THE COURT OF APPEAL

Record Number: 2022/77
High Court Record Number: 2020/295JR

Whelan J. **Neutral Citation Number [2023] IECA 3**
Pilkington J.
Butler J.

BETWEEN/

DECLAN O'CALLAGHAN

APPLICANT/APPELLANT

-AND-

THE SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT/RESPONDENT

-AND-

NIRVANNA PROPERTY HOLDINGS LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Butler delivered on the 17th day of January, 2023

Introduction

1. This is an appeal from the decision of the High Court (Barr J. [2022] IEHC 13) refusing the appellant's application for judicial review of the decision of the respondent Tribunal made on the 11th February, 2020. The respondent is the body established under statute which was, at the material time, responsible for the hearing and determination of complaints of professional misconduct against solicitors. The decision under challenge was one adjourning the substantive hearing of the inquiry into the notice party's complaint against the appellant for what was intended to be a two month period. However, due to a combination of the national lockdown imposed in March 2020 as a result of the Covid-19 pandemic and the granting to the appellant of leave to apply for judicial review on 30th April, 2020, the substantive hearing before the respondent has yet to take place. The application for judicial review seeks an order of prohibition restraining the respondent from proceeding with the disciplinary hearing and an order of certiorari quashing the decision to adjourn the hearing together with various declaration as to the respondent's alleged lack of jurisdiction and breach of fair procedures.

2. At first glance it may seem contradictory that the appellant is seeking both to quash a decision adjourning a hearing and to restrain the respondent from proceeding with the hearing. However, this apparent illogicality is explained by the fact that, having successfully made a preliminary application before the Tribunal on 11th February, 2020, the appellant then wished the inquiry into the complaint against him to proceed on that date in the absence of the complainant which the appellant believes would inevitably have led to the complaint against him being dismissed. Further, in the course of the exchange of affidavits the appellant (with the leave of the court) expanded his grounds to include a complaint that because of the manner in which the original complaint had been made, the respondent lacked

jurisdiction *ab initio* to even embark upon an inquiry because of the alleged invalidity of the application.

3. All of these grounds arise because, although the complaint against the appellant is made on behalf of a company, Nirvanna Property Holdings Limited (the notice party), it is being pursued by two individuals, Tom and Sean Fleming. The appellant contends that the authority of these individuals to make the complaint on behalf of the company has never been properly established and, therefore, that the complaint should not have been accepted by the respondent. In addition, when the respondent intended to commence the hearing on 11th February, 2020 a preliminary application was made on behalf of the appellant to the effect that the complainant company could only be represented at the hearing by a solicitor or a solicitor and counsel and could not be represented by Mr. Tom Fleming, an officer of the company. This application was successful. The appellant then objected to Mr. Fleming's subsequent application for an adjournment to allow the company secure legal representation. He contended that Mr. Fleming did not have a right of audience on behalf of the company in order to make that application. Consequently, he argued that the application should have been refused and, in the absence of the complainant appearing or leading evidence of the complaint against him, it ought to have been dismissed. The respondent did not accept this submission and adjourned the hearing.

4. In order to deal with the legal issues it is necessary to look briefly at the factual context in which they arise. I will then look at the relevant statutory provisions and the rules governing the receipt of complaints and the conduct of hearings by the respondent, the arguments made by the parties and how the issues were treated by the High Court judge in the course of dealing with the two main legal issues raised on this appeal.

Background Facts

5. The details of the complaint made on behalf of the notice party to the respondent are not relevant to the procedural issues raised on this judicial review. It is however relevant that the complaint arises out of the circumstances in which property which was owned by the notice party came to be transferred to a third party, whom I shall refer to in this judgment as F.P. The transfer between those parties is dated 20th December, 2006 and the change of ownership was registered on the Folio on 4th April, 2007. On 10th June, 2010 an application for an inquiry into the conduct of the appellant for alleged misconduct was made to the respondent on behalf of the notice party through the lodging of a DT1 form which had been completed on 30th May, 2010. On that form the application is stated to be made by the notice party. The form is signed by Tom Fleming and by Sean Fleming and the address given is the private residence of one or both of the Flemings (who are father and son) rather than the registered address of the company.

6. On the same date a form DT2 was completed by the Flemings. This document is in the form of an affidavit in which details of the allegations of misconduct grounding the application for an inquiry are set out. The affidavit is stated to be made by "*Tom Fleming and Sean Fleming on behalf of Nirvanna Property Holdings Limited*". The complaint and the documents lodged to support it were sent by the respondent to the appellant who filed a replying affidavit (form DT3) on 21st July, 2010. The appellant denied the allegations against him and set out a detailed alternative account of the disputed transaction. This was followed by two further affidavits of Mr. Fleming and two further replying affidavits of the appellant, the details of which are not relevant for present purposes.

7. The only point of potential relevance is the averment in para. 2 of the appellant's first affidavit which, according to the respondent, confirms the appellant's knowledge of the basis

on which the Flemings were acting on behalf of the notice party. The relevant averment is as follows: -

> "*Mr. Fleming is now the company secretary of Nirvanna and the directors are Sean Fleming and Una Fleming his son and daughter respectively. Thomas Fleming and Sean Fleming and Una Fleming are equal shareholders in the company.*"

8. On 8th February, 2011 a division of the respondent considered all of the relevant documentation and determined that there was a *prima facie* case of misconduct against the appellant for an inquiry as regards four separate allegations. These allegations were set out in a letter of the same date from the respondent to the Law Society, to the appellant and to each of the Flemings at Nirvanna Holdings Limited. This was followed up by a formal notice of inquiry (form DT5) dated 11th March, 2011.

9. It is common case that once a determination has been made that there is a *prima facie* case of misconduct against a solicitor, the respondent is then compelled by statute to proceed to hold an inquiry into those allegations (*per* Finnegan P. in *Stephens v Orange* (Unreported, High Court, 18th March, 2005) and Kelly P. in *Mallon v Law Society* [2017] IEHC 547)). In this case the inquiry was listed for substantive hearing on 25th May, 2011. Prior to that date an application was made by the appellant on 19th May, 2011 seeking to adjourn the hearing on the basis that F.P., whom the appellant regarded as an essential witness, was not prepared to give evidence lest he prejudice his position in separate High Court proceedings which had been taken against him by the notice party relating to the same underlying transaction.

10. That adjournment was granted and the matter remained in abeyance until 2017 during which time an additional set of High Court proceedings were issued alleging professional negligence against the appellant. Between 2017 and 2019 the matter was adjourned from time to time. A hearing date was fixed for 20th June, 2018 but adjourned at the appellant's

request due to the fact that the professional negligence proceedings were listed for hearing a few months later. As it happens the professional negligence proceedings did not proceed on the scheduled date which also resulted in a further hearing date for the inquiry being adjourned. Ultimately on 21st November 2019 the respondent rejected a further application by the appellant for an adjournment and the matter was subsequently listed to proceed on the 11th February, 2020. By this time the professional negligence proceedings had settled and Mr. Fleming had stated that he would withdraw the proceedings against F.P.

11. On each of the attendances between 2011 and 2019 it appears that adjournments were sought by the appellant, albeit on the basis that the notice party had not advanced High Court proceedings the existence of which presented difficulties with the inquiry proceeding. Further, on each occasion the notice party was represented by Mr. Tom Fleming, save on occasions when there was no appearance on behalf of the notice party. The appellant did not raise any objection to Mr. Fleming's participation in this capacity – although, as shall be seen, he maintains that he was under no obligation to do so in the context of these preliminary hearings.

12. Whilst the basis for the adjournment applications – all of which were granted by the respondent save for the last – is not especially relevant, what is significant is their cumulative effect. A complaint made in June 2010, which was determined to give rise to a *prima facie* case of misconduct in February 2011 and initially scheduled for hearing in May 2011 has not yet been the subject of a substantive hearing more than ten years later.

13. On 11th February, 2020 the hearing opened. The appellant was represented by solicitor and counsel and Mr. Tom Fleming was in attendance on behalf of the notice party. After taking attendances the chairperson briefly explained the intended procedure for the benefit of Mr. Fleming. She proposed swearing Mr. Fleming in before he made any opening

statement lest that statement veer into evidence. However, before this could be done counsel for the appellant made what he described as a "*preliminary application*". The basis for that application has been outlined above, namely that a company can only be represented in litigation through a solicitor and/or counsel and solicitor and cannot be represented by an officer or shareholder of the company (*per Battle v Irish Art Promotion Centre Ltd.* [1968] IR 252). Although it was accepted (on the basis of *Pablo Star Media Limited v EW Scripps Company* [2015] IEHC 828) that a company could be represented by a director in procedural or interlocutory applications, as the respondent was sitting for the purposes of the substantive inquiry, the notice party could not be represented by Mr. Fleming.

14. Mr. Fleming in response sought an adjournment to consider the application of which he had no prior notice and the case law which he had only just received. Counsel for the appellant opposed the application for an adjournment. He contended that the respondent had embarked on the hearing, that the applicant and his witnesses were present and ready to deal with the allegations and that Mr. Fleming should not be given the opportunity "*to mend his hand*".

15. The respondent accepted firstly that the rules governing the High Court procedure applied to the conduct of its hearings. Consequently, it also accepted the appellant's central point, namely that the company could not be represented in the inquiry before it by a director or shareholder. It held in line with established case law that there were no exceptional circumstances which might justify a departure from that rule. However, it declined to dismiss the complaint on the basis that *Stephens v Orange* (above) precluded it from striking out any matter without conducting a hearing in order to inquire into it. The chairperson indicated that if Mr. Fleming were to make it clear (which he did) that he would like to engage a solicitor on behalf of the company, the respondent would be prepared to put the

matter back to allow this to be done. Counsel for the appellant objected to this proposed course of action arguing that as Mr. Fleming was not entitled to represent the company, the company was, in effect, not in attendance before the respondent and Mr. Fleming could not make an application for an adjournment on its behalf. Having considered the matter, the respondent postponed the hearing to 29th April, 2020 under Rule 21. In doing so it held that the hearing had not commenced due to the fact that the appellant had raised a preliminary issue. As things turned out the hearing did not proceed on 29th April, 2020 due to the intervention of Covid-19 and, on 30th April, 2020, the appellant was granted leave to apply for judicial review.

16. On the basis of these facts the appellant raises two substantive legal issues. It might be more logical to deal with the jurisdictional issue first as, if the respondent lacks jurisdiction in respect of this complaint, the validity of a decision to adjourn the hearing into it becomes moot. However, the proceedings as originally framed challenged only the decision to adjourn the hearing with the grounds relating to jurisdiction being added at a later stage. Consequently, I propose to deal with the adjournment issue first and then with the jurisdictional issue.

Adjournment of Hearing

17. The appellant makes a number of interrelated arguments under this heading. He contends firstly that the substantive hearing had commenced and was underway at the time it was adjourned on the 11th February, 2020. Secondly, he contends that once the respondent had held that Mr. Fleming was not entitled to represent the company then, effectively the company was not in attendance before the respondent. Thirdly, Mr. Fleming should not have been allowed to make an application for an adjournment on behalf of the company and the

respondent should not have entertained that application. Finally, he contends that the rule relied on by the respondent in granting the adjournment, Rule 21, did not actually apply in the circumstances.

18. All of these arguments are disputed by the respondent. Further, the respondent pointed to two factual matters which it regards as relevant. These are, firstly, the fact that the appellant had not made any objection to Mr. Fleming's representing the company at any of the numerous hearings between 2011 and 2019 and, secondly, the fact that no notice was given to the notice party that this issue would be raised at the hearing. In addition to Rule 21, the respondent relied on a number of other provisions of the Solicitors Disciplinary Tribunal Rules, 2003 (the 2003 Rules). Some of these were relied on to demonstrate the existence of a power to adjourn a hearing in various circumstances (Rules 47, 54 and 12), others evidence a power to adjourn the date of an inquiry (Rules 39(c), 43 and 52(a)). Rule 36 was relied on because it vests general power, subject to the Rules, in the respondent to "*regulate the procedure at any inquiry*". Finally, the respondent argued that the appellant was not prejudiced by the intended adjournment which was for a period of a little over two months. At the time the adjournment was granted the respondent could not have envisaged the subsequent global public health crisis caused by Covid-19 and the effect that would have on the adjourned date.

19. The respondent's arguments were accepted by the trial judge. Crucially, he held (at para. 54 of the judgment under appeal) that the respondent as a disciplinary body "*always has an inherent jurisdiction to conduct its procedures in the way that it regards as being fair to the parties before it*". He was satisfied that the respondent had jurisdiction under its rules to grant an adjournment on Mr. Fleming's application and, apart from its inherent jurisdiction regarding the conduct of proceedings, he viewed the 2003 Rules as giving the

Tribunal "*a wide degree of flexibility*" in this regard. The trial judge held that the respondent acted in a rational and fair way in granting the adjournment, which at the time, would not have caused any prejudice to the appellant.

20. I am satisfied that the trial judge was correct in his conclusions on this issue. As regards the supposed lack of an entitlement on the part of Mr. Fleming to make an application for an adjournment once the respondent had held the notice party could not be represented by him at the hearing, the appellant's argument is premised on the substantive hearing being underway at the time the adjournment was granted. I do not think that this is a reasonable construction of what occurred on 11th February, 2020. Although that date was set for the hearing of the inquiry and it was undoubtedly intended by the respondent that the substantive hearing would proceed on that date, before any meaningful step had been taken and, significantly before Mr. Fleming had purported to open the case for the notice party or to adduce any evidence on the notice party's behalf, the appellant's counsel intervened to make a preliminary application.

21. A preliminary application made on, rather than in advance of, a scheduled hearing date does not thereby lose its character as a preliminary application. This application was procedural in nature. It went to the entitlement of Mr. Fleming to represent the notice party and not to any substantive issue concerning the complaint. Therefore, when the application made on behalf of the appellant was accepted, the respondent was left in a position where the substantive inquiry had not yet opened before it. It could have proceeded to open the substantive inquiry (perhaps with the consequences the appellant envisaged would follow in the absence of evidence from the notice party) or it could adjourn the hearing. It did not in fact require an application to be made by or on behalf of the notice party in order to decide of its own motion to adjourn the hearing if it did not think the hearing could be conducted

fairly and properly at that time. Indeed, the Transcript suggests the respondent's enquiry of Mr. Fleming was not as to whether he was seeking an adjournment but whether the notice party would be engaging a solicitor if the matter were to be adjourned. Clearly, the respondent felt that in principle an adjournment would be appropriate but that it would serve no purpose unless the notice party intended to put itself in a position to proceed on the adjourned date. The chairperson went on to state that, in the absence of an applicant, the Tribunal itself could adjourn the matter.

22. The trial judge's characterisation of the respondent as having acted fairly and reasonably is, in my view, apt. I accept that the consequences for the appellant of a complaint being made against him are very serious - as they would be for any solicitor in that position. I accept that the appellant and his lawyers were not obliged to advise the notice party of the need to engage a solicitor and, that as Mr. Fleming was entitled to represent the company at earlier, procedural hearings, the lack of any prior objection to his doing so did not estop or otherwise preclude the appellant from raising the issue at what was intended to be the substantive hearing. Nonetheless the notice party was faced with an application of which it did not have prior notice and put in a position where, unintentionally, it was now not properly represented before and therefore was unable to address the Tribunal which was to enquire into its complaint against the appellant. Therefore, even accepting, as I do, that the appellant was perfectly entitled to make the application which it made and was not required to advise the notice party of its proofs, so that no blame attaches to the appellant for the position in which the notice party found itself, the respondent still had to deal with those circumstances in a manner which was fair to both parties.

23. To have proceeded with the inquiry without affording the notice party the opportunity to engage a solicitor after having ascertained that it intended to do so, would have been

procedurally harsh. It would also have been contrary to the policy of the legislation under which the respondent derives it powers and functions, namely the Solicitors (Amendment) Act, 1960. That legislation is designed, *inter alia*, to enable an inquiry to be held into allegations of misconduct against solicitors. Once it has been determined that a complaint raises a *prima facie* case of misconduct, there is a public interest in ensuring that an inquiry is actually held. To dismiss the allegation on foot of a purely procedural application without ever considering its substantive merits would not serve that public interest. Whilst it is, of course, vitally important to ensure that the solicitor against whom an allegation is made has the benefit of fair procedures in the conduct of any inquiry, the same procedural fairness must also be extended to the person who has made the complaint.

24. The prejudice asserted by the appellant both before the respondent and before the court amounts to no more than being unable to avail of a hoped-for advantage as a result of succeeding in its preliminary application. Undoubtedly, the appellant who was ready to proceed on the 11th February, suffered some inconvenience when the hearing was adjourned. However, the two month adjournment granted would not have placed the appellant in a materially different position to that which he had been in on 11th February. Insofar as matters had moved on since 2020 and, unfortunately, F.P. has died in the intervening period, it would be a matter for the division of the respondent undertaking the inquiry to decide if the degree of prejudice caused to the appellant is such that the inquiry cannot now be conducted fairly.

25. Lastly, I am satisfied that the respondent had jurisdiction to adjourn the inquiry under the Rule upon which it relied, namely Rule 21 of the 2003 Rules. This Rule has a statutory origin as it replicates the language of s. 7(7) of the Solicitors (Amendment) Act, 1960 as substituted in 2002. The Rule provides:

> "*Where an application is made to the Tribunal, the Tribunal may, at any stage of the proceedings in relation to the application and before the completion of any inquiry by the Tribunal, postpone the taking of any steps or further steps in the matter for a specified period and, if they do so, then, if, before the expiration of that period, the applicant applies to the Tribunal for leave to withdraw the application, the Tribunal may, if they think fit (and whether or not in their discretion they seek the views of the respondent solicitor concerned on such request before making a decision in relation to it), allow the application to be withdrawn; and, if the Tribunal do so, no further action shall be taken by them in relation to the application*."

26. The appellant argues that this Rule, taken as a whole, only applies in circumstances where an applicant is considering the withdrawal of a complaint. In other words, on the appellant's construction of Rule 21 it allows for an adjournment for the purposes of facilitating the withdrawal of a complaint but not for an adjournment for other purposes. A straightforward reading of the text of the Rule demonstrates that this construction is not correct. Most importantly, there is nothing in the text which makes it a precondition to the granting of an adjournment that the withdrawal of the complaint is within the contemplation of the applicant for the inquiry. These two matters are linked only to the extent that the Rule provides for what is to occur in the event that an applicant for an inquiry applies to withdraw the application during the adjourned period. The language used confers an additional discretionary power on the Tribunal which may be exercised if certain circumstances arise during the adjournment but, at all times, this additional power is contingent ("if") on certain circumstances arising and discretionary ("may").

27. It may be that the need to make provision for the granting of leave to withdraw an application when an inquiry has been adjourned arises from the fact that under Rule 21 the

adjournment must be for a specified period thereby suggesting an intention that the hearing will resume on the adjourned date. If the Tribunal grants an applicant leave to withdraw the complaint then no further action is to be taken by it, *i.e.* it is not necessary for the Tribunal to sit again in order for the application to be formally withdrawn.

28. Moreover, the language used in the first limb of the Rule under which a discretionary power to adjourn an inquiry is conferred upon the Tribunal, is broad. Significantly, it allows the Tribunal to adjourn an inquiry "*at any stage of the proceedings*" provided the inquiry has not been completed. This suggests that the appellant's argument as to whether the inquiry had commenced is largely irrelevant as the power to adjourn could be exercised either prior to or after the hearing had been formally opened provided that it had not concluded. I might also note that the phrase "*where an application is made to the Tribunal*" at the commencement of Rule 21 refers to the application for an inquiry rather than any application for an adjournment. This is evident because the immediately following words refer to the Tribunal being empowered to adjourn "*at any stage of the proceedings in relation to the application*" and all of the subsequent provisions in relation to the withdrawal of an application only make sense if they are read as referring to the same application, i.e. the application for an inquiry. It is clear that it is the overarching application for an inquiry which is being referred to throughout rather than any subsidiary application which may be made in the course of an inquiry including, for example for an adjournment. Thus, the Tribunal's power to adjourn is not dependent on a formal application being made to it in that regard.

29. In circumstances where I am satisfied that the respondent had jurisdiction to adjourn the inquiry under the rule invoked by it, it is unnecessary to decide if the respondent also had jurisdiction to adjourn the inquiry under the other provisions of the rules relied on in its

statement of opposition. I note that the trial judge accepted that it did so. However, I do regard Rule 36 as particularly important in this context. Under that Rule the Tribunal is permitted to regulate its own procedure at any inquiry. It is well established that a statutory body must observe fair procedures in the conduct of any decision-making process for which it is responsible. This includes adapting or supplementing such procedures as may be prescribed by statute or by regulation to ensure that the process is fair to all of the parties involved. This is the inherent jurisdiction referred to in the High Court judgment. In the case of inquiries under the 1960 Act the necessary procedural flexibility required to meet any potential unfairness is provided to the respondent under Rule 36. However, for the reasons already outlined I do not think in this instance that it was necessary for the respondent to rely either on a general power to regulate is own procedure or an inherent power to adjourn an inquiry as Rule 21 expressly covered the situation with which the respondent was presented.

The Jurisdictional Issue

30. The second substantive argument made on behalf of the appellant contends that the initial application made on behalf of the notice party was flawed such that it should never have been accepted by the respondent nor a decision made that it raised a *prima facie* case of misconduct which should proceed to inquiry. Given that the initial application was made in 2010 and the decision to proceed to an inquiry was made in 2011 the appellant faces an obvious difficulty in challenging either of these steps in judicial review proceedings instituted in 2020. The respondent expressly pleaded delay, waiver and acquiescence in its statement of opposition and noted in its written submissions to the High Court that no explanation for this delay had been offered by the appellant. However, the delay issue does

not appear to have been the focus of specific argument in the High Court and is not dealt with in the High Court judgment. Consequently, I will deal with the merits of the jurisdictional issue below.

31. The appellant's case essentially arises from an apparent difference between the precedent version of Form DT2 contained in the schedule to the 2003 Rules and the contents of the standard form DT2 provided by the respondent to be completed by an intending applicant. Form DT2 is the affidavit to be sworn by or on behalf of an applicant grounding an application for an inquiry. The precedent version of this document in the 2003 Rules contains two alternative first paragraphs. One of these is to be used where the person swearing the affidavit is making the complaint on their own behalf and the other is to be used where the person swearing the affidavit is doing so to make a complaint on behalf of some other person. In the latter case the proposed wording expressly requires that they specify their "*status and authority*" to make the affidavit on behalf of the applicant. In contrast, para. 1 of the standard form DT2 which was used by the notice party in this case simply states that the deponent is the applicant in the matter, allowing for single and plural applicants but not, on its face, for a deponent making an application on behalf of someone else. Thus, the appellant argues that notwithstanding that the application states on its face that it was made by the Flemings on behalf of the notice party, they have not established their authority to do so. In these circumstances the appellant argues that the application made by the notice party did not comply with the 2003 Rules and that consequently the respondent lacked jurisdiction to entertain it.

32. In response the respondent points to the replying affidavit sworn by the appellant on form DT3 for the purpose of the statutory process. The DT3 affidavit is part of the respondent's preliminary procedures and it enables a solicitor against whom a complaint is

made to respond to that complaint before any decision is made as to whether the application discloses a *prima facie* case of misconduct for inquiry. As previously noted, the appellant (who was familiar with the notice party, having acted as its solicitor) informed the respondent that Tom Fleming was a shareholder in the notice party and company secretary and that Sean Fleming was a director and shareholder. The three equal shareholders in the notice party, all of whom are members of the Fleming family, are identified in that affidavit. Both Tom and Sean Fleming are officers of the company and between them they own two thirds of the issued shares. Consequently, the respondent argues that insofar as there is an obligation on it to look behind the forms submitted by a corporate applicant (a proposition which is not accepted by the respondent), in this instance that obligation has to be read in light of the appellant's own affidavit. It is submitted that the contents of the DT1 application form and DT2 affidavit read together with the contents of the appellant's affidavit were sufficient to enable the respondent to be satisfied that the Flemings were entitled to make the application on behalf of the notice party. This submission must be correct. The respondent cannot be bound to reject a complaint at the preliminary stage because of an alleged procedural omission in the applicant's paperwork which (if it is indeed an omission) relates to matters amply covered in the solicitor's responding papers which are also before the respondent.

33. There is some merit in the appellant's observation that the respondent itself seemed to be unclear as to whether the notice party or the Flemings were the applicant in the process before it. Correspondence from the respondent refers at times to the application having been brought by the Flemings and at other times by the notice party, although more generally the latter. The transcripts refer to the matter as *Fleming v O'Callaghan* and certainly the discussion at the various hearings suggests that many of the chairpersons were under the impression that the application was brought by the Flemings personally rather than by the

notice party. However, I do not regard this confusion as fundamental nor as vitiating the respondent's jurisdiction to conduct an inquiry on foot of an application which, quite clearly, had been made on behalf of the notice party.

34. The appellant also complains that correspondence from the respondent was not sent to the notice party's registered address but rather to the Flemings' residential address. This was the address provided by the Flemings on behalf of the notice party on the DT1 application form. I do not think that anything turns on this. A company may always be served at its registered office but if an alternative address is provided by a company and correspondence addressed to the company at that address is received, then the company will be aware of the communication and its contents which, of course, is the purpose of any such correspondence. Further, whilst a company might legitimately complain if correspondence sent to it is being misdirected, the appellant does not have standing to complain about the address to which correspondence is sent to the notice party once the notice party is receiving all necessary correspondence and actively engaging in the process.

35. The making of an application to the respondent is governed by s. 7 of the 1960 Act, as amended. Under s. 7(1) "*an application by a person*" for an inquiry is to be made "*in accordance with Rules made under s. 16*" of the 1960 Act. Those Rules were made and the version applicable at the time of this application was the Solicitors Disciplinary Tribunal Rules, 2003. Rule 2(a) requires the 2003 Rules to be applied "*in conformity*" with the Solicitors Acts, 1954 – 2002. Section 7 does not deal expressly with applications made by somebody on behalf of another person and this is dealt with exclusively in the 2003 Rules. Therefore, the requirement that the Rules be read in conformity with the Acts does not add significantly to the interpretation of the relevant Rules in this case.

36. The definition of "*applicant*" at Rule 1(a) includes a person furnishing documents to the Tribunal "*for and on behalf of and with the authority of the applicant*". Rule 5 sets out the procedure on an application for an inquiry into the conduct of a solicitor and requires the application to be made on form DT1 "*signed by or on behalf of the applicant*" and be furnished together with a grounding affidavit "*in the form of Form DT2*" which is to be "*sworn by or on behalf of the applicant*".

37. I have already identified the elements of both the precedent Form DT2 and the standard form DT2 provided by the respondent to intending applicants which are significant for the purposes of this case. The appellant contends that because the DT2 affidavit sworn by the Flemings on behalf of the notice party did not set out their status and authority as deponents as required in the precedent version of Form DT2, the application was invalid and the respondent did not have jurisdiction to proceed to hold an inquiry on foot of it. Notably, the appellant accepts that the Flemings were officers of the notice party and did not contend that they did not have authority to make the complaint on the notice party's behalf. Thus the objection is a purely procedural one, *i.e.* that the respondent could not have been satisfied that the Flemings had the requisite authority in the absence of any averment to this effect and, in particular, in the absence of proof of a company resolution authorising the making of the complaint.

38. The 1960 Act was amended in 2002 to introduce a preliminary procedure in which the solicitor against whom a complaint is made is notified of it and given an opportunity to respond to it in writing before a decision is made as to whether there is a *prima facie* case for an inquiry. Rule 9(a) of the 2003 Rules provides that this decision is to be made by the respondent Tribunal on a consideration of the affidavits furnished to the Tribunal by or on behalf of the applicant and by or on behalf of the solicitor. Under Rule 9(b) where, on

consideration of these affidavits, the Tribunal finds that there is a *prima facie* case of misconduct it must ("*shall*") proceed to hold an inquiry. The appellant's case appears to be that if there is any flaw in the affidavits upon which this consideration is based, the Tribunal lacks jurisdiction to make a positive decision to proceed with an inquiry.

39. The trial judge rejected this jurisdictional argument for two main reasons. Firstly, having noted that the respondent could not have fairly considered this issue in circumstances where the notice party was not represented before it and had not made any ruling on the point, he held that proof the company had made the necessary resolution through its board of directors or its members would be a matter for the inquiry itself. In other words, the jurisdictional complaint was premature and might not arise if appropriate evidence is adduced by the notice party at the hearing. Secondly, he held that the rule in *Royal British Bank v Turquand* [1856] 6 E&B 327 applied such that the respondent was entitled to assume that the making of the complaint was properly authorised by the company. The appellant objected to this aspect of the judgment on the basis that the rule in *Turquand's* case had not been relied on by the respondent and was not the subject of argument between the parties at the hearing. He also contended that the rule in *Turquand's* case applies to protect third parties doing business with a company in the commercial or contractual sense but did not apply to the procedures governing the admission of complaints to a statutory tribunal such as the respondent. Although a number of Irish cases dealing with the application of the rule in *Turquand's* case are cited in the appellant's written submissions none of these are directly on point.

40. I am satisfied that there is no substance in the appellant's complaints under this heading. It is significant that the appellant does not contend that there was an actual lack of authority to make the complaint, merely that the authority was not properly evidenced in the

documents before the respondent. It is also significant that this point was not raised before the respondent so that the notice party never had an opportunity to address the issue in the context of its application nor did the respondent have the opportunity to formally rule on it. It is also a matter of some general public importance that once an application made to the respondent has been determined to give rise to a *prima facie* case of misconduct against a solicitor, that the matter should proceed to a substantive inquiry. Interpreting and applying the 2003 Rules in the strictest manner possible so as to allow a respondent solicitor deliver a knockout procedural blow to a complaint without it ever having been substantively considered is not consistent with the role the Oireachtas has conferred upon the respondent under the legislation.

41. The 2003 Rules clearly allow an application to be made by a person on behalf of another person. Indeed, in all complaints in which the applicant is a corporate entity, the application will of necessity have to be made by another person. The text of the Rules is silent as to the circumstances in which one person may act on behalf of another and as to when and how authority to act on behalf of another must be shown. The precedent version of form DT2 suggests that the basis of a deponent's authority to make the affidavit should be stated, something which is or may be subtly different to the authority to make the application itself. Of course, requiring a deponent to state the authority on foot of which they make an affidavit is a fairly standard feature of affidavits. I think it would be a stretch to extrapolate from this that the respondent lacks jurisdiction to proceed to an inquiry in respect of any application where the basis for a deponent's authority whether to make the application or the affidavit is not set out on affidavit.

42. I am also persuaded by the argument made by the respondent that insofar as it was under any obligation to enquire into the Fleming's authority to make the application on

behalf of the notice party, the material in the appellant's form DT3 affidavit was sufficient to allow the respondent to be satisfied in a general sense that the application was properly made. That information identified Tom and Sean Fleming as owning two thirds of the shares in, and as being the secretary and a director respectively of, the notice party.

43. Consequently, the lack of jurisdiction alleged by the appellant has not been conclusively demonstrated. Insofar as the question of the Flemings' authority to make the application may remain in issue, formal evidence as to the basis upon which they made the complaint on behalf of the notice party can be adduced at the inquiry. It is neither necessary nor appropriate at this stage to speculate as to the nature of the evidence that might be led on this point. As the trial judge observed, it would only be appropriate to make an order of prohibition if the appellant had established a fundamental lack of jurisdiction on the part of the respondent. As the issues raised do not query the respondent's jurisdiction over complaints of this nature nor the fact the appellant is subject to that jurisdiction, procedural issues as to whether the application was sufficient to properly invoke that jurisdiction should be addressed to and dealt with by the respondent at first instance. In circumstances where the notice party will have an opportunity to satisfy the respondent at the substantive hearing that the application was properly made on its behalf, it would be manifestly inappropriate to grant an order of prohibition on the basis that the respondent lacked jurisdiction.

44. These findings alone are sufficient to dispose of the appellant's jurisdictional arguments. Consequently, I do not think it necessary to embark upon a detailed analysis of the rule in *Turquand's* case and of its potential application to complaints made by companies to statutory bodies, or indeed the broader question of its application to the interactions between companies and statutory bodies more generally. I would be inclined to agree with trial judge's view that the principle in that case extends to other actions taken by officers of

a company on its behalf, including actions in connection with the making of an application under the 1960 Act. Contrary to what the appellant suggests, the application of the rule in this manner does not confer upon the officers of a company an authority which they do not otherwise have but allows a statutory body to interact with a company without having to satisfy itself of the regularity of the company's internal proceedings (to paraphrase Keane CJ in his textbook "*Company Law*"4th Edn, at para. 12.35). I think the trial judge was correct to take the view that the court could and should adopt a realistic and sensible approach to the circumstances as presented to the respondent.

45. In conclusion I am satisfied that this limb of the appellant's appeal should also fail. As the appellant has not succeeded on either element of his appeal, the appeal should be dismissed and the order of the learned High Court judge affirmed.

46. Whelan J. and Pilkington J. have read and agreed with this judgment.

47. With regard to the question of costs, the Court's preliminary view is that as the appeal has been unsuccessful the appellant should pay the respondent's costs (as in the High Court) and would propose making an order in those terms. If either party wishes to take issue with that proposed order, they have liberty to do so by filing a written submission not exceeding 1,000 words within 28 days of the date of this judgment as to the appropriate form of order. The other party shall have liberty to file a reply to those submissions within a further 14 days.