THE HIGH COURT

[2022] IEHC 179

2011/219MCA

IN THE MATTER OF CUSTOM HOUSE CAPITAL LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE COMPANIES ACTS, 1963 – 2012 AND ON THE APPLICATION OF THE INVESTOR COMPENSATION COMPANY DAC

RULING of Mr. Justice Heslin delivered on the 10th day of March, 2022

Introduction

1. This ruling is in relation to the issue of costs, the backdrop being this court's judgment delivered on 13 October 2021. In the wake of that judgment, the relevant parties corresponded with each other and agreement was reached on the appropriate form of final order, including as to costs, save for a number of disputed issues in respect of which the parties, very helpfully, provided detailed written submissions. I have carefully considered these as well as the oral submissions made on 01 December 2021.

The first issue

2. The first issue concerns the costs of a motion which was issued by the Investor Compensation Company DAC (formerly Limited) (hereinafter "the ICCL") on 30 July 2019, which motion was heard by Ms. Justice Pilkington on 8 August 2019. In that motion, the ICCL sought an order requiring the official liquidator, Mr. Wallace ("the Liquidator") to provide the ICCL with certain information within a 14 day period or such other period as the court might direct. It is the costs of that motion which constitute the first issue and the dispute is between the ICCL and the liquidator.

3. What the ICCL pressed for in the aforesaid motion was an order requiring the liquidator to furnish the following:

> *"A. In respect of the clients of CHC for whom the Liquidator has certified a compensatable loss within the meaning of the Investor Compensation Act, 1998 (or such clients within that cohort as may be identified and agreed between the liquidator and the ICCL):*
>
> *(a) the value of each client's claim, on an asset-by-asset basis, in the liquidation of CHC as at the date of the winding-up of CHC;*
>
> *(b) the amount available for distribution as against each client's claim, on an asset-by-asset basis, in the liquidation of CHC as at March 2019;*
>
> *(c) the value of the distributions from the liquidation of CHC to date on an asset-by-asset basis;*
>
> *(d) the amount of the net loss certified for each client on an asset-by-asset basis;*
>
> *(e) the amount of the compensatable loss certified for each client on an asset-by-asset basis; and*
>
> *(f) the estimated value of future distributions from the liquidation of CHC."*

4. At paragraph 2 of the said motion, ICCL also sought *"such further or other relief as this Honourable Court may seem fit"*. The foregoing is of some significance because it is not in dispute that, at the hearing of the motion, the ICCL also sought an order to restrain the liquidator from making distributions to clients. Whether one characterises the foregoing as an order requiring a "stay" in respect of distributions which the liquidator was otherwise entitled to make or an "injunction" restraining distributions, the net effect is the same. For the sake of convenience, I will refer to the aforesaid motion and application to prohibit distributions by the liquidator as "the information and stay motion".

5. The relevant background to the information and stay motion involved an application which was made in December 2018, wherein the ICCL applied for an order which would have directed the liquidator/administrator to bring an application for directions in order to have determined the dispute as to the scope of the ICCL's right of subrogation pursuant to the 1998 Act. At this juncture it is appropriate to note that in this court's 13 October 2021 judgment, there was a rejection of the right of subrogation which the ICCL had contended for. In other words, insofar as there was a dispute between the parties, in 2018, as to the correct interpretation of the 1998 Act, it was only a dispute because the ICCL took a particular position which was ultimately found to be incorrect.

6. In any event, the December 2018 application gave rise to a judgment of 31 January 2019, wherein Finlay Geoghegan J. refused to direct the liquidator/administrator to bring an application for directions. The court made it clear that if ICCL wished to bring such an application, it would be necessary to identify at least a representative sample of compensated clients. The learned judge also observed that this might require ICCL to obtain further information.

7. In the wake of the 31 January 2019 judgment, ICCL wrote to the liquidator on 7 March 2019 seeking information and this gave rise to a response dated 26 March 2019 which *inter alia* flagged certain practical and timing difficulties which prevented the liquidator from providing information. The ICCL point out that there was no unwillingness to cooperate and no objection to providing information flagged by the liquidator at that juncture. While this may be true, it takes nothing away from the basic fact that the sole reason why the information was sought was in furtherance of an objective held by ICCL based on a contention (ultimately found to be incorrect) as to its subrogation rights pursuant to the 1998 Act.

8. On 29 April 2019 the liquidator provided the ICCL with a breakdown on a fund-by-fund and client-by-client basis of the net loss certified up to that point. Further information was pursued by the ICCL in correspondence of 30 April and 17 June 2019. By letter dated 17 July 2019, the liquidator raised concerns regarding data protection. In particular, the liquidator highlighted concerns that the provision of client information to the ICCL would result in a breach of data privacy protections contained in the General Data Protection Regulation 2016/679 (i.e. the "GDPR").

9. It was made clear in correspondence that the liquidator was concerned to ensure that there was a lawful basis for processing the relevant data and that his legal advisors were

concerned that there was no exemption or lawful basis for doing what was sought by the ICCL.

10. In a response dated 26 July 2019, the ICCL expressed surprise and disappointment and put forward what it regarded as a basis for the lawful processing of the personal data, in particular, having regard to Art. 6(1)(f) of the GDPR, i.e. that this was necessary for the purposes of the legitimate interests pursued by the Data Controller or by a 3rd party. A response was called for by 29 July 2019, failing which the court's attention would be brought to the matter.

11. The liquidator replied on 29 July 2019 to indicate that he had not carried out a 'legitimate interests' assessment, but his initial view was that, if he were to carry out same, it would result in him concluding that the fundamental rights and freedoms of the relevant individuals should not over-ride the legitimate interests pursued. The letter also indicated that this was particularly so, in circumstances where it was open to the ICCL to seek to obtain the information by applying for and obtaining a court order directing that it be disclosed, rather than seeking voluntary disclosure of the information from the liquidator in his role as administrator and liquidator.

12. On behalf of the ICCL, it is submitted that the liquidator had two options open to him at that point, namely, to carry out a legitimate interests' assessment, or to do what the ICCL describe as *"to abdicate that responsibility and to require the ICCL to seek an order to obtain the information".* The foregoing seems to me to be an analysis which ignores at least four things: firstly, the fact that the sole reason the information was required was because the ICCL held an incorrect view as to its rights under the 1998 Act; secondly, the ICCL was contemplating the bringing of a directions motion in that regard; thirdly, that the liquidator was in receipt of professional legal advice to the effect that providing the documentation sought by ICCL could breach the GDPR rights of individuals; and, fourthly, there is no suggestion of that legal advice being other than *bona fide.*

13. The official liquidator's 29 July 2019 letter reiterated his attitude towards Art. 6(1)(f) of the GDPR and stated *inter alia* that "*… Relying on this basis for processing in these circumstances is not without real risk… As administrator and liquidator, I cannot subjectively determine that the information can be provided in furtherance of the ICCL's legitimate interests".* The ICCL characterised the liquidator as having "*failed to engage fully with the lawful bases for processing available to him under the GDPR"* and, instead "*automatically reaching for the comfort of a court order*". For the reasons mentioned, the foregoing seems to me to be an unfair characterisation.

14. In the liquidator's 29 July 2019 letter, responding to the ICCL's request for information on an aggregate and anonymised basis per asset type, the liquidator stated that it could:

> *"only be complied with in accordance with GDPR if the information is genuinely anonymised and cannot be traced back to individual clients. Given the information already in the ICCL's possession, I am concerned that it will be possible to identify particular client positions. Accordingly, I believe this suggestion does not address*

the concerns raised in my letter of 17 July 2019". In a letter of 1 August 2019, the ICCL stated, inter alia, the following as regards its request for aggregated and/or anonymised data per asset type: "*the information would relate solely to the 574 claimants and would only comprise the aggregate amount of the assets available for distributions to these 574 claimants (i) as the date of determination; and (ii) as at the date of our first letter on this matter (i.e. 7 March 2019) in respect of each of the asset types on which compensation has been certified and paid to date. If the information is relayed to us as suggested above it would be impossible for the ICCL to identify individual data subjects and therefore will not present any GDPR or data privacy concerns for you. In light of the above, I hereby reiterate our request for the information on an aggregated and/or anonymised basis".*

15. The ICCL submits that the liquidator did not engage substantively with the foregoing observations in his 2 August 2019 letter wherein he noted that his position remained as set out in his 29 July 2019 letter. The ICCL submits that there was an alternative solution proposed which would have avoided an unnecessary court application and it characterises the liquidator's approach as "misconceived". It does not seem to me that there was anything unreasonable or misconceived about the liquidator holding to a position which reflected legal advice furnished to him that to do what the ICCL was asking would or could involve a breach of GDPR rights.

16. It is also appropriate to state at this juncture that, during submissions made to this court on 1 December 2021, Mr. McCann SC for the ICCL and Mr. Fanning SC for the liquidator both agreed that it was no function of this court to attempt to take a view, in December 2021, as to whether or not *bona fide* legal advice provided to the liquidator, in 2018, was correct. Mr. Fanning SC emphasised that, from the liquidator's perspective, the legal advice was and remains correct. Indeed, the court was furnished with a supplemental 'Book of Authorities' prepared on behalf of the liquidator to underpin the submission that the relevant GDPR advice was correct (comprising 1. *Heinz Huber v Bundesrepublik Deutschland*, CJEU, Case C524/06, 16 December 2018; 2. *Valsts Policijas Rĭgas Reģiona Pārvaldas Kārtĭbas Policijas Pārvalde v Rĭgas Pašvaldibas SIA 'Rigas Satiksme'*, CJEU, C C-13/16, 4 May 2017; and 3. "Final Investigation Report" of the Data Protection Commissioner in relation to the Public Services Card, August 2019).

17. In submissions the ICCL contended that Arts. 6(1)(c) and (e) of the GDPR are of relevance and provide that the processing of personal data:

> *"shall be lawful only if and to the extent that at least one of the following applies…*
>
> *(c) processing is necessary for compliance with a legal obligation to which the Controller is subject;*
>
> *(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the Controller".*

18. The ICCL point out that the processing provision contained in Art. 6(1)(e) of the GDPR has, in accordance with Art. 6(2), been implemented by s. 38(1) of the 2018 Data Protection Act, which provides as follows:

> *"The processing of personal data shall be lawful to the extent that such processing is necessary and proportionate for –*
>
> *(a) the performance of a function of a Controller conferred by or under an enactment or by the Constitution, or,*
>
> *(b) the administration by or on behalf of a Controller of any non-statutory scheme, programme or funds where the legal basis for such administration is a function of a Controller conferred by or under an enactment or by the Constitution.".*

19. It is also submitted on behalf of the ICCL, with reference to ss. 32(1)(i); 33(3); and 35(5)(A), that the 1998 Act impliedly recognises the requirement for the administrator to provide information to the ICCL, and expressly identifies a category sought in the information and stay motion which the liquidator (qua administrator) would be required to provide under the 1998 Act in order to facilitate one aspect of the operation of the ICCL's subrogated claim. A principal submission made on behalf of the ICCL is that all information which was sought by it could lawfully have been provided pursuant to Art. 6(1)(c) of the GDPR without the need for a court order. Regardless of how skilfully made, the flaw in that submission seems to me to be the fact that I simply cannot take the view that expert legal advice to the contrary (which was, without doubt, provided to the liquidator at the time) was or is wrong. I have not attempted to make any determination with regard to the correctness, or otherwise, of the legal advice which was provided at the time to the liquidator, nor is such a determination appropriate or necessary to decide the issue of costs.

20. There was a second aspect to the information and and stay motion and it is to the second aspect of that motion I now turn. It is not in dispute that, at the hearing on 8 August 2019, the ICCL also sought a direction that, until 21 days had elapsed following receipt of the relevant information, any distributions of client assets should be subject to a deduction in order to protect the ICCL's asserted subrogated claim. That, as I say, was a claim asserted by the ICCL based on an incorrect interpretation of its rights pursuant to the 1998 Act. As was clear from the terms of the draft order which the parties helpfully provided to the court in advance of the hearing on 1 December 2021, all parties agree that the following was an appropriate and necessary order to make:

> "And IT IS ORDERED that the restriction on distributions on client assets imposed by the Orders herein dated 8th day of August 2019 and 9th day of October 2019 be vacated."

In substance, the aforesaid 2019 orders had the effect on the liquidator of prohibitory interlocutory injunctions, which orders required to be discharged arising out of the fact that the ICCL was entirely unsuccessful as regards the interpretations of the 1998 Act

which it contended for. It is uncontroversial to say that the 'stay' on distributions was sought exclusively on the (wholly mistaken) basis as to what the ICCL's subrogation rights extended to. Although these were plainly not plenary proceedings, it is fair to say that the trial of the 'main' action comprised the 6-day hearing before me, which resulted in the judgment delivered on 13 October 2021 in which there was a rejection of what the ICCL contended for.

21. The ICCL characterised the application for a stay as a necessary consequence of the official liquidator's insistence on proceeding with distributions from 8 August 2019. That characterisation ignores the reality that, in making distributions, the liquidator was properly and appropriately performing his functions. What is described as his "*insistence on proceeding with distributions*" could just as fairly be called his insistence on properly carrying out his duties insofar as making distributions to those entitled to receive them. In any event, the outcome of the hearing on 8 August 2019 was a 'blanket' stay ordered from that date, with a 'modified' stay, preventing distributions below €20,000, ordered on 9 October 2019.

22. The ICCL submit that there is no basis for awarding the costs of the stay application or of the information motion to the liquidator, notwithstanding what the ICCL characterise as 'an attempt to link' the information and stay application with the directions motion. The ICCL submit that, at that juncture, the directions motion had not yet issued and the ICCL had not even resolved to issue same. The ICCL submits that, for the purposes of adjudicating costs, both motions stand entirely separate and apart. I cannot accept the foregoing submissions. Both motions are inextricably linked. The whole purpose for the former was to facilitate the latter. It is also fair to say that no costs whatsoever would have arisen had neither motion been brought. The ICCL was the moving party in respect of both motions. Both were issued due to an incorrect contention on the part of the ICCL as to what its rights were.

23. The ICCL characterised the situation as being one where (a) the liquidator was proposing to proceed with distributions; (b) the ICCL was opposed to this; (c) this necessitated the application for a stay; (d) the liquidator resisted that application; and (e) the court ruled in favour of the ICCL and granted a stay. The thrust of the submission is for the ICCL to suggest that this was an entirely discrete application made in *inter-partes* litigation where one party "won" and the other party "lost" and that costs should "follow the event". That is not at all the position.

24. It cannot be disputed that the information and stay application were brought by the ICCL as a preparatory step towards bringing its directions application. As counsel for the liquidator correctly submits, the orders made on 8 August and 9 October 2019 had no purpose or benefit other than to facilitate the ICCL with its decision-making and with its preparations in relation to bringing the directions motion. In light of the facts, I fully accept the liquidator's submission that the information motion and stay application were entirely ancillary and incidental to the directions motion.

25. Plainly I did not hear the former but, in circumstances where I dealt with the latter, the relevant parties are satisfied that I am in the best position to deal with the question of costs arising from the information motion and stay application (in circumstances where Pilkington J. adjourned the question of costs). The ICCL must bear the costs of same.

26. In light of Ms. Beirne BL's submissions on behalf of Mr. Nugent (who was a notice party in respect of the same motion), Mr. Nugent's costs also fall to be discharged by the ICCL.

The second issue

27. The second issue concerns whether the ICCL should cover costs on a 'solicitor and own client' basis. As was clear from the terms of the draft order provided to the court on 1 December 2021, the ICCL agreed to cover the costs of all parties to the directions application and to do so on a solicitor and own client basis (i.e. on "an indemnity basis") *except* in the case of the costs of the liquidator. The latter submits that there is no reasonable basis for this discrepancy and submits that if the court directs the ICCL to bear the liquidator's costs of and incidental to the information and stay motion, these costs should also be on a solicitor and own client basis. It is not in dispute that, typically, costs are awarded on a "party and party" basis. The ICCL submit that the liquidator must establish a basis from departing from the normal position.

28. Order 99 of the Rules of the Superior Courts (prior to amendments reflecting the provisions of the LRSA 2015) stated as follows:

> "On a taxation as between solicitor and own client, all costs incurred with the express or implied approval of the client evidenced by writing shall be conclusively presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount." (O.99, r.11 (3))

29. Reference to costs on a solicitor and own client basis continues to appear in s. 9 of the Solicitors (Amendment) Act, 1994 as amended by the LRSA 2015. In *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC, Barniville J. (at para. 41) made clear that, although costs may be adjudicated on a solicitor and own client basis, such an order "*is extremely rare"*. Having reviewed prior authorities, the learned judge stated the following at para. 54:

> "It seems to me that the following principles can be derived from O. 99 r. 10 and from the judgments of the Irish courts discussed above and should inform the exercise by a court of its discretion to make an order for costs on the solicitor and client basis: -
>
> (1) The normal position is that where costs are awarded against one party in favour of on other, those costs will be taxed or adjudicated on the party and party basis.

(2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.

(3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).

(4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.

(5) The conduct in question can include: -

(a) A particularly serious breach of the party's discovery obligations;

(b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;

(c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a *prima facie* case in relation to such claims;

(d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.

(6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -

(a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

(b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;

(c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;

(d) in light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).

(7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the

exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis)."

30. The ICCL also draws attention to the decision in *Re. National Irish Bank (No. 3)* [2004] 4 I.R. 186, wherein the court made such an order in respect of the legal costs of company inspectors who had been appointed by the court. The ICCL submits that (unlike the position in the present case) the bank in question did not resist the making of an order for costs on a solicitor and own client basis, recognising that tax payers should not be liable for any of the inspectors' costs in circumstances where they were investigating the wrongdoing of the bank. Secondly, the ICCL submit that the order must necessarily have been influenced by the subject matter of the investigation (i.e. serious wrongdoing by way of systematically facilitating tax evasion). The ICCL emphasised that no comparable basis for awarding costs to the liquidator on a solicitor and own client basis arises in the present case.

31. With regard to the principles outlined by Barniville J. in *Trafalgar Developments*, the ICCL submits that there is no basis in the present case for this court to exercise its discretion to depart from the normal position. The ICCL submits that any such exercise of discretion would have to be based on the court's desire to "*mark its disapproval of or displeasure at the conduct of*" the ICCL. It is also submitted that the court would be required to clearly identify the particular conduct or behaviour which is said to afford the basis for the exercise by this court of its discretion to award costs on the indemnity basis. It is submitted that no such conduct arises. The ICCL also emphasises that the court would be required to carefully examine and consider the explanation, if any, offered by the party for the conduct or behaviour in question, which necessarily requires the party in question (namely the ICCL) to have been afforded the opportunity to put forward an explanation. The thrust of this submission is that, not being any conduct which would provide a basis for the exercise of the court's discretion to award costs against the ICCL on an indemnity basis, no explanation has been proffered as no opportunity was afforded to put forward an explanation.

32. On behalf of the liquidator, it is accepted that an order for costs on an indemnity basis is very rare. The liquidator draws the court's attention the court's attention to the decision of Irvine J. (as she then was) in *Dublin Waterworld Ltd v. National Sports Campus Development Authority* [2019] IECA 214 wherein (at para. 135) the learned judge noted:

> "that it is only in the rarest of cases that costs will be awarded against a plaintiff who fails in their claim otherwise than on a party and party basis."

33. On behalf of the liquidator, it is submitted that the costs order made by Kelly J. (as he then was) in *Re. National Irish Bank (No. 3)* was made, not as a result of disapproval of conduct, but as a matter of fundamental fairness and justice.

34. In submissions, the liquidator referred to a chronology of extensive correspondence, from February 2018 to date, all of which was generated as a result of the ICCL's assertion, against the liquidator, of its legally incorrect claims in respect of the operation of the 1998

Act. This chronology was set out in a letter dated 20 October 2021 prepared by the liquidator's solicitors. It is not in dispute that this correspondence was generated, nor is any issue taken as regards the accuracy with which it is described. The relevant chronology is as follows:

"1. 28 February 2018 from McCann Fitzgerald to William Fry confirming the official liquidator's position that the subrogation entitlement of the ICCL is to CHC's assets in the liquidation only and that there is no obligation on the official liquidator to make any deduction from distributions to clients on account of the ICCL's then asserted subrogation right;

2. 2 March 2018 from William Fry to McCann Fitzgerald disagreeing with the official liquidator's position;

3. 6 March 2018 from McCann Fitzgerald to William Fry setting out further analysis, inter alia, grounded on an opinion of counsel, in support of the official liquidator's position;

4. 13 March 2018 and 9 May 2018 from William Fry to McCann Fitzgerald restating its position on its entitlement to subrogate two client assets in respect of compensation paid;

5. 2 October 2018 from McCann Fitzgerald to William Fry advising that distributions to clients would proceed after 31 October 2018 without deduction, that the official liquidator did not consider it necessary or appropriate that he bring such an application, but that it would be open to the ICCL to bring a directions application and that the official liquidator would seek the costs of the application against the ICCL if such an application issued;

6. 23 October 2018 and 13 November 2018 from William Fry to McCann Fitzgerald asking the official liquidator to reconsider his position;

7. 13 November 2018 from McCann Fitzgerald to William Fry reiterating the official liquidator's position on subrogation and costs, in the event the ICCL proceeded with a directions application;

8. 13 December 2018 from William Fry to McCann Fitzgerald proposing that the official liquidator bring a directions application but that if the ICCL brought the application, that the official liquidator would be the appropriate party to act *as legitimus contradictor* and offering to pay his reasonable costs in this regard;

9. 27 August 2019 from McCann Fitzgerald to William Fry on the proposed form of award to be made following the hearing of the Information Motion on 8 August 2019, wherein McCann Fitzgerald stated:

"As you know on 8 August 2019 counsel for the liquidator indicated that liquidator will seek the costs of or incidental to the motion. Aside from legal costs, the

liquidator estimates that the cost of providing the information contemplated by the ICCL's motion will be in the region of €17,000 to €23,000. The liquidator has opened a separate matter and all time incurred in providing the information will be recorded on this matter. The liquidator will apply on 9 October 2019 for his costs as against the ICCL".;

10. 27 August 2019 from William Fry to McCann Fitzgerald wherein the latter replied that any orders in respect of costs or incidental to the information motion will ultimately be a matter for Judge Pilkington, but that the range of costs seems out of proportion for the work that should be required in collating and supplying the requested information. Furthermore, to the extent that the official liquidator intends to apply for the ICCL to bear any such costs, the ICCL would expect those costs to be evidenced by time sheets identifying the work undertaken, the time and costs incurred and the staff member undertaking the works;

11. 1 November 2019 from McCann Fitzgerald to William Fry asserting an entitlement to (a) the official liquidator's fees in connection with the Information Motion, (b) the official liquidator's additional fees arising out of the modified order of 9 October 2019 (which required the official liquidator to retain €20,000 from distributions in respect of each client which, as has previously been indicated, will evidently necessitate second and subsequent distributions thereby increasing the official liquidator's fees in this ???) and (c) the official liquidator's legal costs arising out of the Information Motion;

12. 5 November 2019 from William Fry to McCann Fitzgerald disputing the official liquidator's entitlement to fees and legal costs arising on the Information Motion, that the fees and costs for providing the information be limited to the additional work necessitated by the order and that the fees and costs incurred by the official liquidator "*intrinsically linked with the broader divergence of views regarding the scope of the [ICCL's] subrogation claim";*

13. 14 November 2019 from McCann Fitzgerald to William Fry confirming that the official liquidator's position remains as set out on 1 November 2019 and as communicated by counsel for the official liquidator in court on 6 November 2019 and that "*following the determination of the [ICCL's] subrogation claim, in the High Court, regardless of the outcome, the official liquidator will apply for his fees, costs and expenses, which continue to be incurred, against the ICCL";*

14. 28 November 2019 to 31 July 2020 comprising an extensive exchange of correspondence between McCann Fitzgerald and William Fry on the calculation of *net loss* and the requirement to take account of actual and future estimated recoveries of misappropriated assets, which is referred to in the judgment of 13 October 2021. Ultimately, the position adopted by the official liquidator on the calculation of net loss and the administrator's position on the directions motion, has been endorsed by this court;

15. 28 June 2021 from William Fry to McCann Fitzgerald, noting that notwithstanding the judgment of Ms. Justice Pilkington delivered on 30 April 2020 determining the question of the costs of the proposed *legitimi contradictores* arising from the Directions Motion and the order of the High Court made on 1 July 2020, ICCL assert that the question of the "*ultimate incidence of costs*" had not been determined and would be dealt with when the issue of costs comes to be determined following conclusion of the directions motion.

16. 7 July 2021 from McCann Fitzgerald to William Fry rejecting any suggestion that the costs of the *legitimi contradictores,* or the costs of the directions motion, could at a later date be costs in the liquidation and expressly reserving the official liquidator's position on costs;

17. 16 July 2021 from William Fry to McCann Fitzgerald, that ICCL do not accept that they are constrained by the terms of the judgement of 30 April 2020 from seeking the costs of the directions application, including the costs of the *legitimi contradictores,* as costs in the liquidation if the ICCL is ultimately unsuccessful in obtaining the reliefs sought."

35. With reference to the foregoing, the liquidator submits that legal costs were properly and unavoidably incurred by the liquidator in considering and responding to the positions on *'subrogation'* and, subsequently, on *'net loss'*, as asserted and maintained by the ICCL, from in or around November 2017, and which have now been unequivocally rejected by this court in the 13 October 2021 judgment. In my view, the evidence undoubtedly supports that submission.

36. The liquidator goes on to submit that there are no available assets in the liquidation to discharge the aforesaid fees. Thus, absent a costs' award on an indemnity basis, the liquidator submits that some costs may potentially be paid out pursuant to a future potential application under Regulation 158 of the MiFID Regulations 2007 (S.I. 60 of 2007) from the 'pool' of monies recovered by the liquidator in respect of previously misappropriated client assets. It will of course be recalled that the ICCL submit that the effect of the judgment by Finlay Geoghegan J. delivered on 26 July 2017 [2017] IEHC 484 rules out the possibility that client assets would discharge such costs. In circumstances, however, where this issue is disputed and all parties accept that it is not for this court to attempt to resolve that dispute, it does not seem to me that I can safely take for granted that there is no possibility whatsoever of such costs potentially being paid out of misappropriated client funds.

37. The liquidator submits that this court is faced with the decision as to which party should ultimately bear the legal costs incurred by the liquidator in dealing with the issues the subject of, or incidental to, the directions application from November 2017 to date if same are not recoverable from the ICCL on a solicitor and own client basis. As to the possible parties who would bear such liability, the liquidator submits that these are (a) the ICCL; (b) the clients of CHC (via recourse under a future MiFID application in respect of the pool of recovered client assets); or (c) the liquidation. The liquidator submits that, in relation

to the third option, if monies were available and were paid out, it would simply increase the predicted shortfall of €3.033 million in the liquidation. That, in turn, would likely increase the costs which, pursuant to any future MiFID application, would be borne, wholly or in part, by the pool of recovered misappropriated client assets, submits the liquidator.

38. It is also submitted by the liquidator that the logic of the ruling by Pilkington J. in her costs judgment makes clear that the only appropriate option, as a matter of justice and in the particular circumstances of this case, is for the ICCL to bear these costs by way of an order made on a solicitor and own client basis. The liquidator submits that, although such an order is "*extremely rare",* it is consistent with the following:

    (1) The agreement of the ICCL to bear the costs of all the other parties to the Directions Application on a solicitor and own client basis;

    (2) The agreement of the ICCL to pay "*the reasonable and proportionate fees incurred by the official liquidator in giving effect to*" the orders of 8 August and 9 October 2019, (which directed provision of certain information and restricted the liquidator from making distributions). The liquidator submits that the whole point of a provision requiring the ICCL to pay costs and to pay the liquidator's costs on an indemnity basis is to prevent these costs being borne ultimately by clients of CHC. Thus, submits the liquidator, it is entirely contradictory for the ICCL to agree to pay those fees of the liquidator (to avoid a risk of prejudice to clients) while, at the same time, refusing to pay all of the legal costs incurred by the liquidator in relation to the very same matters. The liquidator submits that what it characterises as an "*incoherent*" refusal, exposes clients to the very risk of prejudice which the order in respect of fees was designed to protect them from;

    (3) The agreement of the Central Bank of Ireland ("CBI") to bear all of the expenses of the 2011 Inspectors' report. The liquidator draws attention to the last paragraph of the winding-up order made on 21 October 2011 which notes that the question of the costs of the application by CBI to appoint the inspectors and the expenses of and incidental to the preparing of a report (which had been defrayed by CBI) was adjourned to 28 October 2011. On that date, counsel for CBI indicated that, following careful consideration, it would not be pursuing those costs/expenses against CHC on the grounds that "*whilst it … probably would be likely to be entitled to its costs, it is concerned about the position of investors and it doesn't want to do anything which might be seen or which might have the consequences that the return such as it may be to investors would be diluted by the virtue of the payment of the costs in this investigation"* (transcript, 28 October 2011, p.10);

    (4) The approach of Pilkington J. in the costs judgment. It will be recalled that this was delivered on 30 April 2020 when the position canvassed by the ICCL in respect of costs was rejected and it is appropriate to repeat, here, what Pilkington J. stated in respect of the directions application (which she referred to as the "*subrogation application*"), namely:

> *"31. ICCL has decided (as is its prerogative) to institute and pursue the subrogation application …*
>
> *34. Having carefully considered this matter and, in particular, the 2019 judgment of Finlay Geoghegan J., in my view, the costs of the legitimi contradictores should be borne by ICCL. It is they and not the liquidator who have sought the determination of the subrogation application and, in my view, in such circumstances, it is they who should bear their costs." (emphasis added)*

39. The liquidator also points out that, before the hearing of the directions application, the ICCL refused to accept that the costs of the *legitimi contradictores* appointed to facilitate the hearing of the ICCL's application should be borne by the ICCL. That issue was heard by Pilkington J. who delivered judgment on the matter on 30 April 2020, rejecting the ICCL's position. The learned judge stated *inter alia* that: -

> *" . . . in my view, the cost of the* legitimi contradictores *should be borne by ICCL. It is they and not the liquidator who have sought the determination of the subrogation application and, in my view, in such circumstances, it is they who should bear their costs".*

40. Against the foregoing backdrop, the ICCL accepts that it must bear the costs of *all* parties insofar as the directions application is concerned. Despite this, the ICCL asks this Court to treat differently the costs of the directions application, on the one hand, and the costs of the information and stay application, on the other. This is despite the fact that the latter was entirely ancillary and a precursor to the former.

41. The liquidator also points out, very fairly in my view, that the directions application (and the information and stay motion which preceded it) advanced exclusively the claims and interests of the ICCL as against the clients of CHC who had received, or were likely to receive, payments of compensation. Furthermore, these two applications had no benefit or relevance whatsoever for the assets in the liquidation, or for any creditor of CHC *qua* creditor.

42. It is also pointed out by the liquidator that Pilkington J. did not accept the ICCL's submission that the liquidator could not perform the function of distributing client assets without an answer to the questions raised by the ICCL in the directions application. It is pointed out, quite rightly, that the liquidator was, in fact, in the process of performing this function until he was stopped from doing so by the order made on 8 August 2019 which the ICCL obtained.

43. In light of the facts, I entirely accept the liquidator's submission that, but for the decision taken by the ICCL to assert various claims against client assets (which were not assets of CHC), there would have been no need for either the information and stay application or the directions motion, from the perspective of an orderly winding up of CHC and the distribution of client assets by the official liquidators. Thus, *prima facie*, there is no reason

why *any* expenses or costs of whatever party arising from the two applications brought by the ICCL should be ordered by the court as costs in the liquidation of CHC.

44. The liquidator also draws attention to paras. 8 and 27 of the written submissions of the ICCL in its application before Finley Geoghegan J. on 14 December 2018 wherein it stated: -

> *"This unresolved issue is of the utmost significance: it goes to the core of how the scheme established by the Directive and the 1998 Act operates; it is of critical importance to the ICCL, both in the context of this liquidation and in other and ongoing and future insolvencies; and it is fundamentally important in determining how the liquidator performs his duties and functions in this liquidation".*
>
> (emphasis added).
>
> *"Determining the scope of the right of subrogation is critically important, not only to the ICCL and the liquidator in the context of this liquidation where it is a real and practical issue, but it is also fundamentally important to the future operation of the 1998 Act".*
>
> (emphasis added)

45. On any analysis, the foregoing represents twin-aims articulated by the ICCL. The liquidator submits that, in considering whether any costs arising from applications instigated by the ICCL should be costs in the liquidation, this Court should take into account ICCL's own assertion that the interests of and benefit to the ICCL in obtaining a ruling on its questions regarding the operation of the 1998 Act transcends the circumstances of the present liquidation. That seems to me to be an appropriate, submission given the facts. In light of the twin–rationale for the directions application (and, by implication, the information and stay application which preceded it) the liquidator submits that this is not ordinary *lis inter partes* litigation. I am entirely satisfied that this is so. I also accept, as correct, the liquidator's submission that it would not be appropriate to treat the information and stay application as a 'stand – alone' *lis* between the ICCL and the official liquidator. Nor was the directions motion a *lis inter partes* between those parties.

46. Insofar as the ICCL characterised the information motion and stay application as a necessary consequence of the liquidator's attitude, the latter submits that, for present purposes, the relevant question is as follows: -

> *Would it have been appropriate for the official liquidator*, as a court appointed liquidator operating under the supervision of this Court and having regard, *inter alia*, to the concerns raised by Finlay Geoghegan J. in para. 22 of her judgment dated 31 January 2019 regarding the ICCL's approach (which Pilkington J. expressly had regard to at para. 29 of her costs judgment) *voluntarily to withhold from clients their own assets which were otherwise ready to be distributed to them on*

the basis of an asserted claim to those assets by the ICCL which the official liquidator considered, on legal advice, to be legally unfounded?

(emphasis added)

47. The foregoing seems to me to be a highly relevant question. The liquidator submits, and I agree, that no complaint can fairly be made of his decision not to accede voluntarily to the request made by the ICCL. It is entirely fair to say that the analysis of the liquidator has been vindicated by this Court's judgment as to the proper operation of the 1998 Act.

48. The liquidator also submits and I agree that, insofar as the ICCL argue that the liquidator's stance made it *necessary* for it to issue a motion, that necessity arose from particular circumstances wholly *outside* the control of the liquidator, including: -

- GDPR issues created by the request from the ICCL for personal data of clients above and beyond the date at which they had an entitlement under the 1998 Act (the liquidator did not raise any opposition to the ICCL's application for orders that would resolve the GDPR issues);

- The fact that the ICCL was calling on the liquidator to take a step (i.e. to suspend distributions of client assets otherwise ready to be returned) which was not required for the purposes of the liquidation itself and which would adversely impact on the rights and interests of persons other than the official liquidator, the ICCL, or the creditors of CHC *per se* (namely the clients of CHC):

- The information and distribution requests made of the liquidator by the ICCL had adverse implications for clients and required them to be put on notice. This was subsequently accepted by the ICCL, as client representatives were added as notice parties to the motion issued on 30 July 2019. The liquidator was consistent in his submissions that any decision on these issues by the court needed to be on notice to the clients who were, in fact, heard by the court on 8 August and 9 October 2019. The necessity of a right of participation on the part of clients, as the affected parties, was also confirmed by Pilkington J. in her costs judgment.

49. I accept the liquidator's submissions in this regard. The foregoing also highlights how inappropriate it would have been for the liquidator to agree, unilaterally and voluntarily, to the ICCL's requests for information and to restrict distributions.

50. I accept the liquidator's submission that, in such circumstances, it was unavoidable that the ICCL would need to seek the authorisation of the court for the various steps and requests it was proposing, with a view to facilitating the ICCL's decision–making and preparation in respect of the directions application which it subsequently brought (unsuccessfully).

51. It is also entirely true to say that, unlike the position which would normally pertain in *inter–partes* litigation, the attitude of the liquidator to the ICCL's motion which sought information and a stay was *not* one of opposition. Rather, it involved the liquidator, as an

officer of the court, who had been overseeing an extremely complex liquidation with a long history, bringing to the attention of the court "*a number of serious concerns and reservations about any such directions being made interfering with the return to clients of their assets*" (para. 29 of the approved draft affidavit of Mr. Wallace which was before the court on 8 August 2019 and later sworn by the liquidator on 8 October 2019). With reference to the following, counsel for the liquidator submits, correctly, that the liquidator's expression of concern with regard to the ICCL's motion could fairly be regarded as "*successful*" and the following is relevant in that regard: -

- As per its 2 August 2019 letter, the ICCL had sought an order that any distributions by the liquidator "*should be net distributions, which do not include assets which could be captured in our client's subrogated claim";*

- The liquidator averred at para. 29 of his 8 August 2019 affidavit that: - *"[d]irecting 'net distributions' (rather than, for example, directing the postponing of distributions) necessarily means that there will need to be two or more rounds of distributions when it was only intended to have one. That will involve additional work and costs. That is prejudicial to the interests of clients as those costs will very likely be borne ultimately by clients";*

- At para. 29.3 of the same affidavit the liquidator averred that, on the ICCL's own case, there was a *"lack of clarity as to how 'net distributions' should be calculated'* and the ICCL had "*offered no proposals to the Court as to how that should be addressed in any directions prescribing net distributions";*

- Ultimately, therefore, the court *refused* to make an order on 8 August 2019 in the terms suggested by the ICCL. The order made no reference to *"net distribution"* and, instead, simply directed that the liquidator shall make no distribution on or before 9 October 2019 and the matter was listed for mention again on that date;

- On 9 October 2019, it became apparent to the Court that any restriction on distributions could be in place for a significant period of time and it amended the terms of the restrictions. In doing so, however, the Court again chose not to adopt the equivocal language of "*net distribution*" originally proposed by the ICCL but, instead, framed the order in terms of a 'blanket' requirement to withhold the sum of €20,000 per client, thereby providing an unambiguous and, in that way, workable form of restriction from the perspective if its implementation and administration by the liquidator.

52. I note that, despite the liquidator's submission to the contrary, Pilkington J.'s orders of 8 August and 9 October 2019 did not limit the restriction on distributions to assets assessed in calculating the net loss of the 574 clients who had received compensation. That, of itself, provides no basis whatsoever for directing the liquidator to bear any of the costs associated with the information and stay applications which, as I say, resulted from unilateral decisions made by the ICCL as to what *it wanted* in order to further *its aims,*

the information and stay motion being inextricably linked with the directions motion which followed it, and which was entirely *unsuccessful* from the ICCL's perspective.

53. Among the submissions made by the ICCL is that the effect of the decision by Finlay Geoghegan J. delivered on 26 July 2017 [2017] IEHC 484, in particular the learned judge's analysis from paras. 92 onwards, means that if the court makes a costs order adverse to the liquidator in respect of the information and stay motion, there is no question of any client funds being looked to, in order to discharge those costs even if it transpires that there are insufficient funds in the liquidation. That submission is something the liquidator takes issue with, pointing out that what emerges from the decision of Finlay Geoghegan J. is that, pursuant to Regulation 157 and 158 of the 'MiFID Regulations', if it is proved that the assets of the company have been exhausted, the liquidator may have recourse to client assets in the form of recovered misappropriated funds with such recovery limited to the discharging of the liquidator's fees insofar as they relate to the identification, recovery and distribution of such recovered funds. It is submitted on behalf of the liquidator, however, that the question of whether, and to what extent, the liquidator could have recourse to client funds in the event of a shortfall in assets available to meet a costs order is simply not a matter which arises for determination by this Court at this juncture. In that, I fully agree.

54. Insofar as the ICCL characterise the information and stay application as one which they had to bring in order to decide whether they would bring the directions motion, it seems to me that the foregoing illustrates the reality that, at all material times, it was the ICCL's decision – making which gave rise to the relevant motions and, in turn, created all relevant costs.

55. I entirely accept the liquidator's submission that neither the first motion nor the costs arising from same can be 'divorced' from the directions application and it is a fiction to suggest that the information and stay motion is 'hermetically sealed' and can be dealt with in isolation as such. The reality is that the information and stay motion was brought by the ICCL as a platform for the directions motion. It had no other purpose. As counsel for the liquidator rightly submits, it was, in reality, a discovery–type application which was a precursor to the substantive hearing on a dispute which arose *exclusively* because the ICCL took a particular stance on the interpretation of the 1998 Act (a stance which was wholly incorrect).

56. I also accept the submission that, in a very real sense, what the ICCL sought in the information and stay motion was akin to non–party or third–party discovery. In that scenario, the party seeking the documentation is required under the Superior Court Rules to meet the costs of the non–party making discovery even if, as is commonly the case (e.g. with discovery by, for example, An Garda Siochana) the party in possession of the documentation will not agree to furnish it without a court order. In my view this analogy has even more relevance in circumstances where the liquidator was not the *legitimus contradictor.*

57. At all material times, the liquidator was simply trying to carry out his duties in an appropriate fashion. He was not, in any sense, an opposing party in what might be termed 'normal' or 'typical' *inter–parties* litigation. This was not a normal or typical *lis inter partes*. The liquidator was involved in the information and stay motion, purely and simply and *only,* because of the fact that the ICCL, unilaterally, made demands which he could not satisfy in a manner consistent with his duties in the context of *bona fide* legal advice received by him.

58. Nor would it be at all fair to characterise the outcome of the information and stay motion as a 'win' for the ICCL. In reality, the ICCL obtained orders which the liquidator could not have legitimately consented to (having regard to (i) his obligations in respect of distributions and (ii) *bona fide* legal advice regarding breaches of GDPR) the effect of which was *inter alia* to prevent investors from receiving monies to which they were otherwise entitled, which orders have since been set aside.

59. The liquidator points out that the ICCL accepted that it would not be appropriate for the client *legitimi contradictores* to pay either the costs of the ICCL or their own costs, even if the ICCL was successful and that this concession made clear that the ICCL recognised that the directions applications (and, by implication, the ancillary information and stay application) did not fall into the ordinary run of *lis inter partes* proceedings. I agree.

60. With reference to the costs dispute which was ultimately determined by Pilkington J., the liquidator submits that the ICCL had wanted to obtain the benefit and convenience of securing two representative respondents from among approximately 2,000 potentially affected clients (so that it could establish a right to a share of the assets of all compensated clients) to facilitate obtaining clarification from the Court on the operation of the 1998 Act, in the manner it contended, but the ICCL did not want to pay for the full cost of securing these arrangements. Instead, the ICCL wished to 'externalise' the costs of establishing its claims against all of these clients by imposing them as costs on the liquidation of CHC, even though neither CHC, nor its creditors, had any interest whatsoever in the outcome of the ICCL's applications. The liquidator points out that he argued that there was no good reason for imposing the costs of the ICCL's motion upon what was already an insolvent liquidation in which *inter alia* there was and is no prospect of any dividend being paid to creditors.

61. The liquidator points out that in the costs decision by Pilkington J., the ICCL's position was rejected by the court and the liquidator's position was upheld. Following this, the ICCL now agrees to cover the costs of the client *legitimi contradictores* on a solicitor and own client basis. The liquidator submits that the same logic should apply to *all* of the solicitor and own client costs, in circumstances where the liquidator would not have incurred *any* such costs, but for the positions adopted and advanced (erroneously) by the ICCL in relation to both the *subrogation* and the *net loss* issues. The foregoing is a submission I entirely agree with.

62. It seems to me that the most fundamental of all considerations insofar as the making of a costs order is concerned, is the question of justice. This is far from a conventional dispute

between two opposing parties, each asserting contending positions according to their own interests. I entirely accept the submission by the liquidator that the directions application (and the information and stay application which preceded it and which was inextricably linked with it), does not fall into the ordinary category of *lis inter partes* proceedings. Why this is so has been explained earlier in this ruling. It should not be forgotten either that, in December 2018, the ICCL applied (unsuccessfully) to this Court for an order which would have directed the liquidator/administrator to bring an application for directions concerning the scope of the ICCL's rights pursuant to the 1998 Act. Finley Geoghegan J. refused to direct the liquidator to bring such an application. It is entirely fair to say that all costs which arose for the liquidator, (including (a) the necessity to take legal advice and to respond, via correspondence from February 2018 onwards, concerning assertions by the ICCL as to what it regarded (incorrectly) as its rights pursuant to the 1998 Act; (b) the liquidator's involvement in the information and stay application; and (c) with respect to the directions application), were as a consequence of the ICCL's unilateral desire to pursue its interest. As counsel for the liquidator put it (correctly in my view), the *only* reason the liquidator incurred these costs was because the ICCL "*was barking up the wrong tree*" insofar as its asserted rights were concerned.

63. It is undoubtedly the case that the ICCL has put the liquidator to very significant legal and ancillary costs in connection with the information and stay application and counsel for the liquidator asks, rhetorically, why *all* costs which the ICCL has visited upon the liquidator should not be discharged by the party which created them? In my view, justice requires that all such costs be discharged.

64. The liquidator was at no stage pursuing private interests. He stood to gain nothing from any dispute, his role being to make as 'whole' as possible the creditors of CHC. The liquidator was put to very significant cost and expense, including in seeking to refute the ICCL's (wholly incorrect) position as articulated by it in correspondence, via solicitors, *prior* to the relevant court applications. The costs flow (i) not from any aim pursued by the liquidator; (ii) not from any unreasonableness on the part of the liquidator; and (iii) not because the liquidator took an incorrect view of the 1998 Act. On the contrary, the 'source of the Nile' insofar as *all* costs are concerned can be traced back to the ICCL's assertion of rights and entitlements which it did *not* have, but was determined to pursue in its own interests. There can be no criticism of the ICCL's for taking the view it took. Nor could this Court disapprove of the ICCL's conduct in asserting what it regarded as its rights both in correspondence and via formal motions. That does not seem to me to determine the central point at issue. In short, it does not relieve the ICCL of the obligation, consistent with the interests of justice, to discharge all costs which flowed from its choices in these unusual and very particular circumstances.

65. I agree with counsel for the liquidator that the principles which emerged from Trafalgar are of far less assistance in the very particular and unique circumstances of the present case where, to my mind, the interests of justice must be the guiding principle.

66. In the present case, the interests of justice require that neither the liquidator, nor the relevant company, nor its clients, face the potential of having to meet any element of costs *all* of which were generated as a result of ICCL's decision, in its own interests, to articulate and pursue rights which it did not have. For the reasons detailed in this ruling, the most fundamental of which is the requirements of justice, I take the view that the justice of the situation is met by making an order that the official liquidator's costs be on a 'solicitor and own client' basis.

The third issue

67. The third issue in dispute arises in circumstances where the ICCL have made a concession that it will not make a lodgement or tender, in the context of the costs of the *legitimi contradictores* and the ICCL agreed to include, for the benefit of *the legitimi contradictores*, wording in the relevant order that the costs to which the *legitimi contradictores* are entitled shall include "the costs of any adjudication of costs arising from this order". The official liquidator seeks the same wording against the backdrop of O. 99, r. 13(2) providing that:-

> *"The costs and expenses of an adjudication shall, unless the Legal Costs Adjudicator, for special reason to be stated in his determination otherwise directs, follow the event."*

68. Thus, pursuant to the Rules of the Superior Courts, the official liquidator is already entitled to the costs of the adjudication of any orders for costs that may be made in his favour. The foregoing entitlement is, of course, subject to (a) the proviso identified in O. 99, r. 13(2) regarding a "*special reason*" which could justify the legal costs adjudicator determining otherwise; and (b) the other provisions of O. 99 which include rules 57-61 with regard to tenders and lodgements.

69. Having carefully considered the matter and all submissions made, written and oral which touch on the topic, I agree with Mr. McCann for the ICCL that this Court has no jurisdiction to remove from the ICCL the entitlement, should it so wish, to make a tender or lodgement as regards the official liquidator's costs. The ICCL was free to make such a concession, or not. Not having made such a concession, it seems to me that, for this Court to include the wording proposed by the official liquidator, robs the Legal Costs Adjudicator of their jurisdiction to determine, in accordance with O. 99, r. 13(2), whether any "*special reason*" justifies a departure from the default position that the costs and expenses of an adjudication shall follow the event. The inclusion of the relevant wording could be interpreted as an absolute entitlement by the official liquidator to have costs of any adjudication discharged by the ICCL and to bring about this situation would be to trespass impermissibly on the purview of the Legal Costs Adjudicator.

70. Having made a ruling in respect of all issues in dispute, I invite the parties to submit an agreed form of order reflecting what this Court has determined.