



**COURT OF APPEAL
Civil**

UNAPPROVED

Appeal Number: 2020/125

Neutral Citation No [2022] IECA 145

Woulfe J.

Whelan J.

Faherty J.

BETWEEN/

**JOICE CARTHY, AUGUSTUS CULLEN, JAMIE HART AND DAVID LAVELLE,
A PARTNERSHIP TRADING UNDER THE STYLE AND TITLE OF AUGUSTUS
CULLEN LAW AND CULLEN SOLICITORS SERVICES LIMITED**

RESPONDENTS/PLAINTIFFS

- AND -

**MICHAEL BOYLAN, GILLIAN O'CONNOR,
A PARTNERSHIP TRADING UNDER THE STYLE AND TITLE OF MICHAEL
BOYLAN LITIGATION LAW FIRM
AND CIARA MCPHILLIPS**

APPELLANTS/DEFENDANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 14th day of July 2022

Introduction

1. This is an appeal against certain orders made by Mr. Justice O'Connor in the High Court on the 12th May, 2020. Same were made in aid of enforcement of terms of settlement of a compromise concluded under a voluntary alternative dispute resolution (ADR) process executed by the parties on 26th July 2018 and which was received and filed in the High Court on 27th July 2018 and annexed to the court order.
2. The parties are solicitors. The respondents are partners in Augustus Cullen Law ("ACL"). The first and second appellants are former partners in ACL and have now established, operate and are partners in the third appellant solicitors' firm, Michael Boylan Litigation Law Firm (MBLLF). The fourth appellant was hitherto a solicitor employed in ACL and is now a partner in MBLLF.
3. The partnership, employment and professional working relationship between ACL and the appellants came to an end in July 2018 when the first, second and fourth named appellants resigned from the firm. On the 19th July, 2018 ACL instituted plenary proceedings seeking, *inter alia*, extensive injunctive reliefs against the appellants. By Notice of Motion, ACL further sought interlocutory orders against the appellants. The motion seeking interlocutory injunctions was returnable for hearing before the High Court on the 27th July, 2018. Both sides were legally represented throughout the said process by solicitors and senior and junior counsel. Prior to the hearing the parties entered into a mediation process and an experienced mediator was appointed. On the 26th July, 2018 the proceedings were compromised through the mechanism of their chosen voluntary ADR process and a formal settlement agreement was entered into and executed by the parties.
4. In her grounding affidavit of the 10th July, 2019 the first named respondent deposes at para 6-:

“... a mediation between all of the relevant parties took place in which Brian O’Moore SC acted as mediator. Late on the evening of 26 July 2018 a settlement was reached and recorded in writing between the parties.”

In his affidavit sworn on 31st July, 2019 the first named appellant deposes at para. 3: -

“Ms. Carthy’s affidavit describes the circumstances of the mediation and settlement of the dispute between the parties in July 2018. That settlement was recorded in an agreement which was received and filed in Court on 27 July 2018.”

5. On 27 July 2018 the court was informed that a settlement of the litigation had been reached and, accordingly, granted orders by consent including an order giving “Liberty to apply to all parties for the purposes of enforcing the said settlement”.

6. The Mediation Act, 2017 came into operation on 1 January 2018 as provided by Mediation Act, 2017 (Commencement) Order 2017 (S.I. No. 591 of 2017). The Act was thus in force prior to the institution of the within proceedings on 19th July, 2018. The Rules of the Superior Courts (Mediation) 2018 S.I. No.13 of 2017 came into operation on 22 January 2018.

7. Under Grounds 1 and 2 of the Notice of Appeal the Appellants had contended, *inter alia*, that the order made on the 27th July, 2018 striking out the proceedings had rendered the High Court *functus officio* in respect of all subsequent applications and that a provision granting “liberty to apply to enforce the terms of settlement” was not sufficient to confer jurisdiction on the High Court. They had further contended that the Mediation Act of 2017 did not confer jurisdiction on the High Court to make the orders as sought by the respondent.

8. This Court was informed that Grounds 1 and 2 of the Notice of Appeal were not being pursued. The Court was further informed that Ground 7 did not now arise as the dispute between the parties regarding the quantum of the capital account of ACL had been

resolved. This court makes no determination with regard to Grounds 1, 2 or 7 of the appellant's notice of appeal. The court was informed that the cross appeal was compromised between the parties on the basis that same would be struck out with no order as to costs.

Process for determining costs due to ACL under Settlement

9. The mediated agreement made comprehensive provision for the transfer of particular files pertaining to clients of ACL to MBLLF and identified a process for the determination of costs due and owing by MBLLF to ACL in respect of each client file transferred.

Clause 6 (c)

10. Clause 6 is of significance in the appeal. It provides –

“6. ACL agrees to transfer the files referred to in Schedule A hereto to MBLLF where MBLLF has already either (a) delivered a signed authority from a client of ACL requesting that the client's file be transferred to MBLLF and / or MBLLF has served Notice of Change of Solicitor. MBLLF shall provide to the plaintiffs by 10.30am on Friday 27th July, 2018 a list of all authorities which the parties agree may include a small number of authorities not contained in Schedule A. In respect of all such files referred to in this paragraph and any future files the subject of a similar authority, Mr. Boylan, Ms. O'Connor and MBLLF agree and undertake that the following protocol shall apply:

(a) ...

(b) ...

(c) In default of agreement between the two nominated Legal Cost Accountants the quantum of such costs shall be determined by a third Legal Cost Accountant to

be appointed by Mr McMahon and Mr Fitzpatrick and the determination of such independent Legal Cost Accountant shall be binding on the parties.” (emphasis added)

11. Mr. Anthony E. McMahon was the Legal Cost Accountant retained by the respondent ACL. Mr. Stephen Fitzpatrick was the Legal Cost Accountant retained by the appellant MBLLF. Their task in the first instance was to endeavour to reach agreement as between them concerning the costs due to ACL in respect of files being transferred.

Emergence of dispute pertaining to Clause 6(c) of the terms of settlement.

12. In the affidavit grounding the application before the High Court sworn on the 10th July, 2019 the first respondent deposed, *inter alia*, as follows:

- On 18th October, 2018 ACL wrote to MBLLF’s solicitors in relation to the issue of fees due to ACL under the settlement agreement noting that if agreement could not be reached by 28th October, 2018 it would be necessary to invoke paragraph 6(c) of the settlement agreement for the purposes of obtaining a binding determination from a third party legal cost accountant.
- By letter dated 19th October, 2018 MBLLF’s solicitors wrote to ACL indicating that a meeting would be held with their clients, the appellants, the following Monday.
- On 24th October, 2018 MBLLF’s solicitors wrote setting out their position in relation to the ascertainment of fees due to ACL.
- On the 26th October, 2018 said solicitors wrote a further letter to ACL.

- 23rd November, 2018 solicitors for MBLLF wrote to ACL solicitors setting out their views in relation to the implementation of the settlement agreement with particular reference to Clause 6 and 6(a) thereof.
- On 26th November, 2018 ACL's solicitors wrote to MBLLF's solicitors *inter alia* proposing an immediate meeting between the parties and their respective cost accountants failing which it would be necessary to re-enter the proceedings before the High Court to seek directions.
- 3rd December, 2018 - A meeting between the parties, their respective legal costs accountants and solicitors took place.

At para. 35 she deposes –

“The purpose of such meeting was to try and advance the process for the determination of legal costs as set out in the settlement agreement. Our solicitors indicated that our legal cost accountant would conclude this review of the eight files which had been the subject of initial discussions between the costs accountants. A final effort would be made between them to agree such costs and failing that they would have to nominate a third legal cost accountant as provided for at paragraph 6(c) of the settlement agreement.”

- 5th December, 2018 - ACL's solicitor wrote stating that in default of agreement the quantum of costs due to ACL pursuant to Clause 6 would be determined by a third legal costs accountant being appointed jointly by the parties' respective LCAs.
- 6th December, 2018 – a response was received in which MBLLF stated its commitment to ensuring the implementation of the settlement agreement.

- On 3rd January, 2019 the LCA for MBLLF emailed his counterpart expressing the view that "... it seems to me there is a shift in position since the constructive conversation between yourself, myself, Donal and Liam".

The email was responded to on the 16th January, 2019. It stated, *inter alia*: -

"My position has been absolutely clear from the outset, and that is the files are valued as of the date of transfer. There are other ways to do it but this is what our principals opted for when they brokered a settlement deal."

The email continues –

"As part of that deal, you and I were to agree figures, and if you and I disagreed then a third party is to value them. We practically reached agreement on all 8 files as far back as 25th September. ... Please now indicate which, if any, files are agreed, and let us move this interminable process forward." (emphasis in original)

By email 22nd January, 2019 from Stephen Fitzpatrick to Tony McMahon it is stated: -

"I have expressed grave reservations about the approach from the beginning. I do not agree we were in broad agreement because what we first discussed was heavily qualified and severe doubts were expressed by both of us, mostly about the approach being taken. The first review of these files was very brief for reasons of economy for our clients and on a trial basis to see if we were heading in the right direction."

The email also states the following –

"... I have also reconsidered the value of these files and they fall considerably short on your client's values. I have recalibrated mine downwards to reflect the

realities of where these values are on the ground in the marketplace. They are at
considerableremove from yours.”

The email concludes, referencing: -

“... The wide disparity of views and approach means that no agreement will be
reached on the eight cases in hand.”

By email 22nd January, 2019 the LCA for ACL emails “Just so I am clear, you’re not in a
position to agree any of the first eight?” [the context suggests that reference is being made
to the first eight files]. The response from MBLLF’s LCA was “That is correct for all cases
except [one identified file].” The latter email continues: “On independents, I suggest we
start with appropriate names...”. Clearly therefore the absence of agreement results in
moving to the process envisaged under Clause 6(c) of the terms of settlement. By email 30th
January, 2019 MBLLF’s LCA puts forward two additional suggested names for the
individual to act as the independent LCA pursuant to Clause 6(c) stating: -

“... I am going to suggest two additional names both of whom have extensive
experience in the clinical negligence cases.”

Mr. Brendan Cooke was subsequently agreed between the parties’ LCAs as the independent
LCA pursuant to Clause 6(c) and a copy of the joint letter of appointment emailed to him on
the 22nd February, 2019 was exhibited.

On 21st May, 2019 Mr. Cooke provided his expert determination in relation to the
professional fee applicable in the first case submitted to him.

13. The affidavit of the first named appellant sworn 31st July, 2019 does not appear to
dispute or contradict the proposition that the respective Legal Costs Accountants of the
parties had failed to reach agreement pursuant to Clause 6 of the terms of settlement. At
para. 5 he deposes: -

“The issue of the quantification of the fees due to ACL in accordance with clause 6 of the settlement agreement, which remains the most significant issue between the parties, has been the subject of extensive discussions between the parties and their respective Legal Costs Accountants. Unfortunately, these discussions proved unsuccessful and the parties were obliged to retain the services of an independent Legal Costs Accountant to determine the first case. However, deficiencies in the manner in which the process was conducted by the independent Legal Costs Accountant have necessitated a pause in that process. Gillian and I fully accept that a dispute between the parties in respect of the fees due to ACL must be determined by a third party in accordance with the settlement agreement. However the principles according to which those costs are to be determined and the requirement that the independent third party explain the determination made by him in some or all of the remaining 166 cases is a requisite to the resumption of the process envisaged by Clause 6 of the settlement agreement for reasons which will be set out in greater detail hereunder.”

14. At paragraph 6 he emphasises: -

“My determination to implement the terms of settlement by reaching agreement in respect of all outstanding matters is evidenced by the fact that we suggested a direct meeting between the parties on more than one occasion. To date, the meetings which have taken place to resolve the outstanding issues have been between the parties’ legal costs accountants and their solicitors.”

At paragraph 8(b) he deposes –

“... the principal issues which remain to be resolved between the parties following the compromise of the proceedings are relatively net and may be summarised as follows:

- (a) ...
- (b) Whether Brendan Cooke, the legal costs accountant who was appointed by the parties as an independent legal costs accountant
 - a) has been appointed to determine the appropriate level of costs which may be due to ACL by clients with respect to each of the 166 cases where the plaintiff clients have dispensed with the services of ACL and have instead retained my firm to represent them or whether his appointment is limited to the first eight cases selected for determination by the parties and
 - b) whether Mr. Cooke is obliged to give reasons for his decisions.”

The first appellant deposes at para. 15 –

“Those first 8 cases were selected on the basis that they were cases that had upcoming trial dates. The reason why I proposed these cases was that it was pertinent for my clients to know where they stood and in terms of the fees owed to ACL prior to entering into settlement negotiations. One of the reasons why the dispute between ACL and myself arose in relation to costs due in respect of these eight cases is because ACL has refused to provide itemised bills of costs with regard to any of these cases.”

15. The appellants in their written submissions at para. 6 acknowledge: -

“Both parties retained Legal Cost Accountants (“LCAs”) who attempted to reach agreement on an initial tranche of files which had either been heard or settled or were nearing either of these outcomes. However this process ran into difficulty and on 22 February 2019, Mr. Brendan Crooke was appointed as an independent LCA to determine the costs due to ACL in the first eight cases in which agreement had not been reached between the parties’ respective LCAs.”

16. The appellants disagreed with the determination of Mr. Cooke and directed their LCA to “pause” the process thereby halting the operation of the process whereby disputes between them concerning fees due to ACL were being determined under the settlement agreement.

Motion to Enforce the Mediated Settlement

17. The respondents issued a Notice of Motion on 11th July 2019 seeking to re-enter the proceedings for the purposes of giving effect to the settlement agreement of 26th July 2018 as received and filed in the High Court on 27th July 2018 and specific performance of its terms.

18. The motion was heard on affidavit. There was no oral evidence. Neither party sought leave to cross-examine the other’s deponents. This fact is said by the appellant to be material to the first ground of appeal considered below concerning whether there were conflicts in the affidavit evidence incapable of resolution without cross-examination.

Judgment

19. In his judgment delivered 8th April 2020 O’Connor J. noted;

“**25.** This application proceeded on the basis of no less than twelve affidavits with at least 60 exhibits. Three affidavits were sworn by the legal cost accountant retained for MBLFF (“SF”) and two affidavits were sworn by his opposite number

for ACL (“TMcM”). In default of agreement, the quantum of costs for files transferred with the authority of clients to MBLLF are to be determined by a Mr Cooke who they appointed in accordance [with] para. 6(c) of the settlement agreement.”

At para. 26 the judge observed;

“These defendants submit that the plaintiffs “bear the burden of proof of establishing the factual accuracy of the allegations which they have made”. The plaintiffs reply that “[T]he existence or otherwise of any such disagreement is completely irrelevant to the relief sought”. Paragraph 6(c) of the settlement agreement provides for the binding determination of Mr Cooke. The plaintiffs further contend that the email from SF to TMcM and Mr Cooke sent on the 18th June, 2019, which confirmed that he had instructions “...not to embark upon the process in this case for the minute” has allowed MB to take unilateral action to hinder the implementation of the settlement agreement. Finally, the plaintiffs clarify that the application before this Court is not to apportion blame to TMcM or SF.” (emphasis added)

20. Citing *Dunnes Stores v. McCann & ors.* [2020] IESC 1, the trial judge noted;

“Cost Accountants

31. There is disagreement between the cost accountants engaged by the parties. The court cannot resolve primary issues of fact which are disputed through the exchange of affidavits. The height of the position for MBLLF is that TMcM agreed the costs for a number of client files with SF. Having read through the affidavits and considered the submissions, I conclude that there is agreement among those cost accountants about their disagreement. SF was instructed in June, 2019 to hold back and that, in itself, was not an option available to these

defendants under the settlement agreement. Clause 6(c) of the settlement agreement requires upon a default of agreement between TMcM and SF, that they appoint a third legal cost accountant to make a determination which “shall be binding on the parties”.” (emphasis added)

He went on to state;

“**32.** In a similar vein, TMcM and SF should not be hindered from engaging with Mr Cooke or any other cost accountant ... they agree to appoint under the settlement agreement. It was for those professionals to appoint and then to interact with Mr Cooke as he may require about the quantum of costs for each file. It is reasonable to expect practitioners to honour their commitments under the settlement agreement which are incorporated in a court order.”

Judge’s Construction of Clause 6 (c)

21. The trial judge observed;

“**33.** ... The settlement agreement leaves it to TMcM and SF to agree the costs due to ACL, and in the event of a dispute a third legal cost accountant makes a binding determination. The introduction of the right of clients to a bill of costs from ACL to the process does not avail these defendants in delaying the determination by Mr Cooke because the settlement agreement does not provide for same. The parties were well placed, advised and represented at the mediation before the settlement agreement was executed. The defendants cannot rely on the actual or contingent rights of others to hinder the implementation of detailed terms.”

The trial judge concluded that;

“**35.** There is no justification to maintain the instruction given to SF to refrain from proceeding with agreeing costs or referring the disagreement to Mr Cooke. The

effect of the said email of the 18th June 2019 which followed the first and only decision of Mr Cooke on the 21st May 2019 meant in the words of Mr Fanning counsel for the plaintiffs, that “the whole process has shuddered to a halt”.

Orders under appeal

22. The orders relevant to this appeal are as follows: -

- (1) Restraining the first and third appellants from giving instructions to their Legal Cost Accountant, Stephen Fitzpatrick, not to embark further on the process with the respondents’ Legal Cost Accountant, Anthony McMahon, under Clause 6 of the terms of settlement dated 26th July, 2018.
- (2) An order that the third appellant be directed to instruct the Legal Cost Accountant Stephen Fitzpatrick to continue forthwith in the process commenced with the Legal Cost Accountant Anthony Fitzpatrick in accordance with Clause 6 of the Terms of Settlement for the purpose of reaching agreement in relation to costs payable to the respondents in respect of files listed in Schedule 1 to the Court order.
- (3) That files listed in Schedule 2 to the order be referred for determination to Brendan Cooke forthwith.

First Ground of Appeal

Conflicts in the affidavit evidence requiring cross-examination

23. The appellant contends that the trial judge erred in making final orders where there were conflicts in the affidavit evidence before the court which were not capable of resolution without cross-examination. The key conflict relied upon by the appellant at Ground 3 (b) of the Notice of Appeal is between a contention by the respondents that the appellants and

their Legal Cost Accountant had “frustrated” the costs resolution process pursuant to Clause 6 of the settlement agreement as against the appellants’ contention that they were not responsible for frustration of the process and that it was instead “the conduct of the respondents and their Legal Cost Accountants that had frustrated the process.” The respondent rejects this characterisation of the dispute.

24. Separately, it was contended that the trial judge having made an order (Order No. 1) restraining the first and third appellants from giving instructions to their Legal Cost Accountants not to engage in the cost resolution process pursuant to Clause 6 of the settlement agreement, the terms of the said order “demonstrates that the learned High Court judge agreed with the respondents that the appellants frustrated that process.”

25. The appellants contend that these were findings which the trial judge was not entitled to make having regard to the conflict of evidence before him. In their submissions, the appellants contend that, “the decision of the motion judge and the binding orders which flow from that decision are premised upon determinations of disputed matters of fact which the learned judge was not entitled to resolve on affidavit evidence alone.”

26. The appellants contend that by making orders against the first appellant restraining him from instructing the appellants’ LCA Mr. Fitzpatrick not to embark further on the costs resolution process with the respondent’s LCA Mr. McMahon, “The motion judge made an effective finding of non-cooperation against Mr. Boylan on the basis of the conflicting evidence of the parties [?] respective LCAs which had not been tested in cross-examination.” (para. 37)

27. The respondents reject that contention and argue in their submissions that MBLLF had contended before the High Court: -

“that the certain specific areas of material dispute were “*root factual issue[s]*” which require to be determined in order to establish which of the parties’ respective costs accountants are alleged to have obstructed the costs resolution process. This is incorrect. Far from being “root factual issues” they are, in truth, immaterial and extraneous.” (para. 62)

The respondent’s submission continues: -

“The precise circumstances giving rise to the disagreement on costs between the parties’ experts has no material bearing on the issue which the court was asked to determine. The indisputable facts before the Court are that Mr. Fitzpatrick and Mr. McMahon were unable to reach agreement in respect of the quantification of the costs due in respects of the files referred to them. This being so it was necessary to proceed to the dispute resolution mechanism provided for under paragraph 6(c) of the settlement agreement. Precisely how or why the experts disagreed is, with respect, irrelevant to the effective operation of the settlement agreement.”

28. The appellants rely on the decision in *Re. McInerney Homes Limited & Ors.* [2011] IEHC 4, a case wherein there was conflicting expert evidence on affidavit as to whether a proposed scheme of arrangement would be unfairly prejudicial to some secured creditors and the appropriate approach a court should adopt where there was conflicting expert evidence on affidavit. Clarke J. had observed, citing Hardiman J. in *Boliden Tara Mines v Cosgrove* [2010] IESC 62 that it was “... open to a party to seek to argue that, even taking its opponent’s evidence at its high point, same does not establish a material element of the matters needed to be established in order that the remedy sought be given by the Court.”

Clarke observed that: -

“It seems to me that similar considerations apply where there is contradictory evidence but where the evidence on both sides is given on affidavit without cross-examination. It is, of course, open to a party in such circumstances to say that the Court can rely on un-contradicted aspects of the evidence in reaching its conclusions. Indeed, to a material extent that is what counsel for both the Examiner and McInerney sought to do. However it is impossible for the Court to resolve material questions where there is a conflict of evidence on matters of significance to an answer to those questions.” (para 5.15)

29. In light of the authorities including *Boliden Tara Mines, McInerney, IIB Internet Services Ltd v. Motorola Ltd* [2013] IESC 53 and subsequent decisions the correct approach for an appellate court where evidential conflicts are said to have arisen before the High Court and leave to cross examine was not sought was outlined by Laffoy J. in *O'Donnell & ors. v. Bank of Ireland* [2015] IESC 14 where at para. 43 she observed; “...the crucial question for this Court is whether there was sufficient uncontradicted credible evidence before the High Court which supported the findings made by the trial judge on the material questions to be determined by him...”

30. To reach a view on the appellant’s assertion (set out at Ground 3(a) and (b) in their Notice of Appeal) it is necessary to consider;

- (i) What relevant assertions did the respondents make against the appellants.
- (ii) What was the stance of the appellants regarding assertions considered relevant by the trial judge.
- (iii) When and in what context was it alleged by ACL that MBLLF was “frustrating” the implementation of the settlement agreement including with particular reference to the operation of Clause 6(c).

- (iv) How did the trial judge treat that assertion and did the Court make a finding that MBLLF was frustrating the implementation of the settlement agreement?
- (v) Do the terms of Order 1 made by the trial judge support the appellants' assertion as demonstrating that the judge "agreed with the respondents that the appellants frustrated the process". (Ground 3(b))

Position of Respondent regarding Ground 1

31. A perusal of the Affidavits identifies para 72 in the first Affidavit on the 10th July 2019 of the first respondent where she deposes;

"In order to assist Mr Cooke I say and believe that it would be desirable if MBLLF were to co-operate and provide input in relation to the valuation of costs due to ACL via their nominated expert ...Regrettably, it would seem that this co-operation and participation is not forthcoming and will not now be provided."

(para. 72)

32. In detailed written submissions the appellants contend at para. 33:-

"The essential claim advanced by ACL on the motion was that MBLLF frustrated the determination of costs due to ACL under Clause 6 of the settlement agreement (see for instance para. 72 of JC's first affidavit). MBLLF disputed the claim of non-cooperation in the affidavit sworn in reply to ACL's application and argued that ACL through the failure to provide bills of cost, were guilty of conduct which impeded the resolution of the costs due to ACL."

Position of MBLLF in July 2019

At para. 5 of his affidavit of the 31st July, 2019 the first appellant outlined the appellants' stance. It is cited in full at para. 13 above.

When was allegation of frustration introduced

33. It would appear that, apart from reference at para. 72 of the grounding affidavit that "co-operation and participation" was not forthcoming from the appellants' LCA to provide input in relation to the valuation of costs due to ACL, this assertion was first made in open court by counsel for ACL on 23 January 2020 who asserted, *inter alia*, that "...the other side have frustrated the operation of Clause 6(c)..." (p. 14 -15 Transcript).

34. The appellants in their written submissions to this court emphasise that their LCA had set out in detail all of his dealings with the respondent's LCA "... and in particular the matters which were and were not agreed between them, in the affidavits sworn by him." (para. 33) Those submissions also emphasise that in the course of the hearing the trial judge had requested the parties to prepare a list of issues which were in dispute between them.

The List of Issues

35. This list was prepared by the parties at the direction of the trial judge. It represented the differing views of the parties at that time as to what the issues were. The trial judge ultimately rejected an assertion by the appellants that whether they had frustrated operation of the costs resolution process under the terms of settlement was an issue before the court for determination.

36. The appellants' submissions in this Court annex copies of two documents filed in the High Court in response to the trial judge's request to prepare a list of issues. Several pages are directed to the allegation made at the opening of the hearing suggesting that the

appellants had frustrated implementation of the Terms of Settlement. It asserts at page 2 “...the Plaintiffs’ application is based on the premise that the Defendants’ legal costs accountant ... has as a matter of fact failed to co-operate in the process of agreeing the costs due on the 8 files which have been the subject of discussions.” It goes on to assert that it was the respondents’ LCA who “was guilty of obstruction and a fundamental lack of co-operation”. There follows about four pages of close analysis of the affidavits of the two LCAs identifying with great precision the factual issues arising between them in relation to the relevant files.

37. There was also annexed to the appellants’ submissions the respondents’ response to the appellants’ Note on Factual Issues. It contends that the existence or otherwise of any disagreement between the LCAs “is completely irrelevant to the relief sought”. Significantly, at page 2 it states: “The purpose of ACL’s application to the court is not to establish blame for any disagreement but rather to enforce the Settlement”.

The appellants’ comment on the note submitted by the respondent to the High Court regarding the areas of impasse or dispute between the parties, and same is at Appendix 2 of their submissions. The appellants observe: -

“This document submitted that the existence or otherwise of a factual conflict between the affidavits was irrelevant to the relief sought because it was clear that agreement had not been reached between the respective LCAs and that Clause 6(c) of the settlement agreement which required the appointment of a third party LCA to determine the costs due to ACL was therefore engaged.” (para. 35)

38. The judge did make an effective finding that the appellant’s Legal Cost Accountant Mr. Fitzpatrick had been given an instruction not to embark further on the cost resolution process with the respondents’ LCA Mr. McMahon. The undisputed evidence before the

Court demonstrated this to be so. I do not understand the first named appellant to anywhere expressly deny that he had done so. That to my mind effectively acknowledges the absence of agreement tantamount to “default of agreement” for the purposes of Clause 6(c).

39. A perusal of the terms of settlement in their entirety, and in particular Clause 6 makes clear that the process in regard to the third Legal Cost Accountant was clearly intended to be that that individual was to make the determination alone in circumstances where there was a default of agreement by the parties’ respective LCAs. The mediated settlement agreement is entirely silent in the matter of process once the appointment of the third Legal Cost Accountant has been effected.

40. As such, the position accorded to the third Legal Cost Accountant is that he was selected by the parties’ respective LCAs and was conferred with authority to make the cost determination in circumstances where the impasse which is a continuing impasse arising from the default of agreement between the two nominated LCAs arose. Nowhere does Clause 6(c) articulate an obligation on the part of the third Legal Cost Accountant to give reasons. Had that been the intention of the parties it ought to have been made clear. Likewise, had it been the intention of the parties that the third Legal Cost Accountant would act as an expert or have obligations consonant with that status it ought to have been expressly provided for. It was not.

Position of the Trial Judge

41. It is clear from his judgment that the trial judge approached the issues from the fundamental perspective that the parties had compromised the litigation by means of a mediated settlement. In effectively rejecting the appellants’ arguments that assertions by the respondents that the appellants had frustrated the implementation of the settlement were

incorrect, he noted at para. 26 that, "...the plaintiffs clarify that the application before this Court is not to apportion blame to TMcM or SF."

42. Later, at para. 29 he identified the relevant aspects of the dispute observing;

"The tightly typed six-page settlement agreement with 33 paragraphs including seven subparagraphs in the relevant clause 6 has given rise to two rather net substantive issues of dispute."

43. Having earlier noted the respondents' clarifications the trial judge located the justiciable issues arising for determination in the litigation before him at para. 31 as follows;

"There is disagreement between the cost accountants engaged by the parties. ... I conclude that there is agreement among those cost accountants about their disagreement. SF was instructed in June 2019 to hold back and that, in itself, was not an option available to these defendants under the settlement agreement. Clause 6(c) of the settlement agreement requires upon a default of agreement between TMcM and SF, that they appoint a third legal cost accountant to make a determination which "shall be binding on the parties"."

Does Order No. 1 support claim that trial judge "agreed with the respondents"?

44. The first appellant had deposed on affidavit that for the reasons he had identified at para. 5 and elsewhere in his Affidavit the appellants had put "a pause" in that process. The judgment made clear at, *inter alia*, para. 31 that;

"SF was instructed in June, 2019 to hold back and that, in itself, was not an option available to these defendants under the settlement agreement. Clause 6(c) of the settlement agreement requires upon a default of agreement between TMcM and SF, that they appoint a third legal cost accountant to make a determination which "shall be binding on the parties". (para. 31)

The trial judge was concerned with the core undisputed facts and whether the “pause” admitted to on affidavit by the appellants was permissible under the clear provisions of the Terms of Settlement or not.

45. One need only consider the averments in the affidavits of Stephen Fitzpatrick, the appellants’ LCA, sworn 29th July, 2019, 26th September, 2019 and 22nd October, 2019 on the one hand and those of Mr. Anthony McMahon the LCA for the respondents sworn on the 13th September, 2019 and 4th October, 2019 to be left in no doubt but that there is a fundamental impasse between them which each effectively acknowledges and which remains unresolved. The averments by the LCAs and the parties effectively acknowledge that the operation of the process clearly contemplated by Clause 6(c) had arisen for the progressing of the determination of the quantum of such costs in such an eventuality, *i.e.*, it is to be determined “by a third legal cost accountant to be appointed by Mr. McMahon and Mr. Fitzpatrick and the determination of such independent legal cost accountant shall be binding on the parties.”

46. In substance the respondents had implicitly resiled from any assertion that the appellants had deliberately frustrated implementation of the settlement as of the date they furnished their Response to the Defendants’ Note on Factual Issues. Insofar as such an assertion still survived as of the final date of the hearing of the motion, the trial judge very clearly did not accept it. Thus, there were no irreconcilable differences in the affidavits on key material facts the resolution of which were a fundamental prerequisite to the determination of the issue or the granting of any order sought such as would necessitate the cross-examination of any deponent before the making of the orders granted.

47. Order 1 follows from the judge’s findings of fact and law regarding the import and meaning of Clause 6 and his finding that both LCAs agreed that there was disagreement

between them, MB's acknowledgement on affidavit that MBLLF had actioned "a pause" in the process and the judge's construction of Clause 6(c). The judge did not consider an allegation of frustration as an issue to be determined by him and made no finding in that regard.

Cross-examination

48. If the affidavit evidence was inconsistent or contradictory on fundamental issues or facts germane to the central questions which the trial judge had to determine it would not have been open to him to make findings of fact without the benefit of oral evidence. No notice of intention to cross-examine was served on any deponent by either side. Hardiman J. in *Boliden Tara Mines v. Cosgrove* [2010] IESC 62, a decision where final orders were made, observed: -

"It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a notice of intention to cross examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is made before the court must include cross examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."
(para. 52)

Clarke J. cited that decision with approval subsequently in *Re McInerney Homes Limited (No.2)* [2011] IEHC 4 to the effect that if a deponent is not subject to cross-examination, the averments should not be rejected unless there are inherent obvious flaws in that affidavit evidence.

49. This view finds support in *O'Donnell & anor v. Bank of Ireland*, Laffoy J., cited above. In each of these cases, as in the instant case, the substantive rights and obligations of the parties were to be finally determined.

Conclusion on First Ground of Appeal

50. In my view, this ground of appeal does not succeed. The clear intention of the parties embodied in Clause 6(c) of the mediated settlement agreement contemplated a well laid out mechanism for the resolution of an impasse in a defined circumstance. That circumstance is stated at 6(c) to be “in default of agreement between the two nominated legal cost accountants...”. The net question identified for determination by the motion judge was had a default of agreement within the ambit contemplated by Clause 6 including 6(a) and 6(b) arisen between the two Legal Cost Accountants as would trigger the operation of clause 6(c). Without a doubt it had. The trial judge agreed with them. The reasons why the agreement contemplated under the terms of settlement failed to materialize were entirely immaterial.

51. I am satisfied that the making of the final orders in this case required the judge to take a view on the facts. The facts he identified as material were not the subject of conflicting evidence placed before the court on affidavit. Insofar as an assertion was made that the appellants were engaged in “frustrating the process” under Clause 6(c) of the Terms of Settlement such assertions and any contested facts pertaining to same did not have a bearing on the orders which the court ultimately made as the judgment makes clear. The motion judge was required to make a determination as to whether the provisions and dispute resolution mechanism provided for in Clause 6(c) had arisen. It clearly had as he correctly found.

2nd, 3rd and 4th Grounds of Appeal -Bills of Costs

52. The appellants contend that the trial judge erred in finding ACL was not obliged to provide bills of cost to their former clients either;

- (i) By reason that Settlement Agreement does not expressly require the Respondents to provide Bills of Costs (Ground 4(a))
- (ii) As arising pursuant to their statutory obligations under s. 152 of the Legal Services Regulation Act, 2015 (all/part of Ground 4, (b), (c) Ground 5 (b), (c) Ground 6 (b), (c).
- (iii) As part of the cost resolution process pursuant to Clause 6 of the settlement agreement. (Ground 4 of the Notice of Appeal)
- (iv) As an implied term of the Settlement Agreement or arising under s. 152 and without which the judge was not entitled to Order (at Clause 3) that Brendan Cooke, as independent LCA, should proceed to determine costs due to ACL in five cases listed in Schedule 2 to the said order without directing that such bills of costs be provided by ACL to Mr. Cooke. (Ground 5(a))
- (v) As arising by way of an implied term of the Settlement Agreement as a “necessary step” and/or as “normal practice” when an order for costs is made, such a term being required to be implied “to give efficacy to the settlement agreement”. (Ground 6 (b))

S. 152

53. In this regard the appellants rely on s. 152 of the Legal Services Regulation Act, 2015. Section 152 of the Act provides: -

- “(1) A legal practitioner shall, as soon as is practicable after concluding the provision of legal services in relation to a legal matter for a client, prepare and sign a bill of costs, which shall contain the particulars specified in this section and shall be in such form (if any) as may be specified in rules of court.
- (2) Subject to *subsections (5) to (7)*, a bill of costs shall contain the following particulars:
- (a) a summary of legal services provided to the client in connection with the matter concerned;
 - (b) an itemised statement of the amounts in respect of the legal costs in connection with the legal services;
 - (c) the registration number of the legal practitioner for the purposes of value-added tax, and the amount of value-added tax chargeable in respect of the amounts referred to in *paragraph (b)*;
 - (d) where time is a factor in the calculation of the legal costs concerned, the time spent in dealing with the matter;
 - (e) the amount, where known to the legal practitioner, of any damages or other moneys that are recovered by, or payable to, the client and that arose from the matter in respect of which the legal services were provided;
 - (f) the amount of any legal costs recovered by or payable to the legal practitioner concerned on behalf of the client, including costs recovered from another party, or an insurer on behalf of another party, to the matter concerned.

- (3) The legal practitioner shall provide to the client, along with the bill of costs, an explanation in writing of the procedure available to the client should the client wish to dispute any aspect of the bill of costs, which shall contain the following information:
- (a) that the client may discuss the matter with the legal practitioner;
 - (b) that the client is obliged under section 153(1) to communicate to the legal practitioner the existence of a dispute on any aspect of the bill of costs, and the date and means by which this is to be communicated;
 - (c) that, where a dispute is communicated under section 153(1), the legal practitioner is obliged under section 153 to attempt to resolve the dispute by informal means, including mediation;
 - (d) that the client may have the dispute referred to mediation, including a reference to the procedures available for such mediation;
 - (e) that the client may apply for adjudication of legal costs, including the contact information for the Office and the potential cost to the client of seeking an adjudication of a bill of costs; and the date on which the legal practitioner may, subject to section 153, make an application under section 154(5) for an adjudication in the event that the bill of costs or any part thereof remains unpaid.
- (4) This section shall not be construed as limiting a right that any other person has to require a legal practitioner to submit a bill of costs for adjudication.

- (5) Where an agreement has been made under *section 151* by a legal practitioner and his or her client, that agreement shall be set out in, or annexed to, the bill of costs relating to the matter to which the agreement relates.
- (6) Where an agreement referred to in *subsection (5)* concerns all of the legal costs that are payable by the client to the legal practitioner for legal services provided in relation to the matter concerned, an invoice prepared by the legal practitioner containing a summary of the costs and outlays pursuant to the agreement, together with a copy of the agreement, shall constitute a bill of costs of the purposes of this section.
- (7) Where an agreement referred to in *subsection (5)* concerns a part of the legal costs that are payable by the client to the legal practitioner for legal services provided in relation to the matter concerned, a summary prepared by the legal practitioner of the costs and outlays pursuant to the agreement shall, as respects that part of the legal costs, satisfy the requirements of *paragraphs (a), (b) and (d) of subsection (2)*.
- (8) Where a practising solicitor, having received instructions from a client in relation to a matter, proceeds to instruct a practising barrister in relation to that matter, and the barrister has concluded providing legal services in relation to that matter—
- (a) an obligation on the barrister under this section to provide a bill of costs shall be fulfilled where the barrister provides the bill of costs concerned to the solicitor,

(b) the solicitor concerned shall immediately on receipt of a bill of costs referred to in *paragraph (a)*, provide that bill of costs to the client.”

Sequence of events leading to impasse

54. Eight files were selected by the parties as the initial tranche sent to the LCAs for review and agreement on the costs due by MBLLF to ACL. In her affidavit grounding the motion sworn on the 10th July, 2019 Joice Carthy deposed at length as to the sequence of events. Same is set out in significant detail at para. 12 above.

Independent Legal Costs Accountant - Clause 6(c)

55. The absence of agreement between the respective LCAs resulted in them triggering the default process envisaged under Clause 6(c) of the terms of settlement. The LCA for MBLLF had proposed: “On *independents*, I suggest we start with appropriate names...” and suggested 3 nominees to act as the independent LCA pursuant to Clause 6(c). By email 30th January, 2019 MBLLF’s LCA put forward two additional suggested names stating: -

“... I am going to suggest two additional names both of whom have extensive experience in the clinical negligence cases.”

Mr. Brendan Cooke was subsequently agreed between the parties’ LCAs as the independent LCA pursuant to Clause 6(c) and a copy of the joint letter of appointment emailed to him on the 22nd February, 2019 was exhibited.

On 21st May, 2019 Mr. Cooke provided his expert determination in relation to the professional fee applicable in the first file submitted to him.

56. The affidavit of the first named appellant sworn 31st July, 2019 does not appear to either dispute or contradict the proposition that the respective Legal Costs Accountants of

the parties had failed to reach agreement pursuant to Clause 6 of the terms of settlement. At para. 5 of Mr. Boylan's affidavit, set forth at para. 13 above, it will be recalled that he stated:-

“... deficiencies in the manner in which the process was conducted by the independent Legal Costs Accountant have necessitated a pause in that process. ...the principles according to which those costs are to be determined and the requirement that the independent third party explain the determination made by him and some or all of the remaining 166 cases is a requisite to the resumption of the process envisaged by Clause 6 of the settlement agreement for reasons which will be set out in greater detail hereunder.”

Para. 13 *et seq.* above sets out his position in detail.

S. 152 Grounds

57. The trial judge at para. 34 of the judgment observed: -

“It is too late to be implying terms for further review or practices adopted in other processes to ascertain legal costs. The Court approves of the acknowledgment that the independent legal cost accountant ‘should be the master of his own procedure’”.

At para. 33 he observed –

“The introduction of the right of clients to a bill of costs from ACL to the process does not avail these defendants in delaying the determination by Mr. Cooke because a settlement agreement does not provide for same. The parties were well placed, advised and represented at the mediation before the settlement agreement was executed. The defendants cannot rely on the actual or contingent rights of others to hinder the implementation of detailed terms.”

58. In support of their contentions at, *inter alia*, Ground 4(a), (b), (c) and (d) of their notice of appeal, the appellants in their written legal submissions essentially contend that ACL is obliged to comply with s. 152 when making “claims for costs due to them under Clause 6 of the settlement agreement. This obligation arises as a matter of law and without prejudice to that is an implied condition of the settlement agreement.” They place reliance on s. 152 of the 2015 Act.

59. In their submissions the appellants contend that “while the obligation to provide a bill of costs to their former clients exists independently of whether a formal request has been made for a bill, the plaintiffs have refused to provide bills of costs even in cases where they have been specifically requested by their former clients.”

60. The appellant sought to place reliance on the decision in *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99, where Walsh J. had stated at p. 119, *inter alia*, “[t]he basis of party and party costs is one of indemnity. It is also important to bear in mind that the costs as between party and party are client’s costs”.

61. The appellants in their submissions hypothesise (para. 27 *et seq.*) as to potential scenarios that might arise in the context of the operation of the default mechanism in Clause 6(c) whereby the decision of the independent third LCA could operate unfavourably from MBLLF’s perspectives and argue that “the risk of such an outcome would be eliminated if ACL were to provide bills of costs”.

62. At para. 27 they further submit;

“As has been set out in the affidavits of Michael Boylan and Stephen Fitzpatrick, there are several cases in which the claim for costs made by ACL amounts to close to the full sum which is being offered by a particular defendant for the costs in that case. In the case of ... in respect of whom an application for wardship is to

be made, ACL has claimed 85% of the total fees being offered by the State defendant for the case. If ACL's claim were upheld by Mr. Cooke and if the State defendant's offer were to be accepted or if the matter was to go to taxation and the sum awarded matched the offer, BD would be left with a significant shortfall in respect of the costs due to MBLLF. In the High Court it was argued on behalf of MBLLF that the risk of such an outcome would be eliminated if ACL were to provide bills of cost to ensure transparency in respect of the fees which they have claimed, which in turn is much more likely to lead to a fair and reasonable determination in respect of costs which protects the individual litigant's rights."

Conclusions regarding above issues

63. Section 152 appears in Part 10 of the Legal Services Regulation Act, 2015 (the 2015 Act). Section 138 of the Act defines a "bill of costs" to mean "a document setting out the amount of legal costs chargeable to a client in respective legal services provided to him or her, prepared by a legal practitioner in accordance with section 152 or, where applicable, section 154(1)". Chapter 3 of Part 10 of the 2015 Act governs a legal practitioner's duties in relation to legal costs. Those duties are encompassed within sections 149 – 153 inclusive.

64. However, s. 152 does not avail the appellant. The appellant is not constituted as "a client" of ACL for the purposes of Part 10 of the Act. No provision contained within the terms of settlement, or the order made on the 27th July, 2018 alters that fact or confers any rights or entitlements upon the appellant relevant to ACL's compliance with s. 152. Further, no clause or term contained within the terms of settlement, or the order of 27 July 2018 have been identified imposing a contractual obligation analogous to s. 152 of the 2015 Act on ACL to produce bills of cost in respect of files contractually agreed to be transferred by ACL to MBLLF pursuant to the terms of settlement. The costs payable by MBLLF to ACL on

foot of the terms of settlement, or any part thereof, do not constitute as between the parties “legal costs chargeable to a client in respect of legal services provided to him or her” within the meaning of a bill of costs as defined in s. 138 which permit or contemplate an entitlement in favour of MBLLF to invoke s. 152.

65. Even if it were true, as MBLLF contends, that ACL has refused to provide Bills of Costs to former clients, that fact generates or gives rise to no justiciable claim or right under s. 152 enforceable by MBLLF. The latter lacks privity to enforce rights and entitlements accruing to a client or former client of ACL under Part 10 of the 2015 Act.

66. As regards the decision in *McGarry v. Sligo County Council*, the terms of settlement and in particular Clause 6 thereof, do not suggest, nor could it be in anywise be reasonably construed to provide that costs were only payable to ACL on foot of its terms contingent upon costs orders having first been made in respect of such litigation files.

67. The hypothetical scenarios contended for by the appellants do not establish any legal basis for interfering with the clear terms of Clause 6 which unambiguously sets forth the free-standing process to be embarked upon between the parties in determining the costs payable by MBLLF to ACL in respect of each file transferred when the mechanism for effective resolution of the issue operates where the parties’ respective LCAs fail to result in agreement of the relevant figure.

68. The parameters of a settlement so freely negotiated and so thoroughly mediated and comprehensively drafted are governed primarily by the plain language in the terms of settlement itself.

69. I am satisfied that the trial judge correctly concluded that the rights and interests of individual litigants whose files were transferred from ACL to MBLLF, whether arising pursuant to s. 158 or otherwise, had no bearing on the resolution of the issue of the costs due

and owing to ACL on foot of the proper operation of Clause 6 of the terms of settlement.

No valid basis was established for importing s. 152 of the 2015 Act into the construction of the respective rights and obligations of the parties under the terms of the settlement agreement.

70. The appellants were not entitled to invoke rights of former clients of ACL pursuant to Part 10 of the 2015 Act in the manner in which they sought to do so.

71. The respondents contend that: -

“The purpose of the settlement agreement is not to replicate the taxation (or adjudication) process, but rather to bring a partnership dispute to an end on a reasonably expeditious negotiated basis.” (para. 47)

I conclude that there is force in that contention.

Is an obligation to produce a bill of costs to be implied into the terms of settlement

72. The appellants sought to rely on the decision in *Sweeney v. Duggan* [1997] 2 I.R. 531 where, briefly put, the plaintiff had been awarded damages against his employer, a limited liability company in liquidation which had no valid policy of insurance in operation. The plaintiff sought damages from the employer’s managing director personally, claiming it was an implied term of the contract of employment that the defendant would obtain insurance, or would inform the plaintiff if this could not be done. The Supreme Court dismissed the claim, on the basis that the employment contract was entirely capable of functioning effectively without such a term being implied.

73. Murphy J. in the Supreme Court had observed at p. 538: -

“There are at least two situations where the courts will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a

contract. The first of these situations was identified in the well-known case, *The Moorcock* (1889) 14 P.D. 64 where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties. The basis for such a presumption was explained by MacKinnon L.J. in *Shirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206 at p. 227 in an expression, equally memorable, in the following terms: -

‘*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course”.’”

74. In this instance we are dealing with a mediated settlement between parties fully legally advised who, in turn were themselves highly experienced lawyers. The terms of the settlement were intended to govern the dissolution of their partnership.

75. Great care must be taken before a court will intermeddle with the terms of a compromise concluded under a voluntary alternative dispute resolution (ADR) process having due regard to the objectives of alternative dispute resolution and the intendment of the Mediation Act 2017.

Conclusion

76. It is not the function of the courts to facilitate a redrafting of a clear agreement to achieve a retrospective rationalisation after the event where one party seeks to operate the terms of a negotiated settlement in a manner more advantageous than the clear language of the concluded agreement itself has ordained. It has not been established that the language in the agreement did not give effect to the intention of the parties. There is no application for

rectification of the terms of settlement nor any basis shown on foot of which such an application could have succeeded.

77. As Murphy J. observed in *Sweeney v. Duggan* such an intervention may arise where it is “necessary as a matter of law and logic” (p. 545) to enable the provisions of the agreement to have operative effect. This is not such a scenario. The mere fact that it would be financially more advantageous to one party or another that the terms operate in a given manner not provided by the clear provisions of the original agreement concluded between them cannot constitute a valid basis for the implication of a term into a concluded settlement agreement arrived at with the benefit of independent legal advice.

78. It is noteworthy that in *Sweeney v. Duggan* the Supreme Court was satisfied that an employer was not subject to an implied duty to inform employees about insurance cover for his workers; the court having regard to the fact that such a term, had it been raised or discussed prior to entering into the agreement it would either have been rejected or only agreed after extensive negotiations.

79. Undoubtedly there were risks attendant in the process agreed to on the part of both parties. That is why it was agreed to place matters in the hands of the parties professional Legal Costs Accountants with ultimately the provision that in default of agreement the issue would be determined by an independent LCA.

Implied terms

80. The respondents rely on *Analog Devices BV & Ors. v. Zurich Insurance Co. & Ors.* [2005] 1 I.R. 274 which had cited with approval the opinion of Lord Hoffmann in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 W.L.R. 896. They also rely on *Point Village Development Limited (in Receivership) v. Dunnes Stores* [2017] IEHC 676, a decision upheld on appeal to this court [2019] IECA 233. Reliance was

placed on the decision of *Mary Becker v. The Board of Management of St. Dominic's Secondary School & Ors.* [2007] IEHC 156, in particular where Smyth J. had observed: -

“It is not permissible for the court to imply a term or terms into a written contract merely because one party is dissatisfied with the result of its implementation and *a fortiori* the outcome cannot dictate the reasonableness of the terms sought to be implied.” (p. 3)

They also relied on a further extract where Smyth J. had observed:

“... in the instant case there was no warrant or basis for implying a term into the contract on the basis of reasonableness, much less of necessity. The parties struck a deal. It was clear and unambiguous and they both should be held to it. Second thoughts by one party do not mean that a further term, suitable or favourable to them, should be introduced on an *ex post facto* basis.” (p. 3-4)

81. I note that the approach set out by O’Higgins J. in *Meridian Communications Limited v. Eircell Limited* [2002] 1 I.R. 17 at para. 41 has been followed in this Court including by Hogan J. in *Pagnell Limited (t/a Snap Printing) v. O.C.E Ireland Limited* [2015] IECA 40 where at para. 21 he observed: -

“It is clear that a term will only be implied into a commercial agreement of this kind where it is necessary - and not merely reasonable - to do so and the term must also be necessary to give business efficacy to the agreement”.

The judgment in *Meridian* is of relevance insofar as O’Higgins J. reviewed the jurisprudence in this jurisdiction and in England and Wales and extrapolated the following principles on the implication of contractual terms: -

“ - Before a term will be implied into a contract it must be necessary to do so, and not merely reasonable;

the term must be necessary to give business efficacy to the agreement;

it must be a term that both parties intended, that is, a term based on the presumed common intention of the party;

The Court will approach the implication of terms into a contract with caution;

there is a presumption against importing terms into a contract in writing and the more detail the terms agreed in writing the stronger is the presumption against the implication of terms; if the terms sought to be implied cannot be stated with reasonable precision, it will not be implied.” (p. 41) (bullet points removed)

82. Finlay Geoghegan J. in *Flynn & Anor v. Breccia & Anor* [2017] IECA 74 considered the jurisprudence of the courts of England and Wales stemming from Lord Simon of Glaisdale’s analysis in *BP Refinery (Western Port) Party Limited v Shire of Hastings* (1977)180 CLR 266 which had subsequently been approved by Lord Hoffmann in *Attorney General of Belize v. Belize Telecom Limited* [2009] 1 W.L.R. 1988 and the later decision of the UK Supreme Court in *Marks and Spencer Limited v. BNP Paribas Security Services Trust Company (Jersey)* [2016] A.C. 742 with particular reference to the judgment of Lord Neuberger in the latter case.

83. At para. 77 Finlay Geoghegan J. noted: -

“The conditions identified by Lord Simon (which may overlap) which should be satisfied before a term can be implied as set out by the trial judge at para. 126 are:

- “(1) It must be reasonable and equitable;
- (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- (3) it must be so obvious that “it goes without saying”;

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract...”

She noted the concurrence of the parties that the possibility that (2) and (3) may be alternatives and not necessarily cumulative observing that this accords with the jurisprudence in this jurisdiction as set forth by Murphy J. in *Sweeney v. Duggan*.

84. In her analysis of the jurisprudence Finlay Geoghegan J. observed at para. 86 that “a ‘compelling case’ is not sufficient to warrant the implication of a term.” She further observed concerning the arguments of the appellants: -

“They submit that obviousness requires the court to be satisfied that, firstly, reasonable people in the position of the parties would all have agreed to make provision for the contingency in question, and second, that they would ‘without doubt’, or with something approaching certainty, have accepted the term proposed by the officious bystander.

87. That submission appears justified on the authorities. In *Marks & Spencer v. PNB Paribas* [2016] A.C. 742 Lord Neuberger, at para. 21, commenting on the summary given by Lord Simon in the *BP Refinery* case already referred to, stated:

‘... First, in *Equitable Life Assurance Society v. Hyman* [2002] 1 A.C. 408, 459 ... Lord Steyn rightly observed that the implication of a term was ‘not critically dependent on proof of an actual intention of the parties’ when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional, reasonable people in the position of the parties at the time at which they were contracting...”

85. She also cited with approval the extract from Lord Neuberger where he in turn had considered the judgment of Sir Thomas Bingham M.R. in *Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd.* [1995] E.M.L.R. 472, 481 which Finlay Geoghegan J. considered “helpful in identifying the difficult task facing the Court when asked to imply a term in relation to a matter for which no provision had been made in the contract” (para. 88). Lord Neuberger stated at para. 19: -

“In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which ‘distil[led] the essence of much learning on implied terms’ but whose ‘simplicity could be almost misleading’. Sir Thomas then explained that it was ‘difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue’, because ‘it may well be doubtful whether the omission was the result of the parties’ oversight or of their deliberate decision’, or indeed the parties might suspect that ‘they are unlikely to agree on what is to happen in a certain ... eventuality’ and ‘may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur’.

Bingham MR went on to say, at p. 482:

‘The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.

[He then quoted the observations of Scrutton LJ in *Reigate*, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred...”

86. As the authorities illustrate, the court should be slow to infer terms into an agreement: *Sweeney v. Duggan* [1997] 2 I.R. 531, *Meridian Communications Limited v. Eircell* [2001] IEHC 195, [2002] 1 I.R. 17, *The Law Society of Ireland v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31, [2017] 5 JIC 2501 (Unreported, Supreme Court, O'Donnell J. (Denham C.J., McKechnie, Charleton and O'Malley JJ. concurring), 25th May, 2017).

87. It is to be recalled that *Tradax Ireland Limited v. Irish Grain Board Limited* [1984] I.R. 1, O'Higgins C.J. referred to the power to imply terms into a contract noting that at p.14, “[t]his power must, however, be exercised with care. The Courts have no role in acting as contract makers, or as counsellors, to advise or direct what agreement ought to have been made by two people, whether businessmen or not, who choose to enter into contractual relations with each other”.

Necessary – compelling reasons

88. In *Hughes v. Greenwich LBC* [1994] 1 A.C. 170, [1993] 4 All E.R. 577 it was held by Lord Lowry at page 583 that:-

“In order that a term may be implied, there has to be a compelling reason for deeming that term to form part of the contract, and that compelling reason is missing in this case, unless it was *essential* that Mr. Hughes should live in the

house in order to do his job... It is in my view impossible to contend that 'it goes without saying' that Mr. Hughes was obliged to live at ...”

89. The respondents contend at para. 58 of their submissions that: -

“... it is significant to note that paragraph 6(g) of the settlement agreement *does* provide that MBLLF use best endeavours to serve bills of costs upon any party on whom it obtains an order for costs. The fact that the parties considered and duly agreed the necessity to serve bills of costs in other circumstances strongly militates against the suggestion that such a requirement is to be loosely implied in respect of the para. 6(c) process.”

There is force in that argument.

90. The fact that the parties had directed their minds to the service of bills of costs in the context of the drafting of Clause 6 is evident from Clause 6(g). Given the carefully and comprehensively drafted terms of settlement it is a reasonable inference that the parties made a decision to exclude any reference to bills of costs from Clause 6(c); it being a self-contained process for determination of the issue under consideration in that part of Clause 6.

91. As was counselled in the Supreme Court in *Tradax (Ireland) Limited v. Irish Grain Board* [1984] I.R. 1 by McCarthy J.: -

“... a court should seek to lend business efficacy to a contract by the implication of a term which is necessary in order to do so. It is not the function of a court to write a contract for parties who have met upon commercially equal terms; if such parties want to enter into unreasonable, unfair, or even disastrous contracts, that is their business, not the business of the Courts. If, however, parties engaged in commerce want to enter into a contract for the sale and purchase of goods and purport to do so, believing they have done so and acting as if they have done so,

then a court ought to import a term where it is necessary to do so in order to give business efficacy to the contract.” (p. 26)

92. Demonstrably for the reasons stated above, the appellants have not established that it was necessary, whether for business efficacy or to give efficacy to the agreement, to imply the term contended for by the appellant.

93. In addition to her observations in *Flynn v. Breccia* above, Finlay Geoghegan J. in *Irish Bank Resolution Corporation Limited v. Morrissey* [2013] IEHC 208 (Unreported, High Court, 14th May, 2013), at para. 112, said that “[i]t is well established that the courts must be extremely cautious about implying terms into a commercial agreement”.

94. In my view it is entirely unconvincing for the appellants to contend that the benefit of statutory obligations imposed on ACL pursuant to s. 152 in favour of third parties ought to be implied into the terms of settlement and imposed onto the operation of Clause 6 or, in particular, Clause 6(c). Statutory rights under the section do not enure to and cannot be invoked *per se* by MBLLF. The parties were clearly alive to the existence and effect of s.152 and it is expressly referred to in Clause 6(g). The absence of any reference to the section elsewhere in Clause 6 is significant. The issue identified does not concern a scenario where the High Court was asked to imply a term in relation to a matter for which no provision had been made in the contract by reason of an oversight where its absence from the terms as executed requires the Court to imply such a term. Clause 6 set out in very clear terms the agreed mechanism the parties were to operate to identify the sums due to ACL in respect of each file and the approach to be adopted in default of agreement between the respective LCAs. It has not been established that there was any oversight in regard to the mechanism as drafted. What the appellant contends for is a rewriting of the clear terms of the provision in clause 6(c) to achieve a more favourable result for itself or to minimise any

risk that the operation of the said clause into the future might produce an outcome unfavourable to the appellant. That calls for an intervention by the court which is impermissible as the authorities make clear.

95. It is clear from the jurisprudence including *Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd.* and the decision of the UKSC in *Marks and Spencer v. PNB Paribas* as was approved by this Court that such a term could only be implied by the High Court if it were the case that no provision at all had been made in the terms of settlement executed between the parties to address that matter – as scenario not arising on the facts.

96. The appellants sought to demonstrate the desirability of implying such a provision. However, the appellants have come nowhere near establishing that such a provision is necessary to give business efficacy to the contract. The Terms of Settlement are perfectly effective without it and an independent and resilient mechanism has been put in place by agreement to address the matter. No valid basis has been identified for interfering with the operation of Clause 6 and, in particular, Clause 6(c) which is clear, unambiguous and comprehensive in its terms.

97. Merely because with the benefit of hindsight the appellants consider that a more favourable formulation might have been put in place or that a different provision to Clause 6 (c) might have been incorporated into the terms of settlement cannot be a basis for the interference with the comprehensive thorough detailed agreement representing the fruits of an alternative dispute resolution mechanism entered into by parties of such extensive experience as the appellants and the respondents in the field of litigation.

98. The term the appellants seek to imply as necessary either to give “efficacy to the settlement agreement” or as constituting “a necessary step in determining the fees due to the

respondents pursuant to Clause 6 of the settlement agreement” or as constitutes “the normal practice” is not made out. Such an implied term would significantly vary the rights of ACL on foot of the concluded agreement and would potentially significantly advantage MBLLF. It would materially alter the clear terms of the agreed process and the mechanism for the realisation of same in favour of ACL on foot of the agreement and is inconsistent with the clear terms of Clause 6(c) which represents the clear and unambiguous term agreed to between the parties for the resolution of such an impasse as has arisen. Since the contract is perfectly effective without the term it cannot as a matter of law be necessary to give business efficacy to the contract as the jurisprudence demonstrates.

99. The appellant has not established that such a term ought to be implied by law whether pursuant to the provisions of Part 10 of the Legal Services Act or pursuant to any other statutory provision. I am satisfied in the circumstances that the appellant is not a party entitled to invoke the provisions of Part 10 and in particular s. 152 of the 2015 Act. As such, it lacks a valid legal basis to contend that the Court should imply the terms of s. 152 into the terms of settlement as a necessary incident of the relationship arising thereunder and the respective obligations of the parties specified in the agreement.

Conclusions on implied terms

100. *Sweeney v. Duggan* does not support the appellants’ contentions that the factual or legal basis for implying the terms contended for have been made out. For a term to be implied pursuant to the presumed intention of the parties, or as a legal incident of a definable category of contract, it must be not merely reasonable but also necessary. Murphy J. observed at p. 538;

“Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely reasonable but also necessary.”

At page 540 he noted;

“The contract ... would and did operate effectively without any such term and if one postulated an inquiry by the ubiquitous and officious bystander as to whether such a term should be included I anticipate that it might have well be rejected and certainly would not have been accepted without considerable negotiation and discussion a result which would negate the existence of an implied term.”

101. My further conclusions in regard to the second, third and fourthly argued grounds of appeal are that:-

- (1) The trial judge was correct in his overall approach. MBLLF failed to establish that the respondent is obliged to provide bills of costs to the appellants in the context of claiming costs due and owing to them in respect of any file the subject of a transfer to the appellant and to which the clear and express provisions of Clause 6 of the Terms of Settlement applies.
- (2) MBLLF failed to establish that the respondents have a statutory obligation arising pursuant to s. 152 of the Legal Services Regulation Act, 2015, of a kind either exercisable or enforceable by MBLLF, to produce at the instigation of MBLLF bills of costs in respect of each file which has been transferred to MBLLF pursuant to the settlement agreement.

- (3) The appellants failed to establish on any legal basis that ACL are obliged to produce bills of costs to MBLLF as a prerequisite to making claims for costs due and owing to ACL by MBLLF pursuant to Clause 6 of the settlement agreement.
- (4) MBLLF failed to establish that such obligation arises by implication as a term implied by law. It was not shown either to be necessary to the functioning of the terms of settlement or to give efficacy to the operation of Clause 6 and in particular Clause 6 (c) to imply such a term.
- (5) MBLLF failed to establish that such obligation arises as an implied term of Clause 6 of the settlement agreement concluded under a voluntary alternative dispute resolution (ADR) process and executed by the parties on 26 July 2018.
- (6) In the context of the operation or enforcement of the said terms of settlement between the parties to these proceedings the appellants are not entitled to either insist on the performance by ACL or pursue enforcement of any rights of third parties against ACL or to pursue or purport to pursue or enforce against ACL rights said to be vested in clients or former clients of ACL pursuant to s152 of the Legal Services Act 2015.
- (7) The Appellants have failed to establish on any basis that the respondents bear any obligation to provide bills of costs directly to the appellants as part of the costs resolution process specified pursuant to Clause 6 of the settlement agreement concluded between the parties.
- (8) The High Court judge did not err either in fact or in law in directing Brendan Cooke acting as an independent Legal Costs Accountant to

proceed to determine the costs due to ACL in respect of five cases specified in Schedule 2 to the order of the High Court without directing that a bill of costs be provided by the appellants to the said Mr. Cooke in the manner contended for. Such a step was expressly provided for under the terms of the Settlement.

- (9) The trial judge did not err either in fact or in law in directing the first named appellant to instruct the appellants' LCA to proceed with the Costs resolution process under Clause 6 and in refraining from directing ACL to produce a bill of costs in respect of each file for which a claim for costs was made.
- (10) The provision of such bills by ACL to MBLLF is not established to be a necessary step in determining fees due to ACL under clause 6 and MBLLF has failed to establish that implication of such a term is necessary to enable Clause 6 to have operative effect. With regard to the fourth ground of appeal the appellant has failed to establish that the provision of bills of costs pursuant to s. 152 of the 2015 Act is a "necessary step" in determining the fees due ACL pursuant to Clause 6 of the settlement agreement.
- (11) The appellants failed to establish that such a term was required to be implied into the terms of settlement in order to give efficacy to the settlement agreement aforesaid. The appellants have failed to establish that the implication of a term requiring ACL to produce bills of costs to their former clients is required in order to give business efficacy to the settlement agreement nor did they demonstrate that it could be said to be a

requirement so obvious that at the time of concluding the agreement “it went without saying” that it was in the contemplation of the parties.

- (12) The overall structure of Clause 6 and the express reference in Clause 6(g) to bills of costs coupled with the exclusion of any reference to bills of costs in Clause 6(c) undermines the appellant’s contention that ACL are obliged to comply with s. 158 of the 2015 Act in the manner contended “when making claims for costs due to them under Clause 6 of the settlement agreement” or that such a requirement could on any contended basis be implied into clause 6(c). No basis has been established to interfere with order no. 3 of the Court’s order.
- (13) The appellants failed to establish that the implied term contended for represented the joint intention of the parties.
- (14) MBLLF failed to establish that the construction/implied term contended for represented either the presumed intention of the parties or could be deduced either from the surrounding circumstances or the words of Clause 6.

102. The settlement agreement provided a comprehensive mechanism for the resolution of issues in regard to remuneration payable by MBLLF to ACL pursuant to its terms. The provisions of bills of costs in the manner contended for at Ground 6 of the notice of appeal constitutes an extraneous requirement not in the contemplation of the parties in the context of the compromise in terms of settlement concluded with them at the time of dissolution of their partnership.

103. For the reasons stated above ACL were not required to provide bills of costs to the appellants as part of the costs resolution process pursuant to Clause 6 of the terms of

settlement either pursuant to ACL's obligations under s. 152 of the Legal Services Regulation Act, 2015 and/or as an implied term of the settlement agreement. Accordingly no basis has been identified for interfering with the terms of the orders made by the High Court judge.

Costs

104. In the circumstances the costs fall to be determined pursuant to O. 99 RSC and s. 169 of the Legal Services Regulation Act 2015, as amended. The respondents are entitled to their costs in respect of the appeal to be ascertained in default of agreement.

105. If either party contends for a different order in relation to costs they shall provide a written submission within 21 days from date of receipt of this judgment, no longer than 2,000 in either case, to be filed in the Court of Appeal Office and delivered to the other side. Replying submissions to be filed within a like period of time thereafter. The Court of Appeal office will thereafter provide a date for a costs hearing as required.

106. As this judgment is being delivered electronically Woulfe and Faherty JJ. have authorised me to express their agreement with same.