

THE HIGH COURT

[2022] IEHC 181
[2018/8428P]

BETWEEN

DANIEL KUCZAK

PLAINTIFF

AND

TREACY TYRES [PORTUMNA] LIMITED

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 29th March, 2022

INTRODUCTION

1. This case is an example of a situation in which insurance companies want the taxpayer 'to foot the bill for what might be regarded as a business expense of the insurance companies', to adopt the language of the Law Reform Commission (referenced below). In unusually explicit language, the Law Reform Commission considers that it is very clear that it is 'wrong' for taxpayers to subsidise insurance companies in this manner. This Court reaches the same conclusion in this case.
2. While the sum involved in this case is €45,000, the amounts at stake on an annual basis could be significant if the figures contained in a recent academic article (see below) are correct, since there is reference to a 'shortfall of €20m' to the taxpayer in one year alone, arising from the practice of insurance companies seeking to have the taxpayer foot the bill for their 'business expenses'.

How 'business expenses' of insurance companies are converted to a taxpayer's liability

3. The conversion of what would otherwise be a business expense of an insurance company into a liability of the taxpayer arises by the insertion of a particular form of 'consent term' into a Court Order on the settlement of personal injury cases, which consent terms are referred to as "s. 343R(2) Consent Orders" after the relevant section of the Social Welfare Consolidation Act 2005 (the "2005 Act").
4. These consent terms appear to be innocuous, e.g. the insertion of a term when a personal injuries case is being settled, on the consent of both parties, that the defendant was only 10% liable for the injuries to the plaintiff, to take an example from a previous case heard by this Court (i.e. *Condon v HSE* [2021] IEHC 474). Similar innocuous appearing 'consent terms' are that the plaintiff has withdrawn his claim for loss of earnings or that there was no claim for loss of earnings (as noted by Keane J. when writing extra-judicially, in the article referenced below).
5. That article appeared in the *Irish Judicial Studies Journal*, which has as its primary purpose to provide 'Irish judges with information and opinions that are relevant and useful to them in their work'. At that time of the article's publication, Keane J. was sitting in the personal injuries division of the High Court and he brought to the attention of his judicial colleagues, particularly those who might only deal with personal injury cases for a week or two a year while on circuit, that these s. 343R(2) Consent Orders are in fact far from innocuous.

6. At page 56 of that article he points out that s. 343R(2) Consent Orders sought by insurance companies on the settlement of personal injury cases have '*no apparent purpose other than to*' deprive the taxpayer (i.e. the Department of Social Protection (the "Department")) of a reimbursement from insurance companies to which the taxpayer is entitled. These consent terms have one aim, and one aim only, namely to deprive a person who is not party to the proceedings (the taxpayer) of money due from the insurance company (to which the taxpayer would otherwise be entitled).
7. To appreciate the significance of what is occurring with s. 343R(2) Consent Orders, it is helpful to consider this situation if the money was owed by an insurance company to a private company or an individual (X), rather than to the taxpayer. Imagine the reaction if in such a situation an insurance company (B) and a plaintiff (A), when striking out the proceedings (A v B), to which X was not a party, were to apply to court to insert a 'consent term' in their court order which would deprive X of its legal right to repayment of money from the insurance company. It should be emphasised that there is no input obtained from X, the party who is financially prejudiced by the order, before the granting of such orders.
8. Yet, as brought to the attention of the judiciary by Keane J, this is exactly what is occurring with the use of s. 343R(2) Consent Orders.
9. Just because one is dealing with the taxpayers' funds, rather than the funds of an individual, does not, in this Court's view, mean that the taxpayer/Department should be deprived of money due to it, on the simple say-so of an insurance company inserting an apparently innocuous consent term in an order striking out a personal injuries' claim.
10. As explained by Keane J., once a judge puts such a 'consent term' in a Court Order it has the effect of writing-off debts owed by insurance companies to the Department. In this way, these apparently innocuous consent terms convert what the Law Reform Commission describes as a '*business expense*' of an insurance company into the liability of the taxpayer.
11. In that article, Keane J. highlighted that while in the vast majority of instances in which personal injuries cases settled in the past the Court simply struck 'out the proceedings with no further order', there is now a '*new phenomenon in settled personal injuries actions*' whereby 'defendants now regularly apply to the court' for s. 343R(2) Consent Orders on their settlement.
12. This case is an example of the practice to which Keane J. refers. Here, the sum of €45,000 would be converted from being the liability of an insurance company into the liability of the taxpayer by the simple expedient of a term being inserted into a Court Order with the consent of both parties to the litigation (i.e. a 'consent term') when the personal injury case settles.
13. This Court adopts the analysis of Keane J. and the language of the Law Reform Commission to conclude that it is wrong for 'consent terms' to be inserted into Court

Orders on the settlement of personal injury cases, with the intent of having the taxpayer foot the bill for insurance companies' business expenses. By the taxpayer subsidising insurance companies in this way, to pay settlements in personal injury cases, the taxpayer is directly benefiting insurance companies, and indirectly benefiting personal injury plaintiffs and their lawyers (whose fees are invariably paid as part of the settlement sum).

14. The reimbursements due to the taxpayer/Department, under s. 343R(1) of the 2005 Act when personal injury cases settle, are known as 'recoverable benefits'. Keane J.'s article highlights the successful attempts in recent times by insurance companies to avoid their repayment to the taxpayer by the use of s. 343R(2) Consent Orders. Section 343R(2) of the 2015 Act was inserted by s. 13(d) of the Social Welfare Pensions Act 2013 and has only been operative since 1st August, 2014. Accordingly, the seeking of s. 343R(2) Consent Orders is for this reason a '*new phenomenon*' that has only come in existence since that date.
15. The very significant financial effect of a s. 343R Consent Order, in converting a business expense of an insurance company into the taxpayers' liability, is not immediately obvious from the somewhat dense and technical s. 343R of the 2015 Act, which states:

"Obligation to pay recoverable benefits

343R. (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 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 Board in accordance with the Act of 2003, the compensator is liable only to the extent of that amount so ordered or assessed.

(3) A compensator who fails to comply with subsection (1) or otherwise fails to pay the amount of recoverable benefits due to the Minister is liable to pay on demand to the Minister that amount of recoverable benefits so due."

For this reason, it may be helpful at this stage to give a brief hypothetical example of how s. 343R(2) Consent Orders can work in practice.

How does s. 343R(2) convert a company's business expense into a taxpayer's liability?

16. Sean Citizen claims he was injured in a shop that has insurance. He makes a claim against the shop in which he claims that the shop was 100% responsible for his 'pain and suffering' resulting from his injuries and 100% liable for his loss of earnings. The Department pay him disability and other benefits of €80,000 when he is out of work arising from the accident, which accident Sean claims was 100% the responsibility of the insurance company. These payments are known as 'recoverable benefits' of €80,000,

since they are 'recoverable' by the taxpayer/Department from the insurance company which, by settling the claim (and refusing to contest liability in court for the accident), can be said, in general terms, to be accepting responsibility for causing the injuries.

17. The insurance company offers Sean €100,000 (to include his legal costs of €20,000) to settle the claim and he is happy with this sum. As a condition of the settlement, the insurance company says that Sean must agree to the Court Order striking out the claim on its settlement containing a term that says that Sean was 90% liable for the accident and the shop/insurance company was only 10% liable.
18. This 'consent term' enables the insurance company to claim that, it has an 'order of a court' (to quote s. 343R(2)) to the effect that the insurance company was only 10% liable for the accident. On this basis, it will be able to claim that it will only have to pay back 10%, or €8,000, of the €80,000 in recoverable benefits to the taxpayer/Department. Accordingly, by the simple expedient of inserting this 'consent term' in the Court Order striking out the proceedings on their settlement, the insurance company will save €72,000, which it would otherwise have to repay the Department.
19. Sean has no issue agreeing to this consent term, once he gets the €100,000 he is receiving to settle the claim. He could not care less whether the Court Order says he is 30%, 50% or 99% liable for injuries he suffered once it has no impact on the sum he receives from the insurance company. In fact, he may even appreciate that the true effect of the 'consent term' is to ensure that there is €72,000 of taxpayers' money available to the insurance company to pay his settlement, that if he did not agree to the 'consent term' would not be available.
20. The only party negatively impacted in all of this is the taxpayer, who is in effect contributing €72,000 to the insurance company, which can then use this money to pay €80,000 to Sean and €20,000 to his lawyers. Without this '*subvention from the State*' of €72,000 (to quote Keane J.), the settlement pay out might be just €28,000 to Sean and his lawyers. Alternatively, the settlement sum might be €100,000 but with the insurance company (paying its own 'business expenses') by having to come up with the €72,000 from its own resources and not from the , with presumably a negative effect on the profits of the insurance company (since it would not have the 'subvention' from the State.)

The UK position

21. It is relevant to note that no such possibility exists in the UK for insurance companies to have their 'business expenses' converted into the liability of the taxpayer. This is because as noted by Keane J. (at p. 48 of his article), in the UK equivalent legislation, there is no facility for insurance companies to insert 'consent terms' in Court Orders and thereby have the taxpayer foot the bill for these insurance company '*business expenses*', as there is:

“a crucial distinction between the UK legislation and our own [...] *The compensator remains liable* to pay the Secretary of State an amount equal to the total of the recoverable benefits.” (Emphasis added)

The Law Reform Commission approach to these ‘business expenses’

22. Prior to the enactment of the 2005 Act, the Law Reform Commission considered the position where an insurance company is liable for injuries which led to disability and other benefits being paid by the State in its *Consultation Paper on Section 2 of the Civil Liability (Amendment) Act 1964: The Deductibility of Collateral Benefits from Awards of Damages* (LRC 68-2002).
23. At para. 5.108, it made it clear, in the strongest terms, that the taxpayer *should* be entitled to reimbursement from insurance companies for these disability and other ‘recoverable benefits’ paid by the State to injured plaintiffs:

“To state *a straightforward principle*: it seems to the Commission to be *wrong* for the Department [of Social Protection] (and beyond it, *the taxpayers*) to have to foot the bill for what might be regarded as a *business expense of the insurance companies* who have taken premiums to insure a negligent defendant. There seems to us to be no practical or other reason not to require the insurance company to *shoulder its own business expense*.” (Emphasis added)

How common are these s. 343R(2) Consent Orders?

24. Although not a factor in deciding this case, which has to be considered on its merits, these recoverable benefits may be of considerable financial importance, based on the following information in the public domain (which was brought to the attention of the parties, but who did not make any submissions thereon):
- Keane J. refers in his article to this ‘new phenomenon in settled personal injuries actions’ whereby ‘defendants now regularly apply to court’ for these ‘consent terms’ to be inserted in s. 343R(2) Consent Orders (p. 54, emphasis added).
 - Bearing this in mind, it is relevant to note that there is a very high volume of personal injury cases each year - 17,810 in 2020 – see the Courts Service Annual Report 2020 at p. 41.
 - Of these tens of thousands of personal injury cases, a very high proportion settle since:
 - o only 0.54% of all personal injury cases were actually heard in court in 2017-2019, see the Report of the Personal Injuries Guidelines Committee (published by the Judicial Council in December 2020) at para. 85,
 - o approximately 97% of High Court personal injury cases settle – see the Statement of the President of the High Court, 10th July 2020.
 - The Department of Social Protection told insurers that it believed in one year alone (2017) that it had ‘a *shortfall of €20m*’ in recoverable benefits due to it from insurance companies, as a result of the use of s. 343R(2) Consent Orders by

insurance companies - Peters, Recovery of Benefits and Assistance Scheme: Aim and Implementation (2020) Irish Law Times, Vol 38 (19) at p. 289 (emphasis added). If this figure is correct and it is representative of the amounts involved, it would mean that the annual bill of insurance company 'business expenses', which the taxpayer foots, as a result of s. 343R(2) Consent Orders, could be €20 million, which is then available for use by insurance companies on an annual basis to pay settlement sums to personal injury plaintiffs and their lawyers.

25. This is the backdrop to the application by the insurance company in this case (which insures the defendant) to have a 'consent term' inserted in the Court Order striking out personal injury proceedings that have settled. By doing so, the insurance company hopes to have the taxpayer foot the bill of €45,000, that would otherwise be regarded as a '*business expense*' of the insurance company.

GENERAL BACKGROUND TO APPLICATIONS TO INSERT CONSENT TERMS

26. This is the third application by a defendant/insurance company to this Court for it to consider whether 'consent terms' should be inserted in a court order on the settlement of a personal injuries' action and thereby oblige the taxpayer to provide a 'subvention' to a defendant/insurance company. Before referencing those other applications, it is relevant to explain in a bit more detail how this apparently innocuous use of s. 343R(2) Consent Orders achieves the aim of having the taxpayer 'foot the bill for the business expenses of insurance companies'.

How the use of consent terms means taxpayers are footing insurance companies' bills

27. As previously noted, by settling the claim, the defendant/insurance company is effectively assuming liability for the accident and thereby assuming liability for reimbursing the benefits paid to the plaintiff by the taxpayer/Department.
28. This is entirely logical as a matter of principle, since the Department did not cause the accident, so it should have these payments reimbursed in full by the defendant/insurance company, which is assuming responsibility for the accident and in particular is choosing not to dispute in court its liability for the accident.
29. However there is an exception to this principle (under s. 343R(2)) to the effect that if a court '*orders*' for example that the defendant/insurance company was only 10% liable for the accident. Logically in those circumstances, the defendant/insurance company should only have to reimburse the taxpayer/Department 10% of the recoverable benefits paid to the plaintiff if a court *decides* that the defendant/insurance company is in fact only 10% liable (as distinct from the plaintiff and defendant *deciding* that the defendant is only 10% liable). For this reason, this Court has interpreted a 'court order' in this context to mean a decision taken by a court after it has heard all the evidence regarding the circumstances of the accident.
30. However, where no evidence has been heard by a judge and the case settles (which happens in 97-99% of cases), the practice has developed of both the plaintiff and defendant/insurance company requesting a judge, when they are advising her that the

case has settled, not simply to strike out the proceedings but to insert a 'consent term' in the Court Order that the defendant was, say, only 10% liable for the accident.

31. If, such an apparently innocuous term (or a similar term regarding loss of earnings) is inserted by the judge during what is typically a one-minute application to strike out proceedings 'on consent', then the taxpayer/Department will only recover 10% of the payments made by it to the plaintiff, even though a court did not *decide* that the defendant/insurance company was only 10% liable. Indeed, if the 'consent term' is to the effect the plaintiff has withdrawn her claim for loss of earnings, then the taxpayer/Department will recover nothing from the insurance company.
32. That is the significance of the 'consent terms' which are sought to be inserted in court orders on the settlement of personal injury cases. By the simple expedient of a plaintiff and an insurance company agreeing 'consent terms' amongst themselves as part of the settlement package and having them inserted in a court order by a judge, this leads effectively to the taxpayer subsidising an insurance company to pay a plaintiff and usually his lawyers to settle their claim, and so it leads to the taxpayer footing the bill for what would otherwise be the '*business expense*' of an insurance company.

Not the first application of this kind

33. As previously noted, this is the third application before this Court for the insertion of 'consent terms' into a court order striking out a personal injuries' claim. In the two previous applications this Court refused to insert the 'consent terms' in the orders. In this regard, this Court agreed with the approach of Keane J. in his article that a court should consider whether it would be '*just or fair to*' insert the consent term in circumstances where it amounts to a '*subvention*' from the taxpayer to insurance companies (at p. 52 and p. 56).
34. In the two previous applications heard by this Court, it agreed with an interpretation posited by Keane J., namely that s. 343R(2) '*extends only to a loss of earnings that is ordered or assessed, and cannot extend to a loss of earnings that is privately agreed by the parties*' (at p. 57, emphasis added) and this Court also agrees with the Law Reform Commission that it is 'wrong' for the taxpayer to have to foot the bill for the '*business expenses*' of insurance companies.

1st application: Condon/Szwarc

35. The first application was in fact a joint application in the two separate cases of *Condon v. HSE/Szwarc v. Hanford Commercial t/a Maldron Hotel Wexford* [2021] IEHC 474. The Condon case in fact involved what was described as a 'nuisance' claim (which this Court understood to mean that it had little chance of success and that the defendant/insurance company, even if it won, might not recover its legal costs from the plaintiff).
36. In that case, this Court was advised that the 'consent term' should state that the defendant was only 10% liable for the injuries. This Court was advised that the case would not settle unless the defendant got the financial benefit of having the 'consent term', or to put it another way, *unless* the defendant got this '*subvention*' from the taxpayer. In the judgment in *Condon*, this Court outlined very briefly the reasons why the

application to insert the 'consent terms' in both applications was refused. In essence, it was refused because the plaintiff and defendant (and crucially *not* a court) were effectively getting to decide amongst themselves, for their own financial benefit and without having regard to the interests of the taxpayer, their respective liability for the accident, in order to reduce the amount of the recoverable benefits which the insurance company should repay to the taxpayer.

37. Furthermore, to insert such 'consent terms' into a court order would give the status of '*an order of a court*' (to use the wording of s. 343R(2)) to the statement that the defendant is, only 10% liable for the injuries, *as if* a judge, who has no financial interest in the matter, had objectively decided the issue (after hearing evidence which was tested at an adversarial hearing, when clearly this is not the case).
38. The effect of the Court Order in the *Condon* case would have been that the taxpayer would be subsidising the payment of money by an insurance company to settle the case. If granted, the order would deprive a third party (the taxpayer) of its right to reimbursement on the say-so of the plaintiff and the defendant/insurance company, in whose financial interest it was to make the order.
39. To put the matter another way, this Court could not see how it could simply convert the word of an insurance company (that it is only 10% liable or indeed that no payment was made in respect of loss of earnings), *albeit* that it is conveyed to the Court through its lawyers, into a court order which legally binds and financially prejudices a third party (the Department/taxpayer).

2nd application: what if taxpayer is subsidising a State entity, not an insurance company?

40. The second application was in *Fahy v. Padraic Fahy Tiling Contractors LTD & Anor* [2021] IEHC 682, in which it was sought to distinguish *Condon/Szwarc* on the grounds that the defendant in *Fahy* was not an insurance company, but a State entity, and so it was argued that the effect of the s. 343R(2) Consent Order was that the taxpayer/Department was *subsidising another State entity* (the HSE), and not a private defendant/insurance company.
41. In that case, it was noted that while the Department is perfectly entitled to decide to subsidise another entity, whether a State entity or a private defendant/insurance company, it was not the role of this Court, on the urging of the plaintiff and defendant/insurance company, to legally oblige the Department by means of a court order to do so, particularly where its views were not known to the Court. To put the matter another way, if the Department wishes to use taxpayers' funds to subsidise a third party (whether an insurance company or a State entity) in meeting a personal injuries' claim, it should consent to doing so, and not be ordered, in its absence, by a court to do so.

3rd application: what if the taxpayer wants to subsidise the insurance company?

42. Now there is this third application regarding this issue of s. 343R(2) Consent Orders. This application seeks a court order (which the insurance company expects to be a refusal) for

the insertion of the 'consent terms'. However, after this expected refusal, the insurance company intends to engage with the Department to see if the Department would agree to the 'consent term' being inserted, and so to see whether it is agreeable to subsidising a defendant/insurance company in making the payment of the settlement sum to the plaintiff.

ANALYSIS

43. In the current case, the plaintiff ("Mr. Kuczak") has settled with the defendant/insurance company in respect of the insurance company's liability for the injuries he suffered. The Department has paid the plaintiff disability benefits or other loss of earnings (in the sum of €90,000 approx.) suffered by the plaintiff arising from his personal injuries. In the absence of any order to the contrary, under the 2005 Act, the defendant/insurance company is obliged to pay the Department/taxpayer this €90,000. This is because by settling, and so not disputing the fact that it is 100% liable for the accident in court, the defendant/insurance company is, in effect, assuming 100% liability for reimbursing the costs arising from the injury and which were paid by the Department.

Making court orders in absence of the party prejudiced

44. However, this Court has indicated in *Condon/Szwarc* and in *Fahy* that it is not appropriate for a court to make an order breaching the rights of a third party (in this case the Department's/taxpayer's right to reimbursement) without its consent or input.

45. A similar approach, albeit in a different context, was taken by Butler J. recently in *Allenton Properties Ltd. v. Companies Act, 2014* [2021] IEHC 720, where she held that an order to restore a company should not be made (in order to enforce security over a property which had been sold to a third party purchaser). She refused to do so because, inter alia, such a court order would not be fair and proportionate to parties unrepresented at the application, whose rights and interests may be affected by the order, namely. the third party purchaser who had purchased the property from the charge-holder. At para. 37 she stated:

"In this case the purchaser is the person who stands to be most directly affected by the consequences of restoration and *affected in a profoundly prejudicial way*. By *failing to involve the purchaser in the process* the applicant has left an evidential gap as a result of which the court cannot be and is *not satisfied that it would just and equitable* to make the order requested." (Emphasis added)

46. As in that case, the consequences of the Court Order in this case, affect the Department also in a profoundly prejudicial way, since it will not recover from the insurance company the benefits paid by it to the plaintiff. Just as was the case in *Allenton Properties*, the party affected is not represented at the hearing for the insertion of the consent term in the order striking out the proceedings.

47. Just because in this case one is dealing with the taxpayer, rather than an individual, does not make any difference as to how a court should respond when the rights of an unrepresented person are being prejudiced. This is why the High Court in *Allenton Properties*, and the Court in this case, concludes that it would not be just and equitable to

make the order unless the Department/taxpayer agrees that it is appropriate for it to foot the bill for the '*business expenses*' of the insurance company in this case.

Insurance company wishes to seek Department's consent for the 'subvention'

48. It is for this reason, it seems, that the defendant/insurance company in this case accepts that it should seek the consent of the Minister for Social Protection (the "Minister") for the insurance company to be relieved of its obligation to reimburse her Department in full.
49. To facilitate the insurance company in seeking the Minister's consent, the first step is for the insurance company to seek a formal order from this Court (which it anticipates will be a refusal) regarding its application to insert 'consent terms' in a court order. The 'consent terms' it seeks to insert are to the effect that the insurance company and the plaintiff agreed a 50:50 split on liability.
50. The intended effect of such a term being inserted in the court order is that the insurance company would only be liable to reimburse the Department/taxpayer 50% (i.e. €45,000) of the benefits/loss of earnings paid by the Department to the plaintiff, rather than 100% (i.e. €90,000) which it would otherwise have to reimburse.
51. If this Court refuses the application (which the insurance company anticipates it will, based on the precedent of *Condon/Szwarc* and *Fahy*), it was indicated to this Court at the initial hearing of this application (on the 27th October, 2021) that the second step is that the insurance company wants this Court to adjourn that element of the order (para (iii) of the proposed order set out below) regarding the apportionment of liability to a later date. This is for the purpose of enabling the insurance company to determine whether the Minister will consent to the insurance company being required to reimburse only €45,000 rather than the full €90,000 of the monies paid by the Department/taxpayer to the plaintiff (notwithstanding the absence of '*an order of a court*' which is required by s. 343R(2) of the 2005 Act).
52. This consent is being sought from the Department, it seems, on the basis that while there is not a court finding of 50:50 liability, there is an *agreement* between the insurance company and the plaintiff that the defendant/insurance company was only 50% liable for the injury. In addition, as the insurance company sought unsuccessfully to have this term inserted in a court order, it wishes to establish whether the Department, in all these circumstances, would consider 'consenting' to such a term in the court order and thereby relieving the insurance company of its obligation to reimburse the €90,000 in full. Accordingly, the insurance company has applied to this Court to '*adjourn that element of the Order*' (i.e. the part dealing with 50:50 liability), according to counsel for the insurance company, who made this application.
53. The third step is that the defendant/insurance company seeks liberty to apply to Court for the purposes of making any changes to that final Order to be issued by this Court, if it obtains the consent of the Department.

The legal and financial reasons for the application in this case

54. As previously noted, the reason for this and similar applications for s. 343R(2) Consent Orders would appear to be a matter of some considerable financial importance to insurance companies, and as a consequence also for the Department/taxpayer. This is because some 97-99% of personal injury cases settle and so there are a significant number of cases which could be subject to 'consent terms' which effectively require the taxpayer to foot the bill for insurance companies' *'business expenses'*.
55. In this case, the sum at issue is €90,000 and thus up for determination is whether the taxpayer will provide a 'subvention' of half of this amount, €45,000, to the insurance company to enable it to settle this claim.
56. In view of the importance of the issues involved therefore, this Court has no hesitation in acceding first to the insurance company's application for a formal order on its application (i.e. whether it will insert the consent term stating a 50:50 apportionment of liability) and then adjourning the finalisation of that Order with liberty, if necessary, for any of the parties to apply to court to seek any amendments to that proposed Order (particularly if the Minister were to agree that the insurance company were to be relieved of its obligation to reimburse in full the sum of €90,000 owed to the Department/taxpayer).
57. The first step therefore is whether, on the facts of this particular case, this Court should insert the 'consent term' of a 50:50 liability split in the Court Order striking out the proceedings. Before considering that question, it is necessary to provide some further background to this case.

Factual background to Mr. Kuczak's claim for personal injuries

58. Mr. Kuczak was injured when he was changing tyres on an agricultural vehicle at the defendant's premises and for which he wholly blamed the defendant, which is insured. His claim was set down for hearing before this Court in Galway, but it settled before the case was due to be heard.

Insurance company initially wanted to defer issue of Court Order to next sessions

59. When the case was due to commence on the 26th October, 2021, senior counsel for the defendant/insurance company advised this Court that the matter had been settled on terms to be implemented. However, rather than seeking to have the proceedings struck out as would be usual when a case settles, he sought for the matter to be adjourned until the next personal injury sessions in Galway. He did so on the basis that:

"The matter is resolved on terms which have to be implemented and so the only matter which is required from you is to adjourn until next term for implementation of the settlement – I don't think the matter will trouble the court at the next sessions [in Galway]."

60. This Court sought the reason for the adjournment as the matter had settled. The reason provided by counsel for the insurance company was that:

“There’s a certain amount of money that has to be paid over by the next sessions and clearly if the money is not paid over by the next sessions it will be a situation where the case will have to go on.”

61. However, as this Court is of the view that in most settlements, the settlement sum has to be paid out after the settlement agreement had been reached and after the proceedings had been struck out, this Court felt that this was not a good reason for transferring the matter to be dealt with by whatever High Court judge was in Galway for the subsequent personal injury sessions.
62. In these circumstances, this Court indicated that it was happy to adjourn the matter, but that this Court would retain seisin of the case and that it would be happy to deal remotely with the issue of final orders striking out the proceedings, in order to facilitate the parties.

Insurance company’s position changes – it wants a Court Order with liberty to apply

63. Then on the following day in Galway, the 27th October, 2021, the position of the insurance company changed. Junior counsel for the insurance company indicated that it now wanted this Court to issue the Court Order. Accordingly, the fact that the money had to be paid out after the proceedings had been struck out was no longer an issue.
64. However, counsel for the insurance company indicated that, in light of the *Condon/Swarcz* case, the insurance company anticipated that this Court would refuse to insert the ‘consent term’. In these circumstances, the insurance company wanted this Court to permit the insurance company to come back into court at a later date if the Minister/Department were to consent to this ‘consent term’ being inserted.
65. Counsel for the insurance company, with the consent of Mr. Kuczak, therefore applied for the following terms to be inserted in the Order striking out the personal injuries’ proceedings:
 - (i) Defendant to pay the sum of €120,000 to the Plaintiff in full and final settlement of the Plaintiff’s claim.
 - (ii) Any previous costs Orders to be vacated.
 - (iii) The Order to note that the parties have agreed a split of 50:50 on liability and causation.
66. In relation to costs, he stated that:

“The first part [of the consent terms of the Order being sought] is just setting out that the defendant shall pay the plaintiff a sum of €120,000 *inclusive* in respect of damages plus costs including any reserve costs and costs of discover if any to be adjudicated in default of agreement in full and final settlement of the plaintiff’s claim.”

The registrar’s summary of this submission was that the sum of €120,000 was to include costs.

67. Of course, the important 'consent term' to be inserted in the Court Order, for the purposes of this application, is the third one, to the effect that Mr. Kuczak and the defendant/insurance company have agreed, as part of the settlement, a 50:50 split of liability for the personal injuries suffered by Mr. Kuczak.
68. If this Court were to insert in the Court Order the 'consent term' from the plaintiff's and the insurance company's *agreement*, that there was a 50:50 split in liability, it enables the insurance company to claim to the Department that this Court is in effect *ordering*, for the purposes of s. 343R(2), that the insurance company is in fact only liable for 50% of the injuries suffered by Mr. Kuczak (even though, in this Court's view, this could never be said to be 'an order of the court' for the purposes of s. 343R(2)).
69. The insurance company can then claim that since this 'consent term' has been inserted in a Court Order that there is now '*an order of a court*' to the effect that the insurance company is only 50% liable for the accident.
70. In this regard, no suggestion was made by counsel for insurance company that there was a reason for inserting the 'consent term' in the Court Order, *other than* convincing the Department that there was '*an order of a court*' that the insurance company was only 50% liable for the injuries.
71. In order to give the insurance company an opportunity to advise this Court if there was any other possible reason for this 'consent term' being inserted in the Court Order (and to make submissions on other matters relied upon in this judgment), this Court provided a draft of this judgment to the parties. The only submission made by the parties on the draft judgment was regarding costs. In this regard, at a hearing on 8th March, 2022, both parties indicated that they were in agreement that as regard costs the Order should in fact provide for:
- "a decree in favour of the plaintiff in the sum of €120,000, *together with* an order for the plaintiff's costs, to include reserved costs and costs of discovery to be adjudicated in default of agreement."
72. There is no issue in respect of this part of the 'consent terms' for the simple reason that the only parties affected are the payer of the costs and the recipient. No third parties (whether the Department or anyone else) are affected whether the consent term states the settlement sum is inclusive or exclusive of costs. Accordingly, the Court Order will provide for the settlement sum to be exclusive of costs as requested by both parties on the 8th March, 2022.
73. As the parties made no submissions regarding the purpose of the 'consent term' on liability being inserted, there can be no doubt therefore that the only purpose of inserting the 'consent term' regarding 50:50 liability in the Court Order is to ensure that the taxpayer provides a 'subvention' of €45,000 to the insurance company (being half of the recoverable benefits of €90,000 paid by the Department to Mr. Kuczak) to fund its settlement of the personal injuries claim and legal costs.

74. This Court is being asked to make a formal Order in this case, *albeit* that counsel for the insurance company indicated that, in view of the decision in *Condon/Szwarc*, he expected that the insertion of the term regarding a 50:50 split on liability would be refused.
75. Counsel for the insurance company advised this Court that it is seeking the formal Court Order because the insurance company wishes to have the formal record of this Court's (anticipated) refusal of the insertion of the 'consent terms' in the Court Order, so as to then approach the Minister.
76. This is because the insurance company wishes to see if the Minister would be prepared to consent to the said term (of 50:50 apportionment of liability) being inserted in the Court Order. It is to be noted, of course, that there is nothing to stop the defendant/insurance company from seeing if the Minister/Department would be prepared to simply waive the Department's/taxpayer's statutory right (under s. 343R) to receive the full €90,000 from the insurance company, without any necessity to come back to Court. However, in any case, it is seeking to achieve the same effect by means of an application for the 'consent term' to be inserted in the Court Order.

Court refusals to issue s. 343R(2) Consent Orders have not been appealed

77. It is relevant to observe that Keane J. (at p. 58 of his article) notes that the:

“[C]urrent practice 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.*” (Emphasis added)

Keane J. is referring here to other common terms inserted in s. 343R(2) Consent Orders which also lead to a 'subvention' by the taxpayer to insurance companies, i.e. consent terms referencing a claim for loss of earnings. So, to take the previous example of Sean Citizen. In that example, he initially claimed that the insurance company was 100% liable for his losses. However, in return for his receiving the settlement sum of €100,000, he consented to a Court Order saying that he was in fact 90% liable for his injuries and that the insurance company was only 10% liable for them, which will lead to the State subvention of €72,000 towards the settlement sum.

78. He could equally have initially claimed for loss of earnings and in return for the settlement sum he might have consented to the Court Order stating that *'the plaintiff has withdrawn the claim for loss of earnings'* - see p. 54 of Keane J.'s article. The insurance company in that situation would then have a Court Order that no loss of earnings were claimed and it would thereby be able to claim to the Department that it is relieved of the obligation to repay the Department any of the benefits paid to Sean Citizen in respect of loss of earnings as result of s. 343R(2).
79. However, the key point from this part of the article is that in 2020, when the article was published, Keane J. was highlighting the fact that at that time there was no consistency in the approach of courts to s. 343R(2) Consent Orders. Only after Keane J.'s article came to this Court's attention did it gave its first judgment refusing the 'consent terms' in

Condon/Szwarc on 29th June, 2021 (which involved the refusal of two separate applications) and its third refusal in *Fahy* on 1st November, 2021. It follows that the article must be referring to other refusals by courts of s. 343R(2) Consent Orders, whether by Keane J. or other judges. Indeed, evidence of the fact that there have been grants of s. 343R(2) Consent Orders, as well as refusals and so an inconsistency of approach, is provided by the reference to the shortfall of €20m in recoverable, to which reference has already been made, and indeed the case of *Matthews v. Eircom* [2021] IEHC 456 in which a s. 343R(2) Consent Order was granted.

80. However, it is significant to note that Keane J. observed in this article that the fact that the practice whereby some judges insert 'consent terms' and some do not, if allowed to continue, 'is bound to have an adverse effect on public confidence in the tort liability system' (Emphasis added).
81. An inconsistency in the application of the law by trial judges is resolved by two ways. One way is by the passing of a law to clarify the issue. The other way is by a decision of an appeal court which provides guidance on the correct approach to be taken by trial judges. This would clearly avoid the adverse effect on public confidence in personal injuries litigation to which Keane J. refers. However, before one can have an appellate court judgment, one has to have an appeal.
82. Despite the inconsistency to which Keane J. refers, in the seven and a half years since s. 343R(2) came into operation, there does not appear to have been one appeal of the s. 343R(2) Consent Orders despite the huge number of Orders striking out personal injury actions on settlement in that period and despite the amounts of money which may be involved in this 'subvention' (€20 million in one year alone, if the article to which reference has been made is accurate).
83. As regards such an appeal, clearly, since both the plaintiff and the insurance company are seeking the insertion of the 'consent term' in the Court Order, the *grant* by a court of that request is unlikely to be appealed by either party, since they both get what they want from the court.
84. Equally, the party who is prejudiced by the s 343R(2) Consent Order, the taxpayer, is not a party to the proceedings and therefore is not entitled to appeal the decision to grant the 'consent term' and this Court is not aware of the Department/taxpayer ever having sought to challenge s. 343R(2) Consent Orders by some other means.
85. However, what is curious is that when an insurance company does not get what it wants (i.e. the 'subvention from the State'), there has never been an appeal by an insurance company of a refusal of a s. 343R(2) Consent Order, even though it is at a financial loss as a result of that refusal. Thus, it is to be noted that:
 - counsel for the insurance company in this case was not seeking to argue that this Court was wrong in *Szwarc* or *Condon* or *Fahy* to refuse to insert the 'consent terms' in those three Court Orders;

- no notices of appeal were lodged regarding the decisions in *Szwarc*, *Condon* or *Fahy* and the time limit for their appeal has passed;
- no other refusals by other courts, to which Keane J. was referring in his article, appear to have been appealed;
- counsel for the insurance company in this case is not applying for the formal order from this Court, which he anticipated would be refused, in order to appeal that refusal of s. 343R(2) Consent Order. Instead, he simply wants it to approach the Department to seek their consent to its insertion.

It is of course possible, and indeed may even be probable, if the issue is fully argued in court, that an appellate court, whether the Court of Appeal or the Supreme Court, will decide that there are good reasons why the courts should issue s. 343R(2) Consent Orders.

86. However, in the absence of any appeal by an insurance company (or a challenge by the Minister) to s. 343R(2) Consent Orders, the current inconsistent practice is likely to continue, despite Keane J.'s concern that it is negatively affecting public confidence in personal injuries' litigation.

Legal background to s. 383R(2) Orders

87. It is necessary at this stage to give some further legal background to s. 343R(2) Orders and in particular the extra-judicial analysis of that section as well as the recent decisions of this Court.
88. Section 343R is set out in full earlier in this judgment. As highlighted by Keane J. extra-judicially, it is the insertion of a consent term in the '*order of a court*' that converts the '*obligation to pay recoverable benefits*' in the title of the section, into a liability for the taxpayer.
89. *Fahy* was concerned with whether this Court's previous refusal in *Condon/Szwarc*, to accord 'consent terms' (i.e. private agreements between parties) the status of court orders, should also apply if the defendant is a State defendant, rather than an insurance company.
90. For the reasons set out in that judgment, this Court concluded that this Court should not accord those private settlement agreements the status of a court order:
- even where the defendant is not an insurance company, but is a State defendant, or
 - where the 'consent term' is merely 'noted', rather than being in the body of the Order, or
 - if evidence is offered to support the 'consent term' as part of a 'settlement hearing' i.e. a hearing after the case has settled, when the parties have ceased to be adversaries and come jointly to present evidence to a court to seek to persuade the

court to insert 'consent terms' that will lead to the insurance company obtaining its 'subvention' from the State.

91. As noted in the *Condon/Szwarc* case, in that application this Court sought and received submissions on the analysis of s. 343R(2) in Keane J.'s article '*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.
92. Express reference was made to that article by this Court in the judgment which was handed down in *Condon/Szwarc*. However, because it was an ex temp judgment, a summary of the analysis in that article is not contained in the judgment. For this reason, and in view of the comprehensive analysis by Keane J. of the manner in which insurance companies get a 'subvention' from the taxpayer for their personal injury settlements, it is appropriate to set out the most relevant extracts from that article in this reserved judgment:

Summary of Keane J.'s comments on the 'subvention' from the 'taxpayer' to insurers

- 'We believe that it is right that the compensator and insurer bear the cost of reimbursing the taxpayer for benefits paid to claimants as a result of accidents or injury or disease.' (quoting Social Security Committee of the House of Commons Compensation Recovery (HC 1994-95, 196) at para. 77, p.48)
- 'Where s. 343R (2) of the Act of 2005 applies, it operates as a subvention from the State (or taxpayer) to the compensator (or the compensator's insurer) in respect of the cost of the insured person's injuries.' (at p. 52)
- 'The enactment of s. 343R(2) has created a new phenomenon in settled personal injuries actions. *Defendants now regularly apply to the court*, either on consent (i.e. with the active agreement of the plaintiff) or unopposed (i.e. with the acquiescence of the plaintiff) for the inclusion in the order striking out the proceedings of a recital about the injured person's loss of earnings or profits.' (p. 54)
- 'On other occasions, the court is left to infer that the purpose of the application it is to enable the defendant compensator to adopt the position in dealing with the Minister that, for the purpose of s. 343R(2), the injured person's loss of earnings or profits is 'the subject of an order of a court' and that the compensator is 'liable only to the extent of the amount so ordered', rather than to the extent of the amount set out in the statement of recoverable benefits. *Certainly, it is difficult to see what other purpose such an application might serve.*' (p. 54)
- 'The emergence of this phenomenon prompts two closely related questions. The first is whether such recitals in orders are capable in either law or fact of having the effect under s. 343R(2) evidently contended for. The second, assuming such recitals can have that effect, is whether it is appropriate in justice or fairness for a

court to accede to an application to include one in an order striking out proceedings that have been compromised.’ (p. 54)

- ‘On the construction point, the issue may very well turn on *what is meant by the words ‘the amount so ordered’*. [...] *is it limited to an amount ordered after an adjudication upon evidence?* If it is the former, it is noteworthy that, in using the terms ‘*order of a court or assessment by the Board*’ and ‘*amount so ordered or assessed*’ in framing the scope of s. 343R(2), *the Oireachtas did not expressly extend it to encompass an ‘agreement between the parties’* and an amount ‘*so agreed*.’ (p. 54)
- ‘On the characterisation point, the novelty of a recital of this kind in an order striking out proceedings contributes to the difficulty of assessing its effect. In the vast majority of instances where a personal injuries action has settled, *the final order sought is (or, certainly, was) one simply striking out the proceedings with no further order*. Thus, most personal injuries actions settle on undisclosed terms. [...] But that is not at issue here, where the recital sought by the compensator on consent does not address the overall terms of settlement between the parties, being solely directed instead to the injured person’s loss of earnings with the specific aim of reducing or eliminating the compensator’s public law obligation to reimburse the Minister the full amount of the recoverable benefits paid to the injured person.’ (p. 55)
- ‘Hence, *it is not difficult to see why the Oireachtas might want to ensure that the reduction of a compensator’s liability to the Minister – from that of the full amount of the injured party’s recoverable benefits to the lesser (or nil) amount of the injured party’s loss of earnings or profits – can only occur when the latter amount has been independently verified by an assessment of the Board or an adjudication of the court on evidence submitted or adduced*.’ (p. 55)
- ‘[T]here is ample scope for the argument that *the court’s inquisitorial function is engaged* where a consent application is made for a loss of earnings recital in an order striking out proceedings where that recital has no apparent purpose other than to delimit the public law reimbursement entitlement of the Minister in private law proceedings to which the Minister is not a party. Should it turn out to be the law that such recitals in orders striking out proceedings are capable of coming within the terms of s. 343R(2) of the Act of 2005, and should a court be minded to consider entertaining - and, perhaps, acceding to - an application to include one in such an order, a second question would still arise. That question is whether it would be just or fair to do so.’ (p. 56)
- ‘Under the material part of Order 15, Rule 13 of the Rules of the Superior Courts (‘the RSC’), a court can, of its own motion, add a person as a party to proceedings at any stage, where it considers it ‘*necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter*’. *As the Minister, representing the taxpayer, plainly has an*

interest in whether a loss of earnings recital should be included in an order striking out a settled personal injuries action, the application of the rule falls to be considered. The argument that the joinder of the Minister would be too unwieldy or costly a procedural imposition on the conduct of personal injuries litigation to be practical or useful only serves to refocus attention on the a priori assumption that loss of earnings recital applications can be fairly entertained and justly adjudicated upon.' (p. 56)

- 'Under a narrow interpretation of s. 343R(2), the section extends only to a loss of earnings that is ordered or assessed, and cannot extend to a loss of earnings that is privately agreed by the parties (though not the Minister), even where that term, and that term alone, of the wider agreement between those parties is subsequently incorporated as a recital in a consent order striking out the proceedings.' (p. 57)
- 'Proponents of the broad interpretation [...] suggest that it would greatly inhibit 'all-in' or 'nuisance value' settlements if the compensator had to reimburse the Minister in the amount of the recoverable benefits rather than in a lower or nil amount for loss of earnings where the latter figure has been privately agreed between the compensator and the injured person. As we have seen, precisely the same arguments were vigorously pressed in opposition to the more stringent UK scheme, under which the compensator must pay the Secretary of State an amount equal to the total of the recoverable benefits in every case without exception or qualification, yet in that instance those arguments proved to be entirely unfounded. There is also a counter-argument that the risk of an eventual greater liability for recoverable benefits than for loss of earnings provides a useful incentive to compensators to promptly settle claims, which incentive should not be undermined or eliminated by an overbroad interpretation of s. 343R(2). In addition, *there is a policy argument that 'all-in' or 'nuisance value' settlements are a blight upon, rather than a necessary or useful component of, the tort liability system of accident compensation.'* (p. 57)
- 'In the operation of the RBA Scheme, current practice 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. If allowed to continue indefinitely, this inconsistency of approach – and, consequently, of outcome – is bound to have an adverse effect on public confidence in the tort liability system. Internal consistency must be a priority for a system already facing significant external criticism. That is why the *present lack of clarity on the correct approach to such applications is of more than purely academic interest.'* (p. 58) (Emphasis added)

Mr. Kuczak's claim is different in some respects from Condon/Szwarc and Fahy

93. Having set out some of the key points made in Keane J.'s article, it is relevant to note that the application made in Mr. Kuczak's case is different in some respects from *Fahy's* case, from *Condon's* case and from the *Szwarc* case. Accordingly, it is necessary to

consider whether there is any basis for reaching a different conclusion in Mr. Kuczak's case than that reached in the *Condon*, *Szwarc* and *Fahy* cases.

SHOULD THE CONSENT TERMS BE INSERTED IN MR. KUCZAK'S CASE?

94. In reaching this settlement figure of €120,000 with Mr. Kuczak, and in opting not to litigate (including, say, for the purpose of getting a Court Order, after a hearing of all the evidence, that it was not liable *at all* or was only partly liable, at a percentage to be determined by the Court, for the injuries), the insurance company knew that it would nonetheless have to reimburse the *full* sum of €90,000 to the Department.

95. It is now proposed to outline the reasons in detail as to why this Court has come to the conclusion that it should refuse to insert the 'consent term' of a 50:50 liability split in the Court Order (and so will adjourn its refusal to do so) in this case.

96. It is relevant to note that in order to give the parties an opportunity to make submissions to the Court, if they believed that any of the following reasons do not apply to them, a draft of this judgment was provided to the parties. However, as noted above, the parties did not take issue with any of these reasons for the rejection of their application, the primary submission being in relation to legal costs.

(i) Reimbursement of taxpayer has priority over payment to plaintiff

97. Section 343R(1) of the of the 2005 Act makes clear that the taxpayer has priority over any compensation paid to Mr. Kuczak. This is because that section states that the recoverable benefits paid by the taxpayer have to be reimbursed to it, '*before making any compensation payment to, or in respect of, an injured person*'.

98. Relieving an insurance company of the obligation to reimburse the taxpayer, on the say-so of the insurance company and the plaintiff, therefore runs contrary to the express wording of s. 343R(1) which makes clear that the payment of the recoverable benefits to the Department (and so not just 50% of the recoverable benefits) takes precedence over any payment of compensation to the plaintiff.

99. In Mr. Kuczak's case, it is not known how the parties reached the settlement sum of €120,000 but it would have been prudent for the insurance company to have borne in mind its obligation to repay the Department in full the €90,000, in its calculations of how much the insurance company was prepared to pay to settle the case.

100. Despite being aware of this obligation to repay the full €90,000 to the Department, the insurance company is now applying to Court to insert, in its order striking out the proceedings, a term that the parties have agreed a 50:50 split on liability, with the intention of halving its liability to the Department and thereby having the taxpayer subsidise the settlement sum to the tune of €45,000.

(ii) Intention to portray 'consent term' as having status of an 'order of a court'

101. As noted in the *Fahy* case, the only purpose of the insertion of the 'consent term' is to persuade the Department that there is '*an order of a court*' to the effect that the insurance company is only 50% liable for the personal injuries. If there is any other

reason why parties to personal injury settlements would want such an order, this Court has not been advised of them in the cases it has heard to date on this issue. Similarly, in this case, the insurance company and Mr. Kuczak were given an opportunity to advise this Court if there was some other reason in this instance. No other reason was provided.

(iii) In financial interest of insurance company to deprive taxpayer of reimbursement

102. The basis for such an 'order of a court' if those terms were inserted, is not a finding of fact by a judge (with no financial interest in the outcome) on the basis of evidence which has been tested in an adversarial hearing, that the insurance company is only 50% liable for the plaintiff's injuries (and so only liable to reimburse the taxpayer €45,000).
103. Instead the basis is simply that the insurance company and the plaintiff have entered into a private agreement that the insurance company is only 50% liable for the plaintiff's injuries, in order to ensure that it will be relieved of the obligation to repay the taxpayer €45,000.
104. Crucially, reaching this private agreement is in the insurance company's direct financial interests (and the plaintiff's indirect financial interest) as they will have €45,000 extra to be used to make the settlement payment, and so this is very far removed from an objective finding of fact by a neutral judge as regards what is *the actual split of liability between the parties as a matter of fact*.
105. Since it is not in either party's financial interests to raise any issue regarding the appropriateness of a court inserting 'consent terms' in a court order to the detriment of the taxpayer, it is not surprising that this issue was not raised by a plaintiff nor a defendant/insurance company in any of the applications seeking such orders, since the commencement of s. 343R(2) in 2014. As noted above, plaintiffs and insurance companies have to date not appealed decisions in which these s. 343R(2) Consent Orders are refused. Instead the appropriateness of a court making such s. 343R(2) Consent Orders has only come to the judiciary's attention thanks to Keane J.'s article (i.e. where he highlights the issue of '*whether it is appropriate in justice or fairness for a court to accede to an application to include [a s. 343R(2) Order] in an order striking out proceedings that have been compromised.*').
- (iv) No reason why plaintiff would not agree to term insurance company seeks**
106. A related point is that there would appear to be no reason why the plaintiff would object to whatever split on liability the insurance company sought, provided he is getting the settlement sum he wants. Thus, in this case, if Mr. Kuczak is guaranteed to be getting his €120,000, then whether he then goes on to agree an ancillary term in the settlement agreement, that prejudices the taxpayer, but has no impact on his final figure, what reason is there for him not to agree to it? Mr. Kuczak was given an opportunity to contradict this assumption made by this Court and he did not do so.
107. Indeed, as already noted, it appears to be in Mr. Kuczak's indirect financial interest to agree to it, since it means that there is more money available to the insurance company to pay his settlement sum, courtesy of the taxpayer.

108. The only loser out of this private arrangement between the insurance company and the plaintiff is the Department/taxpayer.

(v) Insurance company and plaintiff deciding how much, if any, to repay taxpayer

109. As previously noted, the reality of what is occurring is that the plaintiff and defendant (and crucially not a court) are effectively getting to decide amongst themselves, for their own financial benefit and without regard to the interests of the taxpayer, to what degree the insurance company was at fault (and so how much it will have to pay back to the taxpayer).

110. Furthermore, to insert such 'consent terms' into a court order would give the status of '*an order of a court*' (to use the wording of s. 343R(2)) to the statement that the defendant is only 50% liable for the injuries, as if a judge, who has no financial interest in the matter, had objectively decided the issue after hearing evidence which was tested at an adversarial hearing, when clearly this is not the case.

111. This is one of the key reasons why this Court has to date refused, and will in this case refuse, to insert such 'consent terms' in the Court Order.

(vi) The person prejudiced, the taxpayer, is not represented

112. Another reason why such 'consent terms' should not, in this Court's view, be inserted, is because the split on liability is to the financial prejudice of a party (the taxpayer) whose interest is not represented in the negotiations on the settlement agreement.

113. If it were a private citizen whose rights were being prejudiced without her input, it seems clear that a court would not permit that to happen (see for example the case of *Allenton Properties* to which reference has already been made).

114. It is this Court's view that just because one is dealing with taxpayers as a whole, rather than an individual citizen, should make no difference to the approach of a court to a third party whose rights are being prejudiced in their absence. Accordingly, this Court is, and should be, alive to the financial interests of the taxpayer whose funds are to be used to directly subsidise insurance companies and indirectly subsidise payments to plaintiffs in personal injuries actions and indeed to their lawyers.

115. Support for this view is to be found in *BAM v. National Treasury Management Agency* [2015] IEHC 756 (per Barrett J.), *Word Perfect v. Minister for Public Expenditure and Reform* [2021] IECA 305 per Barniville J., at para. 89 and *Word Perfect v. Minister for Public Expenditure and Reform* (Unreported, High Court, McDonald J., 21st September, 2021) referenced at para. 155 of the Court of Appeal judgment. It is clear from those cases that there is a public interest in preserving public funds which should be borne in mind by the courts when making court orders.

(vii) Easy to be generous with other peoples' money

116. As was noted by this Court in *Kennedy v. Tipperary County Council* [2021] IEHC 643 at para. 77, which involved two *adults* who had suffered ankle injuries arising from their use of swings in a *children's* playground:

"[...] while a court might have sympathy for the plaintiffs for the fractured ankles they suffered, *it is not the job of a court to be generous based on sympathy, with other people's money, whether that money belongs to a taxpayer, an insurance company or an individual uninsured defendant.* Accordingly, there is no basis upon which the plaintiffs' 'quest' for 'a deep pocket' can be satisfied in this case."
(Emphasis added)

117. That case involved a situation where a court was assessing damages which an insurance company might be ordered to pay. When damages are being assessed against them, insurance companies may wish to rely on the notion that it is 'easy to be generous with other peoples' money' (in that instance, a court determining how much of an insurance company's money is to be paid). In doing so, insurance companies may wish to urge prudence on a court regarding the level of the award, notwithstanding that it is being paid by a large insurance company and not coming out of, say, an individual's pocket.
118. However, this notion cuts both ways and so can operate, not only in favour of, but also against, an insurance company, as in this case, where it is the taxpayer who is footing the bill for the insurance company's 'business expenses'.
119. Accordingly, when making such an order, to the financial detriment of an amorphous group (in this instance, taxpayers' money), rather than out of the pocket of an individual, a court may decide to bear in mind the principle that it is easy to be generous with other people's money.
120. This is particularly important, where that 'other person' is not represented when the decision is being made. Accordingly, a court may instead adopt a cautious approach when being asked to insert terms by parties to litigation, notwithstanding that is taxpayers as a whole, rather than an individual (as in *Allenton Properties*) who are being prejudiced. This is a further reason why courts need to consider, in the words of Keane J., 'whether it is appropriate in justice or fairness for a court to accede to' a s. 343R(2) Consent Order.

(viii) If legislature intended 'agreement' of parties to be sufficient, it could have said so

121. A further reason for this Court's refusal to insert the 'consent terms' in the Court Order is because the term 'order of a court' is explicitly used in s. 343R(2), with all that entails (i.e. a court order usually involves a judge assessing tested evidence to reach a non-partisan conclusion and where a party could be subject to jail for breach of that court order).
122. The legislature has provided in s. 343R(2) that a court order, and all that entails, is *the condition to be satisfied* before the Department/taxpayer is denied its reimbursement right from an insurance company.
123. If the legislature had intended that it would be sufficient for the taxpayer to be financially prejudiced merely if the plaintiff and defendant had a term in their settlement agreement to that effect, then the legislation could have easily provided for this option. However,

there is no such wording in s. 343R or elsewhere, nor is there any suggestion that a private agreement between the parties could have the effect of a court order.

(ix) The subvention by the taxpayer facilitates nuisance claims to be settled

124. In the *Condon/Swarzc* case, counsel for the defendant/insurance company argued that the case involved, what was described as, a 'nuisance' claim. This Court understood that term to mean that the claim had little chance of success and that the defendant/insurance company, even if it won, might not recover its legal costs of circa €50,000 or more from the plaintiff, because of his financial means, and so a payment of €20,000 to the plaintiff to include his legal costs was justified.
125. However, counsel in that case argued that there were valid public policy objectives which supported the '*subvention by the State*' of insurance companies to make personal injury settlements. These policy objectives were that by facilitating the settlement of these 'nuisance' claims, the taxpayer was helping to ease the backlog in the courts. It is important in Mr. Kuczak's case to clarify why this Court believes that these public policy reasons do not justify the grant of the s. 343R(2) Consent Order.
126. First, as noted by Keane J. in his article, it is questionable whether this is a good public policy reason in the first place. At p. 57 he considered the argument that refusals of s. 343R(2) Consent Orders '*would greatly inhibit 'all-in' or 'nuisance value' settlements if the compensator had to reimburse the Minister in the amount of the recoverable benefits*'. He points out that the same argument was pursued in the UK but it was proved to be entirely unfounded. He also points out that, rather than s. 343R(2) Consent Orders facilitating settlements, the availability of s. 343R(2) Consent Orders may in fact discourage early settlement of personal injury claims. This is because if insurance companies knew they had to repay a plaintiff's loss of earning in full, they are likely to be incentivised to settle sooner in order to reduce the possibility of loss of earnings and other recoverable benefits increasing in value with the passage of time.
127. Secondly, he points out that it is debatable whether there could be any public policy reason to subsidise the *settlement* of nuisance claims (and thereby indirectly encouraging the bringing of nuisance claims). This is because he notes that there is in fact a contrary policy argument that '*nuisance value' settlements are a blight upon, rather than a necessary or useful component of, the tort liability system of accident compensation.*'
128. In this case, this Court does not accept that it is the job of a court to make court orders, on the grounds of alleged public policy, to the effect that taxpayers' funds are to be used to subsidise an insurance company to settle a personal injuries' claim, even if it does lead to a lessening of court backlogs. As noted by Dyson J. in *Regina v Lord Chancellor* [1999] 1 WLR 347 at p. 356 (in the context of costs which have to be paid by a public body in defending unsuccessful claims), money which has to be paid (or in this case foregone) by a public body:

"imposes costs on that body, which have to be met out of public funds diverted from the funds available to fulfil its primary public functions."

129. In this Court's view, it is not the role of the courts to determine that €20 million, or whatever the annual figure is in recoverable benefits due to the State, should be diverted to insurance companies to enable them to settle nuisance and other personal injury claims and in this way be diverted away from the primary purpose of such public funds.
- (x) The 'noting' rather than 'ordering' of 'consent term' is in reality the same thing**
130. The insurance company in Mr. Kuczak's case has applied to this Court to have the 'consent terms' merely 'noted' in the Court Order, rather than 'ordered'. Presumably this is in the expectation that a Court would be more amenable to simply noting that the parties agreed a 50:50 split of liability, rather than ordering that there was such a split of liability (for the obvious reason that in either case there will not have been a finding of fact by a court after hearing evidence tested in an adversarial hearing).
131. Presumably, if this Court acceded to the insurance company's application for a 'note' in the Court Order that liability was split 50:50, the insurance company would then seek to persuade the Department that this amounts to 'an order of a court' so as to relieve the insurance company of the obligation to reimburse €45,000 to the Department/taxpayer. Again, it is to be noted that the parties did not contradict this Court's assumption in this regard.
132. It is this Court's view that the recitals, or part of the Court Order which merely 'notes' something, and which is not part of the main body of the Court Order in which something is 'ordered' to be done, does not satisfy s. 343R(2) so as to relieve the insurance company of its reimbursement obligation.
133. This is because that section requires that there be '*an order of a court*' and not a 'noting' by a court of some state of affairs agreed between the parties.
134. Clearly, it is a matter for the Department, if approached by an insurance company, whether it is prepared to accept that a 'note' in a court order is sufficient for it to relieve that insurance company of the obligation to reimburse the taxpayer, but it is this Court's view that it does not satisfy s. 343R(2).
135. However, if anything, this approach by the parties in this case, in seeking a 'note' and not an 'order', simply highlights their understanding of the significance of 'an order of a court', particularly where it prejudices a third party. A court order carries the full weight of the enforcement procedures of the State behind it (including seeking committal to prison of a person who is in contempt of a court order) and so should not be simply granted on the say-so of the parties, where it is designed to financially prejudice a third party (the taxpayer).
136. In some instances of course, it may be appropriate to insert 'consent terms' into a court order when the financial rights of third parties are not prejudiced (e.g. an apology from a defendant to a plaintiff). However, in this case, it is not appropriate to simply 'note' such a 'consent term' in the Order, rather than it being in the body of the Order (i.e. where it is stated 'it is ordered'). This is because it is clear, and not denied by the parties, that the

only purpose of 'noting' the term in the Order is to persuade the Department that this 'note' amounts to 'an order of a court' for the purposes of s. 343R(2), which, in this Court's view, it is not.

137. Of course, a court could 'note' such a consent term in the order, while at the same time stating in the Court Order that this 'note' does not amount to 'an order of a court' for the purposes of s. 343R(2). However, since the whole purpose of inserting the consent term, in any form, is to persuade the Department that it does in fact amount to 'an order of a court', this is not of any interest to the defendant/insurance company in this case.

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

138. As noted at para. 89 of *Fahy*, even if both parties were to provide evidence after the settlement to support their application for the consent term to be inserted, it remains the case that at this stage (i.e. after settlement), this is 'evidence' which arises from two parties with aligned interests. This is because at that stage both parties have a financial incentive in persuading the Court to insert the term, with no input from the party which is financially prejudiced.

139. As previously noted, why would the plaintiff not provide supportive evidence for whatever term is suggested by the defendant/insurance company in order to relieve the defendant/insurance company of its reimbursement obligation to the taxpayer, when the plaintiff is getting a settlement sum as part of the process, and the proposed term has no effect on that settlement sum.

140. 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.

141. To put the matter another way, it is an easy matter, where a plaintiff and insurance company have agreed on a settlement sum to be paid by the insurance company to the plaintiff, for them to both agree to provide evidence at a 'settlement hearing', in their own financial interests, that the insurance company was, say, only 50% liable for the injuries, to the detriment of the taxpayer.

142. However, just as occurred in *Allenton Properties*, this Court does not believe that it would be just and equitable to make the order requested even after such a 'settlement hearing' of the evidence.

(xii) Putting 'word' of insurance company in court order to prejudice 'innocent' 3rd party

143. The essence of this Court's concern regarding an application to insert 'consent terms' into court orders, is that this Court cannot see how it can simply convert the word of an insurance company or indeed any other litigant (that it is only 50% liable or indeed that no payment was made in respect of loss of earnings) into a court order which legally binds and financially prejudices a third party (the Department/taxpayer).

144. The fact that the application for the insertion of the consent terms is made by lawyers on behalf of the insurance company is irrelevant. The submissions made by the lawyer are made on the instruction of an insurance company regarding an apportionment of liability (or indeed the existence of a claim for loss of earnings) and the lawyer is simply conveying the instructions of his client to the court.
145. The refusal of a court to convert this 'submission' by lawyers into a court order and so give it the status of a 'fact' ordered by a court, does not involve a court refusing to accept the word of the lawyer. Thus, there is no question of calling the *bona fides* of the lawyers into question.
146. This situation is no different from where a plea of innocence is made by a lawyer on behalf of a subsequently convicted defendant. Such a plea also does not reflect on the *bona fides* of the lawyer making it, even if defendant is guilty.
147. In both instances, the lawyer is solely acting on the instructions of his client and he has no responsibility for the accuracy of what his client states, whether an insurance company or a defendant in a criminal action.
148. The key issue is that a judge does not convert the word of a lawyer (based on his clients' instructions) that his client is innocent, into a court order to that effect. Similarly, in this Court's view, a judge does not convert the word of a lawyer (based on the instructions of an insurance company that it is say, only 10% liable for an accident) into a court order.
149. In particular, this Court believes that a third party, the Department/taxpayer, should only have its rights to reimbursement prejudiced on the basis of *findings of fact* (by a judge, who unlike the insurance company, has no financial interest in the matter, and after she has heard tested evidence in an adversarial hearing) and not merely on the say-so of a plaintiff and defendant with a financial interest in a term privately agreed by them which they want inserted in a court order.
150. To put the matter another way 'an order of a court' that a defendant is only 50% liable for an accident does not arise simply by a court taking what the parties say, through their lawyers, as the position, and then inserting it in a court order with one purpose and one purpose only, namely to financially prejudice a third party, who has no say in having its property rights so compromised.
151. Therefore, while this Court will accede to the application to insert the 'consent terms' (i) and (ii) set out above, it refuses the application to insert into the Court Order the 'consent term' (iii), that the liability for the accident between the plaintiff and defendant is split 50:50.

CONCLUSION

152. As previously noted, the insurance company in this case wants a formal order from this Court rejecting its application to insert into the Court Order 'consent term' (iii) (that the insurance company is only 50% liable for the accident), if the Court so decides, which it now has. The insurance company wants this formal order, so that it can approach the

Department to see if it will consent to that term being inserted into the Court Order. This is because the Department will not recover €45,000 which is owed to the taxpayer from the insurance company, if that 'consent term' is inserted in the Court Order.

153. This judgment sets out the reasons why this Court refuses the insertion of that consent term, without the consent of the Department. At the request of the parties, this Court's refusal to insert the consent term in the Court Order is being given on a provisional basis, since this Court will revisit its decision, if the Department were to consent to the insertion of consent term (iii).
154. As the application in this case on the 27th October, 2021 for the insertion of the 'consent terms' was a brief hearing, with just counsel for the insurance company present, this Court provided both parties with a draft of this judgment on the 15th February, 2022 to enable them make any submissions regarding the assumptions contained herein and the material relied upon.
155. At a hearing on 8th March, 2022 with both parties, the only substantive submission received was that it was agreed between the parties that the settlement sum was exclusive, and not inclusive, of the payment of Mr. Kuczak's legal costs, which are to be paid by the insurance company. In addition, it was stated that, with the consent of both parties, terms (i) and (ii) of the proposed order should not be finalised until the Order as a whole is finalised.
156. In this regard, this Court will adjourn the finalisation of the entire Court Order until the 29th April, 2022 at 11 am to enable the insurance company establish the position of the Minister regarding the insertion of 'consent term' (iii). If this Court was to be provided with evidence of the consent of the Minister to the insertion of 'consent term' (iii), a final order to that effect will be made on that date.
157. In light of this Court's comments in this judgment on the financial interests of the Department being prejudiced by the insertion of s. 343R(2) Consent Orders, and since counsel for the insurance company has indicated that it intends to notify the Minister of this judgment before coming back to this Court on 29th April, 2022, this Court will request the Registrar to send a copy of the judgment to the Minister for Social Protection and it also seems appropriate to give the Minister liberty to apply.