

THE HIGH COURT

[2022] IEHC 174
[2012/12010P]

BETWEEN:

SAMANTHA ATKINSON

PLAINTIFF

AND

**THE MINISTER FOR HEALTH AND CHILDREN,
THE HEALTH SERVICE EXECUTIVE,
GLAXOSMITHKLINE BIOLOGICALS S.A.**

AND

THE MEALTH PRODUCTS REGULATORY AUTHORITY

DEFENDANTS

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 28 day of March 2022.

1. This is an application by the plaintiff for a payment on account in respect of costs under practice direction HC 71 dated 28 March 2017. Practice direction HC 71 was introduced in recognition of problems for litigants caused by delays in taxation of costs. It has continued in force following commencement of Part 10 of the Legal Services Regulation Act 2015 (the 2015 Act) which introduces a new system for adjudication of costs.
2. Order 99, rule 2(5) of the Rules of the Superior Courts permits the High Court to make an order requiring that a party to an action make a "payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded."
3. I must refuse this application. The plaintiff has settled this action on terms which do not reserve to this court any function in enforcing that settlement. Furthermore, most of the costs sought by the plaintiff relate to the presentation of her claim under the framework set out in the settlement agreement. These costs are not allowable under s.168(1) of the 2015 Act. Orders made in other actions which have been compromised using the same settlement framework did not give rise to any judicial estoppel or estoppel by convention which could support the grant of this application.
4. Where a contract includes express terms dealing with a particular matter, it is not possible to treat it as including implied terms which cut across what has been expressly agreed. The parties could have included express arrangements for payments on account of legal costs and enforcement of those payments in the settlement terms. They did not do so. If I accede to this application, I must take it upon myself to re-write the settlement terms. This is not within my remit.
5. This action claimed damages for injury alleged to have been caused to the plaintiff by a vaccine administered in 2009. The plaintiff's solicitors act for a number of other claimants who brought similar proceedings against the defendants.
6. The plaintiff agreed to settle this action in accordance with a framework formulated in 2020 in settlement of proceedings taken by another claimant represented by her solicitors (the settlement terms).

7. The settlement terms include a commitment by the defendants in clause 3 "...to offer a sum of damages which is equivalent of 50% of the full value (or such other percentage as may be determined pursuant to paragraph [13] below) of the claims (as agreed or determined) of each of the other plaintiffs on behalf of whom MBLLF act arising out of the administration of Pandemrix as per appendix 1 ("the other Plaintiffs"), to those plaintiffs plus costs to include reserved costs and the costs of the Plaintiffs having to make discovery of medical and educational records to be adjudicated in default of agreement and on the basis of the terms set out hereunder. The Defendants agree to waive any costs orders granted in their favour against the other Plaintiffs."
8. The settlement terms establish an extra-judicial procedure for the quantification of an accepted liability of the defendants to make a payment to the plaintiff, without admission of responsibility for injury. Issues of causation of injury and amount of compensation and costs payable are removed from determination in this action. As the settlement did not require court approval there is nothing left for this court to decide on. The settlement terms set out an agreed basis on which compensation, as provided for in clause 3, and "costs", as provided for in clauses 3, 11, and 12, are determined and quantified.
9. The settlement terms provide that where the parties are unable to agree on the appropriate percentage of full value payable or the value of a claim, these issues are referred to an expert identified in clause 9 who is described as "the Mediator" (the mediator). Subject to a right of appeal to a retired judge of the superior courts under clause 10, any determination of the mediator is binding. The mediator and the retired judge are obliged to make decisions in accordance with criteria set out in the settlement terms. This process is not a step within litigation as envisaged by ss.6 and 16 of the Mediation Act 2017.
10. Clauses 11 and 12 of the settlement terms deal with legal costs. These clauses supplement provisions in clause 3 which cover the status of costs incurred by the plaintiff and orders for costs made prior to the date when the plaintiff adhered to the settlement terms.
11. These clauses provide a mechanism for assessment of amount of costs incurred in this action and the plaintiff's costs of presenting a claim under the settlement framework. The settlement terms set out categories of costs which are allowable and categories which are excluded. Disputes are decided by an independent expert.
12. Clause 11 provides for legal costs which a settling plaintiff may incur in implementing the settlement terms, such as costs of referring a dispute to the mediator, as follows: "The aggregate legal costs to be incurred in relation to an assessment and/or assessment of these claims shall be reasonable and proportionate, in accordance with party and party principles, and limited to what is necessary to arrive at a fair and appropriate assessment of such claim, having regard to the mechanism referred to above."
13. Clause 12 sets out the basis on which "the legal costs payable to the Plaintiff's Solicitors in respect of the settlement..." are quantified. These costs may be agreed. In default of

agreement the matter is referred to a legal costs accountant. The parties have agreed that the legal costs accountant will make a binding determination. This provision applies to all legal costs and outlays, including costs incurred in relation to assessment before the mediator.

14. Section 168(1) of the 2015 Act provides: "Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings- (a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more parties to the proceedings..."
15. Section 168(2) of the 2015 Act provides: "Without prejudice to *subsection* (1), the order may include an order that a party shall pay- (a) a portion of another party's costs... and (e) interest on costs from or until a specified date, including a date before the judgment."
16. The wording "the costs of and incident to every proceeding" appears in s.53 of the Supreme Court of Judicature Act (Ireland) 1877. This provision has not been expressly repealed. It is the original basis of the power of the superior courts to award costs. English legislation conferring jurisdiction to award costs has a similar history and uses identical wording.
17. This wording permits allowance of costs incurred before an action, such as inquest costs, in appropriate cases. It also permits allowance of costs of complying with pre-action protocols and mediation costs incurred during the course of legal proceedings, but not costs incurred in pre-action alternative dispute resolution: see *Lobster Group Ltd v. Heidelberg Graphic Equipment Limited and Another* [2008] EWHC 413. Costs incurred before an action in respect of materials ultimately proving of use and service in the action will be allowed.
18. The statutory provisions do not confer jurisdiction to award costs in respect of legal expenses which do not relate to the pursuit of the claim in the action. Legal costs which a party to a settled action incurs in superintendence of implementation of terms of settlement are not claimable.
19. In this case most of items in the claim for costs prepared by the plaintiff's costs drawer relate to costs incurred with a view to presenting her claim under the adjudication framework.
20. Costs which become payable under clause 11 of the settlement terms are not costs which can properly be described as "of or incidental to the proceedings" within s.168(1) of the 2015 Act. The reference to the "proceedings" in the context of this application is a reference to this action and not to the legal costs and expenses which the plaintiff has incurred in advancing her claim before the mediator.
21. Any right of the plaintiff to be indemnified for these costs and other legal expenses derives solely from the settlement terms.

22. The settlement terms contain no provision which permits the plaintiff to enter judgment for any amount agreed or assessed under the framework as "damages" or costs. They do not provide that this action may be used as a vehicle for the purposes of enforcing the settlement, as would happen where a settlement includes words which allow an order to be entered providing that the action be "adjourn(ed) generally with liberty to re-enter for the purposes of enforcing this settlement" or includes a consent to entry of judgment for an amount agreed or quantified under the framework.
23. The settlement terms are silent on any current residual status of this action. It is clear that no further steps were taken in it after the plaintiff adhered to the settlement terms. The effect of her agreement is that she is precluded from taking further steps in this action. Any cause of action and claims to consequential remedies which she might have pursued in this action are gone. They have been replaced by her rights under the settlement terms. She no longer has any right in this action to seek an order for payment of any costs or to have any costs assessed under the 2015 Act.
24. The jurisdiction of this court on all such matters is ousted, except in cases where it is not possible to enter into a valid contractual commitment which removes its supervisory role. This residual judicial supervision is limited to deciding whether or not to approve the settlement terms or amounts agreed or assessed under the settlement terms in actions brought on behalf of minors and persons of unsound mind and to award costs of such applications.
25. The provision relating to costs in clause 3 states that these are "... to be adjudicated in default of agreement and on the basis of the terms set out hereunder..." The words "to be adjudicated in default of agreement" are qualified by the words "and on the basis of the terms set out hereunder." The wording used cannot be construed as amounting to an agreement consenting to a court order for costs, as where parties to an action agree to "strike out with an order for adjudication of plaintiff's costs in default of agreement".
26. Judicial estoppel prevents a party from asserting a factual position, which may sometimes relate to jurisdiction, in a legal proceeding that is contrary to a position taken by that party in a prior legal proceeding. In order to successfully invoke such an estoppel a party must show that the other party took an inconsistent position in a prior proceeding and that this was adopted by the first tribunal in some significant manner, such as by rendering a favourable judgment: see *Robinson v. Concentra Health Services Inc.*, 781 F.3d 42, 45 (2d Cir. 2015) and the authorities cited therein.
27. The issue which arises in this application was not conceded by the defendants or adopted in any other action in such a way as to give rise to a judicial estoppel in favour of the plaintiff. The exchanges between counsel and between judges and counsel and orders made in proceedings referred to in the affidavit of the plaintiff's solicitor are insufficient to establish any judicial estoppel in favour of the plaintiff on this issue.

28. These materials are not admissible as an aid to the interpretation of the settlement terms. The manner in which parties to a contract perform their obligations is not evidence which can be used in interpreting their contractual commitments.
29. Any course of conduct of the defendants in their interactions with other claimants who availed of the terms of settlement is not admissible to add to, vary or contradict the terms of the agreement entered into by the plaintiff.
30. A party to a contract may make concessions and choose not to hold the other party to terms of that contract. Absent an agreed contractual variation supported by valuable consideration or a fundamental assumption or change in position which gives rise to an estoppel by convention, such concessions cannot confer rights or entitlements on the other party.
31. As the settlement terms expressly provide an extra-judicial mechanism which establishes criteria for liability of the defendants to pay costs, a method of calculating those costs, and a contractual commitment to pay such costs as agreed or settled by the expert, there is no room for implication of any term into the contract which adds to or cuts across these arrangements.
32. This judgment is being delivered electronically. In the absence of submissions relating to costs within 21 days, such costs will be awarded against the plaintiff. Costs will be awarded to the successful party unless there is good reason to depart from the general rule.