THE HIGH COURT

[2011 No. 10735 P]

BETWEEN

JOHN HEENEY

PLAINTIFF

AND

DEPUY INTERNATIONAL LIMITED AND HEALTH SERVICE EXECUTIVE

DEFENDANTS

RULING ON COSTS delivered by Mr. Justice Barr on the 28th day of June, 2017

Background

1. This is an application made on behalf of the plaintiff for an order directing that the defendant should pay a sum to the plaintiff's solicitor as a part payment on account in respect of the costs which may ultimately be deemed recoverable by the plaintiff from the defendant.

2. The background to this case is that the plaintiff had had an artificial hip, which had been manufactured by the first named defendant inserted into his hip, when he had undergone a hip replacement operation. It was the plaintiff's case that the artificial hip was defective, resulting in it having to be removed and a new artificial hip inserted in its place. Arising out of this state of affairs, the plaintiff issued proceedings in respect of personal injury, loss and damage suffered by him due to the alleged negligence on the part of the defendants. In addition, the plaintiff maintained that he was entitled to be compensated pursuant to the provisions of the Liability for Defective Products Act 1991.

3. A full defence was filed on behalf of the defendants, in which all matters were put in issue. In particular, the first defendant denied that the artificial hip, which had been manufactured by it and inserted into the plaintiff, was defective, either in the manner alleged, or at all. In addition, and without prejudice to the rest of the defence, the defendant also pleaded that it was entitled to rely on the defence known as the "*state of art defence*" provided for under s. 6(e) of the 1991 Act. Thus, all matters were strongly in issue between the parties.

4. The case came before me for hearing on 15th July, 2015. At that stage, counsel for the parties asked for some time to enter into settlement negotiations. Those negotiations were ultimately successful and the matter was settled on the basis that the first named defendant would pay the sum of €250,000 to the plaintiff as compensation and in addition would pay the plaintiff's costs, which were to be taxed in default of agreement.

5. In August 2016, the first named defendant sent to the plaintiff's solicitor the sum of €500,000 as a global payment on account in respect of the costs which it was due to pay to various plaintiffs, who had been represented by the plaintiff's firm of solicitors. The plaintiff's solicitor divided this sum between the various plaintiffs' actions, which had been processed by the firm up to that time. This resulted in a sum of €23,750 (plus VAT) being applied in reduction of the solicitor's and barristers' fees in this case. The solicitor received the sum of €20,000, plus VAT; and the sum of €3,750, plus VAT, was applied towards discharge of the fees due to counsel.

6. On 5th February, 2016, the plaintiff's solicitor furnished a short form Bill of Costs to the defendants' solicitor in respect of the plaintiff's costs in this action. That bill amounted to €663,421 (inclusive of VAT). By far, the largest elements in that bill related to the fees due to the legal advisers, which in aggregate came to €644,704 (inclusive of VAT).

7. To look at the fees due to the legal advisers in a little more detail, the plaintiff's solicitor had marked an instruction fee of €230,000, which together with other sundry fees and expenses due to the solicitor, brought this part of the claim to €247,349.50 (exclusive of VAT).

8. Senior Counsel had marked a brief fee of €75,000, which when taken with other sundry items claimed by senior counsel, brought the total fee claimed by him to €89,400 (exclusive of VAT). A second senior counsel also marked a brief fee of €75,000 plus €400 for a pre-trial consultation. The first junior counsel marked a brief fee of €50,000, which together with other items claimed, brought his total fee to €61,500 (exclusive of VAT). A second junior counsel, who had been retained primarily as a documentary and discovery counsel, also claimed a brief fee of €50,000, which together with other sundry items, came to a total fee claimed of €50,500. Thus, the total fees due to counsel came in at €276,800, together with VAT of €63,664.

9. By letter dated 20th February, 2017, Messrs. Behan and Associates, the legal costs accountants retained by the first named defendant, replied to the short form Bill of Costs which had been submitted by the plaintiff's solicitor. There was a vast difference between the quantum of fees claimed by the plaintiff's legal advisors and the level of fees which the defendant was prepared to pay. For example, instead of the solicitor's professional fee claimed in the sum of €247,349.50, the defendant was prepared to pay €65,000. In respect of the brief fee marked by the leading senior counsel of €75,000, the defendant was only prepared to pay €17,500. They declined to pay any brief fee in respect of the second senior counsel. In relation to the junior counsel's brief fee of €50,000, they would only pay €11,666. They declined to pay any fees in respect of the second junior counsel.

10. It is a little difficult to determine the overall costs which the defendant is prepared to pay. This is due to the fact that in their letter dated 20th February, 2017, there are a number of items in respect of which queries were raised and which were neither accepted nor declined, pending satisfactory clarification of the queries. Doing the best that I can, it seems to me that based on the figures which are specifically allowed in the said letter dated 20th February, 2017, the defendant accepts a liability for €110,547. To this must be added the items in respect of which there are queries, in respect of which one could allow a sum of approximately €10,000. VAT on the legal fees which the defendant accepts, appears to amount to €22,750. Adding these figures together gives an approximate total, inclusive of VAT, of circa €143,299. Thus, it can be seen that there is an enormous gulf between the costs as claimed by the plaintiff's solicitor and the level of costs which have been accepted by the defendants' solicitor.

The Present Application

11. In this application, the plaintiff has sought a payment on account in respect of the fees which he says are due to him under the terms of the settlement reached on 15th July, 2015. The application is brought pursuant to practice direction HC 71 "Payment on account of costs pending taxation", issued by the President of the High Court on 28th March, 2017. That practice direction is in the

following terms:-

> *"In view of long delays in the taxation of costs, the attention of practitioners is drawn to the provisions of Order 99, rule 1B(5).*
>
> *I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs. Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid.*
>
> *This practice direction shall come into effect on Monday, 24th April, 2017."*

12. In moving the application, Mr. Aiden Doyle, S.C., submitted on behalf of the plaintiff, that the level of fees set out in the short form Bill of Costs dated 5th February, 2016, were not excessive, when one considered the circumstances in which the case had initially been brought on 15th July, 2015. He pointed out that at that time, while there had been litigation against the defendant in respect of allegedly defective artificial hips manufactured by it, in America and Australia. There had been no decision in any court in Europe on this issue. Thus, he submitted that the present case was a most important case, as it was the first of its kind to be actually brought to a hearing in Europe.

13. Counsel further submitted that the court should have regard to the fact that all matters were in issue between the parties. In particular, the plaintiff's legal advisers had had to undertake considerable research, in order to deal with the so called "*state of art defence*" raised by the defendant in its defence. In essence, the plaintiff had to be in a position to prove that, at the date on which the product was put into circulation, there did in fact exist a body of academic and medical opinion, to the effect, that the hips manufactured by the defendant were defective and were likely to cause injury to patients. In order to deal with such issue, the plaintiff's legal advisers had to undertake an enormous amount of research in respect of articles in medical journals published throughout the world.

14. In addition, it was pointed out that approximately 20,000 documents had been furnished by the defendant by way of discovery. In such circumstances, it was reasonable to engage a junior counsel who was specifically tasked with coordinating a team to look at the material which had been discovered by the defendant and to prepare summaries thereon and brief senior counsel in respect of the contents thereof in advance of the hearing of the action.

15. In relation to the number of senior counsel retained, Mr. Doyle, S.C., submitted that when one looked at the issues which arose on the pleadings and having regard to the fact that this was the first case of its kind to be run in Europe, it was reasonable for the plaintiff to engage the services of a second senior counsel. He submitted that not only was the level of brief fee marked by senior counsel reasonable, but that on taxation, the Taxing Master was likely to allow the brief fee at that level and was also likely to allow for the retainer of two senior counsel. He further pointed out that in this particular case, the defendant had in fact retained three leading senior counsel to represent it at the trial of the action.

16. Mr. Doyle S.C. stated that having regard to the current delays that were experienced when having matters taxed in the usual way before the Taxing Masters in the High Court, it was entirely reasonable that the court should, in compliance with the practice direction, direct that a substantial payment on account should be made by the defendant. He stated that the plaintiff's solicitors had a number of plaintiff's actions in similar circumstances on their books and that with the exception of the global payment which had been made by the defendants in August 2016, which resulted in an allocation of only €23,750 per case, the plaintiff's solicitor had to fund the litigation since its inception. In such circumstances, the plaintiff's solicitor was experiencing severe financial difficulty, due to the lack of cash flow. In these circumstances, counsel submitted that the court should direct that a substantial payment on account be made. Counsel stated that the plaintiff's solicitor gave the undertaking as required in the practice direction.

The Defendants' Response

17. In response, Mr. Hurley, solicitor for the first defendant, took issue with a number of the matters raised by counsel. He stated that while the case itself was certainly significant, when one had regard to the level of compensation obtained by the plaintiff of €250,000, this would not generally warrant a brief fee of the order marked by senior counsel in this case. Furthermore, he stated that there were a very large number of cases pending before the High Court against the defendant on almost identical issues. Thus, it was not correct to state that this case was an isolated or unusual case, which would warrant the payment of an enhanced brief fee; much less warrant the retainer of a second senior counsel and a second junior counsel for the trial of the action.

18. In relation to the issue of the delay in obtaining payment on foot of the consent order for costs, Mr. Hurley pointed out that while the short form Bill of Costs had been furnished in February 2016, and while the defendant had not replied thereto until a year later on 20th February, 2017, there was nothing to prevent the plaintiff from drawing up and submitting a detailed and comprehensive Bill of Costs which, if necessary, could be submitted to taxation.

19. In relation to the question of delay within the taxation system itself, he did not accept that there was any undue delay once a party drew up its final Bill of Costs and submitted it to taxation. In support of this assertion, he furnished to the court a summons to tax which had been served by a plaintiff's solicitor in another DePuy case. In that case, an order for costs had been made in favour of the plaintiff by the High Court on 11th January, 2017. The summons to tax was dated 8th June, 2017, and it had obtained a return date before the Taxing Master of 17th July, 2017.

20. Finally, Mr. Hurley indicated that the defendant was prepared to make an offer to pay the sum of €125,000, as a payment on account in this case.

Conclusions

21. The practice direction issued by the President of the High Court dated 28th March, 2017, was designed to deal with the fact that the plaintiff's solicitor may experience considerable cash flow difficulties due to delays in having Bills of Costs taxed before the Taxing Master. To that end, provision was made for a party, who had obtained an order for costs, to apply to the court for a direction that the defendant should make a payment on account in respect of such costs. It is important to realise that when the court is considering such an application, it only has very limited information before it. In the present case, I have been furnished with the short form Bill of Costs submitted by the plaintiff on 5th February, 2016, the response thereto issued by letter from the defendants' Legal Costs Accountant dated 20th February, 2017, and a series of letters and fee notes submitted by the plaintiff's counsel indicating the level of fees marked and in very brief terms, the factors which it is alleged justify the level of fees as marked by them.

22. In these circumstances, where the court has very limited information before it and where there has been extremely limited argument as to why the level of fees marked by the plaintiff's legal advisers may or may not be justifiable, it would be inappropriate for the court to give any indication as to what level of fees should be properly payable to the plaintiff's legal advisers. Were the court to do so, it would risk doing a substantial injustice either to the legal advisers who have claimed the fees, or to the defendant, who must ultimately pay the fees. It is for the Taxing Master, having heard detailed evidence and submissions in relation to the items of cost which remain in dispute between the parties, to determine what the appropriate fees should be.

23. In these circumstances, I am satisfied that it would be wrong of this Court to indicate in any way what fee might be allowable to the plaintiff's legal advisers in this case. On this application, the court is not measuring what fees might be ultimately allowed to the plaintiff's solicitor and counsel. Nor is the court deciding whether it was reasonable for the plaintiff to engage the services of a second senior counsel and a second junior counsel. All the court can do, is try to come to a conclusion as to what sum would represent a reasonably substantial payment on account in respect of costs, while at the same time not exposing the defendant to the risk of a serious overpayment in respect of such costs. The court appreciates that the plaintiff's solicitor has given the necessary undertaking, but the court is of the view that it should avoid a situation arising, whereby the defendant would be left chasing the plaintiff's solicitor personally, in the event that there was a substantial overpayment of costs by the defendant at the pre-taxation stage.

24. The court is deliberately not going to give any indication as to what instruction fee, or what brief fee, may be properly claimable, due to the fear that such indication may be referred to in the taxation hearing. It would be wrong to give any such indication without hearing substantial evidence and argument on the issues raised. Instead, the court is merely going to direct the payment of a global sum by way of payment on account. I would stress that this is merely a payment on account. It is not an indication as to what fees may ultimately be recoverable by the plaintiff. In this case, I have reached the decision that the appropriate amount that should be paid by way of payment on account is the sum of €200,000.

25. The court is also conscious of the fact that bringing a matter to taxation is essentially in the hands of the plaintiff's solicitor. As Mr. Hurley rightly pointed out, until a formal or final Bill of Costs is provided by the plaintiff's solicitor, the defendant is not in a position to refer the matter to taxation. It would be unfair to direct that the defendant should make a substantial payment on account, without there being some incentive to the plaintiff's solicitor to ensure that the matter is brought on for taxation within a reasonable period. Bearing this in mind, I give the following directions in relation to the time for making the payment on account:-

> (a) the defendant is to make a payment on account of €200,000, within 21 days from receipt by the defendant of a formal or final Bill of Costs from the plaintiff's solicitor.