November 2014

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)

2. Instructions in relation to the Mini-Trial (including judicial directions as to the examination of vulnerable witnesses)

3. Trial bundle for Interim Application and Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore where a gown and tabs.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates undertaking the practical assessments are no longer required to complete trial strategy plans. Instead, they are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

Please assume that this contested application is being made by the Plaintiff against the Defendant. The Plaintiff seeks an order, pursuant to the Court's inherent jurisdiction, that the Defendant be debarred from calling their expert witness Deepak Dharma ('DD') at trial because (1) he is in possession of confidential and privileged information belonging to the Plaintiff which prevents him from acting/continuing to act for the Defendant, and (2) he lacks the independence necessary of an expert.

Please assume that the application is being heard before a High Court Judge (not before a Master) some three weeks after experts' reports have been exchanged by the parties in accordance with the direction given at the earlier case management conference.

Whatever the result of the application on the day of the assessment, you may not use the information set out in the agreed facts below in any part of the mini trial. In particular, the information set out below may not be used in the examination (chief or cross) of any of the witnesses in the mini-trial. This prohibition should in no way be regarded as an indication of the strength or weakness of the application.

Please assume that the following are agreed facts for the purposes of the application:

i. The Plaintiff accepts that DD is suitably qualified in terms of expertise to be an expert in the case. DD voluntarily retired from the Defendant company four years ago. He had worked for the Defendant in various positions (as set out in paragraph 1.2 of his report) for 34 years and was the Managing Director of the spun fabrics section on his retirement. He was replaced by Diana Dalkia who came to the Defendant from Fruit of the Loom PLC. She was given the title of Director as opposed to Managing Director but the job specifications did not change.

ii. Diana Dalkia was recruited by DD to replace himself. He and Diana Dalkia are in fact happily married and have been so for 20 years. This fact was known to the Defendant company at the time of her recruitment.

iii. Diana Dalkia has recommended DD's consultancy services (see paragraph 1.1 of DD's report) to at least 20 clients during the last four years but DD has not paid a referral fee for this and Diana Dalkia has not been paid any commission for the introductions. The gross value of the work referred by Diana Dalkia amounts to just

under $1,000,000 over four years. The average annual gross turnover for DD's company, Fabric Contract Consultants Limited, is $4,000,000.

iv. DD has acted as an interface between his own clients and the Defendant on some 10 occasions in the past four years. He has represented his corporate clients when buying garments from the Defendant and, on each occasion, he has obtained reasonably good deals for his clients.

v. Fabric Consultants Limited has on two previous occasions acted as a consultant for the Plaintiff. It was instructed by the Director of the Plaintiff's Clothes Division, Jane Tang, to advise and assist her on a large purchase of men's trousers from a manufacturer based in Shanghai about three years ago. On the second occasion, some two years ago, it acted as a consultant, again to Jane Tang, on a substantial purchase of men's summer shorts from a supplier based in Ireland. On each occasion Ms Tang dealt exclusively with Matthew Archer, one of DD's co- directors. Matthew Archer is still with Fabric Consultants Limited.

vi. DD has never appeared as an expert before in court but the solicitors acting for the Defendant have explained the nature of his duties to him under Appendix D of the Rules of the High Court (Cap. 4A) and O. 38 and arranged for him to attend a half day course with a well known independent training organisation, the College of Experts, where his duties and role were again explained to him.

vii. On 28 July 2013, Jane Tang of the Plaintiff contacted Matthew Archer by telephone with a view to asking him to act as the Plaintiff's expert in the case. She was told that Mr Archer was on paternity leave and so she spoke to DD instead. During the conversation she gave a summary of Mr. Cussler's version of events. She did not mention the name of the Defendant and DD did not ask her for it. Ms Tang and DD cannot now explain why the name of the Defendant was neither sought nor given. Immediately following the conversation, Ms Tang sent an email to DD setting out the Plaintiff's version of events without, again, mentioning the name of the Defendant. The email *[which is not provided for the assessment]* contained Mr. Cussler's version of events which was in substantially the same terms as the contents of his later exchanged witness statement. Both the Plaintiff and Defendant accept that the conversation and email were confidential and subject to litigation privilege.

viii. Following Ms Tang's email, DD tried to agree his fees with her but was unable to do so. Ms Tang declined to instruct him because she considered him to be too expensive.

ix. Later, at the case management conference in the current case, each party was given permission to rely upon an unnamed expert in the field of cotton garment production and supply. It was only when DD's report was served upon the Plaintiff that Ms Tang realised that DD was now instructed by the Defendant. DD had openly declared at the end of his report:

a. his company's previous dealings with the plaintiff,

b. his marriage to Diana Dalkia, and

c. Ms Tang's efforts to retain him.

[Note for candidates: these declarations do not appear at the end of DD's expert report in the mini trial bundle. They are assumed to be there for the purposes of this contested application hearing only.]

Please assume that the following documents are before the court on the hearing of the application and that they are all in order: application notice, draft order, witness statements setting out the salient evidence in support of/ opposition to the application, and respective statements of costs *[Note: these documents are not provided at the assessment hearing or in this bundle].*

For the purpose of the application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

i. The statements of case in the trial bundle,

ii. Facts in the witness statements in the trial bundle,

iii. The following case authority, a copy of which is attached:

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

iv. Hong Kong Civil Procedure (the Hong Kong White Book).

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached case authority as you think appropriate. You do not need to attach it to the skeleton; the Judge will have a copy of it at the hearing. You may also refer to the White Book as you think appropriate.

Please note that your arguments must be limited to this case authority and the White Book.

It is very important that you email your skeleton to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3pm of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

i. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

ii. No reply to submissions will be conducted.

iii. You should be prepared to deal with Judge interventions and questions in relation to your submissions.

iv. You should be prepared to address the court on the issue of costs as a matter of principle.

Neutral Citation Number: [2011] EWHC 474 (Ch)

Case No: HC08C03503

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
07/03/2011

B e f o r e :

MR JUSTICE MANN

Between:

Meat Corporation of Namibia Limited	**Claimant**
- and -	
Dawn Meats (UK) Limited	**Defendant**

John Taylor (instructed by Collyer Bristow LLP) for the Claimant
Robert Howe QC and Mark Vinall (instructed by DLA Piper UK LLP) for the Defendant
Hearing dates: 16th February 2011

HTML VERSION OF JUDGMENT

Mr Justice Mann:

1. This is an application by the claimant, MeatCo, against the defendant, Dawn, relating to expert evidence which it is intended should be given in the trial of the action commencing at the beginning of May. After a previous trial date was vacated, the defendant identified a new expert whom it wishes to call, a Mrs Burt-Thwaites. The claimant opposes that and seeks a direction that permission to call her be refused because she is in possession of confidential and privileged information concerning the claimant which is said to prevent her from acting or continuing to act for the defendant, and because she is said to lack the independence necessary of an expert.

2. I do not need to set out the details of this action. It is sufficient to say that it relates to an agency agreement previously existing between the claimant and the defendant and alleged breaches by the defendant of that agreement. The agency agreement was terminated in November 2008. Permission was given to each party to call one "meat industry expert" to address a specified list of issues. The list of issues is divided into three headings:

   a) Market conditions in 2007-2009, including the EU market for beef, the position of MeatCo within that market and the role of certain Smithfield traders within that market.

b) Pricing – the method for ascertaining the market price, factors affecting the market price, whether new season Namibian beef arrived late in the UK in 2008, the impact of allegedly late arrival of that beef and whether sales of MeatCo product by Dawn were below market price.

c) Market practices or industry standards relevant to the method in issue, including human resources necessary to conduct an agency, stock management, invoice and debtor management, forward selling, sales of different cuts, branding, customer complaints, dealing with associated or related companies and "whether Dawn fails to conduct the agency in accordance with the standards of a reasonable meat agent in the respects alleged by MeatCo".

3. Mrs Burt-Thwaites is a retired meat trader and a vice-president of the International Meat Trade Association (IMTA). It seems that it is accepted by both sides in this action that in terms of expertise she is suitably qualified to be an expert in this case – that is a sensible inference from the fact that both sides tried to instruct her and one side succeeded. The claimant tried first. In May 2010 its UK subsidiary's managing director, Mr Brian Perkins (who used to work for Dawn) contacted her with a view to asking her to act as the claimant's expert. He had various conversations with her on the telephone and sent her some emails.

4. Mr Perkins' evidence is that when he first approached her she said she was expecting to hear from the defendant with a view to an engagement as a consultant, and if she agreed it would exclude her from any role as an expert for MeatCo. She was therefore initially hesitant about becoming involved in the litigation. However, a short time later she agreed to consider the request, from which Mr Perkins inferred that the consultancy prospect was not going ahead. As a result he sent her an email headed "In confidence – expert witness" on 31st May 2010. His witness statement claimed privilege for that email, and asks me to infer that he was communicating with her in confidence. It is common ground that he should be treated as so doing. Indeed it is common ground that the contents of his communications are covered by litigation privilege. Since the email was confidential, he did not set out the contents in his first witness statement; he merely indicated its headings. However, the full email, together with some of the rest of his email traffic with Mrs Burt-Thwaites, was exhibited to a later witness statement which was not served on the defendant. The claimant invited me, if I thought fit, to look at those emails in order to establish the nature of the communications in them so that I could determine the extent of the confidentiality and in particular whether the disclosure in those emails put Mrs Burt-Thwaites in a position in which she could not properly accept instructions as an expert for the other side. The defendant agreed to that course, and indeed encouraged it. In those circumstances I adopted that course. The defendant did not see the content of those emails.

5. Mr Perkins sent another email dated 1 June 2010, again headed "In confidence – expert witness" which he described in general terms in his witness statement; again, he did not wish to set out the full content. He says he made reference to the fact of and details of offers made by MeatCo in the litigation and the reason behind such offers, tactics concerning mediation, his view of the litigation and Dawn's stance in relation to mediation. This information was said to be based on legal advice that solicitors had given to MeatCo.

6. On 2nd June 2010 Mr Perkins telephoned Mrs Burt-Thwaites to discuss her acting as expert. His evidence was that she stated at this point that she agreed to act as expert for MeatCo, and they agreed to meet during the week commencing 20th June 2010 when she would be back in the UK. This obviously did not amount to a formal retainer, so far as there was an agreement at all.

7. During at least one further telephone call Mr Perkins says that he discussed the facts of and details of offers that MeatCo had already made, and what he felt were the strengths and

weaknesses of the respective cases, who he felt was likely to win and tactics for mediation and settlement, together with the sort of terms that MeatCo would be prepared to settle on. Mr Perkins claims that by an email of 3rd June he informed his solicitors that Mrs Burt-Thwaites had agreed to act as MeatCo's expert.

8. In further telephone calls after that date Mr Perkins says that Mrs Burt-Thwaites indicated she had changed her mind – she thought that her diary commitments would not permit her involvement. He tried to reassure her and she said she would "sleep on it" but also reassured him that if she was not going to act on behalf of MeatCo then she would not act on Dawn's behalf either. In due course on 9th June 2010 she emailed saying that, looking at her diary, it would be tricky for her to be available. She added:

"There may also be a conflict of interest with my other activities."

She therefore regretted she would not be able to assist.

9. Mr Perkins responded by acknowledging what he regarded as bad news, and stating that he relied on her "complete confidentiality with our discussions…[the disclosed] information divulges views and opinions that are of a highly confidential and critical nature to the bearing of the issue discussed and we now need for you to treat this in complete confidence." She responded:

"I apologise again that I cannot accept this role, but do stress that I have not, and will not, divulge any of our discussions. Please be assured that I have no involvement with your case and would not discuss it with anyone."

10. Mrs Burt-Thwaites has provided a witness statement dealing with the events of this period. She accepts that she was telephoned by Mr Perkins, when she was on holiday in France not long after a sudden family bereavement. She says she kept the conversations as short as she could and did not want to talk about the detail. She does not deal with the initial telephone calls in which she is said to have been waiting to hear about a consultancy, but acknowledges receipt of the emails. She does not remember specific detail about the telephone call on 2nd June, but the way she deals with it indicates that she does not accept that she agreed in principle to act as an expert. She says that the conversation included generalities and a certain amount of persuasion. She does recall some discussion about "the meat market in 2008". She does not think that they discussed "in any detail" the strengths and weaknesses of the respective cases. She says that in response to Mr Perkins' cajoling she did eventually agree that she would be able to make time to act, and if Mr Perkins informed MeatCo's solicitors that she had done that, then she accepts she may have done so at the end of the conversation of 2nd June. However, until the present dispute about her appointment arose she had forgotten that she had ever agreed to act.

11. She then goes on to deal with her decision not to act for MeatCo. She sent her email withdrawing because she understood the trial would take place in January or February 2011 and she had planned to be in South Africa for most of those months. The reference to "a conflict of interest" was a reference to discussions which she says she and Dawn were having about Dawn's sponsoring her attendance at the IMTA, and the fact that Dawn had expressed an interest in her providing training to their employees (which has not actually been pursued).

12. On 25th June 2010 Dawn's solicitors told MeatCo's solicitors that they were instructing a Mr Richard Brown as their meat industry expert. MeatCo had no observations on that appointment. In January 2011 MeatCo told Dawn's solicitors that Mr Craig McKinlay was to be its meat expert. There was to be a trial in November 2010, but in August it was agreed it would be vacated because of a slippage in the timetable. It was re-fixed for May 2011.

13. It appears from the evidence that the defendant then had second thoughts about using Mr Brown as its expert. It approached Mrs Burt-Thwaites and had an initial discussion with her on 2nd December 2010. Dawn decided to instruct her to act as its expert on the meat industry. It knew that Mrs Burt-Thwaites had been approached by MeatCo to act as its expert and had declined, but it is said by Mr Dominic Higham, Dawn's solicitor, that no details of the contacts were given. She agreed to act as an expert and on 20th January 2011 MeatCo were told. That information has led to the present challenge.

14. When Meat Co challenged Mrs Burt-Thwaites acting, Dawn's solicitors acknowledged that the communications between her and Mr Perkins should remain confidential and that she should not divulge any of those discussions either to Dawn or to the court. For her part Mrs Burt-Thwaites, while stating that she does not recall a lot of what passed between her and Mr Perkins, has offered an undertaking to the court not to disclose any of it.

15. That is the background to one of the challenges to Mrs Burt-Thwaites acting as expert, based on her receipt of privileged information. However, in the run up to the first hearing day in this case another challenge developed. In a witness statement provided by Mrs Burt-Thwaites, she referred to Dawn's continued sponsoring of her "continued attendance at IMTA", and the fact that Dawn had expressed interest in her providing training to employees (which had not been taken forward). That led to a flurry of correspondence a few days before the hearing in which the solicitors to MeatCo said they understood that she was retained by Dawn on a paid basis for the purpose of being a board member (indeed a Vice President) of IMTA and asking for the precise terms of the retainer. They were told the same day that she was paid £500 per month to attend IMTA's monthly meetings, and was to attend at least 8 meetings per year. There was, it was said, already a reference to this in her draft report.

16. All this happened less than 2 clear days before the first hearing, and the extent of her activities were not clear. Accordingly, at the end of the day's hearing I gave directions for the filing of further evidence on the point. Dawn provided further details of the arrangements, which were then relied on by MeatCo in support of its allegation of lack of independence. The following points emerged.

17. IMTA is an association which represents the interests of meat traders at meetings with the UK, European and other international bodies. Mrs Burt-Thwaites has been a Vice President since 1995. Mr Browne, CEO of Dawn had a meeting in March 2010 to see if there were ways in which they could work with her following her impending retirement as a meat trader. They discussed sponsoring her continued membership of the council of IMTA – a council member was required to be employed or sponsored by a trading company, which she would no longer be after her retirement, unless sponsored by someone else. Dawn decided to sponsor her to remain on the council.

18. The basis of her involvement was set out in a couple of emails. On 16th June she had written to Mr Browne:

> " I did speak to Sean and have agreed that there would probably be a conflict of interest were I to accept the role as industry expert' with regard to your case with MeatCo.
>
> Although financially tempting, I have declined the commission, in anticipation of an ongoing role with the Dawn Meat group.
>
> It should be feasible for me to represent Dawn Meats at IMTA for the monthly council meetings, providing I am working for Dawn Meats, however the President will require a written request from Dawn Meats, followed by an acceptance vote from the IMTA Council, which should be forthcoming …
>
> I suggest that I attend a minimum of 7 of the monthly meetings annually and that Dawn

Meats pays me a minimum annual retainer of £3500 pa to cover the basic 7 meetings, and that any further meetings carried out on the half of Dawn Meats should be charged at the daily rate of £500 per day, plus travel and direct telephone expenses.

I hope you agree to the above and that you will propose with whom I should liaise and report to, and who, in your organisation would be interested in world meat market information as I hope to be able to provide. Equally I will remain available to work with your trainees as proposed, on the same fee basis, unless otherwise agreed. "

19. Mr Browne confirmed to IMTA that Mrs Burt-Thwaites was working for the Dawn Meats Group "on a consultancy basis, helping with staff training and meat imports." As indicated above, her role with Dawn has not, in fact, extended to training, so her consultancy at the moment covers only her attendance at IMTA council meetings. There was some evidence that before meetings she asked Mr Clinton, with whom she was apparently asked to liaise, what he wanted raised at meetings.

20. The reference to Mr Clinton then led to another branch in the independence challenge. He is, apparently, to be a witness at the trial, and it was said that her dealings with Mr Clinton on these matters again imperilled her independence. This was a late challenge.

21. There was also another late challenge. MeatCo have been reviewing the disclosure and have identified the possibility that Mrs Burt-Thwaites was involved in one, or some, of the very transactions which are criticised in the action. One of the claims made by MeatCo is that when Dawn was its agent it acted inappropriately in relation to some of its trading counterparties. Specific criticism is made of dealings with a company known as Chitty Foods. MeatCo's Mr Du Plessis will apparently give evidence that he gave an instruction that dealings with Chitty Foods should be on a cash only, and not a credit, basis. MeatCo will say that another company, British Food Solutions, thereafter acted as a front for Chitty, and was given credit, contrary to that instruction in 2008. Mrs Burt-Thwaites was said to be a director and 50% shareholder in British Food Solutions in 2008, and is said thereby to be involved in a company whose transactions are to be impeached. Furthermore, Mr Du Plessis has identified a note of a meeting that he had with Dawn in 2008 in which he identifies "Jenny Bird" as acting for BFS, and being given credit, which was not acceptable because Dawn knew that "BFS = Chitty". Mr Du Plessis thinks that he may have misheard the name, and that "Jenny Bird" was in fact "Jenny Burt" (a version of her name that she sometimes uses). It is therefore suggested that she was personally involved in impeached transactions. Furthermore, various of the issues on which the experts are to opine involve considering the quality of transactions which Dawn entered into, so according to MeatCo Mrs Burt-Thwaites, if allowed to give evidence, and if she was indeed involved in transactions for British Food Solutions, could find herself being required to give evidence in relation to transactions in which she participated.

22. Dawn has responded only partially to this last point, doubtless because of the lateness of the point being taken. Mrs Burt-Thwaites has explained that she retired as director and secretary of BFS Limited (which I understand to be British Food Solutions) on 31st March 2008, and sold her shares to a Mr Andrew Chitty on the same date. She was not aware of any purchases of MeatCo products through Dawn. She has been told by Dawn's solicitors that the first sales of MeatCo product to BFS did not occur until May 2008, after she had left BFS, and she was not aware of any such purchases until she noticed that BFS was mentioned on one of MeatCo's debtor lists in one of the case documents that she has reviewed. She says she was not actively involved in any Dawn sales involving MeatCo products.

23. This factual aspect of the case is relied on as another bar to Mrs Burt-Thwaites' acting as expert for Dawn, on the grounds that it removes her independence.

The basis of the present challenge

24. MeatCo's challenge is essentially twofold. First, it claims that the privileged and confidential information provided by Mr Perkins to Mrs Burt-Thwaites puts her in a position in which she can no longer act for the other side, applying the principles in *Prince Jefri Bolkiah v KPMG* [1999] AC 222. Second, it claims that the evidence now shows that Mrs Burt-Thwaites lacks the degree of independence necessary for an expert witness and that the court, at this stage, should take the view that she should not be allowed to give evidence. I shall take each of those objections in turn.

Privilege and confidentiality

25. In the course of her conversation with Mr Perkins, Mrs Burt-Thwaites received privileged and confidential information. Mr John Taylor who appeared for MeatCo says that that puts her in the same position as a solicitor who has once acted for one side or as accountants who have provided significant litigation support to the other side, and he invokes the law as laid down in the *Prince Jefri* case. In that case KPMG had provided extensive forensic accountancy services to the claimant, and he sought to restrain them from acting for an opponent in litigation. The facts of the case were such that the accountants had conducted many of the tasks usually undertaken by solicitors, and they were given access to highly confidential information concerning the extent and location of the claimant's assets. It is clear that it was an important part of the House of Lords' decision that the accountants were essentially occupying the same position as solicitors. Lord Hope of Craighead said (at page 226 H-227E):

> "I consider that the nature of the work which a firm of accountants undertakes in the provision of litigation support services requires the court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor. The basis of that jurisdiction is to be found in the principles which apply to all forms of employment where the relationship between the client and the person with whom he does business is a confidential one. A solicitor is under a duty not to communicate to others any information in his possession which is confidential to the former client. But the duty extends well beyond that of refraining from deliberate disclosure. It is the solicitor's duty to ensure that the former client is not put at risk that confidential information which the solicitor has obtained from that relationship may be used against him in any circumstances."

26. Lord Millett also stressed the provision of litigation support services at page 228a-b:

> "My Lords, the question in this appeal is whether, and if so in what circumstances, a firm of accountants which has provided litigation support services to a former client and in consequence has in its possession information which is confidential to him can undertake work for another client with an adverse interest."
>
> He returned to the point at page 234c-d:
>
> "The duties of an accountant cannot be greater than those of a solicitor, and may be less, for information relating to his client's affairs which is in the possession of a solicitor is usually privileged as well as confidential. In the present case, however, some of the information obtained by KPMG is likely to have attracted litigation privilege, though not solicitor-client privilege, and it is conceded by KPMG that an accountant who provides litigation support services of the kind which they provided to Prince Jefri must be treated for present purposes in the same way as a solicitor."

27. At page 235 Lord Millett returned to the extent of a solicitor's duty:

> "Whether founded in contract or equity, the duty to preserve confidentiality [on the part of a

solicitor] is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit…[the former client] is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant."

28. At page 236F-B Lord Millett dealt with the degree of risk and the test applicable if a solicitor is to be permitted, or conversely allowed, to act for an opposing party to his former client.

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

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

29. On the facts of the case he was not satisfied that KPMG had discharged the heavy burden on them.

30. Mr Taylor says that the same principles should apply to Mrs Burt-Thwaites. She was in receipt of privileged and confidential information. There was no good reason for drawing a line between solicitors, and litigation-supporting accountants, on the one hand and someone in the position of Mrs Burt-Thwaites on the other. Bearing in mind what Mr Perkins says he discussed with Mrs Burt-Thwaites, there was a risk of the earlier conversations and emails coming into Dawn's possession. She was plainly going to be acting closely with Dawn, particularly since (as was common ground) there was going to be an attempt to mediate the dispute. The essence of *Prince Jefri* is the protection of privileged material, and the fact that Mrs Burt-Thwaites was in possession of it led to her being the subject of the heavy burden in *Prince Jefri*. She could not show that she discharged that burden, notwithstanding her undertaking not to disclose any of the information.

31. As I have indicated, it is not contested that Mrs Burt-Thwaites was given some privileged and confidential information. However I do not think that the application of the strict test in, and the strict requirements in, *Prince Jefri* should be imposed simply because of that fact alone. The facts of *Prince Jefri* were striking. First, the accountants had acted like solicitors. Second, unlike the present case, they were engaged to provide services, and they obtained their information in that context. Third, the information was capable of being very damaging to Prince Jefri. Fourth, the accountants were essentially in the same position as solicitors in relation to that information. In those circumstances what the House of Lords was protecting was a quasi-solicitor/client relationship and all the disclosure that went with it. It is that relationship which is so serious and significant as to attract the disabilities identified in *Prince*

Jefri and to require the heavy burden which the Committee held to apply.

32. The relationship between MeatCo and Mrs Burt-Thwaites was not of that order and it is not apparent to me that she should be equated with a solicitor for these purposes. True it is that she received privileged information, but various people outside a solicitor/client (or quasi-solicitor/client) relationship might receive privileged information, and it is neither necessary nor appropriate to treat them for all purposes as if they were in the same position as solicitors. Mrs Burt-Thwaites was not engaged to do anything (her agreement to act, if any, was only an agreement in principle and not binding at that stage – it is obvious that the full terms of her retainer had to be determined). She received the information in the course of enquiries as to whether she would act as an expert. That does not rob it of its confidential quality, but it does mean that the relationship between her and MeatCo was very different from that of an engaged solicitor and his client. To some extent the information was pushed upon her. She could, of course, have refused to receive the information, and Mr Taylor said that the appropriate course for her to have adopted was one which he tells me is adopted by professionals who undergo a "beauty parade" for legal work – the professionals state that they are not willing to receive any privileged information so as to preserve their right and opportunity (if presented) to act for the other side. That seems to me to be an unrealistic parallel for present purposes. Of course Mrs Burt- Thwaites could have taken that course, but she is not a legal expert and would not have been alerted to any potential disabilities in the same way as a solicitor would. It would be a strong thing to equate her with a solicitor for these purposes and I do not think the mechanistic approach, based on the privileged nature of the information is appropriate so as to require that equation to be drawn.

33. I therefore do not think that the full rigours of the *Prince Jefri* test fall to be applied. Of course, the confidentiality and privilege must be maintained. I am satisfied that two factors mean that it is likely to be maintained. The first is the undertaking such as that has been given by Mrs Burt-Thwaites. I do not think that there is sufficient evidence that she would not or might not comply with that undertaking to require any particular bar being imposed upon her. Mr Taylor submitted that there was an apparent risk based on her own communications. He relies on her indication that she would not act for Dawn, and on what he says is a promise by her not to discuss the case at all with anyone (which would be broken if she discussed the case with Dawn). I do not think that Mr Taylor is entitled to draw what he seeks from those factors. Mrs Burt-Thwaites has not actually admitted that she indicated she would not act for Dawn, but I cannot resolve any dispute about that in this application. For present purposes I am simply prepared to say that she is entitled to reconsider her position. She is not contractually bound to honour what she is alleged to have agreed, and I do not think that her deciding to act for Dawn means that she will betray the confidences that she has received. So far as Mr Taylor relies on an indication that she would not discuss the case, I consider that he misconstrues her email. She does not say that the case itself would not be discussed. She says that she "would not discuss it [i.e. your case] with anyone". She was not thereby saying she would never discuss the case at all with anyone. So far as the case might become industry knowledge, she could hardly be taken to be promising that she would not indulge in industry gossip about it if she felt it appropriate to do so. What she was doing was giving an assurance that she would not disclose what she had been told by Mr Perkins about the case; in other words MeatCo's case in the actual litigation. I therefore do not accept the interpretation that Mr Taylor seeks to put upon this remark.

34. The second significant factor lessening the risk of disclosure is that it seems to me that most of the disclosure made by Mr Perkins would be irrelevant to her functions as an expert, and most of it would also be fundamentally uninteresting to Dawn. I have seen the privileged emails, and since it is agreed that they will remain privileged I will not set their content out in detail or indeed generally. Suffice it to say that for present purposes I express my firm view that there is no information in those emails which Mrs Burt-Thwaites would find of any interest or use for the purposes of writing a report on the issues on which her opinion is required and virtually none of it would be of any interest to those actually conducting the litigation on behalf of Dawn. So far as the oral disclosures are concerned, there are only the

most generalised statements of what was disclosed, but even some of that would not be likely to be disclosed by Mrs Burt-Thwaites under any circumstances. For example, Mr Perkins makes much of the fact that he disclosed the offers that had been made to Dawn. Of course, those offers would be already known to Dawn and so Mrs Burt-Thwaites would not be telling them anything new or interesting. There is, however, some evidence that Mr Perkins discussed his view of the merits of the litigation and his company's approach to settlement. That might be of interest to those conducting the litigation on behalf of Dawn, but it is only that sort of information which it seems to me poses any risk. That is adequately covered by the undertaking Mrs Burt-Thwaites has given (and it is only a risk if she remembers the detail, which she plausibly denies). I observe that the risk of disclosure might be said to arise by virtue of the relationship which now apparently exists under the arrangements for her to represent Dawn on the IMTA, yet that risk does not apparently seem to MeatCo to be so significant as to justify an application for an injunction against her to prevent her disclosing it. That risk, if there is one, arising out of that relationship is perfectly adequately dealt with by an undertaking and is not increased by the fact that she is to act as an expert. Mr Taylor painted a picture of Mrs Burt-Thwaites lurking in the background of the forthcoming mediation, potentially supplying information which would assist in any settlement. She may or may not have an involvement in the mediation, but again the input she might otherwise be tempted to have by way of providing evidence of Mr Perkins' views as to settlement and merits is perfectly adequately dealt with by the undertaking that she has given.

35. That deals with MeatCo's case based on *Prince Jefri*. However, Mr Robert Howe QC, who appeared for Dawn, proposed an analysis which would, if correct, make Dawn's case even stronger. He said that the proper approach to this case is not to apply principles discernible from the *Prince Jefri* case. The proper approach involved applying the principles that one gleans from *Harmony Shipping Co SA v Saudi Europe Line Limited* [1979] 1WLR 1380. In that case a handwriting expert had accepted brief instructions to comment on a document and had fulfilled those instructions. Subsequently, not realising he had already advised on the document, he gave advice to the other side. He then declined to act for either of them but the side that consulted him second served him with a subpoena to give evidence. The Court of Appeal declined to set the subpoena aside. The Court of Appeal applied the principle that there is no property in a witness – see Lord Denning MR at page 1384G.

"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."

36. He dealt with the risk of disclosure of privileged material as follows:

"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 parties 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." (page 1385D-E)

37. Waller LJ also applied the general principle that there was no property in a witness, whether an expert or a witness of fact. He justified the absence of a distinction between those types of witness, as did Lord Denning, on public interest grounds:

"Were it otherwise, as Lord Denning MR had indicated, in a sphere of a small number of

specialists it might be possible for one party to buy up all the possible experts, and clearly such a situation is not right." (page 1387B-C)

38. This case does not directly meet the arguments advanced by MeatCo based on *Prince Jefri*. It actually deals with another point – whether an expert witness is compellable. However, its thrust is contrary to the application of the *Prince Jefri* principle to expert witnesses merely because they are in receipt of privileged information. Lord Denning acknowledged that an expert in the position of the expert in his case would receive privileged information but thought that the matter could be appropriately dealt with by making sure that that evidence did not cross the line. He apparently considered that what the court had to do was to resolve the tension between the principle that there is no property in a witness and the receipt of privileged information by an expert in the position of his handwriting expert:

"The question in this case is whether or not that principle [viz. no property in a witness] 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?"

He went on to hold that it did. I think that if the principles from *Prince Jefri* were to apply to expert witnesses then the resolution of *Harmony Shipping* would have involved the answer going the other way. Of course *Prince Jefri* was not an authority available to the Court of Appeal in *Harmony Shipping*. However, so far as expert witnesses are concerned it does fortify my conclusion that the *Prince Jefri* principles do not apply merely because privileged information has been given to the expert witness, even if it has been given in some significant quantity.

39. Mr Howe properly drew my attention to two authorities in which an expert having been consulted by one side was, on the facts, not allowed to act for the other. In *R v Davies* [2002] EWCA Crim 85 a psychiatrist had interviewed a defendant in criminal proceedings in order to assess that defendant's state of mind. He was instructed by the defendant. It was held that that psychiatrist should not thereafter have been allowed to give evidence for the prosecution because the very opinion which the psychiatrist had formed was based on privileged material. It was therefore inevitable that use would be made of privileged material. In *Sage v Feiven* [2002] CLY430, noted in the White Book at para. 35.7.1, the County Court declined to appoint an orthopaedic surgeon as a single joint expert because he had previously advised one party and, on the facts, it was not going to be possible for him to separate out privileged material in his own mind if he were to act as a single joint expert. Those cases demonstrate that on certain facts an expert should not be permitted to act because it is likely that the expert will be unable to avoid having resort to privileged material that he should not resort to. Stopping him from acting was therefore seen to be necessary in order to protect the privilege. Where the use of privileged material is inevitable the court will intervene.

40. Mr Taylor sought to draw some comfort for his case from *Harmony Shipping*. He pointed to Lord Denning's approval of "a proper professional practice". The expert in that case told the party who instructed him second that he would not go any further in the case at all. It was said that that gave rise to some sort of contract. Lord Denning rejected that submission:

"To my mind no such contract, express or implied, is to be found. At most there was a statement by Mr Davies of his practice, namely, that having been instructed by one side, he would not accept instructions from the other. That is a statement of proper professional practice. It is no doubt very valuable in order to save embarrassment to him and others like him when they are placed in a situation like this: and handwriting experts often are because there are not many of them. But it is not a contract. It is not a binding contract at law, express or implied. But I would go further. 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 that any such contract would be contrary to public policy and would not be enforced by the court."

Mr Taylor relied on the reference to professional practice as indicating Lord Denning's support for a position in which the expert should not act for a second party having acted for the first. He says that that approval of the "professional practice" indicates what a court should do when faced with an expert who turns out to have acted for both sides, and that the same should be applied to the present case where the expert was not actually engaged to the one side before agreeing to act for the other. I do not think that Mr Taylor is right. Lord Denning was approving a sensible, and honourable, position adopted by the expert. As Lord Denning observed, it avoids professional embarrassment. It may also avoid any practical difficulties because, having refused to act for both sides, both sides will usually adopt the sensible course and go and find other experts. However, that principle does not mean that the expert is automatically disqualified – see the result in *Harmony Shipping*. It must follow that it does not demonstrate that the court should bar the expert simply because he or she has acted for both sides. Much less does it demonstrate that the court must not rely on the expert where he or she has not acted for the first side, but has merely discussed the case.

41. In the circumstances I consider that the result and general principles to be derived from *Harmony Shipping* go against Mr Taylor. The case is not directly in point, but it does demonstrate, if demonstration be necessary, that the *Prince Jefri* test is not the correct one to apply.

42. In the circumstances I hold that Mrs Burt-Thwaites is not to be disqualified from acting as an expert by virtue of her receipt of privileged and confidential information.

Lack of independence

43. The second limb of the challenge to Mrs Burt-Thwaites acting as expert is based on a lack of independence, based on the various factual aspects referred to above. Mr Taylor drew attention to various cases which emphasise the need for independence on the part of an expert, and said that a challenge as to the independence ought to be dealt with as soon as it arises, and not merely at the trial – see in particular this remark from *R (Factortame Limited & ors) v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] QB 381 at para 70:

"Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. "

44. I am therefore invited to deal with the point now.

45. The general principles which should be applied in cases of challenged independence are conveniently set out by Nelson J in *Armchair Passenger Transport Ltd v Helical Bar plc* [2003] EWHC 367, as followed by Aikens J in *Gallaher International Ltd v Tlais Enterprises Ltd* [2007] EWHC 464 (Comm) Nelson J said (at paragraph 29):

"The following principles emerge from these authorities:

(i) It is always desirable that expert should have no actual or apparent interest in the outcome of the proceedings.

(ii) The existence of such an interest, whether as an employee of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or correction that matters, not the mere fact of the interest or correction.

(iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.

(iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.

(v) The questions which have to be determined whether (i) that the person has lowered expertise; and (ii) he or she is aware of their primary duty to the court if they give expert evidence and willing and able despite the interest or connection with the litigation or party thereto, to carry out that duty.

(vi) The judge will have to weigh the alternative choices openly if the expert's evidence is excluded, having regard to the overriding objectives of the CPR.

(vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence. "

46. I shall apply that approach, though I add a qualification of my own. In some circumstances it might not be possible to determine with sufficient clarity whether an expert has a disqualifying connection at an interlocutory stage. The facts may be in dispute; or the real extent of the interest or connection may not be sufficiently clear. In such cases (and as will appear, the present case is one of them) the court may not be able to resolve the question of independence at the interlocutory stage, because the real facts and interest may require some teasing out in evidence. In those cases it may not be possible to determine the matter at the pre-trial stage. It is obviously desirable to do so if at all possible so as to avoid the prospect of a party's important evidence being ruled out at the trial, with possible consequential adverse effects on the trial process or even unfairness in the decision-making process. But it may not be possible. So I would not rule out the prospect of having to decide the point at a trial.

47. The first challenge to Mrs Burt-Thwaites' independence comes from her role as consultant to Dawn. Mr Taylor's position starts from the Court of Appeal position in *Arpad Toth v David Jarman* [2006] EWCA Civ 1028:

"Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced…[at page 102]…The conflict of interest could be of any kind…ultimately, the question of what conflict of interest falls within this description is a question for the court, taking into account all the circumstances of the case…[at page 109]"

48. He went on to draw attention to the reference in the White Book at paragraph 35.3.4 citing *SPE International v Professional Preparation Contractors Limited* [2002] EWCA 881 where expert evidence from someone paid as a management consultant was excluded.

49. When he opened the matter before me, Mr Taylor also relied on *Liverpool Roman Catholic Archdiocesan Trustees v Goldberg* [2001] 1 WLR 2337 in which the judge considered the position of an expert who was a member of the same chambers as the defendant. At paragraph 13 of his judgment he said:

"I accept that neither section 3 of the 1972 Act nor the authorities under it expressly exclude the expert evidence of a friend of one of the parties, however, in my judgment, where it is demonstrated that there exists a relationship between the proposed expert and the party

calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be. The question is one of fact, namely the extent and nature of the relationship between the proposed witness and the party."

50. Unfortunately, it then transpired that that authority was not available to him because of what was said in *R (Factortame Limited & ors) v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] QB 381 at para. 70:

"70. This passage seems to be us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

Accordingly, the *Liverpool* case gives me no real guidance.

51. What is of even more significance is the reference in *Factortame* to *Field v Leeds City Council* [1999] CPLR 833. In that case one of the parties wished to engage an employee as a surveyor expert. The Court of Appeal overturned decisions below which sought to disqualify the expert in advance of seeing his report. Lord Woolf MR held that the fact that the expert was employed by the council did not automatically disqualify him from giving evidence. Waller LJ said (at page 841):

"The question whether someone should be able to give expert evidence should depend on whether (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence."

May LJ said at page 842:

"As to questions of opinion and generally, I entirely agree with my Lord, the Master of the Rolls, that there is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of his employment may affect its weight but that is another matter."

52. These cases demonstrate that whether an expert is disqualified by reason of a connection with a party will depend on all the facts of the case, and not on single bright-line considerations such as whether or not he or she is already in some form of contractual relationship with the party who seeks to call that expert. If the status of an employee does not automatically disqualify a person as an expert, then it is even clearer that, by itself, the status of consultant, providing limited functions for a limited part of the year, cannot automatically disqualify either. A lot more than that would have to be established.

53. It is therefore necessary to examine just what Mrs Burt-Thwaites' role appears to be. It seems to me to be very limited, and confined to matters which are remote from the issues on which she is to be asked to express her opinion. She attends a representative body, being

sponsored (and paid) for doing so by Dawn. It is, for these purposes, a relatively occasional role. I have seen some of the agendas and minutes of the council of the IMTA. They are "big picture", regulatory issues. They do not involve any sort of consideration of the sort of issues and points that arise in the present litigation.

54. Her services under this head do not seem to me to come anywhere near creating the sort of connection which would imperil her independence. They may involve her promoting the interests or views of Dawn on the council (and she liaises with Dawn to find out what it wants her to raise) but this is an entirely severable activity. It makes a much more remote connection than that would exist between an employee and employer. It is an occasional, discrete and self-contained activity. The fact that she conducts it does not go to her independence as an expert. It does not suggest in any way that she would not perform her duties to the court.

55. Mr Taylor sought to reinforce his case in this respect by referring to the fact that she will liaise with Mr Clinton, who has provided a witness statement for the trial and will presumably be called as a witness. That does not strengthen his case at all. Mr Taylor suggested that they might talk about the case. That is true - they might. But that does not affect her independence. Experts will often want to talk about the case to their instructing party, in order to perform their functions. That is acceptable, if not necessary. They do not have to live in some hermetically sealed environment with resort only to witness statements. Of course, any expert is capable of having contacts with a party which would remove the expert's independence, but if that were to be the case it would be because of the quality of the contact, not from the fact of contact. So this point does not help Mr Taylor.

56. Mr Taylor also sought to pray in aid Mrs Burt-Thwaites' conduct in her dealings with MeatCo.

i) He accused her of reneging on an agreement not to discuss the case with anyone very shortly after she agreed with MeatCo not to do so. This point proceeds on a wrong assumption as to the effect of what she said in her e-mail, and I have dealt with this above.

ii) He said that she recognised that there would be a conflict of interest in her acting for MeatCo in June 2010 - see her e-mail of 16th June. If there was a conflict of interest at all, she should not act for either party. I had difficulty in following this point. If a person's dealings with A mean that she would have a conflict of interest in dealing with B, it does not also follow that she would then have a conflict in acting for A.

iii) He said that her agreement to act for MeatCo, which she subsequently retracted, was sufficient to disqualify her as expert from the other side. This was despite the fact that he was driven to accept, as I think that he had to, that the agreement was only an agreement in principle and not a binding contract. In my view this does not reflect on her independence as a matter of principle – it would be illogical to think so, and *Harmony Shipping* shows that it cannot be the case. Nor do any special facts in this case mean that this somehow compromises her ability to be independent and assist the court in the way required of experts.

iv) He complains that they were told later than they could and should have been told that it was planned to call Mrs Burt-Thwaites as an expert witness, and the connections between her and Dawn were not made clear. As a pure matter of fact the timing point is probably true. Dawn knew in December that they would appoint her, but it was not until mid-January that MeatCo were told that she was to be engaged. Mr Howe told me that that was because his clients took their eye off the ball. Whether or not that is true, the mere timing point is not of itself sinister. So far as disclosing the connections is concerned, there is nothing in that either. I do not think that there is anything in the relationship between Dawn and Mrs Burt-Thwaites which required them to flag up the point in advance of her report (where, I am told, it was intended to refer to them in the normal way).

57. So none of those facts demonstrate that her independence is sufficiently compromised to mean that she cannot properly give evidence as an expert in this case. I have so far considered the matters separately, but the same applies even if one looks at them in aggregate, and looks at the position in the round. Mrs Burt- Thwaites apparently has a position of some eminence in the meat trade, and nothing in her background suggests that her ability to be independent is impeached. If one then adds in all the facts relied on by MeatCo, there is still nothing to suggest that she cannot be appropriately independent so as to enable the court to judge at this stage that she should not be entitled to be treated as an expert witness.

58. Mr Taylor laid heavy emphasis on the facts of the *Gallaher* case, pointing out the safeguards that impressed the court in that case, which safeguards are missing in the present case. That is a case in which it was proposed that an employee should give expert evidence. In ruling that that was not improper in that case, Aikens J was impressed by the steps that had been taken to ensure independence – the employee had had the benefit of independent legal advice on his role, there was an open declaration of his position, there was an undertaking by the employer not to influence him (paraphrasing slightly), he was aware of his duty to the court and keen to perform it, and experts in the area were scarce. Mr Taylor presented these as the sort of things which ought to be done in the present case, and since they were not then Mrs Burt-Thwaites' independence could not be guaranteed. This is a misreading of the case. They were factors which satisfied the judge in that case. No doubt seeing trouble on the horizon, the party seeking to call the expert presumably sought to ring fence him in that particular way. It does not follow that those steps are necessary in any other case, and in any event the present case is on nothing like all fours with *Gallaher*. Mrs Burt-Thwaites' relationship with Dawn is nothing like that of employer and employee, and nothing else in the facts draws them any closer. At the end of the day that case is a decision on its own facts. The case before me presents a separate set of facts.

59. The last point, that arising out of the dealings with Chitty Foods, is more troubling. If the facts relied on by MeatCo in this respect are accurate and established, there may be a case for saying that Mrs Burt-Thwaites was involved in some of the transactions which are criticised in this case, and, worse still, on which she will have to express a view. That is capable of presenting far more difficulties to her independence than anything appearing above. The problem for MeatCo, at this stage, is that the facts are disputed. Mrs Burt-Thwaites will say that she had no involvement with the transactions in question, or with anything to do with this case. If that is correct then her independence survives intact. However, at this stage I cannot judge whether what she says is correct. I simply cannot decide the factual dispute. Nor is it apparent that the mere existence of the dispute is capable of distorting Mrs Burt-Thwaites' evidence and independence. She has denied any involvement. If that is right, then the mere allegation of involvement ought not to be sufficient to disqualify on an application such as the one before me.

60. I am aware that this point is one which has emerged late, and there may be more to come on it. It may be that if it had emerged earlier then the evidence would have become clearer (one way or the other). However, I can only deal with this application on the basis of the evidence as it is presented to me. At the moment that evidence is not sufficient to justify a ruling that Mrs Burt-Thwaites is compromised as an expert by virtue of an involvement in the facts of the litigation.

The confidential schedule

61. There is one further point of detail which arises on this application. An order of 21st June provides for MeatCo to prepare a confidential schedule containing details of its customers, the type of each customer (retail, wholesale etc), whether it is an EU customer or not and the volumes of trade done with those customers, all for a period from 13th November 2008 to 30th

November 2009. I am told that that is required so that MeatCo's allegations about deals done by Dawn with various customers can be compared with what MeatCo itself did after the agency was terminated.

62. This schedule is confidential. It is not to be shown to any Dawn employee, and is not to be shown to Dawn's expert if MeatCo objects. If MeatCo does object then the objection is to be determined by the court. No criteria are given by which the court is to determine the result of the objection.

63. MeatCo does object to the schedule being shown to Mrs Burt-Thwaites. Its objection is essentially that her current connection with Dawn (the consultancy) shows there is a risk of disclosure, and her reneging on the previous agreement to act, and not to discuss the case, demonstrate that the risk is real. In other words, they are saying she is not to be trusted.

64. I consider that this objection fails for reasons which are closely related to the reasoning appearing above. The consultancy, being what it is, does not demonstrate any risk at all that she will disclose confidential information. The change of mind as to whether she would act for MeatCo does not go to her probity, much less demonstrate a propensity to abuse confidence, and the reneging point proceeds on a false assumption as to the meaning and effect of the agreement. So none of those factors, taken separately or together, demonstrates a likelihood of an abuse of confidence that would mean that she should not see the schedule. I do not consider that there can be any objection to her seeing the schedule. If she has not already given one, she will give an undertaking to the court not to disclose it.

65. The objection to her seeing the schedule therefore fails.

Conclusion

66. Accordingly I refuse the application to disallow Mrs Burt-Thwaites' expert evidence and the application to prevent her seeing the confidential schedule. I should add, however, that nothing that I say above prevents MeatCo challenging the degree of her independence in cross-examination at the trial. An application to refuse to allow an expert at this stage can only succeed if the evidence is sufficient to enable it to be demonstrated, at this stage, that the expert is simply not independent. It is open to MeatCo at the trial to test the independence of Mrs Burt-Thwaites in the normal way, relying on all proper material. This point is made clear in paragraph 88 of the judgment in *Gallaher*. It is particularly true of the Chitty Foods point. Nothing that I have said above prevents an investigation of her involvement in that transaction, and if the position is as MeatCo says it is then it may have the effect of seriously, if not fatally, undermining her evidence. I say nothing about the extent to which that may be true, but merely point out a possible consequence. The further consequence of that may be that Dawn may end up without any, or any strong, expert evidence at the trial. It cannot assume that it would get an adjournment to fix that problem if it goes into a trial knowing that there is a problem. It might or might not get one, but on this application I refuse the relief sought by the MeatCo.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

Claim

The claim is for damages for alleged breach of express and implied terms of a contract.

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses will appear at the mini trial on the day of assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Clive Cussler

2. Sally Tang (a vulnerable witness. Miss Tang has learning difficulties. She must be questioned in accordance with the judicial directions set out on the final page of this document)

3. Cleo Cousins (an expert)

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Defendant's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the 1st Defendant:

1. Diana Dalkia

2. David Dewhurst (a vulnerable witness. Mr Dewhurst has learning difficulties. He must be questioned in accordance with the judicial directions on the final page of this document)

3. Deepak Dharma (an expert)

You can assume:

i. the witnesses will appear at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.

DURING the Mini-Trial

You will be required to:

- make an opening speech (max 5 minutes)

- examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. Please note that one of the potential witnesses you may examine is a vulnerable witness. You should observe the judicial guidance noted on the final sheet of this instruction if this is the case. You should conduct a full examination in chief of the witness on the basis that their statement does not stand as evidence in chief

- cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that one of the opponent's potential witnesses is a vulnerable witness. If this is the case, you should observe the judicial guidance noted on the final sheet of this instruction when cross-examining this witness. Please note that the opponent's witness may be un-cooperative at times. The witness' statement does not stand as evidence in chief

- deal with any interventions made by the advocate representing the opposing party

- make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party

- deal with any Judicial interventions/questions as and when they arise

NOTE TO CANDIDATES

VULNERABLE WITNESSES

The judge has directed that the following adjustments and measures be taken by both advocates so as to ensure that the hearing proceeds in a fair and equitable manner

- Ask single rather than compound/multi clausal questions
- Allow thinking time before pressing for a response
- Make allowances if the witness has difficulty answering concisely
- Speak more slowly, use simple words and sentences, and do not go on too long without a break
- Avoid questions containing a choice of answers which may not include the correct one
- Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change, but the same question may be asked at a later stage to check that consistent answers are being given
- Do not move to new topics without explanation (e.g. of such an explanation: 'let's now talk about…'). And do not ask abstract questions (e.g. ask 'was it after breakfast' rather than 'was it after 9.00am')
- Allow the witness to request that questions be repeated or rephrased and/or permit the witness to check understanding by rephrasing them him/herself without censure or implied criticism
- Allow the witness to tell his/her own story and do not ignore information which does not fit in with assumptions as there may be a valid explanation for any apparent confusion (e.g. the witness may be telling the correct story but using one or more words in a different context at a different level of understanding)
- It may be necessary to explain something more than once using simple language
- Always ensure that the witness is treated with due respect and is not ridiculed if unable to understand the way questions are being asked.