



**THE SUPREME COURT  
DETERMINATION**

**BETWEEN**

**SHAY SWEENEY AND THE LIMERICK PRIVATE LIMITED**

**PLAINTIFFS**

**AND**

**THE VOLUNTARY HEALTH INSURANCE BOARD IRELAND**

**DEFENDANT**

**Neutral Citation:** [2021] IESCDET 36

**Supreme Court record no:** S:AP:IE:2020:000123

**Court of Appeal record no:** A:AP:IE:2019:000329

**High Court record no:** 2015 No. 4210 P

**Date of Determination:** Thursday, 8<sup>th</sup> April 2021

**Composition of Court:** O'Donnell J., McKechnie J., Dunne J.

**Status:** Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE  
CONSTITUTION APPLIES**

**RESULT:** The Court grants leave to the Plaintiffs to appeal to this Court from the  
Court of Appeal

**REASONS GIVEN:**

**ORDER SOUGHT TO BE APPEALED**

<b>COURT:</b> Court of Appeal
<b>DATE OF JUDGMENT OR RULING:</b> 9 <sup>th</sup> June, 2020
<b>DATE OF ORDER:</b> 19 <sup>th</sup> October, 2020
<b>DATE OF PERFECTION OF ORDER:</b> 19 <sup>th</sup> October, 2020
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 4 <sup>th</sup> November, 2020 AND WAS IN TIME.

1. This is an appeal from a decision of the Court of Appeal handed down on the 9<sup>th</sup> June, 2020. The resulting order issued on the 19<sup>th</sup> October, 2020. The judgment in question was delivered by Collins J. (Faherty and Power JJ. concurring) and its effect was to the reverse the decision made at first instance by Barrett J. of the High Court. The applicants, Mr. Shay Sweeney and the Limerick Private Limited seek leave to appeal to this Court so that the order of Barrett J. may be reinstated. They have filed a single application and are represented together. This case has been referred to the Court pursuant to the provisions of Rule 8(E) of Practice Direction SC 19, nothing however arises from this.

### **General Considerations**

2. The jurisdiction of the Supreme Court to hear appeals is set out in the Constitution. In order for this Court to grant leave to appeal from a decision of the Court of Appeal, the Court must be satisfied that there are circumstances which have the presence of either or both of the following factors: i) that the decision sought to be appealed involves a matter of general public importance, or ii) the interests of justice.
3. The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the 33<sup>rd</sup> Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v Director of Public Prosecutions* [2017] IESCDT 134 and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Price Waterhouse Coopers (A Firm) v Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.

4. It should be noted that any ruling in a determination is between the parties. It is final and conclusive as far as the parties are concerned, and is a decision in relation to that application only. The issue determined on the application for leave is whether the facts and legal issues meet the constitutional criteria to enable this Court to hear an appeal. It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case. Where leave is granted, any issue canvassed in the application will in due course be disposed of in the substantive decision of the Court.
5. Furthermore, the application for leave filed and the respondent's notice are published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to fully set out the position of the parties.
6. In that context it should be noted that the respondent does oppose the grant of leave and neither party has requested the making of a reference to the Court of Justice of the European Union under Article 267 TFEU.

#### **Background and Procedural History**

7. Mr. Sweeney, the first applicant, is a director of the company which is the second named applicant. Both parties brought the proceedings which have led to this application. The applicants have had plans for some considerable time to build a private hospital in Limerick. To this end, in 2006, the Voluntary Health Insurance Board ("VHI") were approached by the company and Mr. Sweeney with a view to seeking the approval of VHI for the hospital and agreeing that the cost of the provision of healthcare services by the hospital to VHI's members would be covered by the VHI. VHI approval of the hospital would mean that it would be part of a list of hospitals in the

State in which VHI members are covered for the treatment they receive. Negotiations went on for several years, ending in 2014, with the VHI ultimately refusing to approve the hospital and thus no agreement being reached.

- 8.** This refusal forms the basis for the High Court proceedings then brought by the applicants against VHI in May, 2015: it was their assertion that, as the largest provider of private health insurance in Ireland, VHI holds a dominant position in the market for private health insurance, and likewise in the related market for the purchasing of private medical services. The claim was that the refusal to approve the hospital constituted an abuse by VHI of these positions of dominance, breaching s. 5 of the Competition Act 2002 and/or Article 102 TFEU. Various declaratory reliefs as well as damages were sought, while the VHI denied all the claims made.
- 9.** As the case progressed towards trial, in October, 2017, the applicants retained Professor McDowell as an independent economic expert, to assist with the claim. It is common case that Prof. McDowell has appeared as an expert witness in several competition law cases in the State. It is also common case that he had previously been retained on numerous occasions by the VHI, to act in a similar capacity. Of particular interest, was VHI's retention of him to work on two sets of proceedings arising out of their refusal to offer their members health insurance cover in respect of other private hospitals ("the other proceedings"). VHI objected to the retainer in the within proceedings, on the basis that it would be unfair to allow Prof. McDowell to appear on behalf of the applicants in a case which dealt with substantially similar issues to those which he had dealt with in his capacity as expert witness for VHI in the other proceedings. They say that he had been given access to certain privileged and confidential information in the course of those engagements and accordingly, it was their contention that

this would result in the applicants having an impermissible advantage in the litigation.

- 10.** VHI therefore brought an application seeking to have Prof. McDowell excluded from acting as an expert witness for the applicants. It submitted that it would be an appropriate use of the court's inherent jurisdiction to do so.
- 11.** Barrett J. refused to accede to this application, in a decision which he handed down on the 28<sup>th</sup> May, 2019. The trial judge placed significant weight on an affidavit sworn by Prof. McDowell in which he averred to being fully cognisant of his duties as an independent expert, his primary duty being to the court and to the fact that he had not used any information, confidential or otherwise in the preparation of the draft report he had written for the applicants. It was also noted by Barrett J. that a period of 5 ½ years had elapsed between the last dealings which Prof. McDowell had in relation to the other proceedings and his retainer by the applicants in relation to their claim.
- 12.** The learned judge had regard to several authorities from the neighbouring jurisdiction as well as to a passage from Hodgkinson and James, *'Expert Evidence: Law and Practice'* (4<sup>th</sup> ed, 2015, para 8-006) and formulated the test to be applied based thereon. There was no suggestion that Prof. McDowell was incapable of performing his duties as an independent expert, due to the pre-existing relationship he had with VHI: in addition, Barrett J. was satisfied that it would be possible to avoid resorting to privileged and confidential information during the course of the proceedings. He dismissed the application and "with an abundance of caution" directed that Prof. McDowell give an undertaking and a commitment regarding his role and duties as an expert witness.

### **Court of Appeal**

- 13.** The decision of the High Court was successfully appealed by the VHI. In his judgment of the 9<sup>th</sup> June, 2020 ([2020 IECA 150]), Collins J. noted that at no point had it been suggested that Prof. McDowell did not recall the privileged and confidential information which he had been given access to. He found the position at hand to be far removed from those presenting in cases such as *Harmony Shipping Co. v. Saudi Europe* [1979] 1 WLR 1380 and *Meat Corporation of Namibia Ltd v. Dawn Meats* [2011] EWHC 474 Ch.
- 14.** The learned judge stated that the inherent jurisdiction in question was to be exercised sparingly and with caution. Though the role of the court in the management of proceedings was undeniable, so was the right of a party to select and engage an expert witness of its choice, which fed into the constitutional right of access to the courts. However, these rights must also be applicable when defending a claim and would thus also apply to VHI.
- 15.** Collins J. engaged in a lengthy analysis of the threshold test which should apply to the risk of disclosure of confidential information and concluded that it should be whether there was a real risk of disclosure. He found that there was indeed a real and obvious risk, though stressed that this was not in any way to impugn the integrity of Prof. McDowell.
- 16.** Accordingly, the appeal of VHI was allowed and an order excluding Prof. McDowell from appearing for the applicants was made by the Court of Appeal.

### **Application for Leave to Appeal**

- 17.** The applicants contend that an appeal to this Court is necessary both as a matter of general public importance and in the interests of justice. The

grounds of appeal have been set out in the application for leave and will therefore not be repeated herein.

- 18.** In brief, it is submitted that the issues raised constitute matters of general public importance. Firstly, the applicants contend that the test applied by the Court of Appeal, namely whether there is a real risk of disclosure of confidential information (*Bolkiah v. KPMG (a firm)* [1999] 2 AC 222) was not entirely appropriate as it blurs the lines between roles of expert witnesses and other roles such as solicitors, who owe a fiduciary duty to their clients. In any event, it is said that the correct test has never been considered by this Court and clarification is necessary. Furthermore, an appeal would provide an opportunity for the Court to examine the public policy factors attached to the retention of expert witnesses, such as whether that expert can then be prevented from appearing in subsequent cases by their original retainer. Finally, though the current proceedings are based in competition law, the legal principles in question are by no means limited to that area and are of general relevance.
- 19.** As for the reasons why an appeal is necessary in the interests of justice, the applicants cite the large number of litigants who stand to be impacted by a clarification of the principles relating to the retention of expert witnesses as they arise in these proceedings. The first applicant says he is now at a disadvantage in expensive competition law proceedings as a result of the respondent's application and may have to look abroad for a different expert witness to retain if the decision of the Court of Appeal should stand.
- 20.** The applicants submit that certain factual assumptions were made in the judgment of the Court of Appeal (paras. 23 and 24 of its judgment) which they dispute and wish to address them pursuant to O. 58, r. 30 RSC.
- 21.** For these reasons, the applicants ask that the Court grants leave to appeal.

**Respondent's Notice**

- 22.** The respondent opposes this application. However, in the event that leave is granted, it has requested a priority hearing on the basis that these proceedings have been ongoing since 2015, with relatively little progress, which the respondent suggests is due to various failures on the part of the applicants.
- 23.** The respondent utterly disputes that the matters raised in the application for leave are ones of general public importance; in fact it is said that they are extremely rare and of a discrete nature. It further disagrees with the characterisation of the application as one which stands to infringe upon the applicants' right of access to the courts.
- 24.** It is not accepted that the test utilised by the Court of Appeal was in any way inappropriate or unclear. Further, it is pointed out that the Court of Appeal held that even if the alternative test favoured by the applicants had been applied, they still would not have been successful.
- 25.** None of the points raised by the applicants would satisfy the interests of justice requirement, in the view of the respondent. It is submitted that in truth, if the costs of engaging a different expert are as significant an issue for the applicants as asserted in the application, they should not have attempted to prolong the proceedings by seeking to have the matter determined by this Court, as the costs will be driven up by this move.
- 26.** The respondent therefore opposes the application and believes that leave should not be granted.

**Decision**

- 27.** The application made covers issues relating to the retention of expert witnesses and the duties of an expert witness. The general principles in relation to these matters have indeed been considered by this Court on previous occasions. However, the situation at hand raises more specific questions about the correct approach for a court to take when asked to exercise its inherent jurisdiction to exclude an expert witness from appearing in proceedings. Evidently, accession to such an application has immediate, serious and adverse consequences for the party who has retained that witness and the importance of the correct approach to any application to exclude cannot be understated.
- 28.** The applicants noted the lengthy discussion of the relevant authorities which appeared in the decision of Collins J. A similarly thorough analysis of such cases was performed by the trial judge, who reached a different conclusion. It is true also that while these proceedings are based in the area of competition law, the particular issue upon which leave is sought stands to have a potential impact on proceedings in which an expert witness retained by one party has previously been engaged another party to the proceedings. Thus far, this Court has not given specific consideration to these issues and clarification would therefore be of benefit, not only to the immediate parties, but also to others similarly circumstanced.
- 29.** As such, the Court is satisfied that the questions asked, do raise matters of general public importance.
- 30.** It is further accepted that certain of the reasons put forth by the applicants to satisfy the interests of justice requirement are valid. The retention of an alternative expert, whether from within the State or abroad, would cause significant extra cost to be incurred and in the situation presenting whereby

the applicable principles have not yet been properly defined, an appeal to this Court is considered necessary in the interests of justice.

- 31.** As mentioned at para. 22, the respondent has requested a priority hearing. Even in the normal course of events, this appeal will likely be heard in the Michaelmas term, but in any event, this issue can be raised during case management.

**Conclusion**

- 32.** For the reasons given above, leave to appeal is granted, pursuant to Article 34.5.3° of the Constitution.

**And it is hereby so ordered accordingly.**