[2019] IEHC 922

THE HIGH COURT

[2019 No. 84 MCA]

**IN THE MATTER OF THE DEPUY ADR PROCESS
AND IN THE MATTER OF AN ORDER MADE ON THE 16TH DECEMBER, 2015, IN THE CASE OF CHRISTOPER GAFFNEY V DEPUY INTERNATIONAL LIMITED
AND IN THE MATTER OF AN APPLICATION BY MALCOMSON & LAW SOLICITORS ON BEHALF OF NAMED CLIENTS**

JUDGMENT of Mr. Justice Cross delivered on the 20th day of December, 2019

Background

1. As of December 2014 there were over 1,000 anticipated cases involving claims for damages as a result of the allegedly defective ASR, replacement hips which were manufactured by DePuy International Limited (DePuy). By order dated 16th December, 2015, this Court established an alternative dispute resolution (ADR) process to deal with claims in relation to these allegedly defective hips from certain qualifying claimants.

2. The scheme was finalised after a number of applications with parties suggesting alternative wordings to the scheme and was revised on a number of occasions. The applicants' solicitors, Malcomson & Law, were one of the main objectors to certain terms in the scheme as finally adopted. The scheme was approved by the Court on 16th December, 2015.

3. The scheme provided for resolution without attribution of liability and awarding of damages by a panel of barristers and retired judges who would assess damages based upon paper records in respect of claimants who had the ASR Product inserted in Ireland and underwent revision surgery within 10 years of the initial hip replacement and not earlier than 180 days after it. The scheme reserved the right for DePuy not to agree to a claimant entering the ADR scheme if certain issues arose eg. if the claim was potential statute barred or the claimant had not obtained injuries board authorisation or certain other matters.

The ADR scheme ("the scheme")

4. The scheme required that DePuy's solicitors (McCann Fitzgerald) to produce a report every six months or such lesser period as might be fixed by the Court and copy all known claimants' solicitors with the details of the progress of the claim.

5. Clause 3.1 of the scheme provided:

> *"A claim qualifies to enter the process:*
>
> *(a) The index operation implanting the ASR Product in the patient occurred in Ireland and*
>
> *(b) The claimant underwent revision surgery in Ireland within 10 years of the index operation but not earlier than 180 days after the index operation."*

6. Clause 3.2 provided that DePuy did not agree to a claim entering the process if in their opinion the claim was statute barred, injuries board authorisation had not been obtained or the claim related exclusively to various matters and further if the claim was not sufficiently pleaded or particularised or if sufficient medical records or other details had not been given to McCann Fitzgerald.

7. Clause 5.1 of the scheme provided:

> *"For the purpose of the process:*
>
> *(a) The claimant will not be required to establish that the ASR Product supplied to him or her was defective within the meaning EC Product Liability Directive (the Directive) or that DePuy was negligent provided the claimant proves that the ASR Product early revision by reason it being an ASR Product.*
>
> *(b) DePuy will not raise any of the defences otherwise available to it under Article 7 of the Directive and*
>
> *(c) DePuy will not raise any defence as to causation based upon surgical technique or error causing or contributing to the early failure of the ASR Product and the Evaluator shall evaluate damages and costs on the assumption that the surgical technique or error did not cause or contribute to the early failure of the ASR Product."*

8. Clause 5.4 provided that:

> *"A claimant may avail of the process by completing a standard short form with essential details of the claim (which shall be entitled 'Form B', the form of which is scheduled here to) and by his or her solicitor submitting that to McCann Fitzgerald (reference DFH)."*

9. Clause 5.5 provided:

> *"Where DePuy's advisers are of the opinion that they have sufficient information including sufficient copy medical and surgical records, to form a view as to whether the claim meets the eligibility criteria of the process and to form a view about the validity and the value of the claim McCann Fitzgerald will endorse Form B at the place indicated at the bottom of the form and return the form to the claimants' solicitors."*

10. Clause 5.7 provides:

> "The claimants' solicitors may also send to the Evaluator any other documents which they consider are relevant to the Evaluation. Such documents may include:
>
> *(a) A condition and prognosis report dealing also with causation where relevant;*
>
> *(b) A concise witness statement from the claimant, if desired; and*

(c) Concise written submissions."

11. Clause 5.12 provided:

> *"DePuy envisages that in cases involving uncomplicated revision surgery it will rarely be necessary for it to obtain expert reports for submission to the Evaluator but it may do so if so advised."*

12. Clause 9 provided:

> *"Following the submission of a completed Form B by the claimants' solicitors to McCann Fitzgerald the claimant and DePuy shall not take any active steps (including the making or increase of a lodgement by DePuy) in existing proceedings concerning the claim, or shall not issue new proceedings regards an ASR Product before an evaluation has been issued by the Evaluator and the Evaluation has lapsed pursuant to clause 8.1."*

13. At the time the ADR process was initiated claims against DePuy were being Specially Fixed in the High Court at two per week in 2016. Such was the progress of the scheme and of parallel settlement negotiations that while 71 cases were listed for trial in 2016, only 5 cases were listed for trial in 2019. Accordingly, it can be seen that a combination of the operation of the scheme and the parties willingly negotiating settlements, the substantial majority of these claims are already disposed of.

14. There has only been one judicial determination in relation to liability since the establishment of the scheme. Rather than swamping the Courts with up to 80 cases a year which could each take a number of weeks and involve a significant number of expert witnesses some of whom would have to travel from out of the jurisdiction, the scheme has worked to dispose of the cases economically in conjunction with DePuy, through their solicitors negotiating with other claimants.

15. I accept the evidence in the affidavit of Mr. David Hurley, solicitor on behalf of DePuy that of the 1,125 proceedings issued at the date of swearing of the affidavit in April 2019 revision surgeries to remove the ASR Products have occurred in 904 of these claims and 221 cases revisions are not being performed and accordingly these 221 would not qualify under the ADR scheme. I note that the vast majority of these 221 claims have not progressed beyond the service of an initiating writ. Presumably the plaintiffs and their legal advisors are waiting to see how their physical situation develops and whether they have a realistic prospect of success in litigation.

16. Of the 904 claims a total of 602 were resolved by April 2019 and the Court is aware from subsequent applications over the months and weeks after April 2019 that a number of other cases have been resolved in the meantime. During the six monthly review of the process of the scheme held on 13th December, 2019, a total of 645 cases were reported as being resolved. There were a total of 485 claimants left, 282 of these only relate to revised hips, eligible for the scheme and of these revised hips 92 cases were within the

ADR scheme and the considerable majority of these cases left in the scheme are those of Malcomson & Law, the solicitors for the applicants herein.

17. When establishing the scheme and subsequently this Court has made it clear that there is no point in establish an ADR scheme which allowed applicants bring claims before the ADR process which DePuy would refuse to accept. DePuy state that they do not accept that cases, in which there has been no revision surgery, are not suitable for ADR process as without a revision, they claim it is not possible to know why a hip has failed if it has failed. Similarly, if they had other defences (such as the statute limitation or failure to apply to the Personal Injuries Board) it would be pointless to establish a scheme resulting in an award which would then not be accepted by DePuy. Of course either side under the scheme can reject any award under the scheme and proceed to the Court.

18. In an application brought in the case of *Flynn v. DePuy International Limited & Ors*. [2017] IEHC 267, by the same solicitor as the within application (referred to as "*Flynn*") to revise the terms of the ADR scheme I indicated that as well as a review of every six months or so of the general operation of the scheme it was open to parties to apply to me to revise the scheme should they deem same necessary.

19. At the time of the *Flynn* case I expressed disappointment as to the speed of resolution of claims. That is no longer the case.

This application

20. This an application brought by Mr. Raymond Bradley solicitor, of Malcomson & Law, the solicitors on record for a number of plaintiffs bringing actions against DePuy including those listed in schedule one and two of the notice of motion. The application seeks:

> *"(i) Directions in relation to the entitlement of DePuy to put causation an issue in cases listed in schedule one of a notice of a motion dated the 28th of February 2019;*
>
> *(ii) Directions in relation to the entitlement of DePuy to require additional medical records and/or medical examinations in the case listed in schedule two of the motion;*
>
> *(iii) An order amending the ADR process referred to in the said motion by the deletion of clause 9 from the process; or*
>
> *(iv) Alternatively an order permitting the plaintiff in the proceedings listed in schedules one and two to prosecute their claims before the Court."*

21. The application was grounded on an affidavit of Raymond Bradley, solicitor, as well as further affidavits from the claimants listed in schedules one and two, James Boylan, Katherine Claffey, Martin Coady, Angela Dermody, Frank Gallagher and Michael Gilfoyle. These claimants stated that they withdrew their consent from operating the scheme as presently constituted. It should be noted that it has transpired that Mr. Coady, one of the plaintiffs specified in the schedule, has not yet had his Form B endorsed to enter the scheme so is not in fact part of it.

22. On behalf of the respondents there was a replying affidavit from Mr. David Hurley, solicitor of McCann Fitzgerald, which was responded to further affidavit on behalf of Mr. Raymond Bradley and two of the claimants to which a further response was given by Mr. Hurley.

The applicant's case

23. I heard the learned submissions of counsel for the applicants which honed in on some of the written submissions.

24. The directions that the applicants seek that evaluation of their cases within the scheme should only occur (i) "with a clear withdrawal by DePuy of causation issues purported to be advanced, (ii) without any further request for medical examination on behalf DePuy and (iii) without any further request for medical records be made on behalf of DePuy. The scheme was entered into to provide monetary awards to those entitled to enter and not to engage in issues of causation.

25. It is clear from clause 3.1 that "*early revision*" in clause 5.1 means a revision within 10 years of the operation but not earlier than a 180 days. The applicant submits that in any of the cases in which they have queried causation DePuy have not notified any possible alternative causes for early revision and further that after receipt of further medical reports DePuy did not alter their position in relation to causation.

26. The applicant relies upon clause 5.5 of the scheme to submit that once DePuy's solicitors are of the opinion that they have sufficient information including information as to the validity and value of the claim that they will endorse Form B and from then on there should be question of causation.

27. Clause 5.12 of the scheme provides "*DePuy envisages that in cases involving uncomplicated revision surgery it will rarely be necessary for it to obtain expert reports for submission to the evaluator but may do so if so advised*." The applicants object to the extent of which some of them have been obliged to furnish "*extensive*" medical reports and that the insistence of DePuy for disclosure without any temporal limit of "*all records relating to non-hip issues"* in certain cases is claimed to be severely prejudicial.

28. The applicants concede that DePuy are entitled to exclude claims where they are of the opinion that a plaintiff has not provided sufficient medical records however the applicants state that DePuy are insisting on persons who are admitted to the scheme provide what they describe as additional and unnecessary medical records in detail which they find oppressive.

29. The applicant further seeks that clause 9 of the agreement be amended or in the alternative that an order be made that each of the applicants referred to in the schedule be entitled to proceed to litigate in Court.

30. The applicants object to the prohibition in clause 9 on them prosecuting their claims through the pleadings and interlocutory applications while the ADR scheme process is in

place. In this regards the applicants state in their affidavits that they have withdrawn their consent to participate in the scheme having originally entered into it.

31. The scheme does not make any express provision for a plaintiff to withdraw from the scheme after they have submitted a completed Form B. Under clause 12 however DePuy are given an entitlement to "*terminate this process"* (ie the entire scheme) giving 45 days-notice in writing to the Court and to evaluators and to the solicitors for the claimant. The applicants contend that this power given to DePuy under clause 12 by implication must be replicated by a similar power on applicants to withdraw from the scheme at will.

32. The applicants firstly say that they are entitled, as a general right, to withdraw from the scheme once their consent has been withdrawn and if there is not a general right to do so they claim that the Court should exercise its discretion to permit the cases to proceed in Court. The applicants rely upon the affidavits sworn in *Flynn* (above) by Mr. O'Shaughnessy of Johnson & Johnson on behalf of DePuy in which DePuy accepts *"that any decision to participate in the ADR process must be a voluntary one so in the event that having considered the matter a plaintiff decides not to participate in the ADR process such a plaintiff can then apply to the court to set aside the adjournment order."*

33. The applicant further submits that in the event of the Court deciding that it does not have the jurisdiction or will not allow the applicants to withdraw from the scheme that clause 9 should be amended either by its deletion or by making provision for the plaintiff to withdraw from the scheme so that the stay on proceedings is clarified as continuing only for so long as a plaintiff is continuing to consent to remain in the scheme.

34. It is further contended that in the absence of the applicants' consent there can be no question that the scheme could ever vindicate their constitutional rights and rely upon the decision in *Grant v. Roche Products (Ireland) Ltd. & Ors*. [2008] 4 IR p. 679.

35. The applicants also rely upon *Ryan v. Walls* [2015] 2 IR p. 558 to support the contention that the ADR process requires consent and *Talbot v. Hermitage Golf Club & Ors.* [2014] IESC 57 in relation to the right of their claimants to access to the courts established by the constitution.

36. Counsel for the applicants submit that they have lost confidence in the scheme for good reason and even if it were not for good reason the fact that they have lost confidence is sufficient to allow them to withdraw from it. Counsel further submits that any personality disputes between the solicitor for his clients and for the respondent should not be visited upon their clients and that his clients are in effect now in "*no man's land*" and the respondents are forcing them against their will to maintain their presence in the scheme and to deprive them of their right for a day in court.

The respondents' case

37. The respondents' written submissions were amplified by oral submissions of learned counsel.

38. The respondents state that the firm of Malcomson & Law has the second highest number of claimants but whereas the firm with the highest number of claimants has resolved 72% of its cases and the six other firms with the highest number of claimants have resolved between 92% and 55% that at the time of swearing of Mr. Hurley's affidavit in April 2019 Malcomson & Law had only resolved one of their claims or 0.09%. Malcomson & Law have declined to allow the applicants to be medical examined and declined to furnish records/reports as requested and therefore they submit are responsible for their clients' cases not being processed. Not alone have Malcomson & Law not processed their claims in the scheme but they have not cooperated when suggestions of negotiations were raised, and in effect the applicants have not acted *bona fide*. It is contended on behalf of the respondents that the applicants' solicitors are not engaging with the scheme or indeed engaging with the DePuy solicitors as they have declined to engage in negotiations in their cases.

39. It is submitted that none of the applicants can distance themselves from in this application from the acts or inactions of their solicitor.

40. Of the 1,125 proceedings served on DePuy, revision surgery occurred in 904 claims meaning (subject to other criteria) most of these were eligible for the process and of the 904 claims 602 had been resolved by the time of the respondent's affidavits in April 2019. In fact, 645 of the proceedings have been settled or determined by the time of the last review of the process on 13th December, 2019. It should be pointed out that the solicitors for DePuy have received by April 2019 247 applications for the ADR process and 95 claims remain and 60 of the 95 are those in which Malcomson & Law are the solicitors.

41. A majority of the claims have been disposed of not through the ADR scheme but in parallel with it either by the negotiation of claims before they go into the scheme or by the settlement of the claims that are still within the scheme.

42. It is submitted on behalf of the defendant that neither the ADR process nor its administration cause any undue delay in the resolution of claims and that if an evaluation is rejected that a claimant can avail of their constitutional rights access to the Court. In relation to those claims that were processed in the scheme the average length of time from when Form B was endorsed by McCann Fitzgerald on behalf of DePuy (and therefore the case could proceed to the evaluator) and the receipt of an evaluation was six months, though it is conceded that this length of time can vary significantly and is dependent upon whether the claimant or DePuy obtain further expert reports after Form B was submitted and to the extent of submissions required etc.

43. It is further contended that the ADR process is cost efficient as claimants do not need to expend as much cost under the scheme as full litigation in the courts.

44. Mr. Hurley on behalf of the DePuy stated that there are a further 204 claims in which the claimants have undergone surgery but have yet not applied for the process but he believed that at least 50 of these claims would not be eligible as either the revision was

due to infection or occurred over 10 years after the surgery or did not obtain injury board at authorisation or was statute barred all of which claims are excluded from the scheme.

45. The respondent submits that the applications for "*Directions*" are seeking in substance to amend the terms of the process and that this is clear by the demand by the applicant that the evaluation should only occur when there was a withdrawal by DePuy of any causation issue and that there were no further requests for medical examinations.

46. The respondent contends that the assertion that because the applicants purport to withdraw their consent that they are automatically entitled to prosecute their cases is an argument that was considered in detail and rejected in this Court's decision in the Flynn application (above). It is submitted by DePuy that in accordance with the decision of the Court in *Flynn* that an applicant is entitled to make an application to the Court for a trial date on an individual basis but in doing so must explain to the Court why he or she is not participating in the process and provide good reason for the application and that no good reason has been supplied in the submissions or affidavits of any of the applicants as to why they should be entitled to ignore the terms of the process and utilise limited court resources in circumstances where other DePuy litigants have complied with the procedures set up by the Court and have participated.

47. It is further submitted that the provisions of clause 9 which put a stay on cases pending completion of their applications cannot be considered a disproportionate interference with the constitutional rights to litigate as individual applications can be made.

48. In relation to the applications for directions the respondents contend that clause 3 which specifies "*Claims Criteria*" does not mean that once clause 3 is satisfied that there is no basis to raise the defence of causation. They contend that clause 5.1 stands on its own and that pursuant to 5.1 a claimant must establish that the product required early revision by reason of it being an ASR Product and it provides a specific provision for a particular causation defence. The respondents contend that the submission by the applicant that clause 5.1.A should be amended to provide a provision to the effect that *"for avoidance of doubt the claimant is not required to prove that the ASR Product required early revision by reason of it being an ASR Product*." involves a complete alteration of the ADR scheme for the particular benefit of the clients of Malcomson & Law who represent 60 out of the 95 cases remaining in the scheme.

49. In relation to the complaints about excessive medical examination the respondents note that the applicant accepts DePuy is entitled to have the applicant examined by an expert but suggests that there are limits to the extent that they can do so. The respondents submit that clause 5.12 which provides "*DePuy envisages that in cases involving uncomplicated revision surgery it will rarely be necessary for it to obtain expert reports for submission to the evaluator but may do so if advised*.", clearly allows for not alone medical examination but reports from experts and that the statement that it would be "*rarely" "necessary*" to obtain expert reports is an aspiration as is clearly stated in the scheme.

50. The respondent submits that there are circumstances when it is necessary to obtain medical reports on foot of examination and in particular when there has been significant special damage advanced and the scheme specifically allows DePuy to insist upon these matters.

51. In relation to medical records the respondent submits that they are entitled to request them, they have not been overzealous and that in general only necessary records are requested but certainly if there is large special damages claim, further records are relevant. The respondent quotes that portion of the decision of the Court in Flynn which stated "*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 claims. Accordingly, at least some of the reason for the very disappointing figures as to the numbers that have been processed by the scheme must lie with the reluctance of Mr. Bradley and possibly some other solicitors to present their cases to the evaluators.*" The respondents say that that is still the case with Mr. Bradley and his clients.

52. In relation to the claim by the applicants that they have withdrawn their consent and that the manner in which the case is being processed within the scheme is such that the Court should exercise its discretion to allow all of the plaintiffs in the schedules to depart from the scheme, the respondent says that the suggestion that simply because the applicants have elected to withdraw from the process that they are entitled to prosecute their claim flies in the face of the rationale of the scheme as it provides for nonbinding monetary evaluation which can be rejected by the applicant and proceed to trial and it is submitted by the respondent that the applicants have failed to put any valid reason forward as to why they should be entitled to simply disregard the procedures and be treated differently.

53. The respondents refer to the fact that a similar application was made in the application of *Flynn* and was rejected by the Court in it decision when the Court stated

> *"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 for the Court in 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 trial. Without in any way fettling my discretion, I would be inclined to the view that such a plaintiff would have to have 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 this 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 great degree*

than would have occurred had they applied to have a trial date been fixed in the Court. If any of the cases which have not yet progressed satisfactorily but which in principle qualify for the ADR scheme an application for 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, accordingly I do not find the applicants have demonstrated any real denial of right of access to the Court. …I do not accept the submission on behalf of Mr. Gordon and absent his solicitor's 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 enter 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."

54. Further the respondent submits that the wording of the scheme is clear and in particular clause 9.1 is clear that following a submission of a completed Form B both the claimant and the DePuy shall not take any active steps in existing proceedings concerning the claim before an evaluation has been issued etc.

55. In relation to the further submission by the applicants for a trial date because of the alleged manner in which their claims were processed within the ADR scheme DePuy submits that the evidence demonstrates that any delay in processing the claims has been solely due to the unwillingness of the applicants and/or the solicitor to engage in the process, the respondents also dispute whether that the submission that clause 9 should be deleted.

56. The respondent submits that there is no evidence to suggest that involvement of the plaintiffs with ADR has caused any delay rather it is the manner in which the applicants' solicitor has declined to engage with the scheme and declined to provide records or has declined to have plaintiffs medically examined that has caused the delays to these applicants.

57. The respondents further submit that the application is not in reality to give directions as to the provisions of clause 5 or clause 9 but rather to fundamentally alter and disrupt the scheme and that to allow this application in whole or in part it would be unfair to those who have already participated in the scheme and no good reason has been demonstrated why it should be done. The applicant contends that there is absolutely no prejudice demonstrated by any of the applicants in remaining in the scheme and the applicants accept the decision of this Court in *Flynn* that any plaintiff can apply to the Court for a trial for good reason.

Decision

58. The scheme as finally approved by order of this Court on 16th October, 2016, came to finality after a number of applications to the Court in which all of the solicitors for claimants were represented and were either heard or were entitled to be heard including Mr. Bradley, who was represented and on whose behalf submissions were made as to the

nature of the scheme. It was clear to the Court that Mr. Bradley from the beginning was not enamoured by the scheme as it was approved.

59. A number of his clients however entered the scheme. In fact, Mr. Bradley's firm has the second largest number of claimants in the scheme in the country.

60. The Court is open to any amendment of the scheme if it were shown to be unworkable or causing injustice as is clear from the decision of this Court in *Flynn* (above). I find that the application has entirely failed to show any such injustice in the operation of the scheme in relation to his clients.

61. I accept the submission by the respondents that this application is an attempt not to give directions but to fundamentally alter the scheme. This alteration is of course possible provided an injustice is demonstrated or good reason is shown.

62. I accept the submissions on behalf of the respondent that any delay in Mr. Bradley's clients is entirely caused by the refusal of Mr. Bradley to engage either with the scheme or indeed in the process with DePuy. I do not enter into any possible personal dispute between the solicitors involved but the plaintiffs cannot distance themselves from the acts or inactions of their solicitor.

63. I accept the submissions from the respondent that in the *Flynn* case this Court decided that the scheme as drafted did not breach the right of access to the Courts. The *Flynn* decision was not appealed and I find that these applications are in certain respects, as submitted by the respondents, attempts to revisit the *Flynn* decision.

64. Under the scheme clause 3 provides for criteria to enter into the process and clause 5 indicates that the claimant will not be required to prove certain matters and under clause 5.1.C DePuy is not entitled to raise certain defences. It is crystal clear that DePuy under the scheme are entitled to raise issues as to causation and are entitled to seek further medical records. This right is clear from the provisions of clause 5 in that 5.5 provides that if they respondents believe that they can form a view as to the value and validity of a claim that they will endorse Form B. Clause 5.7 refers to reports dealing with condition prognosis and also causation and clearly these matters are potentially an issue in each case. It is right and just where there are multiple possible causes of a plaintiff's condition and especially where there are significant claims for special damages which may or may not be related to the revision of the hip that these issues are dealt with in the scheme.

65. I do not accept the submission of the applicant to the effect where reports as to causation are submitted that, in the absence of a written judgment by the Evaluator a plaintiff cannot be advised as to just what was or was not being compensated. The plaintiff in those circumstances is in no different from a plaintiff who was given an offer by a defendant or indeed is faced with a lodgement or tender. I accept the submissions from DePuy that they have not abused this process.

66. In order for DePuy to be satisfied that an evaluation is reasonable they as the paying party will have to be satisfied (in the absence of any Court determination) as to the reasonableness of any claims and in particular but not limited to where there are substantial claims for special damages. DePuy are entitled to seek examinations and records and reports and the provision of clause 5.12 clearly does not bind DePuy not to obtain expert reports, it is aspirational and envisages that in many cases they will not need to do so.

67. The scheme allows DePuy to put causation in issue and to seek to have records furnished to them and to have the claimants medically examined. The rationale for these requirements in the scheme is again that before DePuy are likely to be satisfied to agree to an award or payment they will have to satisfy themselves as to the reasonableness of the claim.

68. I reject the submissions in relation to the directions in relation to the claimants in schedule one in relation to the issue of causation and also reject the application for any directions in relation to additional medical records or examinations in relation to the cases in schedule two.

69. It should be pointed out of course that if these matters get to trial the extent of the records requested, the delay in getting same and the extent of examinations of the claimants will be presumably much more extensive.

70. To accede to this application would be to fundamentally alter the scheme in circumstances when over two thirds of those with claims have had them determined and a significant number have been determined within the scheme. To do this would, I believe, risk DePuy withdrawing from the scheme and would not be in the interests of justice and no reasonable case has been made out in this application.

71. In relation to the request to amend the ADR process by the deletion of clause 9 I similarly reject this application. Clause 9 does not provide for any exclusion of right of access to the Court but merely puts a stay on the proceedings once the form has been completed for inclusion into the scheme and imposes a requirement that neither party should take any active steps in the proceedings, including the making or increasing of a lodgement, or issue new proceedings before an evaluation has been issued or the evaluation has lapsed. In this regard I reiterate what I stated in the *Flynn* case (above) and also reiterate that the scheme is a reasonable attempt to manage court resources and to put in place an easier and more rapid and more cost effective scheme to resolve these cases.

72. The ADR scheme was agreed to by DePuy only I believe because they (not unreasonably in view of the one case subsequently decided) took a view that in cases to which the scheme applied that they may well have difficulty in defending such matters (and I make this observation in a general way without any judgment as to any particular case, as different considerations as to liability might arise in other cases). The alternative to establishing an ADR scheme was in effect for two cases a week to be listed for a period of over 10 years before the litigation would be completed. This would have been extremely

costly, extremely burdensome for the claimants, involve considerable delays and utilise an excessive amount of scarce court time. It would of necessity have resulted in a number of other unrelated cases involving sometimes catastrophically ill plaintiffs failing to be heard or having their hearing dates considerably delayed. In order to enter into the scheme, it was necessary that it be voluntary and also it was necessary that either side could reject any evaluation.

73. I have come to the conclusion that it is chiefly because of the existence of the scheme that many more cases have been settled between the parties as the scheme provided ready indicators as to the likely value of claims which values are available to the parties. Accordingly, any suggestion by the applicants that because the majority of claims have been disposed of outside the ADR scheme by negotiations between the parties, in some sense devalues the scheme itself, is erroneous. Without the existence of the scheme I do not believe that the large number of cases that have been compromised by the parties would have been done so.

74. In the *Flynn* case (above) I expressed some disappointment at the time at the progress of resolution of these cases. Thankfully the number of resolved cases has considerably increased since that time and I find that the disposal rate of cases is satisfactory.

75. The burdens imposed by the scheme, in relation to the ability of DePuy to make causation an issue and also the requirements for medical reports are not any different from the other claimants with different solicitors who have advanced their cases and in the main disposed of them satisfactorily.

76. Accordingly, I find that the delays referred to in the various affidavits are entirely or almost entirely due to the actions or rather inactions of Mr. Bradley.

77. I reject any application to amend clause 9 of the scheme. It is reasonable that once the parties have entered into the scheme that they should be prevented from any steps until the scheme has been exhausted. The fact that Mr. Bradley's applicants have not had their claims progressed is as I have indicated not due to any fault in the scheme or in DePuy but rather in the applicant's advisors.

78. I accept the submission on behalf of DePuy that *"the reality as is evident from the affidavits is that the present situation is a situation entirely of the applicants own making and the way in which this argument is presented does not in any way reflect the true position. These applicants could have progressed their applications within the process but they have chosen not to do so. They could have rejected any evaluation if not satisfied and then progressed their litigation. However, they have chosen not to engage with the process and it would be wholly unfair to other litigants and would undermine the process if they were permitted simply by reason of their refusal to participate to ignore reasonable procedures put in place by the Court in the form of a process and the associated stay on the proceedings."*

79. As the respondents have submitted, none of the applicants have averred that they would not be willing to consider or agree to any without prejudice offer prior to a conclusion of a trial, none of them are insisting that to vindicate their rights they require a full determination on liability by the High Court and none have indicated that if their cases were excluded from the scheme that they would be ready for trial at any early date. Accordingly, I reject the submission that the existence and operation of a process fails to vindicate their personal rights by reference to the decision of *Grant v. Roche Products Ireland Limited & Ors.* (above).

80. The right of access to the Court as referred to in *Talbot v. Hermitage Golf Club* (above) is not an absolute one as is made clear from the judgment of the Supreme Court and the Court is entitled and indeed sometimes required to have regard for the demands on the Court in terms of resources and in managing litigation and to "*foster their resources*".

81. The applicant further relies upon the decision of *Ryan v. Walls Construction Limited* (above) on the basis of their submissions that their client cannot be forced into the scheme. I do not find *Ryan* (above) to be any authority for the proposition as advanced by the applicant. *Ryan* concerned whether the Court should force parties into mediation who had not agreed to it. This case relates to an ADR process to which each of the persons identified in the schedules to the notice of motion have actually applied. The applicants applied knowing what the scheme involved. Having entered into the scheme the applicants through their solicitor declined to process their claims they have declined to engage with the respondents with a view to compromise their claims and have declined following the *Flynn* decision to advance any case on an individual basis as to why particular claims should be allowed to proceed to trial.

82. If the applicants have good reason to seek to proceed to trial, they have not articulated such reason and they have had all the time since the *Flynn* decision to make such application. I note and accept the submissions of the respondents that none of the applicants have averred or asserted that they would not be willing to agree on any without prejudice negotiations or none of them have insisted that to vindicate their rights by way of a full determination of liability by the High Court. I conclude accordingly that the applicants are not entitled to reply upon *Grant* (above) merely because they have decided through their solicitor to remain idle in the belief that they can have a claim to a trial merely because they have done nothing to advance their claims.

83. The applicants assert a general right to leave the scheme once they have decided to do and seek differentiate this right to leave the scheme from the right as proclaimed in Flynn to apply it to the Court in any particular case showing good reason why a trial should be fixed. I reject that distinction as being entirely unreal. I stated in *Flynn* that any case could apply to the Court for listing. My decision was not confined to those cases which were not in the scheme. If the applicants believed from over literal interpretation of what I stated, that I confined the right to apply to the Court only to those cases not yet in the scheme, a simple application for clarification could have sufficed. Quite the opposite. Since *Flynn* there has been no application from the applicants' solicitor on behalf of any of

his clients including the persons referred to in the schedules for such a date showing good reason. If the applicants had, following the *Flynn* decision, had good reason to apply for a trial date that would have been considered by the Court. The *Flynn* case clearly set out the basis for the scheme and if any of these applicants had after the *Flynn* decision persisted in the scheme giving normal cooperation I believe their cases would have been disposed of well before now with an Evaluation made and a decision could have been made on a case-by-case basis by each of the applicants as to whether they would accept or reject the award.

84. Accordingly, I am not prepared on the basis of the evidence before me to grant any of the applicants set out in appendix one or appendix two of the application to leave the scheme are to have a trial date fixed. As I stated in *Flynn* the Court is willing to hear any application for a trial date on an individual case by case basis and I shall consider such an application on its merits. Good reasons have been advanced in some other cases, for the scheme to be bypassed, and where good reasons were advanced the applications were allowed. The fact that the applicant's solicitor for his own reasons is not prepared either to engage with the scheme or indeed engage on his clients' behalf in any way with DePuy of itself is not good or sufficient reason.

85. Accordingly, I reject the applications.