

THE HIGH COURT

[2021] IEHC 682
[2015 No. 2772P]

BETWEEN

FAHY

PLAINTIFF

AND

PADRAIC FAHY TILING CONTRACTORS LTD & ANOR

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 1st day of November, 2021

SUMMARY

1. Should plaintiffs and defendants/insurance companies in personal injury cases be able to decide amongst themselves, as part of a settlement agreement, a term, which (if inserted in a Court Order) will mean that the defendant will not have to reimburse the Department of Social Protection/taxpayer, such that the defendant/insurance company will have more money available to it to buy off the plaintiff's claim? The reimbursement relates to benefits paid by the taxpayer to a plaintiff in that personal injuries case arising from his injuries.
2. That is the key issue considered in this Court's decision in *Szwarc v. Hanford Commercial t/a Maldron Hotel Wexford* [2021] IEHC 474.

Should taxpayer be subsidising insurance companies on say-so of insurance company?

3. To put the matter another way, should defendants/insurance companies be able to get the taxpayer to subsidise them in making settlement payments to plaintiffs in personal injury cases by the simple expedient of reaching a private agreement with the plaintiff and having a court put that agreed term in a Court Order, so as to give it the status of a court order?
4. This Court concluded in *Szwarc* that insurance companies should not be able to do so. Accordingly, this Court refused in that case to include 'consent terms' in a Court Order (pursuant to s. 343R(2) of the Social Welfare (Consolidation) Act 2005), on the settlement of a personal injuries case. The effect of inserting the 'consent terms' in the Court Order would have been to have the taxpayer out of pocket and therefore effectively subsidising the insurance company in making the settlement payment to the plaintiff.
5. However, in the case before this Court, both the plaintiff ("Mr. Fahy") and the defendant want the defendant to be relieved of the reimbursement obligation to the taxpayer, and so for the taxpayer to effectively subsidise the settlement sum to be paid to Mr. Fahy and his lawyers. In this case, Mr Fahy's counsel has indicated that the '*vast proportion*' of the settlement sum is made up of legal fees and so will be paid to Mr. Fahy's lawyers, with the balance going to Mr. Fahy.
6. In asking this Court to insert 'consent terms' in a Court Order in this case, the parties have sought to distinguish this Court's decision in *Szwarc*, and their reasons for doing so can be summarised as follows:

- the defendant in this case, unlike in the *Szwarc* case, is not an insurance company, but a State body, and so inserting the 'consent terms' in the s. 343R(2) Court Order would result merely in one arm of the State effectively subsidising another arm of the State, and not the taxpayer subsidising an insurance company,
 - the Court is not being asked to make an 'order' in the terms of the 'consent terms', since this Court is simply being asked to 'note' in the Court Order the 'consent terms', and
 - the parties are happy to call evidence before the Court during the 'consent hearing' (i.e. during the hearing before this Court when seeking to have the proceedings struck out after they had reached settlement), *if* this Court wishes, in order to satisfy the Court that there is 'evidence' or 'facts' to support the 'consent terms' being inserted in the Court Order.
7. For the reasons set out hereunder, this Court concludes that the previously expressed reasons in the *Szwarc* case, for not inserting 'consent terms' into an order for the purposes of s. 343R(2) (a 's. 343R(2) Order'), continue to apply, even if the defendant is a State body, and even if the 'consent terms' are simply noted in the Court Order and even if 'evidence' is provided to the Court *after* the parties have settled.
8. In summary, this Court concludes that a 'consent term' amounts to nothing more than a term that has been agreed between a plaintiff and a defendant to settle their litigation, which is in their interests to agree. It is not a finding of fact or evidence upon which a Court can rely to support the making of a Court Order. As such, in this Court's view, it is not a sufficient basis for an 'order of a court' (as that term is used in s 343R(2)) and certainly not a court order where the order sought is in the financial interests of the plaintiff and the defendant but contrary to the financial interests of a third party (the taxpayer), particularly where the taxpayer's interests are not represented in the settlement negotiations between the plaintiff and defendant or at the settlement hearing when the court order is sought.

The Court being alive to the financial interests of the unrepresented taxpayer

9. Unlike a private individual who sees the money coming directly out of his pocket when he is financially prejudiced, there is no individual's pocket which is directly affected, when it is the taxpayer who is financially prejudiced. Thus, it seems less likely that someone will march into court seeking to protect the taxpayer when a court order prejudices its interests, than where it is an individual whose interests are prejudiced. For this reason, this Court believes that it should be alive to the risk that Court Orders, sought by defendants/insurance companies might financially prejudice the taxpayer, as in this case.
10. In this instance, this Court has concluded that a plaintiff in a personal injuries claim and an insurance company should not be able to effectively decide amongst themselves that the taxpayer is not to be paid back money that would be otherwise due to it from the insurance company.

11. Accordingly, for this and the other reasons set out in this judgment, this Court concludes that such 'consent terms' should not be inserted in court orders. Indeed, where consent terms are included in Court Orders, whether 'noted' or otherwise inserted, in this Court's view they do not amount to an 'order of a court' for the purposes of s 343R(2) such as to relieve a defendant/insurance company of the obligation to repay the Department of Social Protection/taxpayer the recoverable benefits paid by the Department to the plaintiff.
12. Accordingly, in addition to refusing to insert the 'consent terms' in the Court Order sought for the purposes of a s. 343R(2) Order on the grounds that this Court believes, for the reasons set out, such 'consent terms' should not be inserted, this Court also refuses to insert those 'consent terms' in the specific circumstances of this case.

BACKGROUND

13. The effect of the decision of this Court in *Szwarc* can be summarised as follows:
14. A plaintiff and a defendant/insurance company in a personal injuries case can reach a private agreement amongst themselves as part of their settlement (e.g. that the insurance company was only 10% liable for the accident), which term, as noted below, is in the financial interests of both the plaintiff and insurance company to agree.
15. However, if a Court accedes to the request of the parties to insert that agreed term in the Court Order, its effect will be that the Department of Social Protection/the taxpayer will end up subsidising the defendant/insurance company to make the settlement payment to the plaintiff.
16. This is because the effect of inserting such a term in a Court Order is that the insurance company can claim that it is only obliged to pay 10% of the disability benefit paid by the Department of Social Protection (the "Department") to the plaintiff. Thus, the insurance company can claim that there is now '*an order of a court*' (for the purposes of s. 343R(2) of the Social Welfare (Consolidation) Act 2005) to the effect that the insurance company is only 10% liable for the injury, even though the Court simply inserted the term in the Court Order at the request of the parties and the Court did not reach that conclusion based on an independent and objective assessment of evidence which had been tested in adversarial proceedings.
17. For this reason, this Court concludes that it is not appropriate for a court to insert such 'consent terms' in Court Orders, which are in the financial interests of the parties seeking the insertion of those terms, which terms arose from the private agreement of the parties when their interests were aligned and which financially prejudiced a party (the taxpayer) which had no say in those terms.
18. This Court reached this conclusion in *Szwarc* in reliance, in part, on the extra-judicial concerns expressed by Keane J in his detailed analysis of this area 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', (2020) Irish Judicial Studies Journal Vol 4(2) 43, which was opened to the Court in that case.

19. What this article highlighted was that an apparently innocuous term in a Court Order, which is put in by a court on the application and with the consent of both parties to a settlement, has the effect of the taxpayer subsidising insurance companies to make settlement payments to plaintiffs. This is of some considerable significance when one bears in mind that circa 97-99% of personal injury cases settle, see the *Report of the Personal Injuries Guidelines Committee* (published by the Judicial Council in December, 2020) where it is stated that only about 0.54% of all personal injury claims were actually heard in court (in the period 2017-2019) and the statement of the President of the High Court of 10 July, 2020 which states approximately 97% of personal injury cases settle.
20. That is the background to the application by the plaintiff and defendant in this case to depart from that principle and insert the 'consent terms' in the s. 343R(2) Order in this case.

The primary basis for distinguishing this case from the *Szwarc* case

21. In this case, unlike in the *Szwarc* case, where the defendant was an insurance company, the defendant is a State body – the HSE. This is the primary reason the lawyers for both plaintiff and defendant have sought to distinguish the *Szwarc* case from Mr. Fahy's case. On this basis they claim that the 'consent terms' agreed between them as part of the settlement should be inserted in the Court Order even though they are intended to deprive a third party, the Department/taxpayer, of its right to recover €42,000 in benefits paid by the taxpayer to Mr. Fahy arising from his injury.
22. As this Court understands it, the argument being made is that one arm of the State (the HSE) believes that it is in the HSE's financial interests, and thus in the State's financial interests, that the HSE does not reimburse another arm of the State (the Department). Therefore, it seems that any concern that this Court might have that the taxpayer might be *subsidising insurance companies* to make settlement payments, does not arise here. Rather, it is a case of one arm of the State *subsidising another arm of the State* which it is argued should not concern this Court as it is a different matter entirely the taxpayer subsidising an insurance company to make a settlement payment.
23. Before considering this argument, it is necessary to understand the operation of s. 343R in practice. This is because, at first glance, its importance and significance may not be appreciated, particularly when one bears in mind the fact that 97-99% of personal injury cases settle.

GENERAL BACKGROUND TO SECTION 343R

24. Section 343R of the Social Welfare (Consolidation) Act 2005, as amended, can perhaps be best understood by the following example:
 - where a plaintiff is injured as a result of the alleged negligence of a defendant and the plaintiff receives payment from the State to compensate him for that injury, such as for example a disability payment,

- s. 343R requires the defendant (who is found by a court to be responsible for the injury or who has assumed responsibility for the injury by entering a settlement with the plaintiff in respect of the injury) to reimburse the State for the disability payment made to the plaintiff.

Ensuring the taxpayer is not out of pocket for injuries for which it has no responsibility

25. In many cases, the defendant will be an insurance company and in the context of the 97-99% of personal injury cases that settle, the intent of s. 343R is to ensure that the State/taxpayer (which has absolutely no responsibility for the injury to the plaintiff) does not end up out of pocket *vis-à-vis* the insurance company, which is being sued and which has decided not to dispute its liability in court, but to settle the claim (and so accept responsibility for the injury and the loss resulting therefrom).
26. The section does this by providing that (subject to the exception below) if the defendant/insurance company settles with the plaintiff as regards its liability for the loss caused to him by the accident (including loss of earnings), the defendant/insurance company has to reimburse the taxpayer/State for the disability benefits etc. the taxpayer paid to the plaintiff arising from that injury.
27. From a policy perspective, all of this seems logical, since the taxpayer, who has no responsibility for the injury, should not be out of pocket, *vis-à-vis* the defendant/insurance company, which is responsible for the injury, whether it has its liability determined by a judge after a hearing or because it has decided not to dispute its liability in court and instead settle it. Furthermore, when a defendant decides that it is not prepared to dispute a plaintiff's claim in court that the defendant is responsible for the loss caused to the plaintiff, it seems clear to this Court that the defendant must be taken to be 'assuming responsibility' for the injury, as regards recoverable benefits, in contrast to the position of the State, which obviously has no role in causing those losses. This is particularly so, when one considers the express terms of s 343R(1) which make it clear that the reimbursement of the State by the defendant/insurance company takes priority over any compensation paid to the plaintiff.
28. In addition of course, when an insurance company is deciding, in the 97-99% of personal injury cases that settle, that it is not prepared to dispute its liability in court for the injury, it does so in the knowledge that it thereby assumes (pursuant to s. 343R(1)) responsibility to the taxpayer to reimburse it for any benefits paid to the plaintiff arising from his injury (which are known as 'recoverable benefits').
29. Logic dictates therefore, that the insurance company, when determining the amount, if any, it is prepared to pay to settle the claim will take account of the amount that it is required to reimburse the taxpayer, once it settles the action. Indeed s. 343R(1) makes it clear that the reimbursement of the taxpayer *takes priority* over any settlement payment to the plaintiff, since it states that the insurance company must reimburse the taxpayer '*before making any compensation payment*' to an injured person.

30. If s. 343R did not exist, and an insurance company was not obliged to reimburse the taxpayer benefits of say €42,000 (as in Mr. Fahy's case) which were paid to a plaintiff by the taxpayer for injuries caused to him by a defendant/insurance company, then the taxpayer would effectively be subsidising insurance companies to make settlement payments to plaintiffs by covering the losses that the insurance company should be covering. This is because if an insurance company does not have to pay the taxpayer €42,000 in recoverable benefits, which arose from the injury caused by the defendant/insurance company, then the insurance company will have €42,000 more to pay the plaintiff (and the plaintiff's lawyers, as in this case).

Exception where insurance company does not have to reimburse the taxpayer

31. While this is the apparent policy background to s. 343R, the section does recognise one situation in which a defendant/insurance company is not required to reimburse some or all of the recoverable benefits, paid by the taxpayer/Department to a plaintiff.

32. It is not proposed to go into this matter in detail, as this was considered in Szwarc, but in brief, this arises where there is an "an order of a court" (in the words of s. 343R(2)), for example to the effect that the defendant/insurance company was only 10% liable for the plaintiff's injury.

33. This exception makes sense from a policy perspective in a situation where the Court, after hearing all the evidence tested in an adversarial hearing, orders that the defendant/insurance company is say only 10% liable for the plaintiff's injuries and therefore should only be liable to reimburse the taxpayer 10% of the benefits paid by the taxpayer to the plaintiff relating to that injury. In such a case, it is completely justifiable from a policy perspective that the Department/taxpayer should remain liable for the remaining 90% of benefits that it paid to the injured plaintiff.

Putting a 'consent term' in a Court Order to allow defendant benefit from this exception?

34. However, it is a different matter entirely where the parties themselves *decide to agree* that the defendant/insurance company was only 10% liable as part of a settlement agreement, and as part of that agreement the defendant/insurance company pays the plaintiff to settle his claim.

35. Such a term does not result from an *order* of the court reached by a judge after hearing evidence which has been tested during an adversarial process, but it results from a private agreement between the plaintiff and the defendant/insurance company (inserted in a Court Order at the request of the parties), in which they decide to agree amongst themselves that the defendant/insurance company is only 10% liable for the plaintiff's injuries and so should only be liable to pay back 10% to the taxpayer as part of their settlement terms.

36. Furthermore, unlike the usual court order (arising from a decision by a judge with no financial interest in the outcome after hearing tested evidence in an adversarial hearing) this term (that say the Defendant is only 10% liable) is clearly in the financial interests of the plaintiff and the defendant/insurance company to reach such an agreement, since the

defendant/insurance company will be better off to the tune of 90% of €42,000 (using the figures for recoverable benefits from Mr. Fahy's case), and thus have €37,800 (that it otherwise would not have) to pay the plaintiff and his legal costs.

37. Indeed, one might ask, why would the plaintiff not agree to such a term since it makes no difference to him whether he agrees that the defendant is 100% liable or 10% liable, once the plaintiff gets his lump sum as part of that agreement. However, the person to whom it does make a difference is the taxpayer, since he will be out of pocket, pursuant to s. 343R(2), if such an agreed term is made an order of a court.

It is not being suggested that there is any fraud on the part of the plaintiff and defendant

38. While it is being observed that it is in the financial interest of the plaintiff and the defendant/insurance company to reach such an agreement on splitting liability 90:10, to the detriment of the taxpayer who is not represented, it is critical to note that it is *not* being suggested that litigants have reached the view that their liability should be split in that manner, otherwise than in a *bona fide* manner.

The *bona fides* of the lawyers is accepted

39. Similarly, of course, this Court, in refusing to insert 'consent terms' into a s. 343R(2) Order, is not calling into question the *bona fides* of lawyers making submission on behalf of those parties, that a 90:10 liability split has been agreed. This is because lawyers never have any responsibility for the veracity of their instructions, whether it is that their client is innocent of a criminal offence or that in a civil case there was a 90:10 liability split, that there no payment in respect of loss of earnings, etc.
40. Thus, just as one accepts the submissions of lawyers as *bona fide* when they say that their client is innocent, this Court accepts the submissions of lawyers as *bona fide* when they say that a settlement was based on the defendant/insurance company being only 10% liable or that there was no payment in respect of loss of earnings.

However, just as with a submission by a lawyer that his client is innocent in a criminal action, it is an entirely separate matter as to whether a court should *make a court order* to that effect. Accordingly the fact that a court does not simply make a s. 343R(2) Order in a civil case, when it is requested to do by the plaintiff and the defendant/insurance company (through their lawyers), does not call into question the *bona fides* of the lawyers, any more than in a criminal case.

Difference between an Order after adversarial hearing v Order reflecting 'consent terms'

41. Rather the point being made is that there is a significant difference between
- (a) a term in a Court Order which is based on what is agreed between parties which is in their financial interest and which prejudicially affects a party who is not involved in the proceedings,
- and

- (b) a term in a Court Order that is based on the objective conclusions of a judge with no financial interest in the term, after having heard tested evidence in an adversarial setting.

The 'consent term' is in plaintiff's and defendant's financial interest

42. The key issue is that it is in the financial interests of the plaintiff and the defendant/insurance company to agree that the defendant/insurance company should have no reimbursement obligation to the taxpayer. Accordingly, considerable caution should be exercised, in a court simply inserting the 'consent term' in a Court Order, particularly where the effect of that insertion will be to financially prejudice a party whose interests are not represented in the negotiations of that agreement or at the court 'consent hearing' seeking its insertion in the Court Order.
43. A similar point was made in a different context by the Supreme Court and Court of Appeal regarding expert witnesses. In *Byrne v. Ardenheath Company Ltd & Anor.* [2017] IECA 293, Irvine J., as she then was, commented on the opinions of expert witnesses, at para. 31 that:
- "their opinions all too often appeared to *correspond too favourably with the interests of the parties* who retained them." (Emphasis added)
44. O'Donnell J., as he then was, in a similar context in the Supreme Court case of *Hanrahan v. Minister for Agriculture, Fisheries and Food* [2017] IESC 66 stated at para. 4 that:
- "I do not wish to criticize the individuals who gave evidence in this case, since this was a difficult case and in any event the 'high ball – low ball' approach which occurred here is only an example of a more widespread phenomenon. However, *it is surely not coincidental that it was the independent expert on behalf of the plaintiff whose opinion was that the damages were extremely substantial*, and the expert on behalf of the defendant who considered that in effect there was no loss at all." (Emphasis added)
45. It seems clear that the point being made in both these cases is not that these professionals (or their clients) were acting *male fides*, but rather that the reason that it is no coincidence that expert evidence in court always seems to support the party engaging the expert, is simply because it is human nature to act in one's own financial interests and this can often occur subconsciously.
46. Thus, it should not be a surprise that a plaintiff and defendant/insurance company might reach an agreement that is financially beneficial to them and financially prejudicial to the taxpayer. In many cases, this may be subconscious, where the parties simply err on the side of caution in their own favour. Thus, it is not being suggested that an agreement between a plaintiff and a defendant/insurance company that deprives the taxpayer of reimbursement was reached otherwise than in a *bona fides* manner.

47. It is for, *inter alia*, this reasons that a court should not, in this Court's view, accede to an application to insert those 'consent terms' in a Court Order, particularly where the financial rights of a third party, who is not represented, are prejudiced.
48. For this reason, this Court concludes in this case, as it did in the *Szwarc* case, that the expression, 'order of a court' in s. 343R(2) refers to a conclusion (e.g. that the defendant is only 10% liable for the plaintiff's injury) which has been reached by a judge who has no financial interest in that conclusion and after hearing tested evidence in an adversarial hearing. It is not a reference to a term of a settlement agreement which is in the plaintiff's and defendant's financial interests to agree and which is inserted by a judge as a 'consent term' in a court order.,
49. As the intention of inserting that 'consent term' in the Court Order is to persuade the Department that there is in fact in existence 'an order of a court' for the purposes of s 343R(2), relieving the defendant/insurance company of the obligation to reimburse the taxpayer, this Court has concluded that it is not appropriate for this Court to insert in Court Orders a term, resulting from private settlements between a plaintiff and a defendant/insurance company.

Summary of reasons 'consent terms' should not be inserted in s. 343R(2) Orders

50. Before going on to consider the argument that the *Szwarc* case should be distinguished from the case before this Court, it is useful to summarise the four key reasons why this Court believes that the Court should not insert 'consent terms' into a Court Order:
- (i) the terms are not based on evidence tested in an open court before a judge with no financial interest in the conclusion, between parties whose interests are opposed,
 - (ii) the proposed term arose from a private settlement between parties who are no longer in dispute since they have reached a settlement agreement, and whose interests are aligned in making the application to Court for insertion of the terms,
 - (iii) the effect of such an order is to have the taxpayer subsidise any settlement payment by the defendant/insurance company to the plaintiff (by relieving the defendant/insurance company of the obligation to reimburse the taxpayer) and thus for the direct financial benefit of the defendant/insurance company and the indirect financial benefit of the plaintiff, and
 - (iv) the party, who is financially disadvantaged by the order, the taxpayer, has no say in the term proposed to be inserted in the order.

No need for the Department to be put on notice

51. In relation to reason (iv), it is important to note that this Court is not suggesting that the State be put on notice or represented in cases which settle, which would of course add to legal costs. Quite the contrary, since as noted above, the position under s. 343R(1) is quite clear, namely that the reimbursement of the taxpayer takes priority over any settlement sum paid to the plaintiff by the defendant/insurance company. Thus, the defendant/insurance company in calculating how much it is prepared to pay in settlement,

must simply take account of its obligation to reimburse the taxpayer first. In this way, the taxpayer will never be out of pocket, *unless* a judge determines, after hearing tested evidence in an adversarial hearing, that it is justified that the taxpayer be denied the reimbursement. Accordingly, there is no need for there to be any additional costs incurred in the settlement of those cases where the defendant/insurance company has a reimbursement obligation to the taxpayer.

52. At this juncture, it should also be noted that the Szwarc case, which had an insurance company as a defendant, was heard at the same time as case of *Condon v HSE (Condon v. Health Service Executive [2021] IEHC 474)*. In the *Condon* case, the defendant, like in Mr. Fahy's case, was a State entity. However, the issue in this case, that a different approach should be taken when the defendant is not an insurance company but a State entity, was not decided in *Condon*. That argument is considered therefore for the first time below.
53. Before considering that argument, it is relevant to give some brief background to Mr. Fahy's case, which has settled, and the 'consent term' which Mr. Fahy and the HSE want inserted in the Court Order.

SPECIFIC BACKGROUND TO MR. FAHY'S CASE

54. This case involves a claim by Mr. Fahy that he injured himself while doing tiling work on behalf of his brother's company, the first defendant ("Fahy Tiling Ltd"), at the premises of the second defendant ("the HSE").
55. This Court was informed that Fahy Tiling Ltd has no assets/is no longer trading and does not appear to have insurance, so it is not a mark for damages and that a settlement was reached between the HSE and Mr. Fahy for a relatively modest sum (that is modest relative, presumably, to normal High Court damages and costs, which in general are significant).
56. Counsel for Mr. Fahy, indicated that the vast proportion of that 'all-in' settlement sum (i.e. to include the plaintiff's legal costs) will go to Mr. Fahy's lawyers for their legal costs, indeed to such a degree his counsel indicated that the plaintiff is disappointed at the amount that is left for him, once these costs are paid.
57. It was outlined to the court that the reason the settlement sum is modest is because the primary responsibility for the accident was arguably with Fahy Tiling Ltd and there are issues about whether there was in fact any negligence on the part of the HSE and indeed there are claims regarding the extent to which Mr. Fahy himself was contributorily negligent. In this regard, the claim might be termed 'speculative' on the part of Mr. Fahy and therefore may explain the modest sum left for him after the payment of his lawyers.
58. As noted earlier, Mr. Fahy received recoverable benefits from the Department of in the sum of €42,000 as a result of his loss of earnings related to the accident. Both the plaintiff and defendant want the Court Order to insert a term which states that the sum received by Mr. Fahy does not contain any loss of earnings. It seems clear that the

insertion of this 'consent term' will result in the taxpayer not receiving back from the defendant the €42,000 to which the taxpayer would otherwise be entitled, and so the taxpayer will, in effect, be subsidising the defendant in making a small sum payable to Mr. Fahy, but primarily the payment of legal costs to his lawyers.

59. Counsel for the HSE explained that if there was a finding by the Court of even 1% negligence on the part of the HSE, it would have to pay 100% of the damages, as Fahy Tiling Ltd was not a mark for damages. In these circumstances, he explained that the HSE was willing to buy off the litigation risk by making a settlement payment to Mr. Fahy and his lawyers.
60. However, whatever may be the defendant's motivation, one cannot lose sight of the legislative background to their decision, namely s. 343R(1). The effect of that section is that if the HSE does not wish to dispute its liability in court, but instead wishes to settle with the plaintiff, then it is obliged to pay the Department the recoverable benefit of €42,000 '*before making any compensation payment*' to Mr. Fahy. In agreeing to whatever settlement amount it has now agreed with Mr. Fahy, the HSE would have been aware of this reimbursement obligation.
61. It is also important to note that in his proceedings, which he has settled with the HSE, Mr. Fahy is claiming that the HSE is liable for his loss of earnings, which would include the €42,000 he received from the Department.
62. Yet, now that the matter is settled, both the plaintiff and the defendant have agreed as part of that settlement that whatever amount he is receiving from the defendant, it does not include any payment in respect of loss of earnings that he says was caused by the defendant.
63. It should be clear from the foregoing that there is a significant financial incentive for the plaintiff and defendant to reach this agreement, now that they have settled their litigation. It is equally clear that while the plaintiff and the defendant are therefore the 'winners' from their agreement, the only loser from their agreement is the taxpayer.
64. Clearly, the plaintiff and defendant/insurance company are perfectly entitled to agree whatever they want in this settlement agreement, since so long as it remains only a term in their settlement agreement, it only affects the two parties to that agreement. Indeed, as a general point, one might ask if a plaintiff is getting a lump sum from the defendant, why would he not agree to whatever term the defendant suggests regarding loss of earnings, if this makes no difference to the cheque he will be receiving? However, whether there might have been a reason why Mr. Fahy in particular would not have wanted to agree to a term (that his settlement sum did not contain loss of earnings) was not argued before this Court and so this point is not determinative of this court's consideration of the application.
65. However, the key issue is that the plaintiff and defendant now want this term inserted in the Court Order, which will have an effect on third parties, namely the

Department/taxpayer, as it will have the effect of relieving the HSE of the obligation to reimburse the Department the recoverable benefits of €42,000 (this assumes of course, that the Department accept that it is in 'an order of a court', notwithstanding that this Court has expressed the view that even if it is 'noted' in the Court Order, it does not amount to 'an order of a court' for the purposes of s. 343R(2)). In this regard, counsel for the HSE observed that:

"We take our chances with the Department of Social Welfare that they will continue to hold that line, but I have no guarantee that that will be so but certainly on the basis as I opened to the court, I have a legitimate expectation that they will be consistent in approach and if that appears in the court order that no loss of earnings were recovered by way of a note then I hope that the Department will accept that and that will be the extent of the case."

66. It will be seen therefore that an apparently innocuous term in a Court Order, which is put in by a court on consent of both parties to a settlement can have very significant financial implication for the taxpayer, for the benefit of a defendant/insurance company and the indirect benefit of the plaintiff, Mr. Fahy.
67. Counsel for Mr. Fahy summarised his argument regarding the basis for distinguishing the *Szwarc* case from Mr. Fahy's cases as follows:

"we're talking about the State being the Defendant in the guise of the HSE so that no matter what way you were to treat it, it's the payment of one organ of the State back to another organ, there's no detriment to the State in the overall sense.
[Counsel for the HSE] would probably agree with that as well."

ANALYSIS

68. The first point that is made by the lawyers for the HSE and for Mr. Fahy is that they are not asking this Court to 'order' that there was no loss of earnings recovered from the HSE, but rather that this would simply be 'noted' in the Order.

The Court is asked not to 'order' but 'note' that no loss of earnings?

69. If the matter had gone to hearing, it is possible that the HSE would have got a ruling from a court to the effect that it had no liability for the injury to the plaintiff and/or no liability for his loss of earnings. However, it chose not to do so and instead has settled, but now seeks the Court Order to reflect the terms agreed between the parties, *albeit* by means of a 'note'.
70. However, it is not disputed by the parties that whether the proposed term is 'noted' or 'ordered' by the Court, the purpose of inserting that term in the Court Order is to persuade the Department that there was no loss of earnings recovered against the HSE, and that this amounts to an 'order of a court' for the purposes of s. 343R(2), so as to relieve the HSE from the obligation to reimburse the Department the sum of €42,000.
71. Indeed, in this instance, there could be no other purpose for this application, to insert a 'consent term' that the settlement sum contains no sum in respect of loss of earnings,

other than to seek to convince the Department that there is 'an order of a court' which relieves the defendant of the obligation to reimburse the Department the sum of €42,000.

72. However, this Court has made clear that no matter what expression one uses in the Court Order, the contention that there was no loss of earnings recovered against the HSE, should not be treated as an 'order of a court', for the four reasons listed above.
73. Since the intention of the HSE and the plaintiff is that this term to be inserted in the Court Order, be treated by the Department as an 'order of a court', this Court cannot see how it can accede to this application, when it is this Court's view that it is not an 'order of a court' for the purposes of s. 343R(2).
74. Hence, this Court rejects the argument that it should simply 'note' the term in the Court Order, and that by merely noting the term, it somehow surmounts the four reasons which this Court has outlined for not inserting that term in the Court Order.

Defendant and plaintiff deciding themselves that no need to repay taxpayer

75. As should be clear from the foregoing analysis, this Court's difficulty with inserting these 'consent terms' in the s. 343R(2) Order is that the plaintiff and defendant are effectively getting to decide amongst themselves that the defendant should not have to pay back the taxpayer, for their own financial benefit. Just because it is the taxpayer, rather than a private person, that is being financially prejudiced (and so the money is not coming directly out of an individual's pocket) should not alter this Court's attitude to the principle (of constitutional and natural justice). This principle means that a third party should only have its rights prejudiced on the basis of *findings of fact* (by a judge with no financial interest in the matter after hearing tested evidence in an adversarial hearing) and not on the mere say-so of a plaintiff and defendant with a financial interest in something which is not a 'fact' but simply *a term* they insert in a private agreement.

What if it was a private person, and not the taxpayer, who was being prejudiced?

76. Perhaps this point might be better appreciated if one considered the position if one was not dealing with the taxpayer being deprived of a reimbursement, but a private individual X, who was owed money by B.
77. So for example, if there were proceedings between a plaintiff (A) and a defendant (B) and those proceedings settled. Then consider the position if those parties had applied, on the settlement of their case, for a Court Order striking out those proceedings. However, what if they had applied on consent of both parties to insert, and a judge agreed to insert, a term in that Order to the effect that that B did not owe any money to X. If B sought to rely on this 'consent term' as amounting to a 'an order of a court' and therefore sufficient to relieve B of his debt to X, it seems unarguable that this suggestion would be treated as having no legal basis. Clearly the 'consent term' could not be said to be a 'finding of fact' by a court (even though it had managed to find itself in a court order) and for this reason it could not be said to amount to 'an order of a court' which would bind B and X regarding the debt. In addition of course, even if it were to amount to an order of a court, it would be legally flawed since it would have amounted to X having his property rights compromised in breach of his rights to constitutional and natural justice.

78. Just because one is dealing with the taxpayer, and not an individual, does not mean that these principles do not equally apply in such a situation. It is for this reason, that this Court concludes that a 'consent term' should not be inserted into a s. 343R(2) Order. If a 'consent term' does so appear (whether 'ordered' or 'noted'), it remains what it is, merely a 'term' in a private agreement which was agreed, in their own financial interest, between two parties to litigation. It is not transformed into a 'finding of fact' by a judge with no financial interest in the term, or its effect such as to constitute 'an order of a court' which will deprive a third party, whose interests are not represented, of the reimbursement of recoverable benefits.

Distinguishing *Szwarc*?

79. This Court concluded in *Szwarc* that a Court Order for the purposes of s. 343R(2) means an order made by a court after evidence has been tested in an adversarial hearing.
80. The *Szwarc* case has not been appealed and the parties in this case did not seek to argue that it was wrongly decided (*albeit* that there is a view expressed by another High Court judge in *Matthews v Eircom* [2021] IEHC 456 contrary to this Court's view and contrary to the extra-judicial view of Keane J).
81. However, what the parties did do here was to seek to distinguish Mr. Fahy's case from *Szwarc* on the basis that the HSE and the Department, as State bodies, are both two sides of the same coin. On this basis, they argued that any financial prejudice to the Department, which results from the HSE's application to have the term inserted in the Court Order, should be discounted as a valid reason for this Court refusing the application.
82. It is clear that the HSE wishes to be able to argue to the Department that there is an 'order of a court' (*albeit* arising out of a private agreement of the parties) that there was no claim for loss of earnings recovered from the HSE.
83. However, it is a separate matter entirely whether this Court should, by inserting such a term in a Court Order, facilitate a defendant, whether an insurance company or, as in this case, a State entity, in depriving the taxpayer of the right to be reimbursed recoverable benefits.
84. This case perfectly illustrates the reason why two private parties would want such an Order and it illustrates the effect of that Order in practice on the taxpayer, who will be €42,000 out of pocket, while a defendant will have that 'extra' €42,000 to enable it buy off the plaintiff's claim and in this case, in particular, his legal fees.
85. The key issue is should this Court facilitate this purpose because the HSE and the Department are both State bodies?
86. As noted above this Court believes that there are four key reasons why it should not insert the requested terms in the court order, i.e.
- (i) the term is not a 'fact' found or ordered by a court after evidence has been tested,

- (ii) the term arises from a private settlement between parties,
 - (iii) it will result in the taxpayer subsidising any settlement payment, and
 - (iv) the taxpayer's interests are not represented in making this order.
87. In this case, the defendant is a State body, which arguably impacts upon reason (iii) and (iv).
88. However, the fact that the defendant is a State body, rather than an insurance company, does not make any difference to reasons (i) and (ii), since this Court is still faced with a request to put a term in a Court Order which is not based on evidence, but on submissions from the parties, which is in their financial interest and is not tested in an adversarial hearing.

What if evidence is offered as part of a 'settlement hearing'?

89. Indeed, even if the parties were to provide evidence after settlement (which was offered by counsel for the HSE in this case) so as to support its application for the term to be inserted, it remains the case that at that stage (i.e. after settlement), this is 'evidence' which arises from two parties with aligned interests, since both have a financial incentive in persuading the Court to insert the term, with no input from the party which is financially prejudiced. As previously noted, why wouldn't the plaintiff agree whatever term is suggested by the defendant/insurance company (e.g. the settlement sum is not in respect of loss of earnings or that the defendant was only 10% liable for the injury) in order to relieve the defendant/insurance company of its reimbursement obligation to the taxpayer, when the plaintiff is getting a settlement sum to do so, and the proposed term has no effect on that settlement sum?
90. For this reason, this 'evidence' could not be said to be evidence which is tested in an adversarial hearing between opposing parties or evidence of sufficient quality to justify this Court in making an 'order' (or inserting a note in a Court Order) to that effect. To put the matter another way, it is an easy matter, now that the plaintiff and defendant have agreed on a settlement sum to be paid by the defendant to the plaintiff, for them to both agree, in their own financial interests, that there is no payment by the HSE in respect of loss of earnings, to the detriment of the taxpayer.
91. It is crucial to note that in making this point, this Court is not calling into question the *bona fides* of the plaintiff and the defendant, in instructing their lawyers to make these submissions. Rather this Court is simply pointing out the difference between this 'evidence' produced by both parties in a consensual or non-adversarial hearing, who have a financial interest in having such a term inserted in the Court Order on the one hand, and conclusions reached by a judge with no financial interest in the outcome, after hearing evidence tested in an adversarial hearing, on the other hand.
92. It is also important for this Court to point out that it accepts both counsel's submissions, as completely *bona fides*, that the settlement sum does not include any payment in respect of loss of earnings. But this Court cannot simply accept at face value these

statements of their clients (made through their lawyers), any more than a court can accept a statement by a lawyer who states, on his client's instructions, that his client is innocent. That submission has to be tested in an adversarial hearing before it forms the basis of a court order to that effect, particularly, where a third party is financially prejudiced by those instructions.

93. Whether the statement, that the settlement did not include any payment for loss of earnings is accurate or not, is not the point. Rather the point is that it is in the plaintiff's and defendant's financial interests (and contrary to the financial interests of the unrepresented taxpayer) that they agree that the settlement sum does not include any payment in respect of loss of earnings. Furthermore, since this alleged 'fact' or 'evidence' did not arise from tested evidence in an adversarial setting, this means that this Court should not insert it in the Court Order.
94. In addition, as s. 343R(1) makes clear that the interests of the taxpayer take precedence and if a defendant/insurance company chooses not to dispute its liability for the plaintiff's loss of earnings in court and instead settle, then it must repay the taxpayer *before* making any compensation payment to the plaintiff.

The HSE and the Department are on the same side?

95. As regards, reason (iii), even though the HSE is a State body, like the Department, it remains the case that if the term is inserted in the Court Order, another part of the State is subsidising the settlement payment to the plaintiff, in this case to the tune of €42,000. The decision of a Court to insert such a term therefore has very significant financial repercussions.
96. If this were a term with no financial effect on third parties, it would of course be a different matter e.g. it is unlikely that if the parties to litigation wished to have noted in the Court Order a term that 'the defendant unreservedly apologises to the plaintiff for any upset caused', that this will have any financial implications for a third party.
97. As regards reason (iv), the argument is made that, while the Department, and thus an arm of the State, has no say in the terms of an Order, which will financially disadvantage it to the tune of €42,000, this is not a sufficient basis for refusing to insert the terms into the Order in this case. This is because it is argued that the party seeking the Order is not an insurance company, but another arm of the State. Thus, it appears to be suggested that if one arm of the State believes that it is in the State's financial interests to do X, then this should, in effect, bind another arm of the State (or be of no concern to it) and this Court should ignore the interests of that other arm of the State.
98. This Court can see the commercial logic of the point being made by counsel for the HSE, particularly in the circumstances of this case. This is because he is understandably of the view that he is jealously guarding the financial interests of the State by saving it three days of High Court costs, which it may not recover from the plaintiff, by agreeing this settlement (without the burden of also having to pay €42,000 back to the Department).

This Court also completely understands the desire and *bona fides* of both counsel in settling the case and avoiding the costs and court time wasted in having a hearing.

99. However, there are other interests at stake apart from the plaintiff and defendant and the time and expense of court hearings. Accordingly, this Court does not believe that this is a question that the HSE can decide on behalf of the Department, or indeed that this Court can decide on behalf of the Department, that it should be deprived of its reimbursement of €42,000.
100. The Department presumably has, like the HSE, its own budget which it jealously guards and whether it is expended for the benefit of citizens or for the benefit of other State entities such as the HSE (by relieving it of a payment obligation to the Department) is a matter for the Department to decide, and not have decided for it.

Department can relieve HSE of reimbursement obligation whether in Court Order or not

101. Clearly, if the HSE is firmly of the view, as it appears to be, that the Department should forgo its reimbursement right to the €42,000, since it is clearly in the interest of the State as a whole (as it has argued in this court), then, if it is correct, it should simply be a case of the Department agreeing to do so, whether it is in the Court Order or not.
102. However, the fact that the HSE wants to rely on a Court Order to that effect simply highlights for this Court that this is by no means a foregone conclusion. Indeed, the HSE could have sought a letter of consent from the Department to that effect, or indeed it could have sought the views of the Department regarding reimbursement of recoverable benefits generally from other State entities, if it thought that its views and those of the Department regarding what is in the interests of the State as a whole, are the same.

The Department's view of the State's interests?

103. However, it is possible that the Department might have a very different view from the HSE as to what is in the national interest. It could well make it clear to the HSE that it expects such reimbursement and that if the HSE is concerned about how much the settlement will cost the State as a whole (if it also has to reimburse the Department), then the HSE should have reduced its settlement offer to the plaintiff to take account of its obligation to repay the Department and not be seeking to fund such settlements to plaintiffs and their lawyers from funds which are part of the Department's budget.
104. Equally of course it is possible that the Department might conclude that, rather than buying-off such speculative claims, that it is in the interests of the State as a whole or the HSE to litigate them, in order to discourage similar speculative claims being made against the HSE and the State in general, in the future.
105. However, this amounts to speculation, since the key point is that this Court does not know what the position of the Department is regarding reimbursement of recoverable benefits from other State bodies and it is not for the HSE to decide this issue on its behalf.

HSE and Department are part of the same structure?

106. The argument made by counsel for the HSE, that one arm of the State is the same as another arm of the State for the purposes of its application, is comparable to the argument by company X that it wanted a court order that prejudiced company Y, irrespective of company Y's views, because they were both part of the Z group of companies.
107. This Court does not believe that as a matter of principle it can prejudice one company/state entity by means of a court order on the say-so of another company/state entity simply because they are part of the same structure and one company/state entity believes that it is in the interests of the overall structure that the other company/state entity be financially prejudiced.
108. Indeed, the fact that arms of the State do not have the same interests and perspectives and do not operate as one aggregate in litigation is highlighted by the Supreme Court case of *Lett & Company Ltd v Wexford Borough Council & The Minister for Communications* [2012] 2 IR 198 at p. 250. In that case, two State bodies, Wexford Borough Council and the Minister, did not seek to resolve their differences by means of internal mediation or adjudication and ended up in litigation at considerable overall cost to the taxpayer, which was paying both sets of legal fees.
109. And so it is in this case, this Court cannot assume that two separate State bodies have the same interests and perspectives on whether the reimbursement of €42,000 should be made by the HSE to the Department.
110. Furthermore, it is often the case that State bodies will jealously guard their own separate budgets and interests to such a degree that when State bodies are co-defendants, one State body will incur legal costs (at the cost of the taxpayer) to establish which of the State bodies is liable for the legal costs of the original litigation. Since it is ultimately the State which will be paying all the legal costs, it is not in the financial interests of the State, when viewed as whole, to be incurring further legal costs in determining the split of legal costs between two State bodies, yet such litigation is common place e.g. see the case of *The Child and Family Agency v. A.A (No. 2)* [2018] IEHC 116 which involved a dispute between the Legal Aid Board and the Child and Family Agency regarding which State body should be liable for the legal costs which arose from a dispute over the disclosure of the HIV status of a minor in care.
111. Thus, it seems clear to this Court that, it is not simply a case that this Court can assume that if the HSE wants an order which it says is in its financial interests and thus in the State's financial interests, that this Court can conclude that the interests of all other State bodies, and in particular the Department, should be regarded as being one and the same as that of the HSE, such as to grant the Order sought.

CONCLUSION

112. Accordingly, this Court does not believe that the fact that the HSE and the Department are both State bodies is a sufficient ground for distinguishing Mr. Fahy's case from the *Szwarc* (or *Condon*) case, neither of which have been appealed.

113. Obviously, it is possible that an appellate court might reach a different conclusion regarding:
- (a) this Court's refusal to insert 'consent terms' in a Court Order in order to relieve a defendant of its obligation to reimburse benefits paid by the Department/taxpayer to an injured plaintiff, for the reasons set out above,
 - (b) this Court's refusal to do so, even where the defendant seeking the insertion of those terms is a State body, rather than an insurance company, or where the terms are merely to be 'noted' or where post-settlement evidence is offered to the Court.
114. For this reason, this Court reserved judgment on this application, so that a written judgment with detailed reasons can be provided to the parties, should they wish to pursue an appeal.
115. Finally, it is important to note that, as a postscript to the *Szwarc* judgment, reference was made to an article by Peters, *Recovery of Benefits and Assistance Scheme: Aim and Implementation* (2020) Irish Law Times, Vol 38 (19) at p. 289, in which there was reference to the Department of Social Protection believing that it had a shortfall of €20 million in recoverable benefits in 2017. That article came to light after the decision in *Szwarc* was handed down and therefore was not relied upon in that case. For the avoidance of doubt, it is clarified that it was not introduced as evidence in Mr. Fahy's application and therefore it also had no relevance to this decision, which considered this issue irrespective of the extent of the financial implications thereof for the taxpayer.