THE HIGH COURT

[2023] IEHC 292

2019 COS 177

IN THE MATTER OF ADJUDICATION OF COSTS, THE LEGAL SERVICES REGULATION ACT 2015 AND SECTION 161 OF THE LEGAL SERVICES REGULATION ACT 2015. (ADJUDICATION REFERENCE 2020:00688 AND 2020:00689)

IN THE MATTER OF LOHAN CONSULTING LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT 2014

BETWEEN

AIDAN GARCIA DIAZ

Applicant/Respondent

AND

CORMAC LOHAN

Respondent/Applicant

JUDGMENT of Ms. Justice Eileen Roberts delivered on 25 May 2023

Introduction

1. This application concerns two orders for costs made by the High Court against Mr Cormac Lohan – one order was made on 29 April 2019 and the other on 15 July 2019. The costs in each case have been adjudicated by the Chief Legal Costs Adjudicator (the

"**CLCA**") and are now referred to this court for review pursuant to the provisions of s. 161 of the Legal Services Regulation Act 2015 (the "**2015 Act**").

2. Identical issues and arguments arise in respect of each costs order and the determinations of the CLCA dated 31 May 2022 (collectively and individually described hereafter as the "**Determination**"). The adjudications arise under reference numbers 2020-000689 and 2020-000688. This judgment deals with both adjudications and is intended to refer to both even where only one is referenced. Where there are any relevant differences, they are set out separately.

3. The costs orders were made in relation to the liquidation of Lohan Consulting Limited (the "**Company**"). On 23 April 2018 the High Court appointed Aidan Garcia Diaz (the "**Liquidator"**) as official liquidator of the Company on foot of a petition filed by the Revenue Commissioners on 21 February 2018. Mr Cormac Lohan is a director and shareholder of the Company. He is also a practising solicitor and is on record for the Company in these proceedings through his firm Lohan & Company Solicitors. In the course of the liquidation, various applications were brought before the High Court of which two are relevant to the present matter.

4. The first order for costs arose when, in the context of the liquidation, the High Court directed that Mr Lohan, in his capacity as a director of the Company, file and serve a statement of affairs in respect of the Company. Order 74 rule 27 of the Rules of the Superior Courts ("**RSC**") prescribes that the format for a statement of affairs be in compliance with Form 13 of Appendix M of the RSC. The Liquidator issued a motion requiring Mr Lohan to comply with the court order when Mr Lohan failed to provide the required statement of affairs within the time prescribed. The motion was adjourned on several occasions. Mr Lohan swore a statement of affairs that complied with the

RSC and the High Court then struck out the motion and awarded the Liquidator his costs as against Mr Lohan, to be adjudicated in default of agreement.

5. The second costs order arose in respect of the books and records of the Company which were sought by the Liquidator from Mr Lohan as director of the Company. The Liquidator was dissatisfied with the documentation provided by Mr Lohan and the Liquidator issued a motion seeking to cross examine Mr Lohan as a director of the Company. That application was opposed by Mr Lohan but Ms Justice O'Regan determined that it was appropriate for Mr Lohan to be cross examined. The High Court awarded the Liquidator his costs of that motion against Mr Lohan, to be adjudicated in default of agreement.

6. Neither costs order was appealed by Mr Lohan. The Liquidator's solicitor prepared a bill of costs in respect of each motion and served same on Mr Lohan. No agreement was reached by the parties regarding the quantum of the costs. Mr Lohan then applied to have those costs adjudicated by the CLCA. The following is the relevant chronology from that date leading to the referral of matters to this court for review:

DATE	**STEPS TAKEN**
23 September 2020	Notices of adjudication issue by Mr Lohan.
14 December 2020	Return date before the CLCA. Costs are adjudicated by CLCA. No appearance by or on behalf of Mr Lohan at this hearing.
22 December 2020	Mr Lohan files a Notice of Consideration of the decision by the CLCA under s. 160.
October 2021	Legal costs accountants exchange written submissions to CLCA.

18 January 2022	Following several adjournments in 2021, the CLCA s. 160 hearing takes place and is attended by costs accountants for both parties. Costs accountants for Mr Lohan raise procedural issues but do not address quantum.
31 May 2022	CLCA Determination issues, upholding previous adjudication in each case. Copy sent that day to both legal costs accountants by email.
20 June 2022	Mr Lohan serves motions issued on 15 June seeking relief under s. 161, returnable to 11 July 2022.
11 July 2022	Motions struck out on consent with no order (on basis that s. 160 process was not yet complete re the costs of the s. 160 consideration process).
28 July 2022	Costs of objection process determined by CLCA and this completes the process under s. 160 of the 2015 Act. No appearance by or on behalf of Mr Lohan – these costs are awarded against Mr Lohan.
10 October 2022	CLCA issues his Certificates of the Determined Costs. In matter 2020:000688 costs determined at €12,514 (deductions of €4,057.05 on amount claimed) on foot of High Court Order dated 15 July 2019. In matter 2020:000669 costs determined at €16,481 (deductions of €5633.40 on amount claimed) on foot of High Court Order dated 29 April 2019.

28 October 2022	Date asserted by Mr Lohan as the date of receipt by him of the CLCA Certificates of Determined Costs – from which date he says time to seek review by High Court should run.
28 October 2022	Date of motions by Mr Lohan in each case seeking review by High Court of CLCA Determination (pursuant to s. 161 of 2015 Act).
3 November 2022	Motions seeking review are filed by Mr Lohan.
14 November 2022	Motions are served by Mr Lohan on Liquidator and CLCA.

The arguments advanced by Mr Lohan

7. Mr Lohan argues that this court should review the costs determined by the CLCA by reducing same or should refer the matter back to the CLCA for further review. In his affidavit sworn 28 October 2022, Mr Lohan says that the decisions of the CLCA were "*wrong or defective*" and that the costs of the motions are "*excessive and should have been decreased significantly*" by the CLCA. Mr Lohan argues that "*these motions were not necessary*" and that the costs "*cannot in any way relate to time spent on the matter*". He describes the costs claimed and ruled on as "*excessive, unfair, disproportionate*".

8. At the hearing of this matter counsel for Mr Lohan placed considerable emphasis on the argument that the CLCA did not comply with s. 155 of the 2015 Act. The CLCA confirms in his Determination that he was not furnished with any time breakdown by lawyers for the Liquidator. Mr Lohan argues that this means the CLCA did not properly assess the time spent. He says that the time spent is required to be considered by s. 155(5) when assessing the factors set out in s. 155(4) and that the use of the word

"*shall*" in that section confirms that such a consideration is mandatory for the CLCA. Not having assessed the time breakdown, Mr Lohan argues that the CLCA is not in compliance with s. 155 and his Determination cannot stand. He says that the CLCA acknowledges in the Determination that no evidence of the time taken was furnished to him. Mr Lohan states in his grounding affidavit at para 8, "*[I]n that regard the adjudicator accepts that he is not in compliance with section 155*." He avers in his replying affidavit (at para 14) that the CLCA "*failed to take account of the time taken to carry out work*" and that the CLCA "*failed to carry out the full function provided by statute in his review*".

9. Mr Lohan also argues in his grounding affidavit that the CLCA failed to address the reasonableness of the work asserted to have been carried out and he says the CLCA wrongly considered that the original motions were merited and did not, for example, consider whether such motions or adjournments of same were necessary. He avers at para 9 of his affidavit that "*the adjudicator closed his mind to the fact that the application was not merited*". He avers at para 12 of his replying affidavit sworn 12 December 2022 that "*both applications brought by the Official Liquidator were unnecessary and no order of costs should have been made in relation to these motions*".

10. Mr Lohan also argues in his affidavit that it is difficult for the CLCA to vary a decision he personally made at first instance and that there was an element of bias in the decisions made by the CLCA who referred to the Liquidator's legal team "*with gushing praise*". However, neither of these matters were advanced at the hearing by counsel for Mr Lohan and I do not therefore consider them as part of the grounds for review.

11. The written submissions filed by costs accountants on behalf of Mr Lohan in advance of the CLCA hearing on 18 January 2022 focused on alleged procedural defects in relation to the CLCA's initial adjudication on 14 December 2020. The submissions did

not however provide any argument to establish that the CLCA had erred in the quantum of his initial adjudication and/or that the fees allowed on adjudication were in any way unreasonable in quantum terms. There was merely a general statement that "*the figures allowed on Adjudication are excessive in the circumstances*". The same approach was adopted by the costs accountants instructed by Mr Lohan at the hearing before the CLCA on 18 January 2022. Those procedural arguments were rejected by the CLCA. The specific objections raised by Mr Lohan in his costs accountant's written submissions dated 20 October 2021were as follows: –

> "*(a) The Notice of Application does not have the correct address.*
>
> *(b) The Bills of Costs does (sic) not have the correct address.*
>
> *(c) That the Bills of Costs were therefore not properly served.*
>
> *(d) That the [Liquidator] was informed that [Mr Lohan] did not reside in the Waterville address on many occasions.*
>
> *(e) [Mr Lohan] did not receive a copy of the Bill of Costs in the prescribed form, nor an index or paginated booklet containing copies of the vouchers, invoices and/or receipts or a copy of the Court Order.*
>
> *(f) [Mr Lohan] contends that proper service was not affected as a result.*
>
> *(g) It is noted that there is no High Court reference on the Application for Adjudication*."

These particular submissions were addressed in the CLCA's Determination. They are not advanced in the present application as grounds for review.

12. Mr Lohan argues that he is in time to bring an application before this court to review the CLCA Determination under s. 161 of the 2015 Act. He argues that the relevant date from which time runs for the purposes of seeking a review under s. 161 is the date he was served with the CLCA Certificate of Determination. He argues that to start the

clock from any other date than the receipt of the Certificate of Determination would be inherently unfair to him in all the circumstances.

The arguments advanced by the Liquidator

13. The Liquidator argues that this court ought to dismiss the present applications as they were brought out of time. The Liquidator says that the relevant 21-day period under s. 161, within which an application for review of an adjudication must be brought by a dissatisfied party, runs from the date of the Determination by the CLCA. Counsel for the Liquidator says that the Determination issued on 31 May 2022 and that the motions seeking review issued over four months later, on 28 October 2022, well outside the permitted time period.

14. Without prejudice to that position, the Liquidator makes a number of arguments regarding the merits of the application now made by Mr Lohan.

15. The replying submissions filed on behalf of the Liquidator to the CLCA on 27 October 2021 dealt with the procedural objections raised in Mr Lohan's submissions to the CLCA regarding service and the format of the bills of costs. These submissions argued that there must be stated reasons for the CLCA reviewing and reconsidering his decision but that Mr Lohan had advanced no such reasons. The Liquidator points out, and it is indeed clear from para 52 of the CLCA Determination, that Mr Lohan's costs accountants in January 2022 had instructions that "*he was not engaging with the quantum of the items claimed in the bill of costs on the basis that there was no proper service, he did not get the documents and vouchers prescribed under SI 584 and [he] relied on the written submissions*". Where Mr Lohan made almost no complaint about the quantum of costs (apart from a statement that they were exorbitant) the Liquidator says Mr Lohan now appears to make an entirely new set of complaints that he did not

make to the CLCA. The Liquidator says this is not properly a review of the Determination of the CLCA at all.

16. The Liquidator also argues that it is entirely inappropriate for Mr Lohan to challenge the quantum of costs awarded by the CLCA by seeking to challenge the underlying orders of the High Court granting the Liquidator his costs. The Liquidator says that the High Court has already determined that the Liquidator was entitled to his costs of each of the motions brought. If he was unhappy with the High Court costs orders, the appropriate remedy for Mr Lohan was to make arguments to the High Court as to what aspects of those costs might be disallowed (for example in relation to alleged unnecessary adjournments) or to appeal the court's order. No such steps were taken.

17. The Liquidator disagrees with the argument that it was essential for the CLCA to be provided with and review a time breakdown before he could properly assess legal costs. The Liquidator argues that the time spent on the motions is only one of the factors that the CLCA should take into account. The Liquidator says that the 2015 Act does not state that costs cannot be measured unless time spent on a particular matter is specified.

Analysis

18. I propose in the first instance to consider the position regarding the time period within which a party to an adjudication may apply to the High Court for a review of the determination concerned. The Liquidator argues that this application is out of time and should be dismissed on that basis alone.

Time period within which to seek a review

19. The time period within which to make an application to the High Court for a review is set out in s. 161(1) of the 2015 Act. It provides as follows: –

"*(1) A party to an adjudication who has made an application under section 160 may, not later than 21 days after the date on which the Legal Costs Adjudicator has made his or her determination under section 160 (5), apply to the High Court for a review of the determination concerned."*

20. There is some inconsistency in the Liquidator's position on timing. In the affidavit of Gavin Simons sworn 2 December 2022 he states his belief that the correct date from which time should run in this case is 28 July 2022, being the date on which the Determination was finalised by the CLCA, having dealt with the costs of the s. 160 application. This accords with the Liquidator's costs accountants who, by letter dated 29 July 2022, confirmed their view that Mr Lohan would have 21 days from the 28 July 2022 to issue a motion seeking a review by the High Court. In the Liquidator's legal submissions, however, it is argued that the relevant date is the date of the Determination itself, being 31 May 2022. In either scenario however it is clear that the motions before this court seeking review issued well outside 21 days from either date.

21. Mr Lohan says at para 6 of his Replying Affidavit that "*the determination by the Chief Legal Costs Adjudicator dated the 31 May 2022 was only sent to me by email on the 28 October 2022*". In fact it was the Certificate(s) of Determination that he received on that date (as is clear from para 7 of his Replying Affidavit). He argues that the relevant 21-day time period must run from that date as he says he had no notice of the Determination before then. The motions were lodged within 21 days of that date. However at the hearing Mr Lohan's counsel accepted that the Determination itself was sent to Mr Lohan's legal costs accountants on 31 May 2022 by the CLCA (as evidenced in Exhibit GS1 to the Affidavit of Gavin Simons sworn 8 May 2023).

22. The papers before the court show that on 21 June 2022 Mr Lohan issued notices of motion seeking a review of the Determination under s. 161. By letter of that same date the Liquidator's solicitors wrote to Mr Lohan confirming that

> "*[W]e believe those applications to be premature, and misconceived, as the s160 process has not yet concluded and the s161 process cannot be invoked until it has. As you ought to know, our client's legal costs accountant sought your legal costs accountant's agreement to the quantum of the professional fees arising on your objections process.…Once that issue has been determined, the s160 consideration/objections process will have concluded and you could then invoke the provisions of s161 of the LSRA, 2015*".

23. It would appear therefore that Mr Lohan endeavoured to seek a review of the Determination within 21 days of its date but was met with the argument that, at that stage, the 21-day period had not yet started to run as the Determination process was incomplete (the costs of that process being outstanding). It appears that these review motions were then struck out before the High Court on consent with no order on the return date (11 July 2022). Mr Lohan did not participate in the final costs hearing on 28 July 2022, when it would appear all adjudication matters were completed. The parties accept that the Certificate(s) of Determination issued on 10 October 2022. Mr Lohan says he did not receive them until 28 October 2022.

24. In considering from when time should run for the purposes of s. 161(1) it is useful to compare and contrast the wording in that section with other provisions of the 2015 Act.

25. Section 157(2) provides as follows: "*A determination shall, as soon as practicable after it has been made, be furnished to the parties to the adjudication*".

26. Section 158(1) of the 2015 Act provides that: "*Subject to section 160, the determination of the Legal Costs Adjudicator is final and shall take effect 20 days after it is furnished under section 157 (2) to the parties to the adjudication*." (Emphasis added.)

27. This wording can be contrasted with the wording set out in ss. 160 and 161 of the 2015 Act. Section 160(5) provides that where the Legal Costs Adjudicator considers an application in respect of a previous adjudication he/she made, "*the determination…shall, subject to section 161, take effect immediately*". (Emphasis added.)

28. Section 161(1) provides as follows: "*A party to an adjudication under section 160 may, not later than 21 days after the date on which the Legal Costs Adjudicator has made his or her determination under section 160(5), apply to the High Court for a review of the determination concerned*."

29. A determination made under s. 160 takes effect immediately, subject to a referral to the High Court for a review. The question arises as to when the "*determination*" in this case was made. It is dated 31 May 2022 but it appears that there were some ancillary costs issues (relating to the s. 160 process itself) which the CLCA dealt with on 28 July 2022. While there may be some argument as to whether 31 May or 28 July correctly represent the date of the Determination (and the Liquidator is somewhat inconsistent on this point, as outlined above), nevertheless it appears that the latest date of the Determination must be 28 July 2022. In my view it is from that date that the relevant 21-day period commenced for the purposes of seeking a review by the High Court under s. 161. The motions before this court were issued outside that period.

30. In fact, Mr Lohan (through his agents/costs accountants) received a copy of the Determination on 31 May 2022. While he may not have received the certificate of

determination until October 2022 this is not the date from which time runs. The certificate of determination is a different document to the determination. A certificate follows the determination in time. Neither the date of that certificate nor the date it is received by the parties are relevant dates for the purposes of calculating the time period specified in s. 161 of the 2015 Act.

31. Accordingly, I believe that the motions issued by Mr Lohan seeking a review by this court were issued out of time. I am however prepared to proceed to deal with this matter as though Mr Lohan had requested an extension of time within which to seek a review by the High Court.

32. Counsel for Mr Lohan argues that this court can extend time to bring a review either under Order 122 RSC or pursuant to this court's inherent jurisdiction. Counsel for the Liquidator argues that this court has no jurisdiction to extend time. He says that Order 122(7) deals with time prescribed under the Court Rules rather than a time limit specified in statute.

33. Order 122, rule 7(1) of the RSC provides as follows:

> "*Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed*."

While I was not referred to it by the parties, I believe that Order 84C of the RSC, which concerns statutory appeals, is of relevance in this case. Rule 2(5)(a) thereof prescribes a

notice period of 21 days "[s]ubject to any provision to the contrary in the relevant enactment". Rule 2(5)(b) then states that the appeal may instead issue within

> "*such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter*."

34. In the Court of Appeal judgment in *Keon v Gibbs* [2017] IECA 195, delivered by Hogan J. (Finlay Geoghegan and Peart JJ. concurring) on the 4 July 2017, the court drew attention to a jurisdictional issue concerning whether the relevant statutory appeal provision and Order 84C, rule 2(5) RSC, when read together, in fact permit of any extension of the time within which to appeal. However, in light of Hogan J's clear views on the merits of the underlying application for an extension in that case, it was not necessary for him to express a concluded view on this jurisdictional point.

35. In *Keon*, Hogan J at paras 24 and 25 of the Court of Appeal judgment stated as follows:

> "*Perhaps the first thing to note is that there is nothing in s. 123 of the 2004 Act which indicates that this statutory time limit might be extended under any circumstances. It is true that in Law Society of Ireland v Tobin [2016] IECA 26 this Court held that it enjoys an inherent jurisdiction to extend time where the relevant statutory provision permitting an appeal did not expressly provide for such a power. This, however, was in the context of an appeal from the High Court to this Court, where the right of appeal is constitutionally guaranteed by Article 34.4.1 unless regulated or excepted by law.*
>
> *…The present case is quite different since – unlike the position in Tobin – the right of appeal to the High Court from the Tribunal is entirely dependent on*

statutory vesture. If, however, the Oireachtas has not provided for a power to extend time in this particular context, an issue must arise as to whether there is such a power at all under any circumstances, no matter what good reason for the delay may be advanced by any putative appellant."

36. In para 26 Hogan J continued: –

"*…The High Court proceeded on the basis that Ord. 84C independently conferred a power to extend time. I am not, with respect, convinced, however that this premise is altogether correct. It is true that Ord. 84C, r.5(b) does provide for a power to extend time, but this is expressed to be contingent on "any provision to the contrary in any relevant enactment." If the proper construction of s.123 (3) of the 2004 Act is that it provides for a strict 21 day time limit which is not capable of extension, then this would amount to a "provision to the contrary" such as would negative the potential operation of Ord. 84C, r.5(b). Certainly, if this is the proper construction of s.123 (3), then the scope of that appellate jurisdiction could not be changed or enlarged by Rules of Cour*t…".

37. Section 161 of the 2015 Act provides for a review to be taken "*not later than 21 days after the date on which the Legal Costs Adjudicator has made his or her determination*". Similar to the statutory provision that was at issue in *Keon*, there is no express language in the 2015 Act entitling the court to extend the time within which motions seeking review can be brought. Neither is there any express prohibition on this. I do not in this case need the determine whether, mindful of the comments of Hogan J in *Keon*, the correct interpretation of s. 161 of the 2015 Act is that the time period specified can only be extended by primary legislation rather than by Rules of Court. The determination of that question should await a case in which the issue is properly argued before the court.

38. What I believe is an unusual and specific aspect of this case, however, is that Mr Lohan did in fact issue motions seeking a review of each Determination within the relevant 21-day period of the date of the Determination itself. Following correspondence with the Liquidator's solicitors, he agreed to strike out those motions on consent as being "premature" (although they would not have been premature if time was to run from 31 May 2022 as is argued in the Liquidator's legal submissions). This is, I believe, a relevant and distinguishing factor in the present case as to how this court should deal with any extension of the time period.

39. In the very specific circumstances of this case, I will, in the interests of justice, deal with the motions before the court, although I believe the present versions of those motions to have been issued out of time. I am not however determining the broader question as to whether the time period in s. 161(1) of the 2015 Act can be extended by reference to the RSC or this court's inherent jurisdiction.

<u>The jurisdiction of the High Court under s. 161 of the 2015 Act.</u>

40. Mr Lohan argues in his legal submissions that the CLCA erred by failing to abide by his obligations under ss. 155 and 161 of the 2015 Act in not giving due regard to the award of costs being excessive, unfair, and disproportionate in nature.

41. The grounds for review were identified by counsel for Mr Lohan at the hearing of this motion as twofold, namely: (1) that the CLCA erred in his approach by failing to consider the necessity or legal basis for the motions issued by the Liquidator (Mr Lohan claiming they were unnecessary); and (2) that the CLCA erred in his approach by failing to consider and require a time breakdown for the time spent by the Liquidator's legal team. I will consider both of those grounds in turn. Before doing so, however, it is

appropriate to consider the jurisdiction and basis of review by the High Court under s161of the 2015 Act .

42. Section 161 of the 2015 Act provides, in material part, as follows:

> *"(1) A party to an adjudication…may…apply to the High Court for a review of the determination concerned…*
>
> *(3) The court shall hear and determine the review on the evidence that was tendered to the Legal Costs Adjudicator unless the court orders that other evidence be submitted.*
>
> *(4) The court shall, having heard the review under subsection (1) –*
>
> *(a) confirm the determination of the Legal Costs Adjudicator or,*
>
> *(b) allow the review and –*
>
> *(i) remit the matter to the Legal Costs Adjudicator to determine the adjudication in accordance with the decision of the court, or*
>
> *(ii) substitute its own determination for that of the Legal Costs Adjudicator.*
>
> *(5) The High Court shall allow a review under subsection (4)(b) only where it is satisfied that the Legal Costs Adjudicator has, in his or her determination, erred as to the amount of the allowance or disallowance so that the determination is unjust."*

43. This wording is very similar to the previous wording which applied under section 27(3) of the Courts and Court Officers Act 1995, which was considered by the Court of Appeal in *HM v SM* [2018] IECA 396. In that case, Baker J confirmed at para 26 of her judgment that

"*the review is not an appeal on the merits but rather, is conducted in the light of the statutory conjunctive test that an error be established in the approach of the Taxing Master and that an injustice has resulted. That a result be unjust is more than a test that the costs are more or less than that for which either party contends and injustice must be tested in the context of an assessment of the nature of the litigation, the amount of expertise engaged, and all of the other factors that might be relevant in the case in issue. Finding of fact are not to be reversed unless a manifest error or error in approach is found.*"

44. Baker J noted at para 28 that the burden on a party seeking to challenge a ruling of the Taxing Master (now a Legal Costs Adjudicator or the CLCA) is "*heavy*" and that the court will generally be reticent to interfere and should show deference to the expertise of the CLCA. As Kearns J stated in *Superquinn Ltd V Bray Urban District Council (No. 2)* [2000] IEHC 115, [2001] 1 IR 459 (at p. 475) the High Court must "*exercise a considerable degree of judicial restraint in the context of a review, although it must clearly intervene if failure to do so would result in an injustice*".

45. The detail of the court's review jurisdiction was set out by Geoghegan J in *Bloomer v Incorporated Law Society of Ireland (No. 2)* [1999] IEHC 260, [2001] 1 IR 383, at p. 387 as follows: –

"*In considering whether the taxing master erred, I must see whether in arriving at his decision he had regard or excessive regard to some factor which he either should not have had any regard to or to which he should have had much less regard. I then have to consider whether there was some significant factor to which the taxing master ought to have had regard and to which he either had no regard at all or insufficient regard. Those are examples of errors of principle in*

the consideration of the facts but of course the court must also consider whether the taxing master has fallen into error in either law or jurisdiction.

If this court finds that the taxing master has erred in the sense described, this court then has to address the second question which is whether the taxation was unjust. In relation to any given item in the taxation which is in controversy, the justice or injustice of the decision will be determined by the amount. If after falling into error, the taxing master in fact arrives at the correct figures or at figures within a range which it might reasonably have been open to him to have arrived at, the court should not interfere. The decision may not be exactly the same as the decision which the court would have made but it cannot be described as an unjust decision."

46. In light of that jurisdiction I will now consider the grounds of review argued by Mr Lohan . The first of those grounds was canvassed by Mr Lohan before the CLCA. The second ground regarding the time breakdown was not in fact argued in any detail at all before the CLCA as Mr Lohan failed to engage on quantum in any meaningful way. I could, for that reason, determine not to hear this ground of review at all under s. 161(3) but as it is the main ground advanced by Mr Lohan I will deal with it in this judgment.

<u>Pleaded ground of appeal (1) – Did the CLCA err in failing to consider the necessity or legal basis for the Liquidator's motions?</u>

47. In my view, the CLCA cannot be criticised for failing to look behind the costs orders made by the High Court in favour of the Liquidator. Those costs orders are made. The role of the CLCA is to determine the appropriate quantum of the costs on the basis that the court orders reflect the matters in respect of which costs should be assessed. It forms no part of the CLCA's role to revisit the basis of the High Court's costs orders to

determine whether they relate to applications that were necessary or should otherwise be amended in some manner. That would be a matter for the Court of Appeal had the costs orders been appealed to it, which they were not. I am satisfied that the CLCA correctly identified his role in this regard where he states in his Determination (para 57) that "*there are no grounds for Mr Lohan to argue at this late stage that the process before the High Court was ineffective*".

48. Mr Lohan has argued that the debt owed by the Company in liquidation to the Revenue Commissioners was approximately €37,172.52. The combined costs of the adjudication in this matter totals €31,812.45. He submits that given the level of monies due, the costs allowed are disproportionately high and excessive when one considers the nature and extent of work done by the Liquidator's legal team. This particular argument is addressed by the CLCA in his Determination dated 31 May 2022 where he states at para 65 as follows:

> *"An application to the High Court can result in large legal costs, but there is no principle of proportionality in the Act of 2015, as each application to the High Court and any subsequent Adjudication of legal costs, requires that the work undertaken has to be judged on its own facts*".

I agree with that position.

<u>Pleaded ground of appeal (2) – Did the CLCA err in failing to require and consider particulars of time charges?</u>

49. In paragraph 48 of the Determination Reference 2020:00688, the CLCA provides a detailed history of the motion from its date of issue through each adjournment and he sets out the various outcomes of those adjournments, the necessity for substituted service and then the order striking out the motion with costs which was made by the

High Court on 29 April 2019. A similar level of detail is contained in paras 31 and 47-49 of the Determination Reference 2020:00689 in relation to the other motion.

50. The CLCA states at paragraph 49 that:

> "*On the adjudication of costs, I was furnished with a copy of the relevant documents to enable me to be satisfied that I could verify that the work as set out in the bill of costs was actually done, accordingly I verified the work as set out in the bill of costs was work which was done*".

This reflects the obligation of the CLCA under s. 155(4)(a).

51. He states at paragraph 50 of his determination that

> *"From my assessment of the documentation being the Notice of Motion, the Grounding Affidavit, the Replying Affidavit and the solicitor's files and papers which recorded the progression of the matter before the Court I was, and I am satisfied that a charge should be made for the work undertaken and counsel fees. I am satisfied that these were reasonably undertaken and as such an appropriate charge should be made for such legal fees, expenses and disbursements*."

This addresses the obligation of the CLCA under s. 155(4)(b).

52. The CLCA notes at para 51 that he is required to determine under section 155(4)(c) and 155(4)(d) what a fair and reasonable charge for that work or disbursement would be in the circumstances and to determine whether or not the costs relating to the matter or item concerned were reasonably incurred. In turn, this requires him to consider under s. 155(5) that in so far as is reasonably practicable he should ascertain (a) the nature, extent, and value of the work, (b) who carried out the work and (c) the time taken to carry out the work. The CLCA confirms at para 51

> *"At the hearing of the adjudication, I ascertained the nature and extent of the work…I was not given any particulars of the time charges by either legal practitioner, nor indeed were they required so to do, as time is but one of the factors identified in Schedule 1 of the 2015 Act*."

53. It is this particular aspect of this CLCA Determination that Mr Lohan takes exception to. Mr Lohan argues in his submissions that because the CLCA acknowledges that no evidence of the time taken was furnished to him "*the adjudicator accepts that he is not in compliance with section 155 of the 2015 Act*". I do not believe that there is any such acceptance by the CLCA to this effect. The CLCA sets out his view that the legal practitioners were not required to provide detailed particulars of their time charges. The CLCA says that he considered the time taken to carry out the work done. He believed he was able to do so without being provided with a detailed time breakdown.

54. Section 155(4) clearly required the CLCA to verify the work that was actually done, to then consider whether it was appropriate to charge for that work, and whether the costs were reasonably incurred. In determining what a "*fair and reasonable charge*" is for the work done, the CLCA shall "*so far as reasonably practicable*" ascertain the nature and extent and value of the work, who carried it out and "*the time taken to carry out the work*". The principles relating to legal costs which "*shall apply to the adjudication of a bill of costs*" are set out in Schedule 1 to the 2015 Act. Schedule 1 requires the CLCA to determine that the costs have been reasonably incurred and are reasonable in amount. The quantification of the reasonable amount of costs requires the CLCA to consider each of a number of matters "*where applicable*". Schedule 1 sets out ten general matters to be considered which include complexity and novelty; skill or specialised knowledge applied; "*the time and labour that the legal practitioner has reasonably expended on the matter*"; urgency; the place and circumstances where the work was

transacted; the number, importance and complexity of documents; the value of property or interest involved; any limitations on liability; any research or investigative work necessary; and the use and costs of expert witnesses.

55. While it is undoubtedly the case that the CLCA must consider the time spent as part of the overall assessment of the reasonableness and quantum of costs, there is no mandatory requirement that a detailed time breakdown be available to the CLCA for that purpose. Certainly, if such a detailed time breakdown is provided, it would assist any costs adjudicator in understanding the time input of the various legal practitioners. However, such detailed time breakdowns may not be available or indeed may not be accurate even if available. The CLCA must assess the work done and having done so must then determine what is a reasonable fee for that work assuming it was required. The time spent is one important factor in determining a reasonable fee. It is not the only factor. It is entirely possible and indeed appropriate for the CLCA, having reviewed the papers and files, to determine a reasonable fee for the work reasonably done, even where detailed time printouts are not available from the legal practitioners concerned. This is not to say that those records have no value. It is undoubtedly good practice to have such records available where possible and particularly in complicated or lengthy cases. The absence of time breakdowns however does not, of itself, invalidate an assessment by a legal costs adjudicator of a reasonable fee which reflects the adjudicator's assessment of the time spent by the legal practitioners, being one of the relevant factors he is required to consider. As Laffoy J stated in the Supreme Court decision in *Sheehan v Corr* [2017] IESC 44, [2017] 3 IR 252, 254, time is "*only one element of the relevant circumstances by reference to which the nature and the extent of the work done is assessed*".

56. This view was endorsed by the Court of Appeal in *HM v SM* where, at para 46 of her judgment, Baker J stated as follows: –

> "*I reject the argument of Mr. M. that the appropriate approach by the Taxing Master is to identify and measure each item in the bill of costs by reference to the time spent on each item at the appropriate rate applicable to the person who expended this time. Time is not the only factor that bears on the analysis. The appeal on this point must be decided against Mr. M. in the light of the authoritative decision of the Supreme Court in Sheehan v Corr*."

57. It does not appear that any submissions were made on behalf of Mr Lohan to the CLCA regarding the quantum of the costs or indeed the decision by the CLCA that those costs were necessary and verified. This is confirmed in paragraph 68 of the CLCA Determination Reference 2020:00688 where he states:

> *"The submissions advanced at the hearing of the Consideration, do not specifically address at all the conclusions reached, as to the work being necessary, proper, and verified and being done. The Respondent submitted that he was not making any submissions with regard to quantum of the legal costs but confined his submission to the matters outlined above. Given that these matters have been decided, it appears to me, that absent any submissions as to quantum of the legal costs, then I must assume that the figures determined must stand*."

Similarly at para 57 of the Determination Reference 2020:00689 the CLCA confirmed that as Mr Lohan

> "*has decided not to engage in any way with the quantum of the allowances made, I conclude that no grounds have been made out to interfere with the original Determination made*".

Decision

58. I believe that Mr Lohan issued the motions currently before this court outside the relevant 21- day statutory appeal period. However, I have dealt with the motions for review in the particular circumstances of this case where Mr Lohan previously issued identical motions within 21 days of the date of the Determination.

59. On the evidence before the court, Mr Lohan has not demonstrated any error made by the CLCA in the adjudication of the Liquidator's costs. Nor has he established that any injustice arises from the Determination. The CLCA made deductions to the legal costs originally claimed by the Liquidator. No arguments have been advanced by Mr Lohan at any stage in the process or to this court as to what the correct level of fees should be and why. Mr Lohan has merely stated that the fees are in his view "excessive" and disproportionate to the original amount sought by the Revenue Commissioners when they petitioned to wind up the Company. The CLCA confirms, and I agree, that there is no requirement that there be proportionality between the Revenue debt and the costs incurred by the Liquidator in dealing with the motions. It is the view of the CLCA that "*for an application of this nature, the fees are relatively modest*". (para 65 of the Determination). I am satisfied that the CLCA conducted and concluded his adjudication in accordance with s. 155 of the 2015 Act and that he appropriately considered and applied the principles in Schedule 1 to the 2015 Act. In particular, the court is satisfied that the CLCA considered the time spent by the relevant legal practitioners as part of his overall assessment of the reasonableness of the fee claimed. It is not mandatory that detailed time breakdowns be produced to the CLCA before he can adjudicate on and determine what is a reasonable fee for work done. Furthermore, there is no basis to review the CLCA Determination on the grounds that the CLCA

should have looked behind the relevant High Court costs orders to determine if they (or the underlying applications to which they related) were necessary.

60. I am satisfied that the CLCA did not err as to the amount of the allowance or disallowance he made to the Liquidator's costs as claimed nor is his determination unjust. I confirm the Determination of the CLCA in respect of both motions.

61. I will list this matter for mention on 21 June at 10:45 AM to deal with the costs of this application, the final form of order and any other issue arising from this judgment.