[redacted]

14/01/21

Malcomson Law

Solicitors,

Iceland House,

Arran Court,

Smithfield,

Dublin 7

Your Ref: [redacted]

Re; [redacted] v De Puy International Limited

Dear Sirs,

Further to your recent request to me to accept concise submissions in reply to the submissions filed on behalf of DePuy as part of the ADR process, the following is my decision on that request.

By a letter dated the 9th of December 2020, Mc Canns Solicitors for DePuy disputed your entitlement to furnish any such submission or to have same considered in the ADR Evaluation.

Specifically in the 3rd and 4th paragraphs of their letter to you they say:

"*The clause upon which it appears you intend to rely is Clause 5.13. This is a fundamental misinterpretation of the contents of Clause 5.13. The additional concise written submissions referenced in Clause 5.13 can only be delivered in circumstances where the claimant delivered originating submissions pursuant to Clause 5.7[c]. Furthermore, the wording of Clause 5.13 is clear that additional submissions may only be delivered when the Claimant's Solicitors adjudge this to be essential. We cannot see in what circumstances you deem this to be essential in this case given that you did not even consider it necessary to deliver submissions in the first place pursuant to Clause 5.7[c]*

This is also the more so given that Clause 5.17 specifically references the importance that the "evaluations be done as speedily as possible". A review of the ADR process in this case is instructive in this regard. Our client endorsed your client's Form B over four years on the 25 November 2016 and it was not until 21 August 2020, following three years and nine months of no meaningful inter-parties correspondence that you delivered a booklet of documents which you had sent to Mr Justice O Neill……."

In your letter to me of the 23rd December 2202 you say the following:

"In our view, it would be a breach of fair procedures either to prevent the claimant from delivering such submissions or to disregard then once delivered. The interpretation of clause 5.13 of the ADR process advanced on behalf of DePuy is incorrect as the clause permits "either side … to submit any additional report or reports or concise submissions" following receipt of the email from the Evaluator. It does not limit the circumstances in which such concise submissions can be delivered to cases in which the claimant delivered initial submissions pursuant to clause 5.7[c]. The entitlement to deliver such submissions arises pursuant to clause 5.13 where the claimant's solicitors consider such an entitlement to be essential. That judgement is not subject to review by DePuy."

In an email to me dated the 7th January 2021, McCann Fitzgerald said the following :

"Having reflected on the matter overnight if I my make one additional submission to those set out in my letter of the 9 December to the plaintiff's solicitors, that is that fair procedures is already enshrined in the ADR process set up by Mr Justice Cross pursuant to his order of the 16 December 2015".

This email was a further response to an email from me to McCann Fitzgerald in which I asked if McCann Fitzgerald wished to make any further submission in relation to the contents of your letter to me of the 23rd December. McCann Fitzgerald initial response to my query was contained in their email of the 6th January 2021 and said *"I have nothing further to add to the contents of my letter to Malcomson Law of 9 December"*

From the submissions of the parties two issues emerge which must be resolved to determine whether the claimant is entitled to submit a concise submission at this stage in the ADR process. Firstly , does Clause 5.13 of the ADR agreement permit the claimant to furnish a concise submission at this stage of the ADR process notwithstanding that the claimant did not furnish any submission when initially providing documentation to the Evaluator pursuant to Clause 5.7 of the ADR agreement. Secondly what do the norms of fair procedures demand in these circumstances, i.e to permit the claimant to furnish a submission or to deny the claimant that opportunity.

Clause 5.6 reads:

"The Claimant's solicitors shall then send the designated Evaluator the completed Form B together with the following documents:

[a] a complete set of pleadings;

[b] a complete set of relevant medical records which cover the period prior to the index surgery, following the index surgery, prior to the revision surgery and following the revision surgery; and

[c] a schedule of special damages together with supporting documentary evidence ."

Clause 5.7 is in the following terms:

"The Claimant's 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."

Clause 5.10 provides:

"McCann Fitzgerald may submit to the Evaluator on behalf of DePuy such reports or concise written submissions as they consider relevant to the claim, and without delay shall send the Claimant's solicitors a copy of those documents which they have sent to the Evaluator."

Clause 5.13 says:

" Following receipt of documents referred to in clauses 5.6,5.7,and 5.10 [where applicable], and in advance of commencing the Evaluation, the Evaluator shall write by email or otherwise to the Claimant's solicitors and to McCann Fitzgerald saying that he or she will commence the Evaluation within fourteen days unless either side intends to submit any additional report or reports or concise submissions. The submission of an additional report or reports or concise written submissions shall be done only where the a party's solicitors judge that to be essential, given the importance that evaluations be done as speedily as possible."

Clause 5.6 sets out the documents which a claimant is obliged under the ADR agreement to provide to the Evaluator. Clause 5.7 sets out three other categories of documents which the claimant may additionally supply in this initial phase of the ADR procedure. Amongst these is a concise written submission. Clearly the claimant has an unfettered discretion as to whether or not to furnish any of these three categories of documents. Under Clause 5.10 DePuy may submit such reports or concise written submissions as they consider relevant to the claim. In this regard DePuy have an unfettered discretion as to whether to submit any such documents at all, and as to which of the two types of documents, i.e reports or concise written submissions it chooses to submit.

Clause 5.13 provides both sides with an opportunity, having had time to consider the documents each of them had submitted to the Evaluator, to have a final imput into the Evaluation, to address whatever case has been advanced by either side up to that point in the Evaluation procedure. The clause stipulates that any additional reports or written submissions must be "essential" in the judgement of the solicitors for the party seeking to submit the additional material under clause 5.13.

It is quite clear that Clause 5.13 does give both sides an unfettered discretion as to whether or not they avail of Clause 5.13 subject only to the proviso that the submission of the new material is "essential" The judgement as to whether the new material is essential is reserved, not surprisingly, exclusively to the solicitors for the party seeking to avail of Clause 5.13 .

There is nothing in these detailed and clearly well thought out provisions of the ADR agreement which could reasonably be construed as prohibiting access to Clause 5.13 where a claimant had not submitted concise written submissions pursuant to Clause 5.7. On the contrary, the fact that the submission of concise written submissions at this early stage in the procedure is provided for in the discretionary provisions set out in Clause 5,7 rather that in the compulsory requirements set out in Clause 5.6, demonstrates to my satisfaction that the intent of the ADR agreement is that a claimant is not obliged to furnish concise written submissions at the initial phase of the Evaluations procedure, but can do so later in the procedure under Clause 5.13.

The content and structure of these clauses in the ADR agreement rightly caters for the situation in which a claimant is confronted with material submitted by De Puy under Clause 5.10, which the claimant or his solicitors have not theretofore seen or been in a position to evaluate it's significance for the claim. Whilst at the initial phase of the ADR procedure, when submitting documents under Clauses 5.6 or 5.7, the claimant might not have any perceived need to submit a written submission, the content of the materials submitted by DePuy under Clause 5.10 could radically alter the position of the claimant in that regard. All of this, in my view is rightly reflected in the well thought out content of Clause 5.13.

I have therefore come to the conclusion for the reasons expressed above that the claimant is entitled under Clause 5.13 to furnish me with a concise written submission.

I am also satisfied that such a conclusion and the interpretation of the clauses of the ADR agreement it is based on is entirely consistent with recognised norms of fair procedures and natural justice. Indeed a contrary interpretation and conclusion which now denied the claimant the opportunity provided for in Clause 5.13, would fall short of established norms of fair procedures as it could prevent a claimant from addressing and answering issues in respect of which they did not have any or any adequate opportunity to deal with otherwise in the ADR procedure.

Thus my response to your letter of the 23rd December 2020 is that, pursuant to Clause 5.13 of the ADR agreement, I will accept and consider a concise written submission furnished by you.

Yours Sincerely

Iarfhlaith O Neill

Cc. Mr David Hurley

McCann Fitzgerald