EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 47
A202/18

Lord Pentland
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Reclaiming Motion by

by

DEPUY INTERNATIONAL LIMITED

Defenders and Reclaimers

against

ELIZABETH GILCHRIST

Pursuer and Respondent

Defenders and Reclaimers: E Campbell; Clyde & Co.
Pursuer and Respondent: Milligan KC; Connelly; Thompsons

28 December 2023

Introduction

[1] Since 31 July 2020 it has been possible to apply to the court for permission to bring group proceedings under Part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018; see for example *Campbell* v *James Finlay (Kenya) Limited* 2023 SLT 1364. The aim of group proceedings is to allow multiple claims concerning the same or similar issues to be grouped together in a single set of proceedings; these can then be proactively case-managed by the court with view to their prompt and efficient resolution. The scheme is

not, however, retrospective; it does not apply to actions raised before 31 July 2020. The reclaiming motion (appeal) in this case concerns how best to manage multiple connected proceedings raised before the new rules came into force. In order to set the scene for consideration of the issues arising in the reclaiming motion, it is necessary to rehearse the protracted history of the present case and the allied proceedings.

Procedural history

[2] Around 15 years ago, on 5 January 2009, the respondent, Mrs Elizabeth Gilchrist, had surgery for a total replacement of her right hip at the Southern General Hospital in Glasgow. Metal on metal (MoM) prosthetic implants were used in the procedure. The reclaimers manufactured the implants: a metal on metal femoral head, a metal insert, an acetabular cup and a cemented stem. The respondent claims that the products used in her surgery were defective under and in terms of section 3 of the Consumer Protection Act 1987 because they were not as safe as persons generally were entitled to expect. She seeks damages for pain and suffering, for services provided by her husband and daughter, and for miscellaneous expenses. The reclaimers deny liability to the respondent.

[3] The components of a prosthetic hip implant wear as they move. MoM hip implants generate metal debris from the articulating surfaces and the trunnion. Such debris has the potential to cause medical complications and to reduce the effectiveness of the prosthetic hip, sometimes requiring revision surgery to modify or replace the implant. Possible complications include elevated blood ion levels, metallosis, pseudo-tumours, and aseptic lymphocyte-dominant vasculitis-associated lesions. The respondent claims that while it was expected that debris would be produced from the articulating surfaces, it was not expected that debris would come from the head/trunnion interface.

[4] The respondent raised the present action under chapter 43 of the rules of court in February 2017. In the ensuing months she enrolled a series of unopposed motions to have the case sisted to allow further investigations to take place; the action remained sisted until 26 July 2018. On 13 August 2018 an unopposed motion by the respondent was granted to have the case withdrawn from the chapter 43 procedure and to allow it to proceed as an ordinary action. Between the summer of 2018 and the autumn of 2019 there were some procedural steps of little consequence, involving for example the repeated discharge of hearings on the By Order (Adjustment) Roll. In November 2019 the action was again sisted without opposition, this time to await the outcome of the case of *Hastings* v *Finsbury Orthopaedics Limited*, another MoM case. It remained sisted for this reason until the autumn of 2022, *Hastings* having finally been disposed of in the UK Supreme Court in June of that year. By this time the action had passed its fifth anniversary in court without any substantial progress having been made towards its resolution.

[5] The present case is one of forty-nine actions currently before the court in which similar claims are made. In twenty-nine of these the claims arise from the implantation of allegedly defective prosthetic hips in the course of total hip replacement surgery; there are in addition twenty actions arising from hip resurfacing surgery. In total there are thirty-eight actions against Zimmer Limited, two against Finsbury Orthopaedics Limited, five against Wright Medical Limited, two against Biomet Limited, one against Corin Limited, and the present action against Depuy International Limited. The pursuers have entered into arrangements with commercial litigation funders in order to bring their actions. All the pursuers are represented by the same counsel and solicitors.

[6] Two important cases concerning claims arising from allegedly defective products used in hip surgery have been decided: *Gee* v *Depuy International Limited* [2018] Med LR 347

and *Hastings* v *Finsbury Orthopaedics Limited* 2019 SLT 1411 (Outer House); 2021 SLT 187 (Inner House); 2022 SC (UKSC) 43 (UK Supreme Court).

[7] *Gee* was a group litigation involving claims brought against the reclaimers in England and Wales by three hundred and twelve individual claimants who were implanted with one or more Pinnacle prostheses where both the acetabular liner and the femoral head were made of a metal alloy, giving a MoM articulation. The outcome of *Gee* was binding upon all English claimants implanted with the Pinnacle Ultramet implant system, products manufactured by the reclaimers. The respondent accepts that the products used in her case were the same as (or at least not materially different from) those which were the subject of the group litigation in *Gee*. Andrews J (as she then was) held, after a lengthy and complex trial involving a great deal of expert evidence, that the production of wear debris by MoM prostheses was not a defect within the meaning of section 3 of the 1987 Act and that the claimants had failed to prove that the Pinnacle Ultramet presented a greater risk of failure within the first 10 years after implant than a comparator prosthesis and so carried an "abnormal risk" of causing damage. The court was informed that there had been no other MoM cases brought in England and Wales after *Gee*.

[8] *Hastings* involved a claim by a patient who had undergone a MoM total hip replacement in 2009 using a MITCH-Accolade prosthetic hip manufactured by the defenders. The issues at first instance were restricted to the question of whether certain propensities and risks inherent in MoM prosthetic hips rendered the particular combination of components used in the pursuer's operations defective within the meaning of section 3 of the 1987 Act. The UK Supreme Court upheld the Lord Ordinary's conclusion that the pursuer had failed to establish the existence of a defect.

[9] Returning to the history of the present action, in September 2022 the respondent enrolled a motion seeking yet another sist, for a period of six months, so that she could obtain further evidence, such as epidemiological and statistical evidence relating to the specific product used in her case. The motion was opposed on the basis that, rather than having individual actions sisted on a piecemeal basis, it would be a more practicable way forward for the remaining cohort of cases to be dealt with in an expeditious and efficient manner. The reclaimers therefore suggested that a more proactive approach should be taken to the case management of all the cases. Arrangements were accordingly made for all the MoM cases to be administratively allocated to a Lord Ordinary so that effective case-management could take place in respect of the whole cohort. He decided that the present action would be used as a "vehicle" for the purpose of conducting a hearing at which parties involved in all the MoM actions would attend to consider and determine further procedure. Accordingly, on 2 December 2022 counsel and solicitor advocates representing all the pursuers and all the defenders in the cohort appeared at a hearing before the Lord Ordinary. He proceeded to make an order sisting the present case until 31 March 2023 and appointing the respondent to lodge a note of her proposals for further procedure in all the actions. A further hearing took place on 14 April 2023 at which the respondent was appointed to disclose and lodge a draft expert report by Dr Carla Krulewitch; parties (including the defenders in all the actions) were appointed to lodge notes setting out their views on further procedure in the entire cohort of cases.

[10] A hearing then took place before the allocated Lord Ordinary on 11 September 2023 at which the respective proposals of all parties regarding further procedure in all the cases was addressed. At that hearing, the respondent's counsel, on behalf of all forty-nine pursuers in the MoM cases, invited the Lord Ordinary to appoint a single further lead case

to determine: (i) whether the MoM implants caused complications which were greater than the pursuers were entitled to expect; and (ii) whether the MoM implants caused greater issues with revision surgery than pre-existing comparators. The respondent identified the case of *Ann McCarron* v *Zimmer Limited* (A328/17) as a suitable lead case. In support of the respondent's proposal it was explained to the court that the pursuers had obtained a comprehensive draft report from Dr Krulewitch in relation to all the products used on the various pursuers. The report was said to support the view, both generically and in terms of each individual product, that the complications associated with the products exceeded the complications associated with pre-existing comparators. Accordingly, the pursuers intended to proceed with all the actions. In the interests of economy and expediency, the pursuers proposed that one lead action should be taken from the single largest group of total hip replacement cases (the *McCarron* case) and be used to test the proposition that the product used in that case (a Zimmer product) was defective. In the event that *McCarron* was unsuccessful, the commercial litigation funders undertook not to fund any further MoM litigation. That would avoid any concern that the pursuers would continue to litigate until they were finally successful.

[11] The reclaimers' position at the hearing on 11 September 2023 was that it was not sensible or fair to proceed with a single further test case. It was not known what grounds of action the pursuers wished to advance against the reclaimers or their related companies, Finsbury Orthopaedics Limited or Stryker UK Limited; there were three actions in total against these companies. Amendment of the pleadings would be required if *McCarron* was to proceed; that would be opposed. The pursuers should be required to proceed with any cases that they intended to proceed with, rather than selecting a single case for their own

convenience. At the very least they should be required to proceed with at least one case for each product which they contended to be defective.

[12] Zimmer Limited and BioMet UK Limited submitted that as a minimum five cases against them should proceed, one from each product category. This was with a view to guidance being provided for the purpose of other cases within the same category.

[13] Wright Medical Technology Inc and Wright Medical UK Limited were content for their five cases to remain sisted. Corin Limited sought and were granted a continuation.

The Lord Ordinary's decision and interlocutor

[14] At the conclusion of the hearing on 11 September 2023, following a short adjournment, the Lord Ordinary gave an *ex tempore* decision in the following terms:

> "The question of what to do next – at least from a procedural perspective – is usually relatively straight forward. In these cases however – I say these 'cases' because the reality is that we are not just dealing with Ms Gilchrist's case but with all MoM cases because a decision in this case will, in practical terms, have a material bearing on all other MoM cases – there is an appearance of considerable complexity. But I think that it is more of an appearance than a reality.
>
> Mr Milligan (senior counsel for the pursuers) candidly acknowledges that there are lessons to be learned from the approach taken in litigating the *Hastings* case. He asks for what I called 'another protected bite of the cherry' to benefit from those learned lessons. To allow him to litigate a further, single, identified case. Whether those learned lessons are, or would, be enough for him to succeed in any further litigation I do not know. What Mr Milligan does say is that should he be unsuccessful in the further, single, identified case, the funders behind the case and all other MoM cases involving them will fund no further cases.
>
> Ms McMillan, on behalf of Corin Ltd, spoke last but merely sought an unopposed continuation of 4 weeks [in respect of Corin's only case], which I granted.
>
> Wright Medical did not attend the hearing having previously requested their excusal, which I allowed. Their position was as set out in their note, namely (i) they did not consider that a 'lead case' would be determinative of any issues against them and (ii) that they sought to continue the sist in their cases pending the decision in any 'lead case'.

In response to Mr Milligan's submission, Ms Harris for Zimmer and Biomet and Mr McBrearty for DePuy, Finsbury and Stryker say – as they are entitled to – that Mr Milligan should not be afforded another protected bite. They say (i) the universal issues identified by Mr Milligan have been litigated to a conclusion in their favour in *Hastings* and *Gee*, (ii) that allowing a further, single case to be litigated would involve unreasonable delay and expense and (iii) in any event, it is unclear what any meaningful benefit would be, any decision in a single, further, identified case would have no bearing in the long term as all cases will need to be litigated.

There is a strong principle in litigation that there should be a degree of finality. I agree with that.

Mr Milligan seeks a significant indulgence that cuts across that principle so that his clients might benefit from his learned lessons but I suspect Mr Milligan knows that as much, if not more, than anyone else involved.

I approach the question this way. If MoM hips were not of the required standard then those who suffered as a result of having them implanted are entitled to be compensated. That is not an open ended entitlement and that is where finality in litigation comes in. In this case, I am prepared to indulge the lawyers who represent those who have had MoM implants a further bite of the cherry. Not for the lawyers but for the patients.

The next question is how. One Zimmer THR case is the most expedient approach. Ms Harris is not able to suggest which case. Mr Milligan suggests the case of *McCarron*. I accept Mr Milligan's submission that *McCarron* is an appropriate case.

I will sist all other MoM cases pending McCarron. McCarron will be very tightly case managed by me. The indulgence is not a free for all."

[15] The Lord Ordinary's interlocutor issued after the hearing was in the following terms:

"The Lord Ordinary, having heard senior counsel and solicitor advocates by order, by WebEx video conferencing, recalls the sist in respect of *McCarron, Ann v Zimmer Ltd*, court reference A328/17, granted 7 September 2023; appoints *McCarron, Ann v Zimmer Ltd*, court reference A328/17, as the lead case; sists the cause in respect of *Gilchrist, Elizabeth v Depuy International Limited*, court reference A202/18, pending the outcome of the lead case of *McCarron, Ann v Zimmer Ltd*, court reference A328/17; continues the cause, in respect of *McCarron, Ann v Zimmer Ltd*, court reference A328/17, by order until 9 October 2023 at 9.30am before the Hon. Lord Stuart."

The reclaimers then enrolled a reclaiming motion seeking review of the interlocutor

of 11 September 2023.

Reclaimers' submissions

[16] The Lord Ordinary had erred in law and in the exercise of his discretion. Given the reasoning and outcomes in *Gee* and *Hastings* very exceptional circumstances would be required before proceeding with another single test case, particularly one which would not determine the actions against the reclaimers and their related companies. Such exceptional circumstances did not exist.

[17] The two generic questions identified by the respondent had already been considered in depth in *Hastings*. The pursuers' litigation funders were refusing to accept these findings despite agreeing to *Hastings* being a test case. That was a choice open to them, but it should not be permitted to influence further procedure. The funders should be required to engage meaningfully with the whole cohort of actions. That did not, however, mean that all the cases required to proceed at the same time. It was clear from *Gee* and *Hastings* that a decision in a case involving one product would not determine the cases in relation to other products. The question whether entitled expectation had been met was inevitably product-specific. A decision in relation to the Zimmer product in *McCarron* would not determine any of the three cases in which the reclaimers had an interest. The reclaimers would not accept any such decision to be determinative in respect of any of these actions.

[18] There were a number of reasonable and fair options open to the Lord Ordinary. These included:

(i) in respect of the three cases in which the reclaimers had an interest, to put the cases out by order to determine appropriate further procedure aimed at determining the litigations;

(ii) in respect of Zimmer and BioMet, appointing the five lead cases suggested by BioMet with a view to having product/category specific findings that might

realistically influence other cases within those categories involving the same defenders;

(iii) Requiring some (for example product-specific lead cases) or all cases to proceed to a point in which the pleadings were finalised and expert evidence obtained in order that the presence of generic issues could be identified and suitable further procedure reconsidered at that point, including the utility of lead cases or cases being heard together.

[19] In respect of the three cases in which the reclaimers had an interest, a sist was unsuitable and further procedure aimed at resolution of the dispute between the parties should be fixed.

[20] The Lord Ordinary had taken an inappropriate "all or nothing" approach in the sense that either the pursuers should be required to proceed with all cases with expedition and without further group case management on the one hand or have one lead case appointed on the other.

[21] The Lord Ordinary had not exercised his discretion reasonably. Where action A would not determine action B it was unreasonable to sist action B to await the outcome of action A (*Maitland* v *Maitland* (1885) 12 R 899, LP Inglis at 902-903).

[22] The Lord Ordinary had not had regard to the pleadings in any or at least most of the MoM cases. These were at different stages and in some cases had not been finalised. Insofar as the respondent appeared to intend to introduce a new case based on statistical analysis of revision rates, this was not pled in *McCarron*. It would require to be introduced by amendment, which would be opposed. It was unclear to what extent, if at all, *McCarron* would raise issues similar to any of those in which the reclaimers had an interest. The Lord Ordinary's failure to analyse the nature and extent of the common issues was a clear error.

It was also unclear to what extent, if at all, the pursuers contended that the draft report by Dr Krulewitch was relevant to the whole cohort. In any event, the Lord Ordinary appeared not to have relied on the report in his reasoning. The draft report acknowledged that there was a wide range of performance across the range of MoM products.

[23] The Lord Ordinary's reasoning as expressed in his *ex tempore* decision was unsatisfactory. The Lord Ordinary stated that he was granting the pursuers "a significant indulgence". He did not address the reclaimers' and others' objections, but nonetheless "indulged" the pursuers with "another bite of the cherry". It was not possible from his decision or from the note prepared for this court to identify why he exercised his discretion as he did.

[24] Finally, the Lord Ordinary had failed to have sufficient regard to the reclaimers' right under Article 6 of the ECHR to have the proceedings determined in a reasonable time. Unless the Lord Ordinary's interlocutor was recalled, it was likely to be many more years before the cases in which the reclaimers had an interest were determined. *Hastings* had required 10 days of proof. It was appealed to the UK Supreme Court. The actions against the reclaimers were of significant vintage, the earliest having commenced in 2013. The court had an obligation to give effect to the reclaimers' Article 6 right. That obligation, together with the length of time, amounted to further evidence that the Lord Ordinary's decision was one which no reasonable Lord Ordinary could have made.

[25] In answer to questions from the court, counsel for the reclaimers agreed that the interlocutor of 11 September 2023 was incompetent insofar as it purported to make orders applying to other cases. Counsel submitted that the undertaking offered was unclear: whether it would bind the individual pursuers as opposed to the litigation funders was not

specified. In any event, the undertaking would have no impact on the other cases if the pursuer succeeded in *McCarron*.

Respondent's submissions

[26] The Lord Ordinary's decision was one which a reasonable judge exercising his discretion could have properly made. This was demonstrated by the fact that no other manufacturer had reclaimed. A discretionary decision should not lightly be interfered with. It was not enough that the appellate court would have exercised the discretion differently.

[27] The undertaking provided a complete answer to the criticism that a further test case involving one manufacturer would not resolve the claims against other manufacturers. The principle of finality in litigation would be left undisturbed.

[28] The reclaimers mischaracterised the Lord Ordinary's reasoning. It should be assumed that he had considered Dr Krulewitch's draft report and the pleadings in *McCarron*, the latter having been provided to the court before the hearing on 11 September 2023. The Lord Ordinary's decision was the judicial exercise of an administrative function. The MoM cases pre-dated the introduction of group proceedings in Scotland. The court had recognised in other multiple litigations (for example the vaginal mesh cases) that it was not feasible for all cases to proceed concurrently to proof. Lead cases were suitable and appropriate tools of pro-active judicial case management.

[29] The findings in *Gee* and *Hastings* were not binding on all the MoM pursuers. In *Hastings* the Lord Ordinary said at [164]:

> "In holding that the pursuer in the present action has failed to prove that the Mitch/Accolade product supplied to him was defective, I do not exclude the possibility that another pursuer might be able to present evidence in relation to a different product sufficient to establish, on balance of probabilities, that entitled expectation in relation to that product had not been met."

This was what the respondent was now attempting to do. Previous claims had foundered on lack of statistical evidence that MoM hip implants had heightened revision rates compared to non-MoM implants. Dr Krulewitch's draft report demonstrated that the respondent was now in a position to provide that evidence.

[30] The Article 6 point had not been relied on before the Lord Ordinary. "Reasonable time" was case-specific. In the context of mass litigation such as the MoM cases, it did not mean that all cases must progress concurrently. In the civil context, "reasonable time" entailed a greater flexibility than in criminal cases.

[31] It would be unreasonable and unfair to require all the MoM pursuers to proceed with their cases at the same time. The costs of doing so would be prohibitive. In *Hastings*, the agents for the successful defenders had rendered fees in excess of £3m. The expenses of the proof alone had run to £1.45m. The reclaimers' approach of insisting upon multiple lead cases progressing would deny the respondent and the other pursuers fair access to justice.

[32] In oral submissions senior counsel for the respondent accepted that the interlocutor of 11 September 2023 was incompetent to the extent that it purported to make orders in other actions. He suggested that the incompetent part could be recalled while adhering to the substance of the decision. Senior counsel acknowledged that it would have been preferable for the Lord Ordinary's decision to have been more fully expressed.

[33] The respondent now had supportive evidence from Dr Krulewitch. The statistical material in her draft report had not been available in *Hastings*. The evidence showed that for MoM surgery revision rates were higher and complications consequently more frequent and serious. The new statistical evidence would apply to every type of implant. The issues with revision surgery were generic. Senior counsel referred to paragraph 8.3 in Dr Krulewitch's

draft report where she addressed differences in re-revision complications due to MoM. She explained that complex cases were at high risk for revision. This could be the explanation for a wide range in reported complications, as high as 68 per cent, and re-revision rates which had been reported as high as 44 per cent. Dr Krulewitch referred to one study where risk factors for re-revision were reported as being 30 per cent higher in patients who had undergone MoM total hip replacement compared to ceramic replacement and where there was a 57 per cent increased risk if there was a post-revision complication. She said that there were other studies to similar effect. Higher rates of re-revision for adverse reaction to metal debris were, according to Dr Krulewitch, thought to be related to tissue destruction which occurred in the presence of pseudo tumour formation and the other damage related to metal debris. While the Lord Ordinary in *Hastings* had not been persuaded that the prospects of success of revision surgery had been proved to be materially diminished by soft tissue damage resulting from MoM surgery, the pursuers now had statistical evidence showing that this was in fact the case.

[34] No party in any of the litigations had agreed to be bound by the outcome in *Hastings*. The decision in *Hastings* had left the door open for claims to be pursued should stronger statistical evidence become available as had now happened.

[35] Other manufacturers were evidently content to accept the undertaking offered on behalf of the litigation funders. While it would be theoretically possible for individual pursuers to proceed without commercial funding this was unrealistic in view of the scale, complexity and cost of the litigations. Even litigating half a dozen cases would be financially impracticable. Overall, the Lord Ordinary had struck a reasonable balance between the competing interests.

[36] At the request of the court, senior counsel for the respondent agreed to set out the terms of the undertaking in writing. It reads as follows:

> "Milligan KC on behalf of Quantum Claims Compensation Specialists Limited (the litigation funders) undertakes to the Court that in the event that the litigation in the case of *Ann McCarron v Zimmer Ltd* (A328/17) is (1) appointed to proceed as the only lead or first case and (2) is unsuccessful, the litigation funders will not fund any further litigation in Scotland involving metal-on-metal hip implants or resurfacing".

Analysis and decision

[37] Whether it is appropriate to sist proceedings is, of course, a discretionary decision. An appellate court will not lightly interfere with the exercise of a discretion by a lower court. As Lord Reid said in *Thomson* v *Glasgow Corporation* 1962 S.C (H.L) 62 at 66:

> "… if [the Second Division] had a discretion, as in my opinion they had, this House would not overrule the discretion of a lower Court merely because we might think we would have exercised it differently."

In *Skiponian Limited* v *Barratt Developments (Scotland)* 1983 S.L.T 313 at 314 the Second Division stated:

> "Faced with the situation that the motion for the discharge of the diet of proof was a matter which fell within the discretion of the sheriff, counsel for the pursuers accepted that the decision reached by the sheriff could only be impugned if it could be shown that he had proceeded on a misconception of the material facts and that he had reached a decision which no reasonable sheriff could have done."

Nonetheless, where the Inner House is satisfied that the Lord Ordinary has exercised his discretion upon a wrong principle, or where his decision was so plainly wrong that he must have exercised his discretion wrongly, it is entitled to interfere (*Britton* v *Central Regional Council* 1986 S.L.T 207).

[38] Fully conscious of the approach which must be taken by an appellate court in this context, we turn to examine the reasons given by the Lord Ordinary for his decision. Although they are briefly stated, this does not in itself give rise to any real difficulty. The

Lord Ordinary had the benefit of detailed written and oral submissions; he had been provided with the pleadings in *McCarron*; and he had the draft report from Dr Krulewitch. His decision was addressed to parties who were all well-versed in the intricacies of the litigations.

[39] We acknowledge that the task confronting the Lord Ordinary in trying to find a workable way of managing this body of complex and multi-layered litigations was a challenging one. Nevertheless we consider that there are material errors in the Lord Ordinary's reasoning and overall approach. First, he has not explained why he selected *McCarron* as the single lead case nor how determination of any of the issues arising in the *McCarron* action would assist in resolving any of the other cases. An explanation was essential in view of the fact that the earlier test case of *Hastings* had clearly not succeeded in bringing about a resolution of any of the other cases. The product in *McCarron* differed from those used in some of the other cases, including the present action. There is no obvious read-across to such cases. Nor did the Lord Ordinary address the issue of whether Dr Krulewitch's draft report was capable of supporting the respondent's contention that the new statistical evidence reviewed therein would apply to every type of implant. While it may not have been possible for him to reach a concluded view on that assertion, the submission ought at least to have been addressed in the context of determining appropriate case management of the cohort of cases. He could have asked for a detailed response on the issue to be provided by the various defenders before coming to any final view about the way forward.

[40] Before the Lord Ordinary and this court the respondent attached great weight to the undertaking offered on behalf of the funders. It is important to understand, however, that this would not be triggered if the pursuer succeeded in *McCarron*; in that event the

remaining cases would all still have to be resolved and none of them would have moved forward during the time (very possibly a protracted period) during which *McCarron* was being litigated. None of the defenders was prepared to accept the outcome of *McCarron* as determinative of any other actions. The Lord Ordinary states that he agrees that there is a strong principle of finality in litigation, but he has not explained how his decision to allow a single action to progress while sisting all the others (for what could be lengthy periods of time) would promote that principle in circumstances where there was no agreement to treat *McCarron* as a binding test case.

[41] Secondly, we consider that the Lord Ordinary has taken too blunt an approach to the management of the cohort of litigations. There is force in the reclaimers' submission that he has adopted something akin to a "one size fits all" approach in the sense that he appears to have taken the view that there should either be a single test case or all the actions should proceed. This may have arisen from the Lord Ordinary's decision to use the present action as a "vehicle" for case-managing all the litigations. While well-intentioned, it cannot be overlooked that this approach was incompetent. It is not open to the court to make orders in one action which purport to apply to other actions. The court can only competently make orders in the particular action or actions before it. Even leaving aside the question of competency, we consider that to try to address the subtleties, nuances and individual features of a wide spectrum of issues arising in multiple litigations within the framework of a single case was misconceived and liable to result in an over-simplified approach. Such an approach fails to recognise that there were inevitably substantial differences between the various actions such that it was not possible to address the complexities of deciding on further procedure within the constraints of just one or perhaps two cases: the present action and *McCarron*.

[42] The third difficulty with the Lord Ordinary's approach is related to the second. He did not have regard to the pleadings and hence the issues in all the cases which he was attempting to manage. The various cases are at different stages procedurally. We understand that in some cases the pleadings are not in final form. In some actions, including *McCarron*, amendment may be necessary and may be opposed (we were told that it would be in *McCarron* in relation to an attempt to introduce new statistical evidence). It is not clear that the defenders accept that every case is suitable for a proof to be fixed. Constructive and meaningful case management required the Lord Ordinary to have regard to the particular facts and circumstances of every action. He should have arranged for every action to call before him if he was minded to make orders affecting them all. That would have allowed him to take account of the whole landscape across the cohort and to consider whether an approach more closely tailored to the different categories of cases was desirable. This might have involved selecting a number of representative cases according to the different categories of products. In this connection we note that Zimmer and Biomet proposed that five lead cases should be appointed with a view to having product/category specific findings made involving the same defenders.

[43] Fourthly, the Lord Ordinary states that he was prepared to indulge the lawyers who represent those who have had MoM implants (by granting them) a further bite of the cherry. This, he says, was not for the lawyers but for the patients. Proper and effective case-management does not involve the granting of "indulgences" to one side. It requires a fair and proportionate balancing of the interests of all parties.

[44] Fifthly, the Lord Ordinary has not given adequate consideration to the entitlement of the various defenders under Article 6 ECHR to have their civil rights determined in a reasonable time. The selection of a further single case, the outcome of which may not be

determinative of any of the other cases, inevitably means that there will be further substantial delay in the resolution of all the other cases. All the defenders are entitled to have the actions brought against them determined within a reasonable time. Case management must give full weight to this fundamental requirement.

[45] For these reasons the court is not satisfied that the Lord Ordinary's decision amounted to a reasonable exercise of the discretionary power vested in him. The issues are, therefore, at large for this court.

[46] We have not overlooked the submissions made to us on behalf of the respondent about the financial challenges that all of the pursuers and their funders face. We are not, however, satisfied that this consideration alone can be allowed to drive case management of the cohort of actions. The court will always attempt to ensure that litigation is conducted efficiently and expeditiously.

[47] Since the only action before this court is the one brought against the reclaimers by the respondent, it is not competent for us to make case management orders affecting the whole cohort of cases. We shall accordingly allow the reclaiming motion and recall the Lord Ordinary's interlocutor of 11 September 2023, parts of which are admittedly incompetent insofar as they purport to relate to other cases, and remit to the Lord Ordinary to proceed as accords. He should arrange for all the MoM cases to call before him and proceed to address the case management issues in the light of (i) the court's observations in this judgment and (ii) further submissions from all the parties as to the best way forward. He should give detailed consideration to all the cases and consider, in particular, the desirability of grouping certain cases or categories of case together on the basis that they raise common issues. This may allow a number of representative cases to proceed in tandem while others in the same group are sisted.

[48] We have reserved all questions of expenses.