THE HIGH COURT

[2017 No. 32 MCA.]

IN RE DEPUY INTERNATIONAL LIMITED

IN RE APPLICATION ON BEHALF OF VARIOUS PLAINTIFFS

FOR A PRACTICE DIRECTION

JUDGMENT of Mr. Justice Cross delivered on the 22nd day of February, 2017

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

2. An Alterative Dispute Resolution scheme was set up by Court Order and in respect of which a number of the plaintiffs qualified to initiate applications determined on a no fault basis but a significant number of other plaintiffs either did not come within the terms of the ADR or else chose, as was their right, to proceed in litigation in the High Court. In the ADR cases, Depuy have commendably agreed to advance the applicants €25,000 immediately as a down payment in respect of costs.

3. A number of these cases, which have proceeded to trial, have settled with a usual order of the proceedings being struck out with an order for costs to be taxed in default of agreement and to date only one case has proceeded to a final determination and in which a similar cost order was made.

4. A number of solicitors who between them represents a significant number of plaintiffs have brought motions before me to determine:-

> (i) That a Practice Direction be brought in to address the plaintiff's costs by means of a payment of the plaintiff's costs on account, within such times, as a time that may be specified by the court pursuant to O. 99, r. 5 or the inherent jurisdiction of the court.
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> (ii) An order providing for a mandatory Arbitration of Costs.

5. The initial application was on behalf of Cantillon and Company Solicitors and similar applications were brought on behalf of Peter McDonald and Associates and on behalf of Cian O'Carroll Solicitors. Some of the applicants also sought to amend the ADR scheme in different ways. It was agreed that the application to amend the scheme would not proceed and would await further consideration.

6. It was conceded by counsel for the applicants being the plaintiffs in High Court proceedings that the court did not have jurisdiction to impose a mandatory arbitration procedure in respect of costs and accordingly, the matter fell to be determined in relation to the application for a payment on account.

7. Order 99, rule 5 of the Rules of the Superior Courts provides:-

> *"(1) Subject to sub-rule (4A) of rule 1, costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and an order for the payment of costs may require the costs to be paid forthwith, notwithstanding that the proceedings have not been concluded.*
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> *(2) In awarding costs, the Court may direct—*
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> > *(a) that a sum in gross be paid in lieu of taxed costs, or*
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> > *(b) that a specified proportion of the taxed costs be paid, or*
> >
> > *(c) that the taxed costs from or up to a specified stage of the proceedings be paid.*
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> *(3) At any stage of the proceedings, the Court may require the parties to produce to the Court and exchange with one another estimates of the costs respectively incurred by them, for such period as the Court may direct, and particularised in such manner as the Court may direct."*

8. The background to this application is that there is a significant and recognised and accepted problem with the taxation of costs. There is now only one Taxing Master who not alone has responsibility for work that was previously meant to be done by two but he is also obliged to set about the new scheme for taxation that will be put in place in the future. In addition, a decision of the Court of Appeal has meant that the individual taxation takes a far longer period of time that was previously the case. In effect, the taxation system has stalled. It may be arguable that there is a failure of the state to vindicate the rights of litigants for effective access to the courts under the Constitution and such as was held to be the case in respect of the United Kingdom in the case of *Robins v. United Kingdom* [1997] ECHR 22410/93. However, that issue is not for me to determine in this application.

9. It was submitted on behalf of the applicants that Depuy, the respondent had, in effect, deliberately stalled the taxation system and taken advantage of the delays in order to delay payment. It was submitted on behalf of the respondents that the applicants were, through their solicitors, submitting grossly inflated bills. It is not my function and I do not have sufficient evidence to adjudicate that dispute one way or the other. Suffice it to say that I accept that there is a significant problem with delay in taxation of costs.

10. I also accept that this delay has a particular hardship on these plaintiffs in that the litigation in respect of defective hips is almost always fully defended by the defendants, denying liability, denying causation and alleging, *inter alia,* that the "state of the art" statutory defence applied to the hips at the time of their manufacture. I also accept that in order to counter these pleas, the plaintiffs are obliged to engage the services of a number of foreign experts and in particular that on the question of the "state of the art" defence there is apparently only one expert of world renown who is based in Australia and who before he acts for a plaintiff requires the solicitor to undertake to pay a particular fee irrespective of whether that fee might tax.

11. I also accept that without any blame on any side, it may be necessary for the plaintiffs in order to secure agreement on a figure for costs so as to be paid within a reasonable time (to recover some costs) to compromise significantly below a figure that they could reasonably expect to attain on taxation. I also accept the evidence from Mr. Cantillon in his affidavit that plaintiffs cannot always be properly advised as to what portion, if any, of a settlement or decree will have to be taken from their award in order to pay outlay that their solicitor has been forced to contract to pay in order to get the case to a hearing.

12. From a practical point of view it is, of course, the case that if costs are sought to be reduced that the defendants could choose to make concessions, limited to particular cases should they wish, in relation to not disputing for the purposes of the particular case issues such as causation or the defective nature of the hips. This is a procedure that the defendants have adopted in a number of cases without prejudice to their general denial of liability. If such procedures were regularly adopted, the costs incurred by both parties could be greatly reduced. Such tactics are, of course, entirely a matter for the defendants but I make the observation given the history of the litigation in relation to Depuy hips up to date in that all of the cases set down for hearing (and all the cases require these dates to be specially fixed) have either been compromised prior to the date or settled after a number of days or in some cases weeks of hearing. There has only been one order of costs following a final determination of a case and in that case, the defendants had agreed, in effect, not to contest liability without prejudice to their general denials.

13. Be that as it may, I accept that in the Depuy cases there is a particular hardship on plaintiffs that does not arise to the same extent in other cases including in other medical negligence cases, in that the number of experts available are few and involve great expense which has to be defrayed. As a result, of course, the plaintiff's solicitors and counsel are obliged to wait a considerable period of time, possibly a number of years, before they are reimbursed for their services. In the scheme of things, however, that difficulty is of less significance than the difficulty as outlined above that the plaintiffs have to endure of not knowing at settlement or determination how much of their award they will have to expend on contracted outlay to professional witnesses.

14. Mr. Reedy, S.C., on behalf of Mr. Cantillon urged that I issue a Practice Direction whereby after a given period following a determination, I should call the parties and hear submissions as to the costs and make an order requiring the defendants to pay forthwith a percentage of the plaintiff's bill of costs subject to undertakings on behalf of the plaintiff's solicitor to reimburse the defendants for any overpayment. In this submission, he was supported by Mr. McDonald on behalf of Peter McDonald and Company and by Mr. Treacy, S.C., on behalf of Cian O'Carroll, Solicitor. Mr. Reedy initially conceded that the court did not have jurisdiction to make an order in relation to the manner of payment of costs in respect of settlements but subsequently when Mr. Treacy submitted that the court did have this jurisdiction, Mr. Reedy resiled from his previous concession. Mr. McDonald, in effect, agreed with Mr. Reedy's submissions.

15. Mr. Treacy on behalf of Cian O'Carroll and Company, submitted that in the settlements including past settlements where the court is or has been asked to make an order for costs to be taxed in default of agreement that these settlements should result in a similar determination by the court to pay a percentage of the costs. The applicants all submit that the court has jurisdiction pursuant to the provisions of O. 99, r. 5 as referred to above to make the said orders or in the alternative should I not find that the provisions of O. 99, r. 5 give me that power that I should utilise the inherent jurisdiction of the courts in relation to the justice of the case in order to ensure, in effect, that the intention of court orders is not frustrated.

16. In this regard, reliance is placed upon the decision of Kelly J. (as he was) in the Commercial Division of the High Court in *McCambridge Limited v. Joseph Brennan Bakeries* [2013] IEHC 569, and the decision of Geoghegan J. in *Dome Telecom v. Eircom* [2007] IESC 59. Geoghegan J. dealing with the issue of discovery stated:-

> *"The Rules of Court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was a rule applicable, the court is not necessarily hidebound by it."*

17. This passage was quoted with approval by Kelly J. in *McCambridge Limited* case.

18. On behalf of the respondent, Ms. McCrann, S.C., submitted firstly that there was no jurisdiction to make a split cost order which obliged the part payment of a proportion of the costs and that the provisions of O. 99, r. 5 do not envisage such an order. In relation to O. 99, r. 5(1), Ms. McCrann submitted that the power for payment of costs "forthwith" was subject to the qualification of notwithstanding "that the proceedings are not being concluded". She submitted that none of the provisions of r. 5(2) applied in that they relate to powers of the court to direct a portion of the costs only be paid on specific issues and that the provisions of r. 5(3) referred, in essence, to the provisions of r. 5(2) and not to the generality of Order 99, rule 5.

19. Ms. McCrann further submitted that if, which was disputed, there was power under O. 99, r. 5 to make any "split order" that this must be specific to the particular cases and could not be done on a general basis. The provisions of O. 99, she submitted are clearly referable to particular cases and that it would be entirely inappropriate for a court in advance to make a determination as to prior payment of costs which was not specific to the case.

20. In relation to the issue of "inherent jurisdiction", Ms. McCrann further submitted that as the provisions of O. 99, were a comprehensive code dealing with costs as established by the legislature that it was not appropriate for the court to second guess the legislature and in effect legislate by itself, by in effect inventing an "inherent jurisdiction". In this regard, Ms. McCrann submitted a number of authorities, first of all the case *of GMcG v. DW (No. 2) (Joinder of the Attorney General)* [2000] 4 I.R. 1 at pp. 26 – 27 when Murray J. (as he was) stated:-

> *"The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express.*
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> *…*
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> *Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."*

21. Ms. McCrann also relied on the decision of Clarke J. in *Mavior v. Zerko Limited* [2013] 1 IESC 15 in which Clarke J. quoted with approval the extract referred above from Murray J. in *GMcG v. DW (No.2)* and went on to state:-

> *"It seems to me that what Murray J. cautioned against in the passages cited was the creation of parallel jurisdictions, for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction. As Murray J. pointed out, to attempt to invoke an inherent jurisdiction of the courts so as to go beyond delineation specified, in a constitutionally permissible way, in a statute, would be for the courts to trespass on the legislative role of the Oireachtas. If, in a constitutionally permissible way, the Oireachtas have defined the limits of a particular jurisdiction then it is not for the courts to extend those limits by invoking a vague 'inherent jurisdiction'."*

22. Clarke J. went on to state:-

> *"4.6 In such cases, where the scope of a particular jurisdiction is regulated in part by the rules and in part by case law under the rules, it seems to me that the real question which the court should ask itself in a case such as this is as to whether any proposed evolution of the interpretation of the scope of the power amounts to a permissible and legitimate exercise of the courts proper interpretative role. If so then the scope of the power regulated by the rule may be reinterpreted. If not then a rule change or, in some cases, legislation will be required. It is not appropriate that such issues be addressed by the creation of a parallel 'inherent jurisdiction'. What would the point be of an elaborate analysis of the circumstances in which an order of the type under consideration in this case could be made under the rules if it were possible to by-pass the rules and the existing case law altogether by invoking a separate inherent jurisdiction…."*

23. Ms. McCrann further submitted that if there was any jurisdiction to grant the split order in the cases of determinations or judgments that there is absolutely no jurisdiction to make any such order where the parties have settled their case.

Determination

24. I believe that the express wording of O. 99, r. 5 is sufficient to allow the courts make a costs order, after the determination of a case, to direct parties to pay a portion of costs prior to their taxation subject to guarantees as to fairness.

25. Order 99, rule 5(1) empowers the court to "at any stage of the proceedings or after the conclusion of proceedings" to deal with the costs. The order specifically gives the court power to "deal" with the costs and goes on to empower an order requiring the payment of costs to be made "forthwith". I do not find that the words "notwithstanding that the proceedings have been concluded" as being any limitation on such a order for immediate payment to proceedings that have not been not concluded but rather the power of the court to make such a costs order includes those cases in which proceedings have not been concluded.

26. I do not find that the provisions of O. 99, r. 5(2) are relevant to the issue and I accept Ms. McCrann's submissions in this regard.

27. I do not find (as was submitted on behalf of the respondent) that O. 99, r. 5(3) which empowers the court to require the parties to exchange with one another estimates of the costs incurred for such period as the court may direct to be referable its powers under to O. 99, r. 5(2) only. If it were only referable to O. 99, r. 5(2) then r. 5(3) would have been included as part of r. 5(2) but it is a standalone section and refers both to rule 5(1) and (2).

28. Accordingly, I find that there is a direct power under O. 99, r. 5 to make an order at any stage, on a case by case basis, in the proceedings directing that a party pay a portion of the costs prior to taxation. I am aware that the High Court in other divisions has exercised this power. I accept that any order must be on a case by case basis. I find that to make a "generic" order for all cases prior to their determination could not be justified.

29. I have come to the conclusion that the provisions of O. 99, r. 5 cannot in themselves be utilised for a court to impose extra terms on a settlement that has been agreed between the parties. Order 99, rule 5 relates to the powers of the court to make costs orders in matters that the court has determined.

30. The only other matters to be considered whether I may under the alleged "inherent jurisdiction" make an order in respect of settlements. I accept the fact that the rules as to costs under O. 99 are a comprehensive statement as to the rules for cost. I also accept the reservations in relation to the concept of "inherent jurisdiction" expressed by Murray J. in *GMcG v. DW* (No. 2) and by Clarke J. in *Mavior v. Zerko Limited* [2013] 1 IESC 15. The "inherent jurisdiction" of the court is not to be confused with a right to change the law at whim. It is only when what was described by Murray J. as a "fundamental principle of constitutional stature" is invoked that would require judicial expansion of rules in order to achieve constitutional justice.

31. I accept, without deciding the issue, that there may be possible circumstances arising in which the power of the courts might be invoked in relation to settlements and the costs order but the circumstances justifying such an invocation would have to be extreme and the wrongs visited to the litigants under the present scheme would have to be such as to result in a specific denial of a constitutional right so as to possibly invoke the "inherent jurisdiction" of the court. I do not find that the affidavits of the applicants approach such a situation.

32. The situation as envisaged by Kelly J. in *McCambridge (*above) or Geoghegan J. in *Dome Telecom* (above) are not applicable in this case for to invoke the "inherent jurisdiction". To add terms in relation to costs to a case which settles would be to give the court a role as a legislature and that is fundamentally in breach of the separation of powers.

33. Certainly, it would be entirely inappropriate for a court to retrospectively impose terms unilaterally on the cases that have settled in the past. Parties may make any agreement in relation to costs in respect of a settlement. The parties may agree a specific sum for costs, they may agree there are no costs.

34. I am invited to issue a Practice Direction. I am not particularly fond of Practice Directions and I will decline to make one but pursuant to the applicant's motions I state that in each Depuy case that proceeds to a determination where there is an order for costs, I intend to direct both sides to present in short form:-

(a) the total amount of the costs that they submit should be paid in the case;

(b) the total amount of the outlay necessarily committed by the plaintiff's solicitors in respect of witnesses and the like;

(c) that the case be listed for mention approximately three weeks after the judgment to decide on an outstanding issue as to costs;

(d) the parties should make submissions for the adjourned date as to what amount, if any, should be awarded on an *ex gratia* basis on the plaintiffs solicitors undertaking that should the amount to be paid, be in excess of the total allowed on taxation or by agreement that the excess is to be repaid;

(e) that the plaintiff's side furnish their proposed total two weeks prior to the case being listed for mention and the defendants one week thereafter;

(f) I do not intend the submissions to be of any length, a few lines should suffice and they would be heard generally after the call over and before the first case on the list for the day is heard. I will then determine what sum, if any, should be paid to the plaintiff's solicitors on a *ex gratia* basis subject to the undertakings referred to above;

(g) the amount of the sum will vary on a case by case basis. I do not envisage the ordering of a percentage of the plaintiff's bill but rather a fixed sum to effect the same purpose as the €25,000 *ex gratia* payment for costs which the defendants have commendably agreed to pay in respect of advanced costs for those cases in the ADR system. The sum directed will depend upon the issues in the case and the costs incurred and is likely to be greater than the *ex gratia* payment in ADR but would not be a sum approaching 80% or the like of the costs claimed by the applicants. The sum directed would be a lump sum to ensure the avoidance of the hardship as outlined by the applicant's affidavits; and

(h) an undertaking would be required from the solicitor for the plaintiffs to repay a sum to the defendant's solicitors over and above that sum finally allowed on taxation or by agreement but I do not envisage directing part payment of any sum that would be likely to be approaching the final taxation figure.

35. I appreciate that of the cases taken by plaintiffs against Depuy, only one has proceeded to judgment and that was a case in which the issues were limited and the defendants were not contesting liability. Accordingly, had my determination as set out at para. 34 above been in place, it would have applied to only one of the cases so far. I am also conscious of the fact that there is a possible adverse consequence as a result of my determination on the incentive to settle cases. The settlement of cases will not carry such order for payment on account. This imbalance could, of course, be met by Depuy voluntarily agreeing to make *ex gratia* payment towards costs in settled cases, but that, of course, is a matter for the parties alone.

36. Should the applicants, or any other applicant, subsequently demonstrate that constitutional issues as referred to by Murray J. above were engaged which could only be met by an order in relation to settlements then, of course, that issue can be revisited. To date, however, I accept there is hardship on plaintiffs and their advisers resulting from the situation in relation to costs, I do not find that they have demonstrated that constitutional rights can only be vindicated by the court, in effect, imposing a cost regime in respect of settlements that had been voluntarily agreed between the parties and their legal representatives.

37. It follows that I will refuse the applicants the relief they sought in the motions before me.