THE HIGH COURT
PERSONAL INJURIES

[2021] IEHC 474
[2015 No. 10070 P]

BETWEEN

ALINE CONDON

PLAINTIFF

AND
HEALTH SERVICE EXECUTIVE

DEFENDANT

THE HIGH COURT
PERSONAL INJURIES

[2018 No. 9268 P]

BETWEEN

MONIKA SZWARC

PLAINTIFF

AND
HANFORD COMMERCIAL LTD T/A MALDRON HOTEL WEXFORD

DEFENDANT

JUDGMENT (*Ex Tempore*) of Mr. Justice Twomey delivered on the 29th day of June, 2021

INTRODUCTION

1. This judgment involves two very similar, but not identical, applications which were made at the same time when the High Court was on circuit. The applications were for this Court to insert in a court order, on consent of both plaintiff and defendant, certain terms of a settlement, or a proposed settlement.

2. The settlements arose in what are described by counsel in both cases as two separate 'nuisance settlements' in two separate personal injuries actions.

3. The judgment considers the interpretation of the term the court 'order' in s. 343R(2) of the Social Welfare Consolidation Act 2005 (the "2005 Act") and in particular whether an order of the court should contain terms (whether as recitals or in the body of the order) which are agreed between the parties as part of settlement and therefore are in this sense 'on consent' of the parties.

4. The alternative argument is that an order of the court in the context of s. 343R(2) should only contain such terms as were determined by the court after the hearing of evidence. This argument is of particular relevance where the 'agreed settlement terms' sought to be inserted will have a prejudicial effect on third parties, who are not parties to the proceedings, as in this case.

5. In this case, the third party in question which is being financially prejudiced by the orders is the Department of Social Protection (the "Department") and therefore these applications raise the issue of whether the Department (i.e. the taxpayer) should be financially prejudiced by a 'consent order' in personal injury nuisance claims.

6. It was strongly urged on this Court that the making of such 'consent orders' can nonetheless be justified on policy grounds, namely to facilitate settlement of nuisance

claims and therefore in pursuit of a legitimate policy of reducing waiting lists in the courts.

7. On this basis, it was argued that the relevant section should be interpreted to permit the making of such 'consent orders' by a court despite the financial loss to the taxpayer.

8. The background to this issue was considered in detail by Keane J., writing extra-judicially in '*Friends with Collateral Benefits? Consent Recitals on Loss of Earnings in Orders Striking Out Settled Personal Injuries Actions and the Recovery of State Benefits from Tort Damages'*, (2021) Irish Judicial Studies Journal Vol 4(2).

9. To date, there does not appear to have been any judicial analysis of the law or indeed any judgment on the issue, despite the regularity with which personal injuries cases are settled and indeed notwithstanding Keane J.'s observation at p. 58 that the practice in the courts regarding the granting of such orders

> "is not uniform in that some courts are willing to accede to consent applications to include loss of earnings recitals in orders striking out proceedings, while others are not."

10. In view of the importance conveyed to this Court of this issue to the settlement of nuisance claims and the effect of the failure to settle nuisance claims on the backlog of cases in the courts, and of course the financial cost to the taxpayer on the one hand and the benefit to defendants (many of which will be insurance companies) and plaintiffs on the other hand, it seems desirable that there be a High Court judgment on the issue.

Initial ex temp judgment

11. In urgent litigation, the courts will often give an *ex temp* judgment as soon as possible, with a summary of the reasons for the court's decision, and with a detailed written judgment in writing to follow. The applications in this case were heard on Thursday 17th June, 2021.

12. This approach is being adopted in this case, with an *ex temp* judgment being delivered today, with a written judgment to follow. It is important to note that this therefore is just a partial summary of the Court's reasoning, which is being delivered at this juncture to facilitate the parties.

13. As the Covid-19 regulations still apply, and as this matter is relatively urgent (since the very settlement at least of one of the cases depends on this Court's decision) this *ex temp* judgment is being delivered electronically to the parties, rather than delaying matters and requiring the parties to appear in person or remotely.

14. The urgency arises because in relation to the *Condon* case, this Court was advised that if the Court refused to insert the agreed settlement terms in the court order, the case would not settle.

15. In the *Szwarc* case, no such submission was made, but a day or so after the application was made, Mr. Jeremy Maher SC , who appeared in the *Szwarc* case, asked the Court when a decision could be expected and so this Court is conscious of the urgency of the matter for the parties.

16. In both cases therefore, the parties wish to know the outcome of their applications as soon as possible so as to allow them to proceed with the settlement or the litigation.

17. It is also the case that, in view of this Court's decision on the application, it wanted to facilitate the parties in the *Condon* case in particular (but also possibly in the *Szwarc* case) in making an application to this judge or any other judge as soon as possible to have their cases specially fixed in the next sessions of the circuit, rather than having to wait for the full written judgment.

18. Similarly, since the parties may wish to appeal, and since the court order can be drawn up with immediate effect (refusing to issue a court order including the settlement terms sought), the parties should be in a position to seek an urgent appeal of this judgment, without delay, should they so wish, and without having to wait for the full judgment. However, if an appeal is to be pursued, the parties should advise this Court and it will attach priority to the completion of the written judgment.

ANALYSIS

19. Against that background, this Court will briefly highlight its reasons for refusing the applications. First it is necessary to set out s. 343R:

Section 343R

20. Section 343R of the 2005 Act states:

> "(1) Subject to subsection (2), a compensator shall pay to the Minister the amount of recoverable benefits specified in the relevant statement of recoverable benefits before making any compensation payment to, or in respect of, an injured person.
>
> (2) Where the recoverable benefits specified in the relevant statement of recoverable benefits exceed the amount of the relevant compensation payment and **that relevant compensation payment was the subject of an order of a court** or assessment by the [Personal Injuries Assessment Board] in accordance with the act of 2003, the compensator is liable only to the extent of that amount so ordered or assessed." (Emphasis added)

21. The term '*relevant compensation payment'* is defined in s. 343L(1) as '*any part of a compensation payment that is attributable to loss of earnings or profits of an injured person'.*

22. To put these sections in less technical language, the general rule in subsection (1) is that a defendant (usually but not always an 'insurance company', and so this term is used) in a personal injuries claim arising from an accident, and who pays compensation to a plaintiff, must reimburse the Minister (since the payments are made by the 'Department',

this term will be used) the money paid by the Department to the plaintiff in respect of illness, partial capacity, injury benefits etc paid to a plaintiff as a result of the injury.

23. The logic appears to be that as the Department did not cause the accident and as the insurance company is compensating the plaintiff, the insurance company should first pay back the Department the compensation it has paid to the plaintiff, so that the taxpayer is not out of pocket, before paying any compensation to the plaintiff.

24. That is the general rule.

25. The concession to insurance companies in subsection (2) is that where the loss of earnings part of the compensation paid by the insurance company to the plaintiff is less than the amount paid by the Department, then the insurance company only has to pay the lesser amount back to the Department. Thus if there is a court hearing and in the judgment the court finds that the plaintiff had no loss of earnings, the insurance company does not have to make any reimbursement to the Department.

No consent to the terms of the Court Order by the party prejudiced

26. In both these cases, an application is being made for a court to make an order (based on the terms of a settlement reached between the parties), the effect of which will be to deprive the Department/taxpayer of any (or a full) reimbursement to which it would otherwise be entitled. The reason why this Court refuses these applications is because it is being asked to do so, not just without hearing evidence that has been tested, but crucially without hearing from the party (the Minister/Department) whose reimbursement rights are being prejudiced by the court orders sought.

27. If one was to consider for a moment that one was dealing with a private citizen, rather than the Department/taxpayer, who was prejudiced by the orders sought, the reality of what this court is being asked to do becomes clear.

28. It would mean that private citizen C could have her right to be reimbursed by an insurance company (A) eliminated by virtue of A (who is in litigation with B), agreeing with B certain terms in a settlement agreement and then requesting those terms be inserted in a court order.

29. It seems to this Court that applying principles of natural and constitutional justice and bearing in mind the protection attaching to property rights of citizens under the Constitution, this Court should not make such an order in the absence of consent thereto from private citizen C.

30. The position should be no different just because one is dealing with the money of the Department/taxpayer, rather that of a private citizen, and so it seems to this Court that the orders sought should only be granted if there was evidence that the party prejudiced, the Department, was also consenting to those terms being made an order of the Court.

31. There is no such evidence and on this basis, the applications are refused.

Interpretation of s. 343R

32. Although not strictly necessary, this Court will now consider whether the term court 'order' in s. 343R permits the Court to insert terms into the court order which were agreed between the parties, rather than ordered by the court after hearing evidence.

33. In this regard, it is important to note that the section does not state that the concession arises where the insurance company and the plaintiff agree as part of a settlement that there was no loss of earnings on the part of the plaintiff.

34. On the contrary, there is a very significant *proviso* before this concession arises (and it must be remembered this is a concession which financially advantages an insurance company at the cost of the taxpayer). That *proviso* is that there must be a 'court order' regarding the loss of earning element of the compensation before the insurance company is relieved in full or partly from reimbursing the taxpayer.

35. The purpose of the reference to court orders in this *proviso*, in this Court's view, is to ensure that before an insurance company is able to benefit from this financial concession, at the cost of the taxpayer, there must have been an independent and neutral verification process overseen by a judge who makes a determination regarding how much of the compensation is made up of loss of earnings.

36. Thus the term 'court order' in the context of s. 343R, in this Court's view, amounts to the requirement of an independent and neutral determination of the evidence, which was subject to cross examination or other testing, during an adversarial process at a time when the defendant's and plaintiff's interests were not aligned.

37. If after such a process, there is a court order, the Department/taxpayer will, in this Court's view, have the comfort of knowing that there are reasons, backed up by tested evidence, why the taxpayer should not be reimbursed (by the insurance company assuming responsibility for paying compensation) for the compensation the Department paid to a plaintiff for an accident (for which the Department has no responsibility).

38. It seems to this Court that the intention of the legislature in putting in the requirement of a 'court order' was to provide as much protection as possible to the taxpayer in recovering compensation paid by the Department for accidents for which it bore no legal responsibility and for which insurance companies were compensating the plaintiff.

39. As already noted, the section does not contemplate a plaintiff and defendant agreeing a settlement between themselves, in which they agree that the compensation payable has no (or only a certain percentage of) loss of earnings and thereby entitling the insurance company to the concession of not making any (or a full) reimbursement payment to the Department.

40. In this regard, it is relevant to set out the reasons why a court order arising from a settlement between the parties is very different from a court order arising from an independent determination by a neutral court (with no financial interest in the outcome) after hearing all the evidence tested in adversarial proceedings.

41. First of course there is the fact that a court order, which is sought on consent by both parties after settlement, is one which is being *jointly* sought by both parties. Thus, unlike in an adversarial hearing, both parties' interests are now aligned (i.e. they both want a settlement), which is not of course the case for a court order arising after an adversarial hearing.

42. Secondly and even more significantly, in this instance this court order on the consent of both parties is not one whose terms will only affect those parties. Rather the court order sought in this case is one which will financially prejudice a party, the Department/taxpayer, who is not represented in the application for that court order.

43. Thirdly, when one is dealing with a court order which is requested to reflect the settlement reached between the parties, one is dealing with a court order which is being sought on the basis of submissions made by lawyers after the case has settled, and not based on evidence which is tested in an adversarial hearing.

44. Of course, it is important at this juncture to emphasise that this Court is not suggesting that the solicitors and barristers representing the parties would be anything other than open to the Court in their submissions to a court. While this Court can of course rely on the *bona fides* of lawyers and their higher duty to the court, it must always be recalled that lawyers only act on whatever instructions their clients decide to give them.

45. At this juncture, it is appropriate to make clear that Mr. Jeremy Maher SC in the *Szwarc* case and Mr. David Kennedy SC in the *Condon* case were very frank and open in their submissions in relation to the facts of their respective cases and in particular their view that the cases in which they were involved were 'nuisance settlements'. They were also open in their view that the courts should insert the settlement terms into court orders in such nuisance claims (and thereby facilitate their settlement by relieving defendants/insurance companies of the obligation to fully reimburse the Department/taxpayer so that they have greater funds to offer plaintiffs in nuisance claims), because of the higher policy objective, in their view, of easing the backlog in the courts system.

46. Fourthly, and related to the fact that lawyers only act on instructions, this Court should bear in mind in its consideration of a joint application by a plaintiff and defendant/insurance company to have settlement terms inserted in a court order, that it is in the direct financial interest of the defendant/insurance company to have those settlement terms inserted in court order. This is because it can then produce that court order to the Department so as to avoid the obligation which it otherwise would have to reimburse the Department. Similarly, it is arguably in the indirect financial interest of the plaintiff, since he may benefit from any saving made by the insurance company in the amount the insurance company is willing to pay to him to settle his nuisance claim.

47. For all these reasons, this Court believes that interpreting the term court '*order*' in s. 343R to include the terms of settlement agreements is not justified based on a literal

interpretation of the term court '*order'* when it is considered in its context and when one considers the purpose of s. 343R.

CONCLUSION

48. For the reasons set out above the applications are refused and in particular this Court does not believe that a court should insert settlement terms into a court order for the financial benefit of a defendant/insurance company (and the indirect financial benefit of a plaintiff in a nuisance claim), at the cost of the Department/taxpayer, without the consent of the party that is financially prejudiced, i.e. the Minister.

Postscript

After the delivery of this judgment on the 29th June 2021 to the parties, two matters were brought to this Court's attention:

1. Three days later another High Court judge delivered judgment in *Matthews v. Eircom* [2021] IEHC 456 in which he disagreed with this Court's analysis of the legal position set out in the foregoing judgment and in which he disagreed with Keane J.'s extra-judicial analysis in his article on the topic in the *Irish Judicial Studies Journal*. To the extent that there are any differing views on this matter in the High Court, it may therefore be a matter for the appellate courts, were it to be appealed by the parties to this case or indeed were the Minister to seek a declaration regarding the status of orders made on consent for the purposes of s. 343(R) or to seek full payment from an insurance company/defendant which seeks to rely on such an order.

2. In an article by Peters, *Recovery of Benefits and Assistance Scheme: Aim and Implementation* (2020) Irish Law Times, Vol 38 (19) at p. 289, it is noted that:

> "In June 2017, the Department told insurers that they had received orders on approximately 1,300 cases and believed that they had a shortfall of €20m in RBA payments as a result. To date, the Department has taken no further action in pursuing the alleged outstanding RBA payments."