THE HIGH COURT

COMMERCIAL

[2024] IEHC 162

Record No. 2022/5538P

Between:

BOC AVIATION (IRELAND) LIMITED, BOC AVIATION LIMITED, SILVER AIRCRAFT LEASING (IRELAND) 2 LIMITED, WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED

PLAINTIFFS

AND

LLOYD'S INSURANCE COMPANY S.A., GLOBAL AEROSPACE UNDERWRITING MANAGERS (EUROPE) SAS, BERKSHIRE HATHAWAY EUROPEAN INSURANCE DESIGNATED ACTIVITY COMPANY, CHUBB EUROPEAN GROUP SE, CONVEX EUROPE S.A., FIDELIS INSURANCE IRELAND DESIGNATED ACTIVITY COMPANY, HDI GLOBAL SPECIALITY SE, GREAT LAKES INSURANCE SE, STARR EUROPE INSURANCE LIMITED, SWISS RE INTERNATIONAL SE, AXIS SPECIALTY EUROPE SE, ELSECO LIMITED, SIRIUSPOINT INTERNATIONAL INSURANCE CORPORATION (PUBLIC), GENERALI IARD S.A., HELVETIA ASSURANCES S.A., MMA IARD S.A., SMA S.A., and AIG EUROPE S.A. TOKIO MARINE EUROPE S.A., MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS S.A., MSIG INSURANCE EUROPE A.G., and PING AN PROPERTY & CASUALTY INSURANCE COMPANY OF CHINA LIMITED

DEFENDANTS

Judgment of Mr. Justice Denis McDonald delivered on 19 March 2024

The application before the Court

1. The application before the Court is brought not only on behalf of the plaintiffs in these proceedings but also on behalf of the plaintiffs in five other sets of proceedings in which an identical issue arises namely 2022 no. 5514p, 2022 no. 5759p, 2022 no. 5975p, 2022 no. 6087p and 2022 no. 6232p. All six cases are currently being case-.managed together and are listed for trial (on a concurrent basis) on 4 June 2024

2. While, there are a number of aspects to the application before the Court, in broad terms, this is an application by the plaintiffs for orders:
    (a) that they should be permitted to anonymise and redact the witness statement of one of their expert witnesses and that appropriate measures

should be put in place to protect the identity of that witness from disclosure during the pre-trial stages of the proceedings;

(b) that similar measures should be put in place in respect of other witnesses with similar concerns; and

(c) that appropriate measures should be put in place to protect the identity of the witness from disclosure in the course of the trial. In particular, it is proposed that the part of the trial dealing with the evidence of this witness should take place *in camera* and that appropriate procedures should be put in place to ensure that nothing should occur or be said in the balance of the trial or in the judgment to be given by the Court or the order to be made by the court that might lead to the identification of the witness concerned.

3. This relief is sought in circumstances where the expert witness has expressed concern that, in light of the evidence to be given by the witness as outlined in a detailed report, the witness may be exposed to harm if the identity of the witness becomes known to the Russian authorities. The plaintiffs contend that, on the basis of the evidence before the Court, the granting of this relief would not infringe the requirement laid down in Article 34.1 of the Constitution that justice shall be administered in public save in *"such special and limited cases as may be prescribed by law".* In this context the plaintiffs, in their written submissions, relied on the principles laid down by the Supreme Court in *Gilchrist v. Sunday Newspapers Ltd.* [2017] 2 I.R. 284 (*"Gilchrist"*). They argued that both limbs of their application satisfy the rigorous test laid down by the Supreme Court in that case. However, in the course of the plaintiffs' oral submissions, counsel argued that the anonymisation and the other pre-trial relief sought do not engage the *Gilchrist* principles and that, instead, this element of the relief claimed falls to be considered by reference to a less strenuous standard.

4. It should be noted that, in order to preserve the position pending a decision by the Court, the application was heard *in camera.* The decision to proceed in that way was announced in open court during the usual Monday motion list when there were court reporters present none of whom sought to question the decision. That said, I am very mindful of the Court's obligations under Article 34.1. The requirements of that article must be applied and upheld by the Court whether or not there is opposition to a hearing otherwise than in public. But, in my view, it was necessary to hear the application *in camera*. To have proceeded in open court would have negated the very relief sought by the plaintiffs and would have made the running of the application futile. This was clearly acknowledged by the principal defendants opposing the relief sought – namely Fidelis Insurance Ireland DAC, Fidelis Underwriting Limited and Fidelis Insurance Bermuda Limited (collectively "Fidelis"). When the matter was mentioned on Monday 26 February 2024, counsel for Fidelis himself suggested that an *in camera* hearing would be necessary in light of the matters which Fidelis wished to raise about publicly available materials relating to the plaintiffs' expert which would inevitably have identified the expert had they been made public.

5. It will be necessary presently to consider the *Gilchrist* principles in some detail but, first I should briefly describe the background to this application and the respective positions of the parties.

Background

6. In these six sets of proceedings the plaintiffs – all of whom are aircraft lessors – seek to be indemnified by the defendant insurers in respect of aircraft which they had leased to a number of Russian airlines. They contend that there has been a total loss of the aircraft arising from the Russian invasion of Ukraine and the subsequent measures taken by the Russian authorities which they contend have had the effect of detaining the aircraft within Russia. The plaintiffs claim that the combined value of the detained aircraft is in the region of €2.5 billion.

7. The plaintiffs' claims are made both by reference to War Risks and All Risks policies of insurance issued by the defendants. For present purposes, it is the War Risks policies which are relevant. Broadly speaking, the War Risk policies provide cover in respect of three potentially relevant perils. The first is War Risks A which covers war, invasion, acts of foreign enemies, hostilities, whether war be declared or not, civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power. The witness who is the immediate subject of this application has not addressed that peril. The witness's report is, however, relevant to the War Risks C and E perils.

8. War Risks C covers any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional. In turn, War Risk E provides cover in respect of confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government, whether civil, military or de facto or public or local authority.

9. The witness has provided a very detailed report covering the events which occurred within Russia in the aftermath of the invasion of Ukraine. The report deals with the decisions taken by the Russian authorities, the manner in which those decisions were taken and the manner in which it is alleged there is an expectation by the Russian authorities (which is understood by those affected by the decisions) that such decisions should be obeyed and given effect even in advance of formal laws being decreed or enacted. The report provides extensive material in relation to the manner in which it is alleged the Russian authorities proceed and in particular in relation to their expectations and requirements in respect of the aircraft in issue, such aircraft being regarded as essential to maintaining connectivity within such a vast country.

10. The expert has expressed serious concern that the safety of the expert will be put at significant risk if the identity of the expert and the contents of the report become known. The expert believes that, in such circumstances, action may be taken against the interests of the expert arising from the contents of the report. Initially, the concerns of the expert were recounted in affidavits sworn by Ms. April McClements of Matheson solicitors (who act for the plaintiffs in four of the six sets of proceedings before the Court) but later a draft affidavit of the expert was produced which was furnished to the Court in a sealed envelope. It has been confirmed by counsel for the plaintiffs that the expert will swear an affidavit in the terms of the draft once appropriate arrangements can be put in place to have it sworn.

The position taken by the All Risks insurers

11. The All Risks insurers do not oppose the plaintiffs' application. That is probably to be expected given that the evidence of the expert is likely to assist them in arguing that, if the plaintiffs have suffered a total loss of the aircraft (as understood in insurance law), that loss was proximately caused by either War Risk peril C or peril E. That said, it is clear that, at an earlier point in the lifetime of this application, the All Risks insurers had concerns about some of the restrictions initially sought to be imposed by the plaintiffs on who would see the expert's report (either in its redacted or unredacted form). However, the plaintiffs have, more recently, agreed to broaden the terms of what I might call the proposed "confidentiality club" and that appears to have satisfactorily addressed the concerns previously expressed by the All Risks insurers.

The position taken by the War Risks insurers

12. As noted above, Fidelis has taken on the lead role in opposing the relief sought by the plaintiffs. Its position is supported by HDI Global. The concerns of Fidelis were set out in an affidavit sworn by Mr. Ian Lavelle on 12 February 2024 and in written submissions delivered on the same date. The concerns of Fidelis related to both the pre-trial directions sought by the plaintiffs and the application to have the expert's evidence at trial heard *in camera.* However, some of those concerns in so far as they related to pre-trial directions have been ameliorated by the agreement of the plaintiffs to permit, under careful conditions, limited circulation of identifying material relating to the expert to a confidentiality club comprising not just lawyers but also nominated officers of the defendants. There is now also agreement by the plaintiffs that similar arrangements can be made to allow nominated officers of the defendants to observe the evidence of the expert at trial (assuming the Court permits the evidence to be given *in camera*). But Fidelis strongly opposes the proposed anonymisation of the expert and the application to have the expert's evidence taken *in camera* at the trial. Fidelis stresses the exceptional nature of the nature of the jurisdiction to place restrictions on the public nature of court proceedings envisaged under the

Constitution. Fidelis maintains that the plaintiffs have signally failed to objectively make out a case for the orders sought.

13. Fidelis claims that there is no substance to the expert's concerns in relation to personal safety. Fidelis has highlighted that the expert has already been involved in a number of public events in which the expert expressed views which denigrate the Russian regime and the decision to invade Ukraine and that the expert has already published material which contains similar views. Having already expressed views in this way, Fidelis contends that the expert cannot think that any greater risk arises from giving evidence in these proceedings. The relevant materials relating to these public events and published material were identified to the Court by Fidelis. I have reviewed those materials but I will not identify them here because to do so would obviously lead to the identification of the expert. In the course of his oral submissions on Day 3 of the hearing, counsel for Fidelis drew particular attention to one of those materials and he argued that it showed a very clear overlap between what was said in that item and a section of the expert's report where the expert deals with the same issue.

14. In addition, Fidelis has emphasised that, in other cases before the court involving issues relating to Russia, experts have previously given evidence on an entirely open basis that was highly critical of the Russian judicial system and its alleged lack of independence and impartiality when dealing with subject matter of importance to the Russian regime. In particular, reference was made to the evidence of Russian law experts in two jurisdictional challenges which resulted in the judgment of Barniville P. in *Trafalgar v. Mazepin* [2022] IEHC 167 and in my own judgment in the same case namely *Trafalgar v. Mazepin* [2023] IEHC 195. Counsel for Fidelis also drew my attention to the report of the expert retained by the plaintiffs in these proceedings to deal with the Russian legal system. He has not sought any equivalent restrictions to those sought on this application notwithstanding that he is very critical of the Russian justice system and expresses the view that: "In politically sensitive cases the Russian courts typically align with the position of the President, the Russian Government and the Russian State. In doing so, they usually do not state that they disregard the applicable law but instead adopt interpretations of law favouring the Russian State". He also expresses the view that: "… in practice the Russian judiciary is not independent from the executive. As discussed in more detail … below, independent observers conclude that the Russian judiciary is susceptible to political pressure and influence from the executive branch and I share this view." For completeness, it should be noted that, although counsel for Fidelis was under the impression that this expert is a Russian citizen, this was subsequently corrected by counsel for the plaintiffs. The plaintiffs' expert on the Russian justice system is from Belarus.

15. Fidelis has also argued that the plaintiffs have failed to place any objective evidence before the Court sufficient to establish that there are no other experts available who could give equivalent evidence and who would be prepared to do so on an open basis.

This point was strongly emphasised both in Mr. Lavelle's affidavit and in the submissions of counsel. A similar argument has been made by Lloyd's Insurance Company S.A. ("Lloyd's"). In turn the position of Lloyd's is supported by Convex and AIG. Both Fidelis and Lloyd's have argued that the affidavit evidence before the Court has gone no further than asserting the lack of availability of an alternative witness without providing any underlying details to substantiate the factual basis for this assertion.

16. Fidelis has also made the case that the expert is in a different position to a witness of fact such as an independent witness of a road traffic accident. In contrast to such a witness as to fact, it was argued that the evidence to be given by the expert here could be given by any number of witnesses. Thus, it was said that the expert was not an essential witness and that the plaintiffs had failed to identify any authority in which orders of the kind sought were made to "protect the identity of professional witnesses voluntarily selected to give evidence in commercial proceedings".

17. It should be noted that, in response to Mr. Lavelle's affidavit and the written submissions of Fidelis, a further affidavit was sworn on behalf of the plaintiffs on 20 February 2024 by Ms. April McClements who is a partner in Matheson, the solicitors acting for the plaintiffs in four sets of the proceedings before the Court. In para. 26 of that affidavit, Ms. McClements dealt with the availability of an alternative expert witness as follows:

> "At paragraph 8 of the Replying Affidavit and in a number of other places in that affidavit and in the Fidelis legal submissions served alongside it, complaint is made that the Plaintiffs have not averred that there was or would have been an impediment to the Plaintiffs retaining experts who were prepared to go to Court to "give evidence in the normal way'. As to this:
> (a) This position is inconsistent with the Fidelis contention that they have a fundamental constitutional entitlement to select and engage the expert of their choice. This is a point that was made forcefully in the written legal submissions of Fidelis in response to the Lessor Plaintiffs' motion seeking to direct the Lessor Defendants to share experts, and it applies mutatis mutandis in the present circumstances. I beg to refer to a true copy of an extract of the said written legal submissions at Tab 9 of the Booklet.
> (b) Given the number of parties involved in the within proceedings and the Lessor Related Proceedings, and similar proceedings in other jurisdictions, the number of individuals with the necessary expertise to comment on issues of Russian geopolitics and Russian law, who are not conflicted, is limited. The Plaintiffs have retained experts who have security concerns for the reasons given, and they ought not to be forced to attempt to change their experts simply to avoid attempting to accommodate those concerns. Building into the security concerns protocol a facility to allow a change of expert in extremis should it prove necessary does not demonstrate that there are many other such experts available at short notice.
> (c) It is the nature of the evidence that is being given in the Proceedings that gives rise to a particular security concern for Individual 1.
> (d) This expert is essential to the Lessor Plaintiffs' case. The Lessor Plaintiffs' legal teams are satisfied there is no other equivalent expert available to them who can address the issues central to the contended for occurrence of War Risks Perils C, and

> E and the consequent losses, with the level of expertise and knowledge possessed by this witness"

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18. However, both Fidelis and Lloyd's have submitted that these averments fall far short of what would be required in order to justify the restrictions sought by the plaintiffs by reference to the *Gilchrist* principles. They emphasised the demanding nature of the *Gilchrist* test. They highlighted the necessity to clearly show that a departure from a normal public hearing is justified in order to safeguard a constitutionally protected interest. They also stressed that, under the *Gilchrist* principles, the party seeking such a departure must satisfy the Court that the extent of the departure sought is no more than is required to protect the interest in question.

19. Counsel for Fidelis drew attention to the judgment of the Court of Appeal in *Sweeney v. VHI* [2022] 2 I.R. 327. The facts of that case are quite different but the judgment of Collins J. addresses an issue that has some resonance here. In that case, the plaintiff alleged that the defendant, as the largest provider of private health insurance in the State, had abused its dominant position by refusing to approve a proposed private hospital in Limerick for the treatment of patients insured by it. An issue arose as to whether the plaintiff was entitled to engage the well-known economist, Professor Moore McDowell as an expert witness. The defendant objected to his retainer in circumstances where Professor McDowell had previously been retained as an expert witness on its behalf in two earlier sets of proceedings of a somewhat similar nature during the course of which he came into possession of privileged information. While emphasising that the jurisdiction to exclude someone from acting as an expert witness should be exercised sparingly and cautiously, the Court[1] concluded that, in the particular circumstances, it was necessary to do so. What is relevant for present purposes is that the plaintiff in that case argued that they would be deprived of access to justice if they did not have the opportunity to retain Professor McDowell. This argument was rejected by the Court of Appeal. At p. 340, Collins J. emphasised the need for concrete evidence to support such a contention:

> "The plaintiffs' affidavit evidence is also uninformative about the steps taken by them to identify and engage a suitable expert and/or whether they experienced any difficulty in doing so. This is relevant because, at para. 16 of the affidavit sworn by her opposing the VHI's application, the solicitor for the plaintiffs seeks to suggest that, if Prof. McDowell is excluded from acting for the plaintiffs, this would have the effect of impeding the plaintiffs' access to an expert and would impede their access to justice. She also expresses concern at para. 20 that, if the plaintiffs are required to engage another expert, it would likely mean that they would have to engage an expert from abroad which would add to their costs. **In the absence of any concrete evidence that Prof. McDowell was the only available expert in Ireland as of October 2017 or any evidence that efforts to identify an alternative Irish expert at this stage have been and/or are likely to be unsuccessful — and there is no such evidence beyond the speculative and general assertions made by the solicitor for the plaintiffs — I**

[1] Its decision was later upheld by the Supreme Court

> **do not think it appropriate to give any material weight to these stated concerns**. Prof. McDowell is by no means the only economic expert in the State with experience of acting as an expert witness in competition law actions. Furthermore, it is not uncommon for expert witnesses in such actions to be retained from abroad (and, more generally, foreign-based experts commonly give evidence in Irish courts) and, in the absence of any concrete evidence to that effect, there appears to me to be no reason to believe that such would give rise to any material prejudice to the plaintiffs. I therefore respectfully differ from the view expressed by the judge at para. 5(7) of his judgment" (emphasis added)

20. Counsel for Fidelis argued that those observations apply equally here. He submitted that, similar to *Sweeney,* there is no objective evidence to support the suggestion that there is no other suitably qualified expert available to give evidence on behalf of the plaintiffs. Counsel suggested that the plaintiffs have known since October 2023 (at the latest) that the expert was not prepared to give evidence in the normal way and that they had ample time to source another expert who would be so prepared. He also drew attention to the fact that the report of the expert draws extensively – if not exclusively – from open source material including papers and commentary by other experts. On that basis, he submitted that it was clear that there are a "wealth of commentators who are commenting in this area, and there is simply no evidence that any number of them might not be in a position to produce the same report".

21. Counsel for Fidelis and Lloyd's were particularly critical of the averment in para.26 (d) of Ms. McClements' affidavit to the effect that the plaintiffs' legal teams are satisfied that there is no other equivalent expert available to the plaintiffs in relation to that part of their case dealing with War Risks Perils C and E. Counsel for Fidelis characterised the averment as no more than an assertion. He maintained that it provides no evidence that any attempts have been made to locate an alternative expert who would be prepared to give evidence in the usual way and he submitted that, to allow the plaintiffs to proceed on the strength of such an unsubstantiated averment would invert the burden of proof. He again reiterated that the plaintiffs bear the burden of demonstrating an objectively justifiable basis to "suspend" Article 34.1. Counsel for Lloyd's was equally critical of this averment. He submitted that the plaintiffs have wholly failed to provide evidence that would enable the Court to assess whether an alternative expert might have been available to give evidence on an open basis. He argued that there was no evidence which the Court could subject to the resolutely sceptical consideration expressly required under the *Gilchrist* principles. In support of his submission, he suggested that it would be useful to consider a hypothetical example. He asked me to consider the reaction a court might have if confronted with the following scenario: namely an ordinary trial taking place in the Commercial List where a party had been directed to file an expert report by a particular date and, in advance of that date, counsel for that party came before the Court and sought further time solely on the basis of an affidavit to the effect that the party's legal team were satisfied that they had tried all measures to find a witness, that they had not yet found the witness and needed more time. He submitted that, in

such circumstances, the Court would not be satisfied to extend the time on the basis of such a high level assertion. Counsel suggested that the Court would be likely require details, probably without names, of the number of experts who had been approached, when they were contacted, what their levels of qualifications were and why it was that they were not in a position to accept instructions. And if that would be the level of detail that would be required on an application for a variation of directions, counsel submitted that, at minimum, the same level of detail must also be required on an application to disapply the Article 34.1 requirement of a fully public hearing.

22. On the question of anonymisation of the expert, counsel for Fidelis submitted that there is a general public interest in knowing the identity of an expert. He referred in this context to the decision of Munby J.[2] in *British Broadcasting Corpn. v. CAFCASS Legal* [2007] EWHC 616 (Fam) at para. 34 where he identified a number of "powerful arguments", founded on the public interest, for denying anonymity to expert witnesses:

> i) "First, there is, it might be thought, a general public interest in knowing the identity of an expert witness. As Watkins LJ memorably observed in *R v Felixstowe Justices ex p Leigh* [1987] QB 582 at page 595, "There is … no such person known to the law as the anonymous JP." Advocates do not have anonymity. In the same way, it might be thought, the courts should be chary (to put it no higher) of admitting the anonymous expert.
>
> ii) Secondly, there is a particular and powerful public interest in knowing who the experts are whose theories and evidence underpin judicial decisions in relation to children which are increasingly coming under critical and sceptical scrutiny.
>
> iii) Thirdly, there is the equally important public interest, especially pressing in a jurisdiction where scientific error can have such devastating effects on parents and children, not only of exposing what Sedley LJ (in *Re C (Welfare of Child: Immunisation)* [2003] EWCA Civ 1148, [2003] 2 FLR 1095, at para [36]) once called "junk science" but also of exposing other less egregious shortcomings or limitations in medical science.
>
> iv) Fourthly, and leading on from the last two points, there is a powerful public interest in knowing whether or not someone putting himself forward as an expert has been criticised by another judge or other judges in the past. Thus the sorry saga of Dr Paterson can be traced through the successively reported judgments of Cazalet J in *Re J (Child Abuse: Expert Evidence)* [1991] FCR 193, of Wall J in *Re AB (Child Abuse: Expert Witnesses)* [1995] 1 FLR 181 and of Singer J in *Re X (Non-Accidental Injury: Expert Evidence)* [2001] 2 FLR 90. In each of those cases, it may be noted, Dr Paterson and the other expert witnesses were named in otherwise anonymised judgments. But in contrast the identity of the so-called 'independent social worker' and 'counsellor' Jay Carter criticised in damning terms in *Re JS (Private International Adoption)* [2000] 2 FLR 638 and again in *Flintshire County Council v K* [2001] 2 FLR 476 (the 'internet twins' case), was not known to the public until she was publicly exposed and named in the judgment in *Re M (Adoption: International Adoption Trade)* [2003] 1 FLR 1111. As a commentator has observed (Camilla Cavendish, *The Times*, 29 March 2007), "In the dark, we cannot see whether patterns of injustice exist."

[2] As he then was

23. Counsel for Fidelis acknowledged that some of those considerations are specific to childcare cases but he argued that the first and fourth propositions are relevant (at least by analogy) here. I agree that the first consideration is plainly relevant but I believe that the fourth is of less relevance. While there are a number of cases in this jurisdiction and in England & Wales[3] of a similar nature to the present case, the expert here is different to the type of expert witness discussed by Munby J. in para. (iv) above. Unlike the experts described by Munby J., the expert is not an habitual or professional expert witness. Moreover, to the extent that the expert may give evidence on the same subject matter in another jurisdiction, it is unlikely that the expert will not be asked at a trial in that jurisdiction whether the expert has ever given similar evidence elsewhere. Thus, in the event that any adverse finding is made in this jurisdiction about the evidence to be given by the expert here, it is likely that a line of questioning will connect the expert to those findings.

The arguments on behalf of the plaintiffs

24. As noted earlier, I am very mindful of the requirements of Article 34.1. I am also very conscious of the burden that lies on the plaintiffs under the *Gilchrist* test and the need for the Court to approach the plaintiffs' application with an appropriate level of scepticism. Nonetheless, I do not propose here to recite all of the arguments made by the plaintiffs in support of this application. Nor do I propose to undertake an extensive review of the many cases that were opened to me by counsel for the plaintiffs in the course of their lengthy submissions that occupied most of the hearing. It seems to me that, to the extent necessary, I can address the plaintiffs' submissions and the cases that were cited to me in the course of my analysis of the issues and my assessment of the material before the Court as set out below.

25. In contrast, I have set out many of the points made by the War Risks insurers because their submissions have been of considerable assistance to me in assessing this application in a "resolutely sceptical" way as mandated by the Supreme Court in *Gilchrist.*

26. Nonetheless, there are a number of aspects of the plaintiffs' replying submissions that I should mention at this point. In the first place, counsel suggested that the *Gillchrist* principles were not engaged in respect of the pre-trial directions sought. He also argued that the principles did not apply to anonymisation of witnesses. He again went through those principles (as he had in his comprehensive opening of the application to the Court). Counsel stressed the importance of the evidence of experts in assisting the Court to reach a conclusion and the duty on experts in that context to provide fair, objective and non-partisan assistance to the Court. He referred to the observations to that effect made by Collins J. in the Court of Appeal in *Duffy v. McGee* [2022] IECA 254

[3] There may also be litigation elsewhere.

at para. 27. In the same case, Collins J. also observed[4] in para. 4 that such evidence is "often indispensable to the just resolution of civil proceedings …". Counsel also argued that the expert evidence is of particular importance in this case, in the light of the issues that arise with regard to War Risk Perils C and E. He submitted that the evidence of the expert is directly relevant to those perils which he said were fundamentally important aspects of the plaintiffs' case. On that basis, he submitted that the administration of justice is best served by the Court having access to what the parties consider to be the best evidence that will assist the Court in relation to those issues. He suggested that "it can only be the parties' judgment of what is the best evidence". He contended that, if the plaintiffs were to choose another witness who did not have the expertise or ability to present to the Court the evidence in relation to these crucial matters, they would be significantly disadvantaged in the presentation of their case. He also submitted that the Court itself would be disadvantaged by being unable to ensure that justice was administered appropriately by reference to the best available evidence.

27. Counsel for the plaintiffs also argued that, in the application of the *Gilchrist* principles, the interests raised by the plaintiffs on behalf of the expert are of considerable weight. The entitlement of witnesses to give evidence without fear as to the consequences was essential and they should not be put under some "self-restraining rule" because of a fear that something would be said that could "unleash the consequences" of the type that he submitted have been objectively established on the evidence before the Court. He rejected any suggestion that, because a witness has chosen to make their evidence available to the Court to determine an issue, that somehow means that the Court cannot take account of the vital interests of the witness and he stressed that such interests are entitled to protection under both the Constitution and the European Convention on Human Rights ("ECHR"). He also stressed that these are interests that go to the essence of the human person. On that basis, he submitted that there is no requirement in *Gilchrist* that the plaintiffs needed to go further than they had done.

28. In so far as anonymisation is concerned, counsel for the plaintiffs argued that what is proposed by them is no more than is required. In contrast to a number of criminal cases (where the Court of Appeal ruled that particular witnesses could lawfully give their evidence on behalf of the prosecution without revealing their identity to any other parties), the identity of the expert would be available to the Court and to the defendants' legal teams and nominated representatives of the defendants who would all be able to see and hear the expert give evidence at the trial.

29. Counsel for the plaintiffs also stressed that none of the War Risks insurers has given any evidence of prejudice. That may be so but, as I reminded counsel, the Court is not solely concerned with the interests of the parties. As previously noted, the Court is under a constitutional duty to uphold the requirements of Article 34.1 and the right

[4] Albeit with some reservations

of the public to see justice administered in open court. As *Gilchrist* makes clear, a public hearing represents an important check on the exercise of judicial power. As O'Donnell J. observed in para. 4, it is "particularly important that the judiciary should be particularly astute to respect and enforce the limitations and constraints upon the exercise of the judicial power".

30. In response to the criticisms made by Fidelis and Lloyd's of para. 26(d) of Ms. McClements' affidavit, counsel for the plaintiffs contended that it was "an extraordinary proposition" that the Court should have evidence put before it about the other witnesses approached by the plaintiffs. Having regard to the approach taken in *Gilchrist,* I asked counsel was that not basic information that should be put before the Court. Counsel for the plaintiffs emphatically rejected that suggestion contending that it is sufficient for the plaintiffs to say that they have identified a witness who they believe is suitable to give evidence and who they consider to be the best witness available. He said that the plaintiffs believe that this expert is the witness who best assists in the context of the presentation of the plaintiffs' case and in maximising the prospects of success for the plaintiffs. He argued that this goes to the administration of justice and that there is "no counterbalance to suggest that the administration of justice is going to be diminished on the Defendants' side. That's an end of the matter". Secondly, he submitted that none of the cases suggest that it is necessary to provide information to the Court, even on a generalised basis, of the enquiries made of other potential witnesses. Where would that stop, he asked rhetorically? In similar vein, he asked: "What are you meant to say? That they can give evidence but we don't think it's sufficient. You couldn't get into that …and there's nothing in *Gilchrist* which suggests you could". Thirdly, counsel referred to para. 26(c) of Ms. McClement's affidavit where she said that it is the nature of this evidence that gives rise to the issue. I should explain that, in the draft affidavit, the expert has confirmed everything that has been said by Ms. McClement. The expert also says that, even though much of the report is based on public sources, the analysis contained in the report goes far beyond anything that would be produced by experts in Russia (who the expert says routinely engage in self-censorship to protect themselves and their families). For that reason, the expert says that the report would be regarded as going further than much of the material in the public domain. This assists in understanding the point made in para. 26(c) of Ms. McClement's affidavit. Counsel made the point that there is no countervailing evidence from the War Risks insurers in opposition to what is said in para. 26(c).

31. In closing, counsel for the plaintiffs referred to the observations of O'Donnell J. in the Supreme Court in *Sweeney v. VHI* at p. 390 and p. 411 where O'Donnell J. identified the importance of the freedom of choice available to a party in respect of the witnesses proposed to be tendered at a court hearing. Counsel argued that, in considering the application of the *Gilchrist* principles, it is necessary to weigh the plaintiffs' constitutional right to produce the evidence of a witness chosen by them. Next, he stressed the nature of the interest in issue for the expert (namely protection

of life, limb and liberty) which he submitted was entitled to even higher protection than the right to a good name (which has been enough in some of the authorities cited to the Court to justify restrictions on public hearings). He argued that it is critical to the administration of justice that persons who are prepared to give evidence under threat should feel that the Irish courts are prepared to acknowledge the existence of such threats and are willing to provide them with appropriate protection such that they can give their evidence freely and without fear of the consequences.

The approach which I propose to take

32. In considering the issues, it seems to me that I should start by assessing whether the stringent *Gilchrist* test has been satisfied by the plaintiffs in respect of their application that the hearing of the expert's evidence should take place *in camera.* That aspect of their application is the most far-reaching in terms of Article 34.1. It undoubtedly engages the *Gilchrist* principles. If the plaintiffs can demonstrate that they satisfy the test in relation to that element of their application, this will assist in determining how the balance of their application should be addressed.

33. In assessing the material before the Court, I will begin by considering the expert's report. I will then consider the materials that have been put in evidence in support of the plaintiffs' case that the identification of the expert as the author of the report would expose the expert to potential harm. I will then seek to apply the *Gilchrist* test.

The report of the expert

34. The report is lengthy and very detailed. Discounting the annexes, it is 145 pages long and contains 478 closely typed and single spaced paragraphs. The description of the qualifications and experience of the expert occupies 19 paragraphs. While I fully appreciate that all of what is said by the expert has yet to be tested on cross-examination at trial, I believe that it is fair to say that those paragraphs suggest that the expert is well qualified to conduct the analysis and to reach the conclusions which are subsequently set out in detail in the report. I appreciate that much of the report is based on open sources of information but, in advance of cross-examination at the trial, I do not believe that one could say, at this point in the proceedings, that the report is not the product of the individual expertise of its author. While it will be for the trial judge to reach a fully informed conclusion in due course, the report, on its face, suggests the application of considerable expertise, care and skill. The open sources of information (many of which I suspect could only be identified by someone with significant expertise) are deployed and stitched together in a very skilful way to paint a detailed – and apparently comprehensive – picture of relevant events and to support the views and conclusions expressed by the author. In many ways, the

approach taken by the author, in dealing with sources, is very similar to that undertaken by an historian, albeit that the author is concerned with relatively current events rather than the distant past.

35. The report contains an extensive description of how it is alleged the Russian Government operates, who makes the decisions, how they are made, the constraints that are imposed by the system of government, and the difficulties that arise for people operating at different levels within that system and for those living and working in Russia, more generally. The expert expresses the view that the system is one in which those operating within it are constantly trying to understand and anticipate what the President wants to achieve and they also want to be seen to implement his will with vigour and loyalty. The report suggests that any checks and balances ostensibly built into the system are mere formalities and do not, in practice, operate as a brake on giving effect to the will of the President. The report also suggests that this system meant that lessee airlines (and those employed by them) were under severe constraints in making decisions with regard to the return of the aircraft. As I understand what is said in the report, the author contends that such actors would feel obliged to act in accordance with the wishes of the Russian authorities irrespective of the legal position. The tenor of the report is that decisions were made at the top level by the President which were then communicated to named individuals who participated in formal meetings which formally gave effect to his wishes. While this approach is said to be characteristic of the way in which the system generally operates, the expert says that this was also the position in respect of the specific context of civil aviation. According to the report, the consequences of those decisions being made very shortly after the invasion meant that nobody was going to voluntarily return the aircraft in response to requests or demands made by the plaintiff lessors. The author maintains that these decisions or indeed wishes were communicated in various ways prior to the enactment of legislation or decrees and that they were decisions that nobody dared disobey. The author also paints a picture that it was well known and understood that there would be very serious and unpleasant consequences for those who disobey decisions or who do not give effect to what are known or understood to be the wishes and expectations of the President and his regime. The expert expresses the view that the system has multiple formal and informal instruments of control and a well-entrenched system of punishment for those suspected of disloyalty.

36. The report also goes into considerable detail in relation to the importance of the civil aviation sector to the Russian regime and explains why the retention in Russia of the aircraft in issue in these proceedings was so vitally important to the regime. It refers to official statements highlighting the importance of civil aviation (including a statement made by the Prime Minister of Russia just 13 days before the invasion). It also highlights that the territory of the Russian Federation spans 11 time zones stretching from Kaliningrad in the west to Vladivostok in the east and that much of its natural resources (which form a major element of the economy) are located far from

the populated areas (which are largely in Europe) in regions with little local infrastructure. As a consequence, air transport is vital.

37. The report addresses, sequentially and in great detail, the Russian response to the aviation sanctions imposed by the European Union, the United States and the United Kingdom. It is important to keep in mind in this context that the effect of these sanctions was that the plaintiff lessors were required to seek the return of the aircraft. As elsewhere in the report, the expert specifically names those who are said to have been involved in the Russian response to the sanctions. The author identifies that, as early as 28 February 2022, the President had signed an executive order dealing with the sanctions. While the order did not refer specifically to aviation, the expert expresses the view that it clearly indicated the direction of counter-sanctions strategy which was, according to the expert, to retain assets in Russia to the extent possible. The expert also describes a meeting in the Russian Ministry of Transport on 28 February 2022 attended by representatives of the airlines and the expert says that this meeting was an important milestone in the evolution and consolidation of the decision to detain foreign aircraft in Russia and that it was clear, by that time, that the Russian Government believed that detention was the only option. The report goes much further into the detail of the events in issue but I do not believe that it is necessary to recount that detail here. It is sufficient to note that the analysis and conclusions of the expert are obviously of considerable relevance to the plaintiffs' case in respect of War Risks Perils C and E and one can readily understand why the plaintiffs would regard the report of the expert as being of assistance to the case they wish to make. In these circumstances, I cannot accept the argument advanced by counsel for Fidelis (summarised in para. 16 above) that an expert of this type is not an essential witness for the plaintiffs. It seems to me that such a witness is crucial if the plaintiffs are to make a case based on these War Risks[5].

38. The expert also describes the role played by the Federal Security Service ("FSB") which the expert says is the successor of the Soviet era KGB. The expert suggests that the FSB is central to the current regime and that it is represented in all major state-owned companies and key Government agencies such as airports. The report suggests that the FSB is largely unconstrained in its operations save to the extent that it will always seek to give effect to what its members understand to be the wishes of the President. The expert describes a system of government where informal networks and instruments are more important than formal laws and decrees. It is fair to say that the report paints a picture of a highly autocratic system of government in Russia. Decisions are made and communicated and the consequences are well established. These decisions are enforced by a system of obedience that has been generated by the autocracy of the system and by the knowledge of the consequences that befall those who dare to act in a way that is considered adverse to the interests of Russia. I stress

[5] I deal separately below with the argument made by Fidelis and by Lloyd's that there is insufficient evidence to establish that there is no other expert available who would be prepared to give similar evidence on a open basis.

that I am merely attempting to describe the tenor of what is said in the report. I am not making any finding that this reflects the reality of the current system in Russia. That is a matter entirely for the trial judge who will hear all of the evidence which will, in the usual way, be tested by cross-examination. The trial judge will also have the benefit of evidence from experts called by the War Risks insurers.

39. It seems to me that the focus of the report is substantially different to those provided to the Court in the *Trafalgar v. Mazepin* litigation. The latter reports were centred on alleged deficiencies in the administration of justice in Russia. Unlike the report of the expert here, they were not focused on the Russian regime and the way in which decisions are made and enforced by the regime. They certainly did not provide the level of specific detail that is contained in this report in relation to that regime. Nor did they address the role alleged to be played by the FSB. The views expressed in this report are directed specifically at the Russian regime and contain highly critical and hard-hitting views in respect of how the regime operates and how it maintains control over Russian business and Russian society. Because they were aimed at the judicial arm of government, the reports that were furnished in *Trafalgar v. Mazepin* were far less likely to provoke the ire of those involved in the executive arm of the government than the views expressed in the expert's report.

40. For similar reasons, I cannot accept that the expert's report is no more damaging to the Russian regime than that of the expert tendered by the plaintiffs in these proceedings to address the Russian judicial system. It seems to me that the same considerations apply to it as apply to the reports in *Trafalgar v. Mazepin.* For that reason, the fact that the Belarussian author of that report is prepared to give evidence on an open basis is not a reason to dismiss the concerns expressed by the author of the report in issue. Nor is it a basis to suggest that another expert could have been identified who might have been prepared to give evidence in open court along similar lines to that contained in the report in issue.

41. Similarly, I do not believe that the earlier materials authored by the expert (as identified to the Court by Fidelis) are of a similar nature to the report. I confirm that I have considered each of these materials. None of them provides anything like the level of detail that is contained in the report. It is also clear from the draft affidavit of the expert that the level of detail in the report about the regime is unusual. As noted in para. 30 above, the expert has explained that the analysis in the report goes far beyond what would be produced by experts based in Russia who, according to the expert, routinely engage in self-censorship. The expert suggests that the level of detail contained in the report would be regarded as going beyond what has previously been available publicly. That may seem counterintuitive given the extent to which the expert relies on open sources but I do not think that I can discount that evidence. Moreover, the ability of an expert to skilfully piece together the jigsaw of information

available from open sources may well allow a story to be told that would not otherwise be publicly known[6].

42. In the course of his submissions, I asked counsel for Fidelis to address the material which his client had identified to the Court by way of a number of footnotes. In response, counsel drew my attention to one aspect of the material identified by Fidelis in footnote 1 and he also drew my attention to part of the expert's report which addressed the same issue. It is certainly true that the report does address the same issue. However, the level of detail in the report in relation to the issue is much more extensive than is contained in the material described in footnote 1. In the latter, it is addressed in very short order. No sources are cited and it is discussed at a general level. In contrast, in the report, it is addressed in 22 paragraphs over 7 pages with 25 sources or commentaries cited. The same applies in so far as there are other overlaps between the subject matter of the footnoted material and the report. In my view, the expert is fully justified in what is said in para. 7 of the draft affidavit where the expert says that, in the footnoted material, "my analysis is generally pitched at a high-level (not covering individuals or the process of political decision making on … policy) and falling within the mainstream expert opinion on Russia". I therefore do not believe that the overlap between the material described in the footnotes and the topics covered in the expert's report is material for present purposes.

The evidence of the risk of harm in the event that the expert is identified

43. In the affidavits sworn on behalf of the plaintiffs, reference is made to a range of material in support of the contention that the interests of the expert would be adversely affected in the event that the identity of the expert, as the author of the report, became public. I do not propose here to examine all of this material. Much of it comprises newspaper articles or other similar materials from media sources. In addition, reliance is placed on a report dated 15 September 2023 of Ms. Mariana Katzarova, special rapporteur appointed by the United Nations Human Rights Council. That report seems to me to be an inherently more reliable source of information about the extent of the risk (if any) facing the expert in the event of identification. Furthermore, the conclusions in the report have been supported by a former Irish ambassador to Russia, Mr. Justin Harman in a letter dated 26 January 2024. In that letter, Ambassador Harman also states that "the concerns and the potential risks regarding the security and/or safety of those persons mentioned in your letter … who may be identified in the witness statement and/or in expert reports, are entirely legitimate".

44. In the U.N. report, Ms. Katzarova considers in some detail the human rights situation in the Russian Federation in the aftermath of the invasion of Ukraine. In para. 19 of her report, she draws attention to a law which predates the invasion in 2022 namely

[6] This is well recognised, for example, in the law protecting commercial confidential information. See *House of Spring Gardens v. Point Blank Ltd.* [1984] I.R. 611 at p. 663 per Costello J. (as he then was).

Federal Law No. 121-FZ of 20 July 2012, "the Foreign Agents Law". This law introduced the designation of "foreign agent" which she explains can be attributed to any non-commercial organisation or individual that receives foreign funding and participates in "political activity" in Russia. The special rapporteur expresses the view that this law (and the amendments made to it) have had a highly damaging impact on the rights of freedom of expression and freedom of association in Russia.

45. In para. 21 (when read in conjunction with footnote 20), the special rapporteur identifies that the Foreign Agents Law was amended in July 2022 to substantially broaden its remit. In that para., she says:-

> 21. Subsequent amendments introduced an even vaguer term – "foreign influence" – which refers to anyone perceived as receiving foreign support, or being influenced by foreigners in other ways, including through coercion, persuasion or other means. "Support" is understood as the provision of funds and/or other property from a foreign source, as well as organizational, methodological, scientific, technical or other assistance. Under this definition, "foreign influence" could potentially include any engagement with foreign nationals or entities, including the United Nations, travelling abroad, or simply watching or listening to content online, on radio or television. There is no requirement for any causal link between such "foreign influence" and the "political activity" of the person or entity in question.

46. Those observations have a particular resonance in the present case. Here, the expert will be engaging with a foreign organ of State namely the Courts of Ireland and the evidence of the expert will be deployed by the Plaintiffs in an effort to persuade the Court that the Russian system of government is highly autocratic and repressive and that it is intolerant of anyone who does not give effect to the wishes of the Russian leadership whether or not those wishes have yet been formulated in law.

47. The special rapporteur also identifies that a number of new criminal offences have been created including an offence of discrediting the exercise of powers by Russian public authorities aimed at defending Russian interests. In paras: 32 to 34, the special rapporteur says:

> "32. New crimes have been added to the existing set of legal restrictions on freedom of expression. Article 207.3 of the Russian Criminal Code, of March 2022, prosecutes public dissemination of "knowingly false information containing data about the use of the armed forces of the Russian Federation to protect the interests of the Russian Federation and its citizens and to maintain international peace and security and about the operation of any Russian State agency abroad". The maximum penalty is 15 years of imprisonment.
>
> 33. As at July 2023, at least 185 people had been prosecuted under article 207.3. To date, some of the harshest verdicts are the sentences of 8.5 years of imprisonment for opposition politician Ilya Yashin and Dmitry Ivanov, a university student and creator of the Protest MGU Telegram channel; the seven

years for independent municipal deputy Alexey Gorinov; and the six years for journalist Maria Ponomarenko.

34. Article 280.3 of the Criminal Code added the crime of "**discrediting** the use of the Russian armed forces **or of the exercise of powers by the public authorities of the Russian Federation aimed at defending the interests of the Russian Federation** and its citizens and maintaining international peace and security". It is similar to article 20.3.3 of the Administrative Code and provides for criminal punishment for a repeated offence. They are commonly known as laws against "discrediting the armed forces" and have been used to shut down any perceived anti-war sentiment or disagreement with the official position of the authorities on the war against Ukraine. As at 20 August 2023, more than 7,683 cases had been filed under article 20.3.3 of the Administrative Code and 110 cases under article 280.3 of the Criminal Code". (emphasis added)

48. I have emphasised the reference in para. 34 of the U.N. report to the exercise of powers by public authorities. Contrary to what has been suggested in the course of the hearing, Article 280.3 is not directed solely at discrediting the Russian armed forces. It also applies to discrediting the exercise of powers by Russian public authorities aimed at defending the interests of Russia. On the basis of what is said in the expert's report, the measures taken by the Russian authorities in relation to the leased aircraft plainly constitute the exercise of powers aimed at defending Russian interests. It is equally clear that the criticisms made by the expert in the report about the way in which those measures were taken could readily be regarded as discrediting the relevant exercise of powers by the Russian authorities. One can therefore envisage how matters might unfold.

49. Furthermore, it is clear from the special rapporteur's report that, in practice, these laws have been interpreted and applied very broadly by the Russian courts. In para. 35, she says:-

"35. These prohibitions are interpreted broadly and without any legal certainty. Trials have been held in almost all regions of the Russian Federation. People have been found guilty of displaying anti-war or pro-Ukraine signs or elements of clothing; taking part in anti-war rallies or their "silent support", such as posting photos or comments, or liking anti-war posts on social media; sharing information about the death of civilians, destruction of civilian objects and claims of war crimes committed by the Russian army; expressing opposition to the war in conversations; opposing State-promoted pro-war symbols, such as "Z" and "V"; and singing Ukrainian songs."

50. In light of these examples cited by the special rapporteur, it is obvious that the interests of the expert could be adversely affected arising from the content of the report. There are several instances cited where persons resident abroad have been the subject of criminal sanction in Russia. The expert's report also suggests that the Russian authorities (or those who work on their behalf) will sometimes resort to extrajudicial methods to exact retribution. I appreciate that, at the trial, it may be

shown that this is an unsubstantiated suggestion but, at this stage of the evidence, It is not something which, in my view, can be ignored. This is especially so in light of the following conclusion expressed by the special rapporteur in para. 107 of her report where she says:

> "107. The often-violent enforcement of these laws and regulations has resulted in a systematic crackdown on civil society organizations that has closed civic space and independent media. It has led to mass arbitrary arrests, detentions and harassment of human rights defenders, peaceful anti-war activists, journalists, cultural figures, minorities and anyone speaking out against the war of the Russian Federation on Ukraine. Women, especially those who are human rights defenders, activists or journalists, have suffered specific gender-based violence, humiliations and intimidation. The persistent use of torture and ill-treatment, including of sexual and gender-based violence, puts at risk the life of people in detention".

51. On the basis of the materials discussed above, I find that the plaintiffs have established that the expert could be at risk of real harm in the event that the expert's identity as the author of the report was made public. In light of that finding, I next turn to consider the application of the *Gilchrist* test

The application of the *Gilchrist* test

52. In *Gilchrist,* O'Donnell J[7]. summarised[8] the applicable principles as follows:-
    (i) The Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance.
    (ii) Article 34.1 itself recognises however that there may be exceptions to that fundamental rule.
    (iii) Any such exception to the general rule must be strictly construed, both as to the subject matter, and the manner in which the procedures depart from the standard of a full hearing in public.
    (iv) Any such exception may be provided for by statute but also falls under the common law power of the court to regulate its own proceedings.
    (v) Where an exception from the principle of hearing in public is sought to be justified by reference only to the common law power and in the absence of legislation, then the interests involved must be very clear, and the circumstances pressing. That demanding test was capable of being met by the combination of the threat to the witness protection programme and the risk to lives of people in it or administering it. This was not a matter of speculation, but was an unavoidable consequence of the existence of a witness protection programme.
    (vi) If it can be shown that justice cannot be done unless a hearing is conducted other than in public, that will plainly justify the exception from the rule established by Article 34.1, but that is not the only criterion. Where

[7] As he then was.
[8] What follows is largely in the language used by O'Donnell J. but is not fully a direct transcription.

constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, it may be appropriate for the legislature to provide for the possibility of the hearing other than in public, (as it has done) and for the court to exercise that power in a particular case if satisfied that it is a case which presents those features which justify a hearing other than in public.

(vii) The requirement of strict construction of any exception to the principle of trial in public means that a court must be satisfied that each departure from that general rule is no more than is required to protect the countervailing interest. It also means that the court must be resolutely sceptical of any claim to depart from any aspect of a full hearing in public. Litigation is a robust business. The presence of the public is not just unavoidable, but is necessary and welcome. In particular this will mean that even after concluding that the case warrants a departure from that constitutional standard, the court must consider if any lesser steps are possible such as providing for witnesses not to be identified by name, or otherwise identified or for the provision of a redacted transcript for any portion of the hearing conducted *in camera.*

53. Having regard to the circumstances of the present case, a number of points should be noted in the context of those principles. I am being asked to apply the common law power of the Court to order that part of the trial of these proceedings should be held *in camera.* Thus, the interests invoked must be very clear and the circumstances must be pressing. But,in assessing the application, I am not confined to considering whether justice can or cannot be done unless the hearing is in private. As O'Donnell J. made clear, article 34.1 envisages that other constitutional interests and values of sufficient weight may be considered. If I am to accede to the application, I must be satisfied that the particular departure from a fully public hearing sought by the plaintiffs is required to protect that countervailing interest and is no more than is necessary. If there is some lesser step which can be taken sufficient to protect the interest in issue, I must confine the remedy sought accordingly. As noted earlier, I must also approach the application with resolute scepticism. I confirm that this is the approach that I have sought to take in reviewing and assessing the materials before the Court and in arriving at my conclusions. As previously observed, the submissions made by the War Risks insurers have been very helpful to me in this context.

54. For the reasons discussed in paras. 50 to 51, I am of the view that the plaintiffs have established a strong countervailing interest, namely a risk of harm to the expert. That seems to me to qualify as both a clear interest and a pressing circumstance. My attention has been drawn to a number of authorities where the right to a person's good name was regarded as sufficient. It follows that the risk of harm either to liberty or to the person must also qualify. It does not matter that the expert is not a citizen of the State. That follows from a number of Supreme Court authorities including *A.P. v. Minister for Justice* [2019] 3 I.R. 317 at p. 363.

55. Given the nature of the risk and the content of the report, it seems to me that there is an objectively justifiable basis for protecting the identity of the expert. If that protection is not afforded to the expert, there is, on the evidence before the Court, a real risk of harm to the expert. In my view, subject to the issue discussed in paras. 56 to 59 below, the only sure way to protect the identity of the expert (and to address the risk of harm) is to direct that the hearing of the expert's evidence should be *in camera.* I cannot identify any less restrictive way in which the interest can be protected. Thus, for example, it would not be sufficient to simply anonymise the expert and allow the hearing of the expert's evidence to proceed in public. That would not protect the expert as the expert could be recognised by someone physically present in the court room or potentially observing the proceedings on TrialView.

56. The one issue which has troubled me more than others is the argument made by the War Risks insurers that the plaintiffs have not demonstrated that the expert is the only witness available (or the best witness available) to give the evidence in issue. This argument is potentially relevant to the question as to whether it is truly necessary to depart from the requirements of Article 34.1 in this case. If there is another expert witness who can give evidence to this or to similar effect, does that mean that the test of necessity under *Gilchrist* has not been met? While the plaintiffs have stressed their right to tender a witness of their choice, is the existence of that right enough to displace the Article 34.1 requirement?

57. I fully acknowledge the force of the observations made by the Supreme Court and the Court of Appeal in *Sweeney v. VHI* in relation to a party's freedom of choice of witness. It is clear that the entitlement of a party to select and engage the expert of its choice is an important element of the right to litigate and the right of access to the court. But it is not clear that this is a right that would always be sufficient to displace or modify the Article 34.1 requirement that justice be administered in public. There are many circumstances where a party's freedom of choice of witness must yield to the public interest in the just and efficient despatch of litigation or the rights of an opposing party to have proceedings brought to finality. To take a fairly simple hypothetical example, if in straightforward professional negligence proceedings against an architect, the plaintiff sought to delay the hearing to await receipt of a report from a particular architectural expert who happened to be on a lengthy sabbatical abroad, I think it is likely that the court would tell the plaintiff that an available expert witness should be retained instead. There are plenty of architects available to give expert evidence. In that hypothetical example, the plaintiff's freedom of choice would clearly be outweighed by the interest of the defendant architect (who might well be suffering reputational damage as a consequence of the claim) in having the proceedings determined in early course and might also be outweighed by the wider public interest in the efficient administration of justice. A further example is to be found in *Sweeney v. VHI* itself where the freedom of choice of the plaintiff was outweighed by the right of the defendant to prevent the risk of wrongful use of its confidential and privileged

information and where, as Collins J. remarked, there were other expert economists available to give evidence in competition proceedings other than Professor McDowell.

58. The fact that the Court of Appeal and the Supreme Court ultimately determined that the plaintiff in *Sweeney v. VHI* was not entitled, in the particular circumstances, to retain the economist of his choice demonstrates that the right of choice of a litigant may have to yield to competing interests. Given the importance of the public hearing requirement in Article 34.1 and the underlying public interest in maintaining a check on the exercise of judicial power, it would be surprising if that requirement could be readily trumped by the right of a party to select an expert witness of its choice. Thus, in a routine case where there is an ample number of experts available to choose from, it seems to me that a court should be especially sceptical of an application to allow an expert to give evidence *in camera.* This is not a routine case. But the War Risks insurers claim that there is an ample number of expert commentators – "Kremlinologists" – available who might be prepared to give evidence on a fully open basis. And it is in that context that they criticise the assertion made in para. 26(d) of Ms. McClements' affidavit quoted in para. 17 above.

59. I have to say that, if para. 26(d) of Ms. McClements stood on its own, I very much doubt that it would be sufficient to satisfy the *Gilchrist* requirement to demonstrate that the restriction sought by the plaintiffs is necessary. In my view, the War Risks insurers are correct in characterising it as no more than an assertion. If it stood on its own, I believe that more detail would be required before the Court could be satisfied that the relief sought is truly necessary. However, the averment does not stand on its own. Ms. McClements also says, in para. 26(b), that there is a limited pool of experts available who would not already be conflicted. Furthermore, she also says, in para. 26(c), that it is the nature of the evidence contained in the report that gives rise to a particular security concern for the expert. That averment must also be read, in turn, with what the expert says in the draft affidavit. As noted in para. 30 above, the expert says that the analysis and detail of the report goes far beyond anything that would be produced by an expert in Russia. As counsel for the plaintiffs remarked, there is no countervailing evidence from the War Risks insurers.[9] Having had an opportunity to read the report myself, I agree that the extent of the detail contained in the report is striking and that it goes considerably further than anything said by the experts involved in the materials identified by Fidelis. Based on what is said in the U.N. special rapporteur's report, I can also see that a risk arises for anyone who provides material that could arguably be construed as a form of criticism of the response of the Russian authorities to the sanctions imposed by the European Union and others. In those circumstances and in light of the conclusions expressed both by the special rapporteur and by former Ambassador Harman, it seems to me that there must be a real risk that similar security concerns might well arise no matter which expert is retained by the

[9] In recording that observation, I am conscious that the draft affidavit of the expert was produced at a very late stage in the process. On the other hand, no application was made by any party to seek time to respond to it.

plaintiffs to give evidence of this nature. The content of the expert's report and the conclusions reached by the special rapporteur provide significant support for the contention made by Ms. McClements in para. 26(c) of her affidavit that it is the content of the report that gives rise to a security concern. Taken together, all of these factors have persuaded me that there is sufficient evidence before the Court to hold that it is necessary (within the meaning of the *Gilchrist* test) that the evidence of the expert should be given *in camera* at the trial.

60. I am satisfied that there is no lesser restriction that could be put in place. In that context, I would emphasise that, subject to any consequential directions that may be necessary (as outlined in para. 63 below), the trial will be held in public and the judgment given by the trial judge will also be public subject to any redactions that the trial judge may consider to be necessary. To that extent, the restriction on the public nature of the trial is limited in its terms.

61. In the circumstances, I will order that the evidence of the expert should be taken *in camera* at the trial. I will also order, for the same reason, that the affidavit of the expert, when sworn and stamped, shall be delivered to the Registrar in a sealed envelope and that it be treated as evidence given *in camera* and be placed in the Strong Room next to the Central Office and that the only entry to be made in the cause book or other record in the Central Office be as follows: "Affidavit filed [insert date]; name of deponent withheld by order of the Court".

62. I stress that this is an order that is solely concerned with the position of the expert the subject of this application. It does not apply in relation to any other witnesses to give evidence at the trial. In light of the requirements of Article 34.1 as explained in *Gilchrist,* each restriction on the public nature of the trial would have to be individually justified. In the absence of witness specific evidence, it would therefore be wholly wrong for me to suggest that a similar approach might be taken in respect of any other witness. That is not to say that the parties could not seek to reach agreement, subject to a hearing by the Court, in respect of any other witness with security concerns. That would certainly reduce court hearing time and minimise costs.

63. In light of the order proposed in para. 61 above, it is clear that there will be further consequences for other stages in the trial (including the evidence to be given on behalf of the defendants and the making of submissions by all parties) when reference may need to be made to the evidence given *in camera.* Notwithstanding the relief claimed by them, I have not seen any proposals from the plaintiffs as to how they propose that these stages should be addressed. That is unsatisfactory. I will accordingly direct that, if this has not been done already, the plaintiffs must, not later than 5.00 p.m. on Thursday 14 March 2024, put forward their proposals as to how these matters should be dealt with and that, thereafter, between 15 and 20 March 2024, the parties should seek to agree how these matters should be addressed at trial. The Court should be

furnished with an update not later than 3.00 p.m. on 21 March 2024 and the matter will be listed for further consideration before me on 22 March 2024 at 11.30 a.m.

64. The plaintiffs have also sought relief as to how the evidence of the expert should be addressed in the judgment of the trial judge and in the order to be made by her. In my view, those are matters exclusively for the trial judge and it would be inappropriate that I should trespass, in this judgment, on the decisions to be made by her.

The pre-trial directions sought by the plaintiffs

65. I now turn to the pre-trial directions sought by the plaintiffs. In my view, counsel for the plaintiffs was right to suggest, as he did in the course of his oral submissions[10], that the *Gilchrist* principles are not engaged in so far as the witness statements are concerned. This is for the simple reason that, until put in evidence at the trial, the witness statements are not evidence and are not part of the public record of the Court. They are simply exchanged between the parties. The nature and status of a witness statement which has not yet been deployed in evidence was explained by Clarke J.[11]in *Moorview Developments Ltd. v. First Active plc* [2009] IEHC 214 at para. 3.18 where he said:

> "3.18 It does not seem to me that the alteration in the Rules of Court applicable to the Commercial Court … could be taken to have altered the substantive law. … The fact that, as a procedural measure, it has been considered advantageous that parties obtain notice in advance of the evidence likely to be given by their opponent does not, in my view, alter that legal situation. A statement of evidence intended to be given by a witness is no more than what its description states it to be. It is a statement that the party concerned anticipates that, if necessary, the named witness will give evidence along the lines of the content of the witness statement concerned. In the absence of any agreement by the parties in advance that all of the witness statements filed should be taken as evidence in chief, or a form of similar agreement which would turn a statement of intended evidence into an admitted statement of actual evidence, I do not believe that a plaintiff is entitled to place any reliance on defendants witness statements in circumstances such as arose in this case."

66. It follows that neither Article 34.1 nor the *Gilchrist* principles are engaged in relation to this element of the plaintiffs' application. It is true that the plaintiffs seek that the report of the expert should be anonymised and that the decision of Munby J. in the CAFCASS case suggests that the identity of an expert witness is a facet of a public hearing. However, the relevant public interest only arises at trial. Besides, I have already held that the evidence before the Court is sufficient to justify that the expert's evidence should be given *in camera.*

67. Pre-trial procedure in the Commercial List is regulated by the provisions of O. 63A, r.r. 5 to 21. Rule 5 gives a very wide power to the Court to give such directions and make such orders for the conduct of proceedings "as appears convenient for the

[10] As noted previously, a different approach was taken in the written submissions of the plaintiffs
[11] As he then was

determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings." Given the finding that I have made that the expert could be at risk of real harm in the event that the expert's identity became known, it seems to me to plainly follow that, just as it has been necessary to direct that the evidence of the expert be given *in camera* at the trial, justice requires that appropriate protections are put in place to ensure that the identity of the expert should be kept confidential during the pre-trial stages of these proceedings. For that reason, I believe that it is clearly necessary to order that the report of the expert should be anonymised and that all identifying material in the expert's report should be redacted. The plaintiffs are prepared to allow a small number of lawyers and nominated officers of the defendants to see the report in unredacted form and a draft order has been circulated to deal with the minutiae of the procedure which the plaintiffs propose should be put in place. As I understand it, a draft order in similar terms has also been circulated between the parties to similar proceedings currently pending before the Commercial Court in London and, given that many of the parties to the proceedings there are also party to these proceedings, it would make sense that similar arrangement should be put in place in both jurisdictions, to the extent that it is practicable to do so. It should be noted that the draft order goes beyond the immediate position of the expert and, if made, the order would extend to any other witness who transpires to have genuinely held security concerns of a similar kind to those held by the expert. Since *Gilchrist* principles do not apply to the exchange of witness statements, I see no difficulty with the parties proceeding in that way.

68. I do not think that it is necessary to address the detail of the proposed order in this judgment. I believe that, in light of the issues of principle decided in this judgment, I can rely on the parties to reach agreement in relation to the detail of the order to be made. I believe the parties should be able to reach agreement on the draft order in advance of the matter appearing before me again on 22 March 2024. I will therefore direct that, between now and 21 March 2024, the parties should liaise together with a view to reaching agreement on the draft order. If it is the case that the parties are still unable to agree the order by 21 March, the parties should, not later than 3.00 p.m. on that day, submit a note to the Court outlining the extent of the disagreement between them and I will rule on the dispute at the hearing already directed on 22 March.

69. However, there is one aspect of the arrangements proposed in the draft order that I should address in this judgment. The combined effect of paras. 4.2 and 5.1A of the draft order restricts the extent to which even a redacted version of the expert's report can be provided to a Russian based expert retained by a defendant. This is quite a significant inroad into the defendants' freedom to retain and take advice from experts of their own choice. It seems to me that such a restriction would have to be shown to be necessary, the burden falling on the plaintiffs to do so. Given the redaction of the name of the expert and the paragraphs of the report providing details of the expert's personal circumstances and expertise, it is conceptually difficult to see why

restrictions of the kind proposed by the plaintiffs should be necessary. It also has to be said that the evidence to justify this element of the relief sought is sparse. Ms. McClements merely says in para. 9 of her affidavit sworn on 20 February 2024 that the expert has advised her that the expert believes that, if even the redacted version of the report became public, there would be a significant risk that the expert could be identified. While the balance of para. 9 goes on to describe what could befall an expert in Russia who expresses such a view, Ms. McClements says nothing further about the basis for her averment that the expert could be identified from the redacted version of the report. Furthermore, there is nothing said in the draft affidavit of the expert which specifically addresses the factual basis of the alleged risk of identification arising from the redacted report. The expert goes into some considerable detail in relation to the much more obvious risk arising from the transmission of an unredacted version of the report to a recipient in Russia. The expert then says in the penultimate paragraph, that, if expert's report "whether redacted or unredacted … made its way into Russia", there would be a risk to the expert's security. However, the draft affidavit is otherwise silent in relation to the redacted report.

70. In the course of the hearing, I asked counsel for the plaintiffs to address the sparsity of evidence in respect of the risk arising from the provision of the redacted version of the report. In response, counsel highlighted that, in the draft affidavit, the expert had specifically confirmed the accuracy of what was said by Ms. McClements. Counsel also urged that I should use my common sense and that I should take judicial notice of the kind of steps that could be taken in order to identify the expert from the redacted version of the report.

71. In my view, given the burden on the plaintiffs to establish that the restriction sought is justified, it is less than satisfactory that the court should be asked to use its common sense. It seems to me that the plaintiffs could and should have provided more detail in their affidavits to justify this element of the relief sought. That said, there are some basic facts that should be borne in mind. First, there is evidence in the affidavits before the Court that a Russian based expert may feel duty bound to provide the report to the Russian authorities. Second, there is material in the report of the expert dealing with the approach which the expert suggests is regularly taken by the Russian authorities. Third, there is the evidence in the U.N. special rapporteur's report about the effect of the Foreign Agents Law (as amended in July 2022) which criminalises engagement with foreign nationals or agents and the effect of Article 280.3 of the Criminal Code which criminalises repeated criticism of the Russian authorities' response to the sanctions. Thus, it is reasonable to conclude that, if the redacted report became public, steps might be taken to try to identify the author. Fourth, while I stress that I have no knowledge of the methods that might be used by a sophisticated intelligence agency of a world power such as Russia, it is the case that we all have individual ways of expressing ourselves. This hit me forcefully as a number of authorities were opened to me in the course of the hearing. One could well recognise the characteristic way in which individual judges (both serving and retired) express

themselves; one often would not need to know the name or the facts of the case, in order to recognise the author of the judgment. The way in which the judges expressed themselves was enough to do so. Given the sheer length of the expert's report and the fact that the expert has published material in the past, it seems to me that, again, it is reasonable to conclude that there is a risk that the expert could be recognised from the way in which the report is expressed. In these circumstances – and notwithstanding the sparsity of evidence on this issue – I have come to the conclusion that there is a sufficient basis for the restriction sought on the circulation of the redacted report. However, it also seems to me that the defendants must have liberty to seek a variation of this order in the event that circumstances arise that justify it. As I understand it, the draft order provides for this. That would allow a more detailed analysis and balancing of interests to be carried out by reference to the individual circumstances that might arise in relation to a specific expert on the defendants' side.

72. For completeness, it should be noted that an earlier version of this judgment was made available on a restricted basis to certain named representatives of the parties on 11 March 2024 and I gave the plaintiffs until 3.00 p.m. on Thursday 14 March 2024 to notify the defendants and the Court in the event that they sought any redactions to the judgment. The plaintiffs availed of that facility and sought a number of redactions to the version of the judgment circulated on the basis outlined above. A hearing subsequently took place on 15 March 2024 at which counsel for the plaintiffs outlined the basis for the redactions sought and also drew my attention to the course which had been adopted by Mulcahy J. in *Doe v. Garda Commissioner* [2024] IEHC 115 at para. 2. That case was brought by a number of plaintiffs who were participants in the State's witness protection programme and had been heard *in camera.* Mulcahy J. first provided his judgment to the parties in draft and gave them an opportunity to identify any changes which might tend to identify the plaintiffs. Some changes were suggested and Mulcahy J. incorporated a number of them in the final version of his published judgment.

73. At the hearing on 15 March 2024, the redactions sought by the plaintiffs were opposed by Fidelis and HDI but none of the other defendants did so. Having heard the parties, I was concerned that the redactions sought would leave too many unexplained gaps in the judgment. I was, however, persuaded that, in order to protect the expert, some adjustments would be necessary to the language used in the version delivered on 11 March 2024. In those circumstances, I suggested that, by analogy with the method adopted by Mulcahy J. in *Doe,* I would treat the judgment delivered on 11 March 2024 as having been delivered in draft and I would make some adjustments to the language used in this, the final and published version of the judgment. No party had any difficulty with this course and that has been the basis on which this judgment has been prepared.