THE HIGH COURT

[2017 No. 32 MCA]

BETWEEN

DEPUY DEFECTIVE HIP LITIGATION

ALTERNATIVE DISPUTE RESOLUTION

AND

JOHN FLYNN

PLAINTIFF

AND

DEPUY INERNATIONAL LIMITED AND OTHERS

AND

[2013 No. 65 P.]

[2012 No. 13064]

THE APPLICATION OF CHRISTOPHER GAFFNEY

AND

DEPUY INTERNATIONAL

JUDGMENT of Mr. Justice Cross delivered on the 5th day of May, 2017

1. Depuy International Ltd. (Depuy) are defendants in a number of High Court actions in which the plaintiffs allege damages for injuries caused by the allegedly defective implanted hips supplied by Depuy.

2. As the court was advised that there were approximately 1,000 of these cases pending, and each case would be expected to last up to six weeks, the court invited the parties to establish an Alternative Dispute Resolution (ADR) scheme in order to deal with a number of these cases.

3. After a series of motions in this Court in which various parties suggested various aspects to a scheme, the court, by order of 16th December 2015, established an ADR scheme whereby certain cases could be disposed of without hearing evidence by a panel of Evaluators selected by the Chairman of the Bar Council on the papers before them and without any determination of liability.

4. As I indicated at the time and subsequently thereto, there was little point in establishing a scheme for all of the plaintiffs if Depuy would decline any awards made in those categories. Accordingly, the scheme proposed that the applicants should lodge a form with Depuy and submit documents and records as required. After perusing those documents, Depuy would then decide if they would consent to the case coming under the scheme. Grounds for Depuy excluding a case would include that PIAB authorisation had not been obtained, the case was apparently statute barred *etc*.

5. The scheme also only applied if the implant of their product occurred in Ireland and the claimant underwent revision surgery in Ireland within ten years of the operation, but not earlier than 180 days after the operation.

6. The reason for the exclusion of claims where the hip had not been revised was that in cases where there was no revision of the hip, the allegedly defective hip could not be analysed scientifically, so it would be a matter of speculation as to whether any injuries had occurred or whether there was any alleged defect in the product.

7. The order of this Court of 16th December, 2015, established the scheme and invited the parties to use the ADR process, refused the application of Depuy to adjourn any of the proceedings currently listed for trial, but ordered, pursuant to O. 56A, r. 2(2) of the Rules that no further proceedings in the Depuy litigation be listed for hearing pending a first report approximately six months thereafter, save and except by application to this Court. The court indicated that the ADR scheme would be kept under review every six months or so.

8. In relation to the ADR scheme, the matter was put in for first review on 27th July 2016, and at that stage, there were some 609 outstanding proceedings in Ireland against Depuy in respect of their product, and in 345 of those cases, the plaintiff had undergone revision and that only in those cases could the claimant enter the process.

9. On that occasion, I stated:

> *"That the virtual blanket refusal of trial dates from me, certainly in relation to those matters that do not come within the ADR scheme should be revised*
>
> *. . .*
>
> *When the parties are ready, in the normal course of events trial dates should be available for those parties . . ."*

10. The court has kept the progress of the scheme under review at six monthly intervals. It is the intention of the court that these reviews or any ancillary inquiries be as informal as possible. It is the general intention of the court that these issues be disposed of without cost to either side. Since the first review, the court has ordered some trials to be allowed to proceed and accordingly allocated some dates after the first review in July 2016. Dates can be allocated for trial in cases that do not come within ADR scheme

or for other stated reasons subject to the court's discretion.

11. Since the establishment of the ADR scheme, a number of cases have over the period, been settled, out of the List, prior to trial and a number of cases have been listed for trial. Some of these cases have settled on the morning of the trial; others have settled after a number of days or even weeks into the trial.

12. There has only been one case which went to a final determination and that was a case that took a number of weeks in which the defendants had entered a limited defence in which they did not concede liability, but did not contest their obligation to compensate the plaintiff. In my decision in that case, I indicated that notwithstanding that concession, there seemed to have been no significant limitation in the time the case took for hearing.

13. From the foregoing, it is clear that there has been no judicial determination in this jurisdiction as to the liability of Depuy in respect of their allegedly defective hips.

14. As of 20th April 2017, the solicitors on behalf of Depuy have apparently received 153 Form Bs (the necessary preliminary form to enter into the ADR scheme), so accordingly, there are nearly two hundred further cases that appear to be eligible for the ADR scheme that have not yet applied. It may be that some of the outstanding proceedings referred to earlier, which do not now qualify, will subsequently qualify for the scheme. But to date, it has to be said, notwithstanding the submissions on behalf of Depuy, that the progress has been lamentably slow.

15. The slowness of the scheme has been pointed out by the Chair of the panel of adjudicators in correspondence with the parties.

16. Of the 153 Form Bs received, 97 have been endorsed from a total of 48 different firms; 16 of the claims have been deemed ineligible and a total of 14 evaluations have been made, all of which have been accepted by Depuy, 10 of which have been accepted by the plaintiffs, two of which rejected by the plaintiffs and two accepted by Depuy, but a decision on behalf of the plaintiff is awaited, and a further 11 of the cases submitted to ADR have been settled during the process but prior to evaluation.

17. Of the 16 claims that Depuy have deemed to be ineligible, they refused to admit them into the scheme on the basis that they do not qualify due to factors such as lack of PIAB authorisation or that the revision was due to allegedly an unrelated infection or that they were unrevised or revised less than 180 days prior to surgery *etc*.

18. In a number of applications before the court since the first report in July 2016, counsel on behalf of the various applicants has complained of excessive and unnecessary requirements by Depuy for medial records and paperwork, and counsel on behalf of Depuy has complained about solicitors for the applicants not having their paperwork ready.

19. As I commented in the course of the motions before me in this matter, it is not my function at this point to adjudicate on fault between the parties, sufficient to say the ADR scheme has not worked with the ease and efficiency that I had anticipated.

20. In this regard, these applications were made on 25th April 2017 by a number of solicitors in respect of the scheme.

21. The first application was made on behalf of Malcomson Law Solicitors in the case of *John Flynn v. Depuy & Ors.*, but the submissions were made also on behalf of all the clients of Malcomson Law Solicitors, who qualify for the ADR scheme. This application was supported by counsel on behalf of Ernest Cantillon Solicitors who also have a number of clients.

22. I will deal with this application secondly.

23. An application was also made on behalf of Peter McDonald & Company Solicitors who have also a number of clients and their application was for:

> *"An order admitting to the ADR process the 232 High Court cases which are in being on behalf of plaintiffs who have not as yet undergone revision surgery...*
>
> *An order providing for the increase of payments on account in accepted ADR valuations to €75,000."*

24. In relation to claimants who have not had revision, I am sympathetic to the view that an ADR process would be reasonable in the circumstances. However, in my decision in December 2015 establishing the ADR scheme, I referred to the decision of Gilligan J. in *Atlantic Shellfish v. Cork County Council* [2015] IEHC 570 and in the Court of Appeal [2015] 2 I.R. 575, where there was no consent of one party to enter into such a scheme. The effect of extending the scheme to cases of unrevised hips would be that any determination by the assessors would be rejected by Depuy and another layer of litigation would have been added to no reasonable result. The same reasoning seems to have applied also in the Court of Appeal's decision in *Ryan v. Wells Construction* [2015] 2 I.R. 558.

25. While I have indicated my support for the view that such cases might be the subject of an ADR scheme, I note and also understand the objections of Depuy that as some 3,000 revisions of hips have been undertaken using this product in Ireland, that to open the unrevised hips to an ADR scheme would be to give an open door to every person to make a claim and presumably get some compensation.

26. In individual cases, naturally, Depuy will have to make an informed decision as to whether they are going to litigate a particular person's unrevised case for a number of weeks in this Court when such cases presumably would attract modest damages, but given their length and also the experience that this Court has in dealing with such claims, would also presumably be entirely inappropriate to be dealt with in the Circuit Court.

27. I also note that there are number of cases, including that of Dr. John Flynn, the plaintiff in the Malcomson Law application, in which a claimant has had two hip replacements, one of which has resulted in a revision and the other, though possibly causing some pain, has not yet been revised. In such cases, it might seem, from a common sense point of view, that if one hip required revision due to alleged defects and the other hip was causing pain but had not yet been revised, that the same cause for the pain might well exist in the second hip. In the absence in such cases of agreement from Depuy to have both hips determined in the ADR scheme, I believe that they would have an almost unanswerable case for a hearing in this Court in respect of both of their hips rather than, as is suggested by Depuy, that they should proceed to the ADR in respect of the revised hip and then proceed to claim damages in this Court in respect of the unrevised hip.

28. In accordance with my previous reliance on the *Atlantic Shellfish* principle that while a court may order ADR without agreement that in a case such as this, there is nothing to be gained by forcing Depuy to accept the case proceeding to ADR in the knowledge that they would then reject all the awards. Accordingly, I reject the application to extend the scheme on revised hips.

29. In relation to the application to increase the payment on account to €75,000, during the course of the scheme, Depuy, in order to make the same attractive for applicants and their advisers, agreed to pay €25,000 on account for costs once a evaluation had been made and accepted. Mr. McDonnell sought to have the court order that this payment on account being increased to €75,000.

30. On behalf of Depuy, Mr. Hurly, Solicitor, in his affidavit indicated that in his view, the total cost of an ADR evaluation would be significantly less than €75,000 and absent any orders in relation to taxation, I am not in a position myself to make a judgment on same and am not disposed to alter the sum of €25,000 which Depuy have agreed to pay by way of an interim payment in relation to costs to €75,000. Accordingly, the applications of Mr. McDonald should fail and be dismissed.

The Application of Malcomson Law Solicitors
31. By way of notice of motion in the case of *John Flynn v. Depuy & Ors,* Malcomson Law, his solicitors sought to amend the scheme in a number of ways as suggested by Mr. Bradley, Solicitor, in correspondence with Depuy but on receipt of the replying affidavits on behalf of Depuy sworn by Mr. Hurly, Solicitor, Mr. Gordon, S.C., on behalf of Malcomson Law, agreed absent the consent of Depuy to the amendments of the scheme as sought not to proceed with that aspect of his claim.

32. He did, however, proceed to apply for an order:-

> *"Pursuant to O. 56A, r. 2(2) of the Rules of the Superior Courts withdrawing the approval of this Honourable Court in respect of the Alternative Dispute Resolution process scheme which was approved by this Honourable Court by order of 16th December, 2015, in the case of Christopher Gaffney v. Depuy International Limited [2012 No. 13064 P.]…"*

33. The application by Mr. Gordon was, in effect, that the court should withdraw the support of the court for the ADR scheme, remove the requirement that cases that came within the scheme not to be processed unless by way of application to the court and secondly, that I should indicate that the provision in r. 1(b) of O. 99 of the Rules as inserted by O. 56A, r. 4 be deemed not to apply to the Depuy cases. This rule as inserted provided that a court when considering the awarding of costs might have regard to the refusal or failure without good reason of any party to participate in any ADR process.

34. Mr. Gordon's submission essentially was that the ADR scheme had failed and that the consent of his solicitor, Mr. Bradley on behalf of his various clients including John Flynn had been withdrawn. Mr. Gordon submitted that O. 56 which refers to the mediation:-

> *"is based entirely on the premise of a consensual process between the parties and it means consent by both sides. Mr. Howard will not consent to changing his scheme, he is perfectly entitled not to. My clients are perfectly entitled not to enter the scheme, they are perfectly entitled not to. The only circumstances in which the court might restrain the progress of a case is to facilitate the engagement of the parties with a view to finding agreement and indeed having ,if necessary, discussions about the ADR. But I say as a matter of law, neither O. 56, nor the inherent jurisdiction of the court, allow the court to confer on a temporary restraint on the progress of cases a de facto status of being an injunction against proceedings."*

35. Mr. Gordon went on to submit that the court did not have jurisdiction other than on a temporary basis to restrain people from proceeding with their cases. Mr. Gordon submitted that that temporary basis had expired since July 2016, the date of the first review of the scheme by the court, and the result is that "unwittingly", the court has now brought in a element of compulsion and that compulsion has nothing to do with Order 56.

36. Order 56A defines an ADR process as "*mediation, conciliation or other dispute resolution process approved by the court but does not include arbitration".*

37. In O. 56A(2), it provides:-

> *"(1) The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and—*
>
> *(i) invite the parties to use an ADR process to settle or determine the proceedings or issue, or*
>
> *(ii) where the parties consent, refer the proceedings or issue to such process…"*

38. The order made by the court was pursuant to O. 56A(2)(1)(i) i.e. an invitation to the parties to use the particular ADR process and I further directed that no further proceedings in the litigation be listed for hearing pending the first report save by application to the court but I declined to adjourn any of the proceedings then listed for trial.

39. In learned submissions of over nine thousand words, Depuy made six objections to the application. It is clear that some of the submissions were not pressed upon the court my Mr. Howard, S.C., but I must deal with them in turn:-

> (a) It was first submitted that in the absence of clear provision once a final order had been made, the jurisdiction of the High Court as to matters determined by that order is exhausted save possibly to the extent that a subsidiary or supplementary order may be made subsequently by consent and the appropriate remedy is an appeal.
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> While it is fair to say that subsequent to an observation about that ground the court made to Mr. Gordon on behalf of the applicants, Mr. Howard did not press this point, I determine that this ground is to misunderstand the nature of the order made which was an order in relation to all the proceedings setting up a ADR scheme in order to provide a quick and more informal access to justice for those coming within its remit and also in order to free up valuable court time for other litigants including other Depuy hip claimants. The order made in December 2015, in no way represented a final determination about any matters and the court kept a review of the process every six months or so with a view to seeing how the ADR scheme progressed. I, therefore, reject this submission.
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> (b) That the notice of motion taken on behalf of the applicant was not the process provided for in the ADR scheme, in relation to the review every six months. It is correct that the listing of the scheme approximately every six months is

principally to observe the progress of the scheme but parties are in no way prevented from by way of motion or more informal submissions making suggestions for any changes to the scheme including its abolition. I accordingly reject this submission.

(c) It was submitted by Depuy that the application described as being to amend the process is, in truth an application to set aside the previous determination of the court approving the ADR process and that my original order has not been appealed.

I accept the proposition that what Mr. Gordon is now doing is, in effect, to set aside the previous determination of the court in relation to the scheme. He is making a submission that the scheme should no longer have the approval of the court due to its alleged defects and the lack of confidence his clients have in it. I do not accept that there is no jurisdiction for me to end the operation of the scheme if the scheme is, for example, acting unfairly preventing access to justice. I, accordingly, reject the Depuy submission in this regard.

(d) It was also submitted by Depuy that virtually all of the objections to the process had been previously raised and rejected by this Court. That is certainly the case in relation to matters such as the admission to the scheme of unrevised hips etc. but it does not apply to the case now being made by Mr. Gordon on behalf of Malcomson Law Solicitors. In addition, even if on previous occasions the court had on the evidence before it on that occasion declined to accept the suggestions for amendments, it does not necessary mean that the court would not in subsequent review alter its position. I, therefore, reject that submission.

(e) It was further submitted that the ADR scheme itself at clause 11 expressly provided for a process for amendment and that it would render the process entirely unworkable if it were open to the parties to ignore clause 11 and make repeated applications to the court to amend the terms of the scheme. It is correct that under clause 11 of the scheme, there was provision for application to be made to the chairman of the Evaluators for an amendment to the process to enhance its efficiency.

The number of claimants have made representations to the chairman but he was of the view that absent consent, he was not going to alter the scheme. I do not accept the contention that the provisions of clause 11 confer an exclusive jurisdiction to the chairman of the Evaluators rather they confer an additional jurisdiction and what was envisaged was that matters of procedure that fell within the experience of the valuators might be altered or improved during the course of the scheme. Certainly, the application now made on behalf of Malcomson Law by Mr. Gordon, S.C., is not one that could only be made to the chairman of the evaluators. I, therefore, reject that submission.

(f) Further and without prejudice to the above, it was submitted that the court should decline the reliefs sought on the merits of the affidavits as furnished by Depuy and the submissions of counsel. In the alternative, it was submitted that I should postpone a decision on the applications until the scheme had more time.

40. It is the latter submission that I must address. I note the attitude of Mr. Bradley which apparently is shared by Mr. Cantillon but not shared by Mr. McDonnell and other applicants.

41. I believe that part of the reason for the very disappointing nature of the scheme may well be that there is an over officious requirement in relation to records that would suit more a full trial and than a dispute resolution process, and I will keep this matter under review. However, I also note that Mr. Bradley has not processed his claims which are eligible for the scheme because he does not like it and wished for it to be expanded, *inter alia*, to include all possible claimants.

42. Accordingly, at least some of the reason for the very disappointing figures as to the numbers that have processed by the scheme must lie with a reluctance of Mr. Bradley and possibly some other solicitors to present their cases to the Evaluators.

43. Accordingly, I am not now of the view that the scheme can be said to have failed.

44. In relation to Mr. Gordon's submissions that the scheme depends upon consent, that is correct up to a point. The court did in December 2015, *invite* the parties to utilise the ADR process under Order 56A(2)(1)(i). At the same time, the court put a prohibition on cases being listed save by way of application to the court. This prohibition was in July 2016 altered to limit it only to those cases who apparently were qualified for the scheme. This prohibition is, I believe, a reasonable exercise by the court of the management of its own business. It is proportional. A plaintiff who qualifies for the scheme but does not wish to avail of it may apply to the court for a date for a trial. Without in any way fettering my discretion, I would be inclined to the view that such a plaintiff would have to have a good reason for this application. If such a plaintiff succeeded in having the matter listed for trial rather than proceed to ADR and if such a plaintiff were successful in his trial, he would, of course, have to deal with the issue in relation to costs that is provided for in the amendment to Order 99. I am not persuaded that any case which qualifies for the ADR has been demonstrated to have been delayed in any different manner or to any greater degree, that would have occurred had they applied to have a trial date being fixed in court. If in any of the cases which have not yet progressed satisfactorily but which, in principle, qualify for the ADR scheme, an application for a trial date in court were made, undoubtedly the defendants would be able to say that the cases were not ready for trial as the paperwork including medical records and discovery *etc*. had not been complied with.

45. Accordingly, I do not find that any applicant has demonstrated any real denial of right of access to the courts.

46. Secondly, given the refusal by Mr. Bradley to process his claims in the ADR scheme certainly until this motion has been determined, I do not believe that he has the best equities to be making the case that is made on his behalf. Insofar as the ADR scheme is disappointing in its productivity to date, at least part of the responsibility lies with plaintiffs and their advisers not processing the claim though I am conscious that Depuy are, in some cases, placing an obligation on claimants to produce their records that would be necessary for a trial but not necessarily required for an ADR.

47. I accept that once the scheme was established, it would take a number of months to get up and running but I would have thought that approximately one year that the scheme has been in operation would have resulted in more cases applying to join the scheme and also in particular more cases being process through it.

48. It is clear that there has been no fault among the Evaluators to the scheme and accordingly, any fault must be either over officiousness on behalf of Depuy or lack of promptness on behalf of the applicants or a combination of the two.

49. I do not accept the submission on behalf of Mr. Gordon that absent his solicitors consent now to any of his cases being entered

into it that the scheme is *ultra vires*. The scheme remains. If Mr. Bradley's clients do not want to enter into it, they can of course make application for a trial date to the court at which stage the court would want to be informed as to the reasons the scheme was not being utilised.

50. Accordingly, I will refuse the reliefs sought by Mr. Bradley. I make no decision as to the future. Should the scheme continue to operate at a slow pace especially, should that slow pace prove to be the responsibility of the scheme and Depuy's interpretation of it rather than the tardy nature of any application then I may at a future date grant similar reliefs as is sought on behalf of Mr. Bradley's clients. I do not believe that the case has yet been made out and would urge the parties both applicants and Depuy to utilise the scheme in as open a manner as possible to remember its nature and how different it is from the requirements of litigation and to hasten further determinations.

51. I also reiterate as I stated in the first review in July 2016 that any case that does not qualify for the scheme can have a trial date subject to usual criteria being ready for trial and any case such as Dr. John Flynn's in which the applicant has had both hips replaced and only one revised can apply for a trial date for a trial in respect of both hips, if Depuy continue to insist that such cases can only proceed to ADR in respect of the one revised hip.