their clients' position.

The courts have generally tried to make the duties clearer, and many professionals now attend training to ensure that they understand these duties, in the manner envisaged by the Court of Appeal of England and Wales in *R v Momodou*.[25] The judgment in *Sweeney* will require careful explanation in such training so that professionals giving evidence in the courts of Ireland understand the permissible level of involvement with the client and legal team and what confidential information they may consider.

24 [2018] EWHC 1577 (TCC), [237] (Fraser J).

25 [2005] EWCA Crim 177.