THE HIGH COURT

COMMERCIAL

[2024] IEHC 272

RECORD NUMBER 2021/3571P

BETWEEN

CHUBB EUROPEAN GROUP SE (FORMERLY ACE EUROPEAN GROUP LIMITED),

AIG EUROPE SA (FORMERLY AIG EUROPE LIMITED), AXIS SPECIALTY EUROPE SE,

ALLIANZ GLOBAL CORPORATE & SPECIALTY SE,

ALLIED WORLD ASSURANCE COMPANY (EUROPE) DESIGNATED ACTIVITY COMPANY (FORMERLY ALLIED WORLD ASSURANCE COMPANY (EUROPE) LIMITED),

LIBERTY MUTUAL INSURANCE EUROPE SE (FORMERLY LIBERTY MUTUAL INSURANCE EUROPE LIMITED),

XL INSURANCE COMPANY SE,

ZURICH INSURANCE PLC,

QBE EUROPE SA/NV (FORMERLY QBE INSURANCE (EUROPE) LIMITED)

and

LLOYD'S INSURANCE COMPANY SA

PLAINTIFFS

AND

PERRIGO COMPANY PLC, JOSEPH PAPA, JUDY BROWN, MARC COUCKE, LAURIE BRLAS, JACQUALYN A FOUSE, ELLEN R HOFFING, MICHAEL R JANDERNOA, DONAL O'CONNOR, GARY COHEN, HERMAN MORRIS JR, GERALD K KUNKLE JR, JOHN HENDRICKSON, RONALD WINOWIECKI, DOUGLAS BOOTHE, DAVID GIBBONS and RAN GOTTFRIED

(NO.2)

DEFENDANTS

JUDGMENT OF Mr Justice Twomey delivered on the 9th day of May, 2024

INTRODUCTION

1. If A and B are parties to litigation (and B has a separate potential debt to C), could A and B, when their litigation settles, have a term inserted in a court order about an issue which was *not the subject of a court hearing* but which has the effect of reducing/eliminating the obligation of B to C?

2. There are conflicting views in the High Court on the answer to this question in the context of orders issued by a court on the settlement of personal injury cases. One view is that the Court has the power to issue such an order, even though the matter was not decided by the court at a hearing, and even though C is not a party to the proceedings and so could not appeal

the order. The other view is that the Court does not have the power to insert a term in a court order, regarding an issue which was *not* determined by it, and which prejudices C, as this would breach C's right to due process before the law.

Rule of law issues arise where there is an arbitrary choice of law

3. Despite the importance of this issue, there has been no appellate court decision to resolve these conflicting High Court views and there is no prospect of one.[1] This is despite the fact that Keane J. stated that the '*inconsistency of approach'* in the High Court was '*bound to have an adverse effect on public confidence.'*[2] Indeed, not only does this inconsistency of approach affect public confidence, it also raises rule of law issues, since it is a principle of the rule of law, that laws *should apply equally to everyone*,[3] rather than, the current situation, where every trial court has an *arbitrary choice* of two interpretations of the law to apply.

4. In this regard, it is relevant to note that in reaching differing interpretations of the law, the High Court, in both of those cases,[4] drew attention to the fact that the way, in which to clarify this unsatisfactory situation, is for the Minister for Social Protection to bring declaratory proceedings, which should then lead to a determination by an appellate court. However, no such proceedings have been brought.

The same issue, but this time in the context of a commercial contracts case

[1] As noted by this Court in *Moloney v Dunne & Anor* [2024] IEHC 84 and the cases referenced therein, in personal injury cases, it is in the *direct* financial interests of the insurance company/defendant, and the *indirect* financial interest of the plaintiff, to seek the insertion of a term in the court order (e.g. that the defendant is only 10% liable for the plaintiff's injuries and so liable to pay only 10% of the disability benefit to the Department of Social Protection). Since any appeal by an insurance company risks an appellate court finding that all trial courts do not have jurisdiction to make these 'consent orders', which are for the financial benefit of the plaintiff and defendant, it would appear not to be in the financial interest of insurance companies to appeal any instance where the insertion of a term is refused by a court.

[2] Keane, '*Friends with Collatera 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) 2 Irish Judicial Studies Journal, 43-58, at p 58.

[3] Bingham, *The Rule of Law* (Penguin Books, 2010).

[4] In *Wilson v Leonardi* [2022] IEHC 670 at para 47, the High Court noted that the uncertainty regarding the status of such court orders will only be determined when there are '*appropriate proceedings to which the Minister is party'*. In *Moloney v Dunne & Anor* [2024] IEHC 84 at para 10 *et seq*, this Court outlined the public interest reasons for the Minister to take the proceedings suggested in *Wilson*, and for this reason, the Court Registrar was asked to provide a copy of the judgment to the Minister.

5. In this case, the same question, as arose in those personal injury cases, arises in the context of a commercial contracts case. It is whether a court has the power to insert a term in a court order, about an issue which was *never decided by the court at the hearing* (or in its judgment), where that term is *prejudicial to another person*. However, because there are unresolved conflicting views in the High Court, this Court, in deciding this issue, is left in the unsatisfactory position of having an arbitrary choice of which law to apply.

6. This is despite the fact that this issue is of considerable practical relevance, since hundreds of court orders are issued on a daily basis throughout Ireland. It is also a question of some importance, since it deals with judges deciding themselves if they have the power to make court orders about issues, which were not heard by them, but which prejudice third parties. The importance and complexity of *judges deciding the limits of their own powers* is illustrated by the recent 4-3 decision in the Supreme Court case of *Delaney v Personal Injury Assessment Board* [2024] IESC 10. In deciding whether judges have the power to adopt personal injury guidelines in *Delaney*, Hogan J. held that a key factor is that one is dealing with the powers of '*an unelected judiciary'* and so with judges, who do not have the same accountability as the *'elected representatives of the People'* (at para 46 *et seq*). The same logically could be said of judges deciding themselves whether they have the power to make orders about matters not heard by them and prejudicial to other persons, i.e. one must bear in mind that judges are not elected and are unaccountable for the exercise of those powers.

The conflicting authorities on the jurisdiction of a court to insert terms into court orders

7. As regards the conflicting authorities in the High Court, on the one hand, one view of the law is represented by *Matthews v Eircom* [2021] IEHC 456 and *Wilson v Leonardi* [2022] IEHC 670. In those cases, it was decided that a court *has the jurisdiction* to insert a term in a court order which was not decided at a hearing, or in the court's written judgment, even where

that term prejudices[5] a person, who is not party to the proceedings. In *Matthews*, the High Court inserted a term in the order striking out the proceedings, at the request of the parties, stating that they had been settled on a 50/50 basis. In doing so, the court held that such a court 'order' had the same status, as if the court had decided the matter itself at a hearing. The insertion of this term meant that a person, not party to the proceedings (i.e. the Department of Social Protection/taxpayer), would be deprived of 50% of a reimbursement of disability benefit paid to the plaintiff, which was otherwise due to it from the defendant under s 343R of the Social Welfare (Protection) Act, 2005. The High Court in *Matthews* held at para 10:

> "[W]here a court orders that for example liability is assessed at 50/50 that is just as much a court order if the same was as a result of the consent of the parties as if the same was pronounced by the judge in a written judgment."

8. On the other hand, the conflicting view of the law is represented by the cases of *Kuczak v Treacy Tyres (No. 2)* [2022] IEHC 619 and *Moloney v Dunne & Anor* [2024] IEHC 84. In those cases, this Court, in reliance, in part on the extra-judicial views of Keane J., concluded that a court *does not have the jurisdiction* to insert a term in a court order, which was not determined by the court at hearing, if it prejudices other parties. In this Court's view, this is particularly so where the person prejudiced is not even a party to the proceedings. This is because that person, as well as not obtaining due process before having their rights prejudiced by a court order, would also not have a right of appeal in relation to the court's order. On this basis, this Court decided in those cases, that a court does not have jurisdiction to insert a term in a court order (which was in the financial interests of the parties to the litigation), where the

[5] The facts of *Condon v HSE* [2021] IEHC 474 illustrate how a third party is prejudiced. In that case, the plaintiff and defendant/insurance company had settled a personal injuries action. They both agreed to seek the insertion of a term in the Order, striking out the proceedings, that the defendant/insurance company was only 10% liable for the plaintiff's injuries. Such a term, if inserted in a court order would entitle the defendant/insurance company to claim that it was obliged to pay only 10% of the reimbursement due by it (under s 343R of the Social Welfare (Protection) Act, 2005) to the Department of Social Protection for disability benefit paid by the Department to the plaintiff, i.e. on the basis that a court had 'ordered' that the defendant was only 10% liable for the injuries and so, under s 343R(2), the defendant only has to pay back that percentage of disability benefit.

term is prejudicial to a person, who is not party to proceedings. It seemed to this Court that *if* the person who was financially prejudiced by the court order (C, in our example above) was an *individual* citizen*,* who was not party to the proceedings between A and B, but was financially prejudiced by the court order, a court would not make such an order, on the grounds of due process. Indeed, if such an order was made by a court in C's absence, depriving her of money otherwise due to her, one would expect her lawyers in court the following day pointing out the absence of due process. This Court cannot see how it could be any different just because the third party who is prejudiced by the court order in those personal injury cases is the taxpayer, who is not represented in court, when the order is made. Indeed, it seems to this Court that there is an onus on the courts to look out for the interests of the taxpayer, as is clear from the Supreme Court case of *Reardon v. Government of Ireland* [2009] 3 I.R. 745 at p. 765, where Murray C.J. noted that the interests of the taxpayer had to be '*borne in mind'* by the court in reaching its decision in that case.

9. While those conflicting authorities deal with the finalisation of court orders *in* personal injury cases, the same issue arises in the context of the finalisation of a court order in this, a commercial contract dispute.

Power of court to insert terms in a court order in non-personal injury cases

10. In this case, Perrigo is seeking to insert a term in the court order regarding certain issues (known as the Shareholder Demand Letter and the Single Claim), which *were not considered at the hearing* and so were not determined by this Court at the hearing, or in this Court's judgment in *Chubb European Group SE & Ors v Perrigo Company plc & Ors* [2024] IEHC 9 ("**Principal Judgment**").

11. There can be little doubt that the conflicting principles, which one can take from the *Matthew/Wilson* or the *Kuczak/Moloney* cases, *are both potentially applicable* to the form of court order in this commercial contract case. This is because, in those cases and in this case,

the Court is being asked to insert a term in a court order (which will mean that the Court *determined* an issue, since the Court will have so '*ordered*'), even though the matter was not decided by the court at the hearing, nor contained in its judgment.

12. In the foregoing personal injury cases, the reason the issue was not determined by the court, at a hearing, was because there was no hearing, as the matter settled. In this case, there was a hearing, but the issues in question, the Shareholder Demand Letter and the Single Claim, were not considered at the hearing.

13. Although the Shareholder Demand Letter and the Single Claim were not dealt with at the hearing, it is nonetheless suggested by Perrigo that these two issues should be determined by the Court in the Order. If this Court does so, it will have determined those two issues, not because of a decision of the court, but because the Court has been asked to insert terms determining those issues by a party to the litigation.

14. In deciding on Perrigo's application, this Court has an arbitrary choice of which law to apply. This arbitrary choice relates to an issue of considerable legal significance. This is because the principle to be derived from *Matthews/Wilson* is that, whether in a personal injuries case or a commercial contracts case, *a judge does have the power to put a prejudicial term in an order* (i.e. prejudicial to a person, other than the person seeking the order), not because it was *determined* by that judge at a court hearing or in a judgment, but because the judge has been *requested* to do so.

15. It seems clear to this Court that it makes no difference to this underlying principle in *Matthews/Wilson*, if the Court is asked to insert a term in the court order, by both litigants on consent (as in those cases) or by one litigant, (as in this case).Of course, a court is *more likely* to insert prejudicial terms, if both parties, rather than just one party, request the insertion of the term. However, this relates to the *likelihood* of the term being inserted by the court, not whether the court *has the power* to insert the term in the first place.

16. Similarly it makes no difference to the underlying principle in *Matthews/Wilson*, if the reason the issue was not determined by the Court at a hearing, is because there was no hearing, as occurred in *Matthews/Wilson* (because the cases settled), or if it was because there was a hearing, but this issue was not raised at the hearing (as in this case).

17. Finally, it also makes no difference to the underlying principle in *Matthews/Wilson*, if the term to be inserted is prejudicial to a person who is not party to the proceedings (as in those cases) or prejudicial to a party to the proceedings (as in this case). This is because, in both instances, one has a person who is prejudiced by the decision of the court to insert a term in an order regarding an issue, which was not determined by the court at a hearing or in its judgment.

18. The reason these differences between this case and *Matthews/Wilson* are irrelevant is because the Court *either has the jurisdiction, or not, to determine issues* in a court order, which are prejudicial to another party, where those issues have *not been decided* by a judge at a hearing or in her judgment. The key issue at stake is the jurisdiction of the judge. Thus, the jurisdiction, in relation to inserting prejudicial terms in a court order, either exists or it does not, *irrespective* of whether one party or both parties to the litigation request the insertion, *irrespective* of whether the order is being issued after a case settled or after a hearing/judgment and *irrespective* of whether the party prejudiced is a party to the proceedings or not. It is for this reason that the *Matthews/Wilson* and the *Kuczak/Moloney* cases are relevant to the issues in this case. In those cases, and in this case, the Court is being asked to 'order' something, which was not determined by it at a hearing or in its judgment.

19. In deciding on Perrigo's application, it would of course be preferrable, for rule of law reasons, if there was an appellate court decision clarifying which of the two approaches taken in the High Court is to be adopted by all trial courts when inserting terms in court orders. However, because this is not the case, this Court must make its decision, as set out below, based on an arbitrary choice of which law to apply.

If the Court does not insert a term in the Order, will it 'note' that term in the Order?

20. A related question, which also arises in this case, is whether a court can insert a prejudicial term in the *recitals* of a court order, even though the matter was not considered by the Court at hearing?

21. In considering this question, it is relevant to note that if a term is inserted in the recitals, the Court is not 'ordering' or determining an issue, but simply 'noting' it. However, this still raises the question of whether a *judge has the jurisdiction* to insert such a term, whether on the application of one or both parties, *if it may prejudice another person*, whether that person is a party to the litigation or not.

BACKGROUND

22. The foregoing issues of general application arise in the context of a dispute over the meaning of a commercial contract and in particular the Order to be granted by this Court arising from a hearing which was held from 21st of November, 2023, to 1st of December, 2023 ("**Principal Hearing**") and the resulting judgment, the Principal Judgment. Defined terms used in the Principal Judgment are also used in this judgment.

23. This supplementary judgment arises from a hearing held on 12th April 2024 regarding the terms to be inserted in the court order to be issued, in light of the Principal Judgment. In support of their respective positions, both Chubb and Perrigo relied on the Supreme Court judgment in *IBRC v Quinn* [2014] IESC 11 at para 2.3, in which Clarke stated that:

> "All courts in Ireland are now courts of record. That means that the official record of orders made by the courts are to be found in the **formal written orders** produced which are, subject to the entitlement of the court to correct any errors in same, **a definitive account of what a court determined on a relevant occasion and in respect of the**

specified proceedings. It is, therefore, of the **utmost importance that the record be accurate.**[…]. **While it can be said that the scheduled draft order reflected where the parties wished to end up (i.e. with an order in that form), to make such an order in that form would have been to allow the official record of the court to be at variance with what actually occurred**. That was something which this Court could not allow."

24. In order for this Court to now decide the form of the final court order, the starting point is what was decided by this Court at the hearing, not what *either or both* parties want to go into the Order. With this in mind, each of the issues to be addressed in the Order will be considered in turn.

Value of Offer Misrepresentation was aggregated back to 2014 Policy

25. The Principal Judgement is clear as to what was at issue between the parties and what was decided. It was whether certain claims should be aggregated back to the 2014 Policy (see for example para 8 of the Principal Judgement summarising the key issue in the case). At the Principal Hearing, Chubb claimed that all the wrongful acts (i.e. Value of Offer Misrepresentation, Organic Growth Misrepresentation, the Omega Integration Misrepresentation, Tysabri Accounting Misrepresentation, Collusive Pricing Misrepresentation and Pricing Pressure Misrepresentation) should be aggregated back to the 2014 Policy, while Perrigo claimed that none of these wrongful acts should be aggregated back to 2014 Policy.

26. In the Principal Judgment, this Court held that only one of the wrongful acts (the Value of Offer Misrepresentation) should be aggregated back to 2014 Policy.

27. This Court did not hear arguments, nor was it decided, that all the other wrongful acts, which were not aggregated back to the 2014 Policy by the Court, should or should not be aggregated back to the 2015 Policy.

28. In these circumstances, and bearing in mind that a court order is an account of what the '*court determined on a relevant occasion'* and what '*actually occurred'* at the hearing, this Court concludes that the Order should state in relation to the Value of Offer Misrepresentation, that:

> **"that the alleged wrongful act, identified in the judgment as the "Value of Offer Misrepresentation", aggregates back to the policy identified in the judgment as the "2014 Policy".**

29. This Court rejects the suggestion by Perrigo that the reference in the Order to the '*wrongful acts'* aggregating back, should be to *'any claims arising out of alleged wrongful acts'* aggregating back. This is because the Court determined that the wrongful act (known as the Value of Offer Misrepresentation) aggregated back to the 2014 Policy. It did not determine that any claims (including, for example, future claims of which this Court is unaware), arising out of that wrongful act, aggregated back to the 2014 Policy. Accordingly, the Order should reflect what was determined by the Court.

30. As already noted, the Principal Hearing and so the Principal Judgment was not concerned with how wrongful acts, other than the Value of Offer Misrepresentation, were to be treated (if the Court found, as it did, that they were not aggregated back to the 2014 Policy). Two of those wrongful acts were the Organic Growth Misrepresentation and the Omega Integration Misrepresentation and the question arises as to what should be said about those wrongful acts in the Order.

Organic Growth Misrepresentation and Omega Integration Misrepresentation

31. The Organic Growth Misrepresentation and the Omega Integration Misrepresentation were notified during the 2015 Policy. Since this Court held that that they did not aggregate back to the 2014 Policy, *the only policy to which they can be allocated* is the 2015 Policy. This is an

important distinction from the other wrongful acts (which are considered below). In particuarl, there is no possibility of these two wrongful acts being allocated to another policy, whether the 2016 Policy or otherwise. Thus, a corollary of this Court finding that the Organic Growth Misrepresentation and the Omega Integration Misrepresentation did not aggregate back to the 2014 Policy is that they must be allocated to the 2015 Policy.

32. Indeed, there was no disagreement between the parties in this regard. The only difference between Chubb and Perrigo regarding the terms of the Order, concerning these wrongful acts, was whether there should be a reference *to 'claims arising out of the alleged wrongful acts'* or a refence just to the '*wrongful acts'*. For the same reason as given for the wording in the Order relating to the Value of Offer Misrepresentation, this Court concludes that there should be a reference only to the '*wrongful acts'* , and not to claims arising out of those wrongful acts, and so it will order as follows:

> **"that the alleged wrongful acts, identified in the judgment as the "Organic Growth Misrepresentation" and the "Omega Integration Misrepresentation", do not aggregate back to the 2014 Policy and attach instead to the policy identified in the judgment as the "2015 Policy"**

<u>Tysabri Accounting, Collusive Pricing & Pricing Pressure Misrepresentations</u>

33. At the hearing in April 2024 regarding the terms of the final Order, the main issue in dispute was what the Order should say about the remaining wrongful acts (Tysabri Accounting Misrepresentation, Collusive Pricing Misrepresentation and Pricing Pressure Misrepresentation). These wrongful acts were notified under the 2016 Policy, but are not aggregated back to the 2014 Policy, under the terms of the Principal Judgment. The main question for this Court is whether the terms of the Order should state that these wrongful acts:

- fall for cover under the policy, which applied when those wrongful acts were notified, i.e. the 2016 Policy, as suggested by Perrigo, *or*
- aggregate back to the 2015 Policy, as suggested by Chubb, or
- something else.

34. Both Chubb and Perrigo claimed that their respective wording to be inserted in the Order is implicit in the Principal Judgment.

35. For its part, Chubb claims that in the Principal Judgment, this Court characterised five wrongful acts (i.e. Organic Growth Misrepresentation, the Omega Integration Misrepresentation, Tysabri Accounting Misrepresentation, Collusive Pricing Misrepresentation and Pricing Pressure Misrepresentation) as being similar or related, since this Court held that the essence of all those wrongful acts was wrongfully inflating Perrigo's value. On this basis, Chubb claimed that the three wrongful acts notified under the 2016 Policy (i.e. Tysabri Accounting Misrepresentation, Collusive Pricing Misrepresentation and Pricing Pressure Misrepresentation) must aggregate back to the two wrongful acts notified under the 2015 Policy (i.e. Organic Growth Misrepresentation and Omega Integration Misrepresentation), to which Chubb claims, they are similar or related.

36. It is true that this Court did characterise those five wrongful acts as amounting to inflating Perrigo's value. However, it did *not* do so in the context of determining whether those wrongful acts were 'similar or related' *to each other*. This description of the wrongful acts was done in the context of determining whether each of them were '*similar or related'* to the Mylan Counterclaim. In particular, this Court did not do so in order to determine whether, say the Tysabri Accounting Misrepresentation, which was notified under the 2016 Policy, should be aggregated back to the Organic Growth Misrepresentation, which was notified under the 2015 Policy. Yet this is what Chubb wants the Order to state. In addition, as is clear from the Principal Judgment, considering whether one wrongful act, say the Tysabri Accounting

Misrepresentation, is similar or related to another wrongful act, say the Organic Growth Misrepresentation, is a very fact specific analysis and this fact specific analysis was not ever considered, or determined, by this Court. Accordingly, it should not be part of the Order made by this Court.

37. For its part, Perrigo argued that since this Court decided that the Tysabri Accounting Misrepresentation, the Collusive Pricing Misrepresentation and the Pricing Pressure Misrepresentation did not aggregate back to the 2014 Policy, it follows that these wrongful acts should be allocated to the 2016 policy, since they were notified in that year.

38. It is true that those wrongful acts were notified in the 2016 Policy year. However, this Court did not determine that they should be allocated to the 2016 Policy, yet this is what Perrigo wants the Order to state.

39. Unlike, the situation with the Organic Growth Misrepresentation and the Omega Integration Misrepresentation, allocating these wrongful acts to the 2016 Policy is *not the only possibility*. As is clear from Chubb's suggested wording, an argument can be made that these wrongful acts should be aggregated back to the 2015 Policy.

40. In particular, the issue which was argued at the Principal Hearing (and so determined in the Principal Judgment) was not the question of whether these wrongful acts, did not or did not aggregate back to the 2015 Policy, and so were allocated, or not, to the 2016 Policy. The only issue which was considered was whether they aggregated back to the 2014 Policy.

41. Thus, since this Court did not determine in its Principal Judgment that these wrongful acts fall for cover under the 2016 Policy, there is no basis for this Court to make an order to that effect.

42. Thus, this Court rejects the terms proposed by Chubb and by Perrigo. Instead, this Court will insert in the Order what was actually determined in the Principal Judgment, based on what *'actually occurred'* at the hearing, i.e. that the Tysabri Accounting, Collusive Pricing and

Pricing Pressure Misrepresentations did not aggregate back to the 2014 Policy. Hence this Court will order:

> **that the alleged wrongful acts, identified in judgment as the "Tysabri Accounting Misrepresentation", Collusive Pricing Misrepresentation" and "Pricing Pressures Misrepresentation" do not aggregate back to the 2014 Policy.**

The Shareholder Demand Letter

43. Perrigo also requests a term in the Order that the claims arising out of the Shareholder Demand Letter do not aggregate back to the 2014 Policy.

44. This is the issue to which reference has already been made, namely inserting terms in a court order, which were not determined by the court at the hearing, or in its judgment. This is because the Shareholder Demand Letter is not even mentioned in the Principal Judgment, as it was not an issue at the Principal Hearing. Chubb objects to the insertion of this term for these reasons.

45. The request by Perrigo in this case, that the Court insert a term regarding an issue which was never determined at the hearing, is similar to the requests, *granted* in *Matthews/Wilson* but *refused* in *Kuczak/Moloney*, i.e. that a court insert a term, prejudicial to another party, in an order about something which was never determined by it and about which there was not even a hearing.

46. As already noted, it is irrelevant whether the application to insert such a term is made on consent of the plaintiff *and* defendant (as occurred in *Matthews/Wilson* and *Kuczak/Moloney*), or by a plaintiff *or* a defendant (as in this case). It is also irrelevant why the issue was not addressed by a court at a hearing. In *Matthews/Wilson* and in *Kuczak/Moloney*, there was *no* hearing, as the cases settled, while in this case, there was a hearing, at which the issue was not addressed. In addition, it is irrelevant whether the person prejudiced is *not* a party

to the proceedings (as was the case with the Department of Social Protection in *Matthews/Wilson* and in *Kuczak/Moloney*) or is a party to the proceedings (as is the case with Chubb). In both instances, one is dealing with a party *being prejudiced* by a court deciding an issue which was not the subject of a hearing. In both instances, if the court was nonetheless to decide the issue, and prejudice that party, it seems to this Court that there would be an absence of due process for the party prejudiced.

47. The reason the foregoing differences between this case and the *Matthews/Wilson* and *Kuczak/Moloney* cases are irrelevant is because the key issue is whether the Court has the power to insert terms prejudicial to another party in a court order, which determine an issue, where that issue was *never decided by the judge* at the hearing (or in the judgment). It may be relevant to the *likelihood* of the court granting the request, that it is made *on consent* of both parties, rather than just one party. Similarly, it may increase the likelihood of a court granting the request, if the person prejudiced is *a party* to the proceedings (and so may appeal), rather than a third party (with no right of appeal). However, these factors relate to the *likelihood* of the court granting the order, not to whether the court has power in the first place to grant the order.

48. Unfortunately, as already noted, the difference in opinion in the High Court regarding the answer to this question remains unresolved. This means that this Court has to now make an arbitrary choice between the principle in *Matthew/Wilson* and the principle in *Kuczak/Moloney*.

49. In this case, there *was a hearing* before this Court of the issues in dispute between the parties. However, the Shareholder Demand Letter was not an issue at the hearing. For this reason, Perrigo's request is similar to the request of parties asking a court to insert a prejudicial term in a court order on consent (e.g. determining that a defendant is only 10% liable for a plaintiff's injuries), even though the matter was never heard by the court. The key point is that this issue was never before the court for determination, yet there is an application for it to

appear in a court order as something which was 'ordered' by the court and so determined by the court, in order to *prejudice* another person.

50. In this Court's view, for the Court to make such an order, would involve a judge in exercising powers he does not have. This is because, as set out by this Court in the line of cases ending with *Moloney*, a judge only has power to *determine* issues which may prejudice another party, if they have been the subject of a hearing before that court and the person prejudiced is granted due process. This is the case no matter how much one party, or both parties, might want the court to so decide, or how much it might be in their financial interest for the court to so decide. Of course, *if no other party is prejudiced,* eg. insertion of a term on consent that one litigant must pay another litigant's costs, then there can be no issue about inserting such a term in the Order. However, outside such cases, it seems to this Court that the making of such an order would involve a judge exceeding his powers.

51. This is particularly so when one considers that inserting a term in court order has very significant consequences. For this reason, it is not to be done simply because one or both of the parties *request* that it be done, if another person may be prejudiced by the order. This is because the breach of a court order may give rise to contempt proceedings and imprisonment, as clearly illustrated by the decision of *Board of Management of Wilson's Hospital School v Burke* [2022] IEHC 719. Therefore, it seems clear to this Court that inserting an order about an issue in a court order should only be done where that issue has been the subject of a decision by a court at a hearing, *if* another person may be prejudiced by that order.

52. In this instance, Chubb has objected to the insertion of a term that the claims arising out of the Shareholder Demand Letter do not aggregate back to the 2014 Policy. It has done so on the basis that the Shareholder Demand Letter was not an issue which was considered at the Principal Hearing. Accordingly, it was not considered in the Principal Judgment, and it must

be presumed that Chubb, in objecting to its insertion, believes its insertion is not in its interest, i.e. that it may be prejudiced by such a term in the Order.

53. As the Shareholder Demand Letter was never raised at the Principal Hearing (and forms no part of the Principal Judgment), this Court rejects Perrigo's request to insert a term in the Order seeking to determine that issue. This Court does so in reliance on *Kuczak/Moloney*, and notwithstanding that there is conflicting authority in *Matthew/Wilson*.

2019 Derivative Complaint

54. Perrigo also requested this Court to make an order that the 2019 Derivative Complaint is a Securities Claim as defined by the 2014 Policy, 2015 Policy and 2016 Policy. For its part, Chubb requested that this Court make an order that the 2019 Derivative Complaint constitute claims that fall within the 2015 Policy.

55. At the Principal Hearing, the parties in arguing that the 2019 Derivative Complaint did/did not fall within the definition of a Securities Claim, referred to the definition contained in the 2014 Policy. At that hearing, uncontroverted submissions were made that the definition of Securities Claim in the 2014 Policy was identical to the definition of Securities Claim in the 2015 Policy and also that it was in substance the same as the definition of Securities Claim in the 2016 Policy.

56. As a result of these submissions, at para 129 of the Principal Judgment, this Court summarised the issue in dispute between the parties, as being whether the 2019 Derivative Complaint was a securities claim under the '*relevant policy'.* At para 136 of the Principal Judgement, this Court concluded that the 2019 Derivative Complaint is '*covered by the policy'*.

57. It is true that, when summarising the Court's conclusions at para 148, this Court stated that the 2019 Derivative Complaint is '*covered by the Endorsement to the 2014 Policy'*, but it is common case that this is a typographical error. This is because, in light of the Court's main conclusions in the Principal Judgment, it is very clear, and it is common case, that the 2019

Derivative Complaint could never be subject to the 2014 Policy. (In brief, this is because the 2019 Derivative Complaint consists of the Organic Growth Misrepresentation, the Omega Integration Misrepresentation, the Tysabri Accounting Misrepresentation and the Collusive Pricing Misrepresentation. As already noted, the Principal Judgment held that all four of these wrongful acts did not aggregate back to 2014. It follows that the 2019 Derivative Complaint, could not be subject to the 2014 Policy.)

58. When it comes to the terms of the Order, it follows the most accurate way to describe the finding in the Principal Judgment is that the 2019 Derivative Complaint is a Securities Claim under the relevant policy.

59. For this reason, this Court will not order, as suggested by Perrigo, that the 2019 Derivative Complaint is a Securities Claim as defined in the 2014 Policy, 2015 Policy and the 2016 Policy, as this was not the finding of the Court. Similarly, it will not state that the 2019 Derivative Complaint constitutes a claim that falls within the 2015 Policy, since no such finding was made by the Court.

60. The Order therefore which reflects the argument made to the Court and the finding of the Court in the Principal Judgment is that:

> **"that the 2019 Derivative Complaint is a 'Securities Claim' under the relevant policy"**

Specific Matters Exclusion

61. The next term of the Order relates to Perrigo's request that the Order should state that the Specific Matters Exclusion of the 2016 Policy does not prevent claims arising from the Tysabri Accounting Misrepresentation and the Collusive Pricing Misrepresentation, first made in the Amended Roofers Complaint, from attaching to the 2016 Policy.

62. Chubb's requested wording is almost identical to Perrigo's, but it wants to add the term that Chubb is not liable under the 2016 Policy where the Tysabri Accounting Misrepresentation and the Collusive Pricing Misrepresentation aggregate back, and/or attach, to the 2015 Policy.

63. At para 140-146 of the Principal Judgment, this Court held that the wrongful acts alleged in the Amended Roofers Complaint, that were *not* alleged in the Roofers Complaint (i.e. the Collusive Pricing Misrepresentation and the Tysabri Accounting Misrepresentation), *were not excluded from cover under the 2016 Policy*, by virtue of the Specific Matters Exclusion in the 2016 Policy.

64. It is important to note that this was the point that was argued at the Principal Hearing and this was the point that was determined by this Court in the Principal Judgment.

65. This Court did not find that the Collusive Pricing Misrepresentation and the Tysabri Accounting Misrepresentation in the Amended Roofers Complaint attach to the 2015 Policy or aggregate back to the 2015 Policy. Accordingly, the Order should not reflect any such term requested by Chubb.

66. The Order therefore should read:

> **that the specific matters exclusion endorsement of the 2016 Policy does not prevent claims arising from the wrongful acts, identified in judgment as the "Tysabri Accounting Misrepresentation" and the "Collusive Pricing Misrepresentation", first made in the Amended Roofers Complaint, from attaching to the 2016 Policy.**

<u>Wrongful acts treated as a 'Single Claim'</u>

67. Perrigo requests that the Court insert the following terms in the Order:

> "And the Court doth declare that the claims made in the Amended Roofers Complaint, the Securities Actions (as defined in the Amended Defence and Counterclaim), the Shareholder Demand Letter and the Perrigo Derivative Complaint arising out of the

"Tysabri Accounting Misrepresentation", "Collusive Pricing Misrepresentation" or "Pricing Pressures Misrepresentation" alleged wrongful acts are treated as a Single Claim under the 2016 Policy"

This is another instance where this Court is being asked to make an order relating to an issue which was not determined by the Court at the hearing, or in its judgment. This is because this Court did not consider whether under the terms of the 2016 Policy, these wrongful acts were Single Claims. As previously noted, all the Court determined was that these wrongful acts were not aggregated back to the 2014 Policy. For its part, Chubb has objected to the insertion of this term, as it was not dealt with at the Principal Hearing or in the Principal Judgment and presumably also because it believes its insertion is not in its interest, i.e. that it may be prejudiced by its insertion.

68. As previously noted, there are conflicting authorities regarding whether this Court has the jurisdiction to make an order determining an issue, even though that issue was not determined by the Court at the hearing, or in its judgment, if it prejudices another person. For reasons already stated, this Court chooses to rely on *Kuczak/Moloney*, notwithstanding that there is conflicting authority in *Matthew/Wilson*. On this basis, this Court concludes that it is not open to this Court to make an order about an issue, which was not the subject of the hearing, where it will prejudice another party (in this case, Chubb). Hence it refuses to insert this term into the Order.

Refusal of declaratory reliefs

69. Perrigo also seek an order that the declaratory reliefs sought at paragraphs B-G (inclusive) of the Statement of Claim are refused.

70. To take just one example of some of the reliefs claimed in the Statement of Claim, at Paragraph C of the Statement of Claim, Chubb sought a declaration that the Shareholder

Demand Letter falls for cover under the 2014 Policy. At paragraph 5 of its Counterclaim, Perrigo sought a declaration that the Shareholder Demand Letter falls for cover under the 2015 and 2016 Policies.

71. However, the Shareholder Demand Letter was not an issue at the hearing and no determination was made regarding Chubb's claim *or* Perrigo's claim, regarding the Shareholder Demand Letter, in the Principal Judgment. Hence, it would not be accurate for the Order to state that this relief was refused.

72. It is not proposed to deal with each relief separately, as similar points can be made regarding the other reliefs claimed by Chubb and the counter claims made by Perrigo. However, to take one more example, Chubb seek a declaration at Paragraph B that the Perrigo Derivative Claim is not a Securities Claim as defined in the 2014-2017 Policies. It is to be noted that Perrigo sought a declaration in its Counterclaim that the Derivative Claim falls for cover under the 2015 and 2016 Policies. While, as is clear from the Principal Judgment, this Court did not grant the declaratory relief sought by Chubb, it also did not grant the declaratory relief sought by Perrigo.

73. Nonetheless, it is to be noted that Perrigo is not seeking an order that the relief sought by it has been refused. It only seeks an order that the relief sought by Chubb has been refused. It is arguable that if this Court were to give Perrigo what it is seeking, in order to be more complete, if not more accurate, this Court should also order that Perrigo's relief was also refused.

74. In all these circumstances (and since similar points can be made in relation to the other reliefs which were not granted), and in the interests of ensuring that the Order is a '*definitive account'* and is '*accurate'* as an '*official record of […] what actually occurred'* at the hearing and in the judgment, these terms suggested by Perrigo will not be inserted.

Insertion of a 'note' rather than an 'order' in the Order

75. Perrigo also requested that in the recitals to the Order, and so not in the operative part of the order, that the following *'note'* be inserted:

> "And the Court noting that no order was sought by the Plaintiff [*sic*] in respect of paragraph A of the prayer for relief of the Statement of Claim in circumstances where no indemnity is claimed in the Amended Defence and Counterclaim by the First Defendant in respect of the Omega Arbitration claim and Counterclaim."

76. The issue regarding the Omega Arbitration Claim was not part of the Principal Hearing or the Principal Judgment. An Order, and in particular the operative part of an Order, is a record of what was *determined* by a court. A court order is not a place for making observations or noting matters which were not determined or even heard by the Court, particularly where they may prejudice another person (whether party to the proceedings or not). While this is particularly so, in relation to the operative part of the court order, it is also the case regarding the recitals.

77. This issue was considered in the context of personal injuries settlement in the case of *Fahy v Padraic Fahy Tiling Contractors Ltd & Anor* [2021] IEHC 682 at para 69 *et seq*. In that case, on the settlement of proceedings, the plaintiff and the insurance company/defendant requested this Court to insert in the Order striking out the proceedings, a *'note'* that the settlement sum did not contain any figure in respect of loss of earnings. The parties had sought its insertion as a 'note' because this Court had refused to insert that term in the body of the Order as an 'order' of the Court (since there was no hearing, as the case settled, and so no decision by this Court to that effect).

78. In *Fahy*, this Court refused to insert the '*note'* as it was clear that a person, who was not a party to the proceedings (i.e. the Department of Social Protection) would be prejudiced by the insertion of the term in the Order. This is because the inserted term was intended to be used to deprive the taxpayer/Department of Social Protection of a reimbursement from the

defendant/insurance company of a disability benefit. This is because it would enable the insurance company to claim that a court had 'ordered' (for the purposes of s 343R(2) of the Social Welfare (Consolidation) Act, 2005) that the settlement sum did not contain a sum in respect of loss of earnings. This was the intended purpose of the 'note' in the recital, even though it was clearly *not* the case that the Court would have been making an 'order' to that effect, even if it had inserted the term as a 'note' in the Order.

79. In *Fahy*, the person (i.e. the Department of Social Protection) intended to be prejudiced by the insertion of the 'note' in the Order was not a party to those proceedings and the application, which was refused, was on consent of both parties to the litigation.

80. In this case, the party likely to be prejudiced by the insertion of the 'note' is a party to the proceedings (Chubb) and the application is made by only one of the parties to the litigation (Perrigo). However, this difference is of no significance, since the key issue is whether the insertion of a term in the Order regarding the Omega Arbitration Claim, which was not determined by this Court, may prejudice any person (whether a party to the proceedings or not).

81. In this case, Chubb submits that the term, or observation, should not be inserted in the Order. In its submissions, Chubb states that the '*observation does not have legal effect and may give rise to prejudice to'* Chubb if '*Perrigo seeks to rely on the observation for some undisclosed reason'*.

82. The reason why the parties in *Fahy* wanted the term inserted was clear, as was the prejudice to another person, if it was inserted. However, even though it is not clear why Perrigo would want the '*observation'* noted in the Order, this Court concludes that it should not be inserted, since, as noted by Chubb, it '*may prejudice'* it. For this reason, i.e on the grounds of possible prejudice to another party, this Court refuses to insert this term.

83. More generally, this Court also refuses to insert this 'note' on the grounds that a court order should be a '*definitive account of what a court determined on a relevant occasion and in respect of the specified proceedings'* and not a list of observations that a litigant might feel that it is useful to have a Court to note.

Costs

84. Finally, there is a clear implication from a recent Court of Appeal decision that there is an onus on lawyers to take a broad-brush approach to costs and not to engage in time consuming and costly '*nit-picking'* (*Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189 at para. [94]). For this reason, this Court hopes that the foregoing conclusions assists the parties in reaching agreement regarding all costs incurred to date. This case will nonetheless be put in for mention at 10.30 a week for today's date, but with liberty to the parties to notify the Registrar, in the hope that such a listing proves to be unnecessary, in the event of the parties agreeing all outstanding matters.