THE HIGH COURT

[2022] IEHC 13

[Record No. 2020/295 JR]

BETWEEN:-

O'C.

APPLICANT

AND

THE SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT

AND

NIRVANA PROPERTY HOLDINGS LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 14th day of January, 2022.

Introduction.

1. This is a challenge by the applicant solicitor, to a ruling made by the respondent in the course of an inquiry into alleged misconduct on the part of the applicant, wherein the respondent granted an adjournment of the hearing to a Mr. Fleming, who was either the company secretary or a director of the complainant company (the notice party), to enable the company to obtain legal representation to be represented before the Tribunal.

2. The applicant maintains that, having embarked on the substantive hearing and having acceded to the preliminary objection taken on behalf of the applicant, that a company could not be represented before the Tribunal by one of its officers, but could only appear by retaining a solicitor and/or barrister; the respondent erred in law in granting an adjournment of the hearing, on the application of Mr. Fleming. It was submitted that the respondent should have proceeded to dismiss the entire complaint against the applicant.

3. In the alternative, the applicant submitted that the respondent lacked jurisdiction to deal with the substantive application for an inquiry that had been lodged by Mr. Fleming on behalf of the company, because there was no evidence before the respondent that the company had passed any resolution authorising Mr. Fleming to make the application on its behalf. It was submitted that this was a fatal defect in the proofs, which denied the respondent jurisdiction to embark on the inquiry.

4. The applicant seeks a number of reliefs, to include an order of certiorari of the Tribunal's decision to adjourn the proceedings and an order of prohibition preventing it from taking any further steps in the inquiry.

5. On behalf of the respondent, it was submitted that, (a) as the applicant had a statutory right of appeal against any finding that may be made by the respondent at the end of the inquiry, it was inappropriate for this court to interfere in the conduct of the inquiry by way of an application for judicial review; rather than allowing the matter to proceed and allowing the applicant to appeal that decision, if he wished to do so; and (b) the Tribunal was entitled to make whatever orders it deemed necessary, including an order adjourning the hearing, so as to ensure that the inquiry upon which it had embarked, was carried out in a fair and proper manner. It was submitted that the rules of procedure under which the

respondent operated, clearly provided that it had the power to adjourn the proceedings from time to time, as necessary.

6. In relation to the jurisdiction point, it was submitted that both s. 7 of the Solicitors (Amendment) Act 1960 (as amended), and the Solicitors Disciplinary Rules 2003, which governed procedures before the respondent, made it clear that applications could be made on behalf of another person, who wished to claim that there had been misconduct on the part of their solicitor.

7. Counsel for the respondent pointed to the fact that the forms DT1 and DT2, the necessary application forms for an inquiry into the conduct of a solicitor, which had been filled out in this case, made it clear that the application for an inquiry had been made by Mr. Fleming on behalf of the notice party. Prior to the commencement of the substantive inquiry on 11th February, 2020, there had been numerous preliminary applications before the respondent which dealt with procedural matters, primarily attempting to fix the date for the substantive hearing of the inquiry. On various occasions an adjournment had been sought by the applicant and on other occasions, either Mr. Fleming had not appeared, or he had sought an adjournment or postponement of the commencement date of the substantive hearing for one reason or another. At none of these "for mention" dates, did counsel for the applicant take any objection to Mr. Fleming appearing on behalf of the notice party and making representations on its behalf.

8. Counsel pointed out that at page 14 of the transcript of the hearing on 11th February, 2020, counsel for the applicant had expressly conceded that Mr. Fleming had had authority to represent the company at the previous hearings.

9. It was pointed out that it was only at the hearing of the substantive inquiry, some 10 years after the date on which the application for an inquiry had first been lodged on behalf of the company, that counsel for the applicant for the first time, had raised the objection based on the decision in *Battle v Irish Art Promotion Centre Ltd* [1968] IR 252, that the company could not be represented before the Tribunal by one of its officers, but could only be represented by a solicitor and/or counsel.

Issues for Determination in these Proceedings.

10. The court is of the view that the following issues arise for determination in these proceedings:

    (a) Whether judicial review is the appropriate remedy at this stage in the proceedings;

    (b) Whether the respondent was entitled to grant an adjournment to Mr. Fleming to enable him to obtain legal representation for the notice party;

    (c) Whether the respondent had been obliged to inquire into whether the company had authorised Mr. Fleming to make the complaint on its behalf and whether the respondent ought to have demanded production of a resolution of the members in general meeting, or of the board of directors of the notice party, authorising Mr. Fleming to act on its behalf, and in the absence of such proof, whether the

respondent ought to have held that it lacked jurisdiction and on that basis, ought to have dismissed the complaint against the applicant.

Background.

11. There is an extremely long background to these proceedings. The application for an inquiry pursuant to s. 7 of the Act was made by Mr. Tom Fleming and Mr. Sean Fleming on behalf of the notice party on 30th May, 2010. On that date, they completed a form DT1(a) and swore an affidavit in the form provided for in DT2(a).

12. In the application made on behalf of the notice party, it was stated that the applicant had acted as solicitor for the company in 2003, when it purchased certain lands in County Mayo. The events which are alleged to constitute misconduct on the part of the applicant in his role as solicitor for the company, were said to have arisen in 2006 in connection with the sale of those lands. It is neither necessary or desirable for the court to say anything further about the substance of the complaint brought by Mr. Fleming on behalf of the company against the applicant.

13. It is only fair to point out that the applicant swore a detailed affidavit on 21st July, 2010, in which he vehemently denied the allegations that had been made against him by Mr. Fleming on behalf of the notice party.

14. Mr. Tom Fleming and Mr. Sean Fleming on behalf of the company made an application to the respondent for the holding of an inquiry as to whether the applicant had been guilty of misconduct in his handling of the transaction. On 8th February, 2011 the respondent found that there was a *prima facie* case of misconduct on the part of the applicant and directed that an inquiry should be held.

15. There were a number of preliminary hearings before the respondent, when the matter was listed for mention to try to agree a date for the commencement of the hearing of the substantive inquiry.

16. On the 19th May, 2011, the applicant made the case that the inquiry could not proceed, due to the fact that the notice party had instituted civil proceedings before the High Court against a Mr. P., who had been the principal behind the company, which had purchased the lands from the notice party. It was asserted by the applicant that Mr. P. was an essential witness on his behalf. However, Mr. P. was not willing to give evidence before the respondent, while there were High Court proceedings extant against him, for fear that his answers would incriminate him in those proceedings. The Tribunal acceded to the applicant's application for a postponement of the start of the inquiry on that basis.

17. The matter next came before the respondent on 5th April, 2017, at which time the company was not represented before the Tribunal. The latter was put back for mention to October 2017.

18. On 11th October, 2017, the matter was again listed for mention. The applicant was represented by counsel. Mr. Fleming appeared on behalf of the company. The respondent

ordered that the matter should be set down for hearing, with a date to be fixed by the Tribunal Registrar.

19. On 31st May, 2018 the applicant again sought to have the inquiry adjourned, due to the existence of certain actions then pending before the High Court. The respondent adjourned the matter pending the determination of those proceedings. On 14th December, 2018, the parties were notified that the inquiry would commence on 24th January, 2019. The applicant again applied for an adjournment on 15th January, 2019. The respondent acceded to the applicant's request. On 30th May, 2019 the matter was listed for mention before the respondent. The applicant was represented by counsel. There was no appearance on behalf of the company. The matter was adjourned again.

20. Ultimately, when the matter was mentioned before the respondent on 21st November, 2019, it was confirmed that professional negligence proceedings, which the company and/or Mr. Fleming had instituted against the applicant in the High Court, had been settled. It was also confirmed by Mr. Fleming that the proceedings against Mr. P. had also been disposed of. On this basis, there was no further impediment to the inquiry proceeding and the hearing date for the substantive inquiry was fixed for 11th February, 2020.

The Hearing on 11th February, 2020.

21. It is necessary to set out a brief summary of what occurred at the hearing held before the respondent on 11th February, 2020. On that occasion, the applicant was represented by Mr. Mullooly BL, instructed by Staunton Caulfield and Co., solicitors. Mr. Tom Fleming appeared on behalf of the company.

22. It is clear from the transcript, that the Tribunal appeared to have been under the impression at the outset that the complainant was Mr. Fleming, rather than the company. That is clear from the initial interaction between the chairperson and Mr. Fleming. After the chairperson had given a brief explanation of the procedure that would be adopted, counsel for the applicant indicated that he had a preliminary application to make.

23. Counsel for the applicant made a submission based on the authority of *Battle v Irish Art Promotion Centre Ltd* [1968] IR 252, that the company could not be represented before the Tribunal by Mr. Fleming, being an officer of the company. He submitted that the company could only be represented by solicitor and/or counsel. In the course of his submission, counsel referred to a number of cases which considered the principles set down in *Battle v Irish Art Promotion Centre.*

24. In the course of his submission, counsel referred to the decision in *Pablo Star Media Ltd v EW Scripps & Co* [2015] IEHC 828, where it was held by Humphreys J. that, while an officer of the company could be permitted to represent the company and make submissions to the court at purely procedural hearings, it was not permissible for them to represent the company at the hearing of the substantive matter. In the course of his submission, counsel accepted that it was appropriate for the company to be represented

by one of its officers when making purely procedural applications (see pages 14 – 15 of the transcript).

25. In the course of making that submission, counsel also made somewhat of a "rolled up plea", to the effect that there was no proof before the Tribunal that the company had passed any resolution authorising either Mr. Tom Fleming or Mr. Sean Fleming, to make a complaint to the respondent on its behalf. On this basis, it was submitted that the respondent lacked jurisdiction to deal with the complaint by the company. While the jurisdiction point was referred to by counsel at pages 7 and 20 of the transcript, it is fair to say that the main thrust of his application was in relation to the representation issue.

26. When Mr. Fleming was given a short period to consider the application made on behalf of the applicant, he applied for an adjournment of the hearing. Counsel for the applicant opposed that, on the basis that Mr. Fleming was merely trying to "mend his hand" on behalf of the company.

27. The Tribunal rose to consider its ruling. When it returned, it indicated that it had decided to make a finding on the preliminary issue that had been raised by counsel for the applicant, being the issue in relation to whether Mr. Fleming could represent the company before the Tribunal.

28. Having referred to some of the cases that had been opened to it in the course of argument, the Tribunal gave its ruling, as follows:

> *"This Tribunal is satisfied that the law is clearly established. A person appearing in court can represent himself or be represented by his solicitor, or by counsel instructed by his solicitor. A company cannot represent itself and cannot be represented by a director or shareholder. The Tribunal is also satisfied that there is no evidence of any exceptional circumstances existing in this matter, which would justify Mr. Fleming being permitted to represent the company today. Accordingly, we are acceding to the application that has been made."*

29. The Tribunal then referred to the decision in *Stephens v Orange* (Unreported, High Court, Finnegan P., 18th March, 2005) and held that once it had decided that there was a *prima facie* case against a solicitor, the respondent was obliged to hold an inquiry into the matter. There was then some discussion as to whether the respondent should grant an adjournment to enable the company to get legal representation. Mr. Fleming stated "*Well I would just like time to get a solicitor on board to represent us*". To which counsel for the applicant stated: "*In fact I would point out to the Tribunal that, having made a finding that Mr. Fleming is not entitled to represent the company, that's the end of it. He cannot now apply for an adjournment or cannot now seek to represent the company in the way that he is seeking to do*." Counsel went on to state that as the Tribunal had reached a decision to hold with his submission on the preliminary point, the Tribunal must go on to take the next step, which he submitted should not be an adjournment of the proceedings, but should be a dismissal of the proceedings against his client.

30. The Tribunal rose again to consider the issue of an adjournment of the proceedings. When they returned, the respondent pointed out that the substantive hearing had not commenced. They held that as counsel had raised a preliminary matter, the substantive hearing had not actually commenced. They went on to hold that they had power under the Solicitors Disciplinary Rules 2003, in particular under rule 21, to postpone the taking of any steps, or further steps in the matter for a specified period. In the circumstances, the Tribunal granted an adjournment of the matter and relisted it for hearing on 29th April, 2020.

Submissions On Behalf Of the Applicant.

31. In essence, the applicant makes two primary submissions. Firstly, that once the respondent held with the submission that had been made on behalf of the applicant, to the effect that Mr. Fleming could not represent the company at the hearing before the Tribunal, they had then fallen into error in failing to continue with the hearing and dismiss the complaint against the applicant.

32. It was submitted that once the substantive hearing had commenced on 11th February, 2020, the respondent ought to have continued with the hearing and in the absence of the company being properly represented before it, the respondent should have dismissed the complaint. Counsel accepted that on the authority of the decision in *Stephens v Orange,* the respondent could not strike out the complaint, as it was obliged to proceed to hold an inquiry once it had found that there was a *prima facie* case against the solicitor concerned. However, it was submitted that once the substantive inquiry had commenced, the Tribunal ought to have dismissed the complaint as the company had effectively not appeared before the Tribunal to pursue its complaint.

33. It was further submitted that, in purporting to rely on rule 21 as a basis for granting the adjournment, the Tribunal had fallen into error, because that rule only allowed for an adjournment of a hearing where it was anticipated that the complaint would be withdrawn prior to the matter resuming before the Tribunal.

34. The second area in which it was submitted that the Tribunal had fallen into error, was in failing to accede to the submission that had been made on behalf of the applicant, that the Tribunal did not have jurisdiction to deal with the complaint, as there was no evidence before it of any resolution having been either by the Board of Directors, or by the members in general meeting, authorising Mr. Tom Fleming or Mr. Sean Fleming to make the application on behalf of the company.

35. It was submitted that the absence of any evidence as to the existence of such a resolution, deprived the Tribunal of jurisdiction to deal with the matter. It was submitted that rule 1(a) of the Solicitors Disciplinary Rules 2003, defined "applicant" as an "*applicant to the Tribunal for an inquiry*" and went on to state that "*a reference to the applicant furnishing documents to the Tribunal includes a solicitor or other person doing so for and on behalf of and with the authority of the applicant."*

36. It was submitted that where there was no evidence before the Tribunal at the outset that the application had been made "*with the authority of the applicant*", the Tribunal did not have jurisdiction to enter upon the inquiry. It was submitted that the absence of any affidavit or documentary proof of the passing of the necessary resolution by the company, deprived the respondent of jurisdiction to hold the inquiry.

37. Counsel referred to the decision in *Re Aston Colour Print Ltd* [1997] IEHC 33 as authority for the proposition that proof of the making of a resolution authorising the bringing of proceedings on behalf of the company, was a necessary proof in order to ground jurisdiction.

38. Insofar as it had been argued by the respondent, that the applicant could not raise the jurisdiction issue at the hearing on 11th February, 2020, or in these proceedings, due to the fact that it had never raised the issue earlier and that therefore the applicant was guilty of waiver or acquiescence and that that was sufficient to give jurisdiction to the Tribunal; it was submitted that a person could not confer jurisdiction on a court by acquiescence or by consent, when the court did not have jurisdiction to deal with the matter: see *DPP v Hickey* [2008] IR 31.

39. It was submitted that in these circumstances, where the Tribunal had not ruled on the applicant's submission on the jurisdiction point, it was appropriate for this court to strike down the ruling of the Tribunal made on 11th February, 2020 and to grant an order of prohibition on the Tribunal continuing with its inquiry, on the grounds that it had no jurisdiction to hold such an inquiry.

Submissions On Behalf Of the Respondent.

40. It was submitted that both the 1960 Act and the Solicitors Disciplinary Rules 2003, governing the holding of inquiries before the Tribunal, made it clear that applications for an inquiry could be made by or on behalf of another person. It was submitted that the forms DT1 and DT2 that were submitted in this case on behalf of the company, had been submitted by officers of the company. That was permitted by the statutory provisions and by the rules.

41. It was submitted that the 2003 Rules made it clear that the Tribunal enjoyed wide powers to adjourn or postpone the holding of the inquiry as and when the Tribunal saw fit. In this regard counsel referred to rules 47, 54, 36, 39(c), 43, 52(a) and 21.

42. It was submitted that the respondent was entitled under the rules to postpone taking any further steps in the inquiry, once it had considered the submission made by the applicant on the representation issue.

43. It was pointed out that it was only at the hearing on 11th February, 2020, that the applicant for the first time, some 10 years after the making of the initial complaint and after many procedural hearings where Mr. Fleming had represented the company without objection, had first raised the objection in relation to Mr. Fleming representing the company before the respondent. It was submitted that in such circumstances it was

reasonable and in accordance with the dictates of justice and within jurisdiction, for the Tribunal to have granted an adjournment on the application of Mr. Fleming, to enable the company to obtain legal representation.

44. On the jurisdiction issue, it was submitted that the 1960 Act and the rules, made it clear that an application could be made by or on behalf of the company. It was submitted that Mr. Tom Fleming had been the company secretary at the time when the initial complaint was lodged on behalf of the company and he was stated by the applicant to be a director of the company by the time the matter came on for hearing in February 2020. He was also a shareholder in the company. Mr. Sean Fleming had been a director of the company and a shareholder in the company at the time when the initial complaint had been made in May 2010.

45. Counsel pointed out that in his DT3 affidavit, the applicant had stated as follows:

> *"Mr. [Tom] Fleming is now the company secretary of Nirvana 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."*

46. Counsel further pointed out that at the hearing on 11th February, 2020, counsel for the applicant had effectively conceded that Mr. Fleming had had authority to represent the company in the multiple procedural hearings that had been held prior to that date (see p. 14 of the transcript).

47. It was submitted that, as the applicant had not raised any objection to Mr. Fleming representing the company at previous hearings before the Tribunal, it was too late for him to raise that objection at such a late stage, over 10 years after the date on which the initial complaint had been made. Similarly, where the applicant had accepted the jurisdiction of the respondent to hold the inquiry and had effectively participated in its hearings prior to the substantive hearing without objection to jurisdiction, he had to be taken as having either waived his objection to any want of jurisdiction, or had acquiesced in the Tribunal having jurisdiction in the matter and therefore the objection in this regard should not be allowed.

Conclusions.

48. Having considered the papers in this matter, along with the submissions of counsel, the court has reached the following conclusions on the issues raised in this application.

The Adjournment Issue.

49. The Tribunal was about to commence the substantive hearing of the inquiry on 11th February, 2020. That would have involved the giving of evidence on behalf of the company, as the complainant, together with cross examination of the complainant's witnesses and the giving of whatever evidence the applicant/solicitor wished to call on his own behalf.

50. However, before that took place, counsel for the applicant made a preliminary objection, to the effect that the company could not be represented before the Tribunal by one of its

officers. That submission was based on the following cases: *Battle v Irish Art Promotion Centre Ltd; McDonald v McCaughey Developments Ltd* [2015] IECA 159; *Dublin City Council v Marble & Granite Tiles Ltd* [2009] IEHC 455; *Re Application for Orders in Relation to Costs in Intended Proceedings by Coffey & Others* [2013] IESC 11 and *Pablo Star Media Ltd v EW Scripps & Co* [2015] IEHC 828.

51. The respondent considered the submissions that had been made on behalf of the applicant and the responding submissions made by Mr. Fleming. Having retired to consider its decision, the respondent returned and ruled in favour of the applicant. It held that the company could not be represented before the respondent by its company secretary/director. That could only be done by the company engaging legal representation by a solicitor and/or counsel.

52. Mr. Fleming then applied for an adjournment to enable legal representation to be obtained on behalf of the company. Counsel for the applicant objected to an adjournment. He urged the respondent to dismiss the application in its entirety, due to the fact that the complainant, being the company, was not in a position to proceed with its application for an inquiry, as it did not have legal representation before the Tribunal on that date.

53. The respondent ruled that in the circumstances which had arisen, where the company could not proceed with its application for an inquiry, or progress its complaint in relation to the alleged misconduct on the part of the applicant, because it did not have legal representation before the Tribunal on that date; it was appropriate to grant an adjournment to enable the company to obtain the necessary legal representation.

54. The court is satisfied that a disciplinary body, such as the respondent, always has an inherent jurisdiction to conduct its procedures in the way that it regards as being fair to the parties before it. The court is satisfied that the respondent had jurisdiction to grant an adjournment on the application of Mr. Fleming, who was the company secretary or a director of the company at that time, so as to enable the company to obtain the necessary legal representation, to enable it to progress its application and complaint before the Tribunal.

55. The court is further satisfied that the rules of procedure of the respondent clearly give jurisdiction to the respondent to adjourn or postpone proceedings from time to time as it sees fit. The respondent had exercised that jurisdiction without complaint from either party in the previous nine years, when it had postponed the commencement of its inquiry from time to time, for various reasons.

56. In particular, rule 47 provides that if an applicant does not appear at an inquiry, the Tribunal may strike out the application, or adjourn the inquiry on such terms as the Tribunal thinks fit. Rule 54 provides that the Tribunal shall hold an inquiry at such date, time and place as the Tribunal Registrar shall designate; and the Tribunal may adjourn the consideration of any matter at an inquiry from date to date and from time to time and from place to place, as the Tribunal thinks fit. This gives the Tribunal a wide degree of flexibility as to how it regulates the procedure at an inquiry. Rule 12 provides that an

inquiry may be adjourned from time to time by the Tribunal for the purpose of hearing further evidence, or receiving submissions or both, or otherwise. Rules 39(c), 43, and 52(a) envisage that the date of an inquiry may be adjourned.

57. Rule 21, which was the rule cited by the respondent in its ruling, states as follows:

> *"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."*

58. The court is satisfied that the respondent had jurisdiction to grant an adjournment upon the application of Mr. Fleming on behalf of the company, in light of the ruling that had been made by the Tribunal on the preliminary objection that had been raised by counsel for the applicant. That jurisdiction arose under various provisions of the rules, as outlined above. The court is satisfied that the Tribunal had jurisdiction under rule 21 to adjourn the matter for a definite period. The jurisdiction to grant an adjournment under that rule, was not dependent upon the applicant for the inquiry withdrawing his or her application within that period. The rule merely provides that if that was done, the Tribunal had the option of deciding that no further step should be taken in relation to the application.

59. The court is satisfied that in granting the adjournment to Mr. Fleming, the respondent was acting in a rational and fair way in the conduct of the proceedings before it. In particular, the respondent was entitled to have regard to the fact that no objection had been taken by the applicant to Mr. Fleming representing the company before the respondent at the various procedural hearings that had been held in the previous nine years.

60. In these circumstances, it was reasonable for both the company and Mr. Fleming to presume that the applicant was not going to object to Mr. Fleming representing the company, as he had done on previous occasions. When the objection to the lack of legal representation on the part of the company was raised for the first time by the applicant at the commencement of the substantive hearing on 11th February, 2020, it was reasonable for the respondent to grant an adjournment to the company, on the application of Mr. Fleming, so as to enable it to obtain the necessary legal representation.

61. That adjournment, which was anticipated at the time would only be of short duration until the next hearing date, which was fixed for 29th April, 2020, would not have caused any prejudice to the applicant in the conduct of his defence of the allegations made against him.

62. It is only the events that have transpired, being the onset of the COVID-19 pandemic and the bringing of these judicial review proceedings, that have resulted in the failure to resume the inquiry before now.

63. The court is satisfied that the respondent was entitled to consider the adjournment application and was entitled to grant it in the circumstances which arose for the first time on 11th February, 2020.

64. The court is satisfied that the respondent was entitled to conduct the proceedings before it in the way that it thought best complied with the dictates of fairness and justice. The court is of the view that granting an adjournment to Mr. Fleming to enable the company to get legal representation, was a fair and reasonable thing to have done in the circumstances. It ensured that the company could make its case before the Tribunal, while at the same time not causing any prejudice to the applicant in his defence of the allegations that had been made against him. The court declines to overturn the Tribunal's decision in this regard.

The Jurisdiction Issue.

65. It is important at the outset to bear two matters in mind: firstly, the respondent did not rule on the jurisdiction issue that had been raised by the applicant. The Tribunal's ruling on 11th February, 2020 solely dealt with the preliminary objection that Mr. Fleming was not entitled to represent the company at the hearing before the Tribunal. The Tribunal made it clear that it was only going to rule on that aspect. Thus, there was no ruling by the respondent on the jurisdiction issue.

66. Secondly, it is important to bear in mind that neither Mr. Fleming, nor the company, effectively had the chance to make any submissions on the jurisdiction issue. That issue was not addressed on behalf of the company on 11th February, 2020. The views of the company, as the complainant in this case, on the issue of jurisdiction were not heard by the Tribunal.

67. In relation to the jurisdiction issue, the court is not satisfied that there is any substance in this point. The provisions of s. 7 of the 1960 Act make it clear that an application for an inquiry can be made on behalf of another person. In this case it is accepted that Mr. Tom Fleming was at all material times, either the company secretary of the company, or was a director of the company. He was also a shareholder in the company. There was nothing wrong with Mr. Tom Fleming and Mr. Sean Fleming, who was also a director and shareholder, making the application for an inquiry on behalf of the notice party as set out in the forms DT1(a) and DT2(a), completed on 30th May, 2010.

68. The applicant has argued that there was an obligation on the respondent to make inquiry as to whether the company had in fact authorised Mr. Tom Fleming and Mr. Sean Fleming to make the application for an inquiry on its behalf. There is more than an air of unreality about this submission, given the fact that Mr. Fleming has asserted that the applicant had acted as solicitor for the company since in or about 2003 and in particular; had acted for

the company in relation to the transaction which is the subject matter of the complaint in this case.

69. In addition, the fact that the initial application had been made on behalf of the company by people, who were officers of the company, and when one of them, in his role as company secretary and/or director, had appeared before the Tribunal on a number of occasions, when the matter had been listed for mention to deal with procedural matters, there is an air of unreality in the submission that the company may not have authorised Mr. Fleming to act on its behalf.

70. The rule in *Royal British Bank v Turquand* [1856] 6 E&B 327, provides that where third parties are dealing with officers of a company, they are entitled to assume that those officers have been properly authorised to enter into the contract or transaction on behalf of the company. The rule was described in the following way by Keane C.J. in his textbook, "Company Law", 3rd edition, at para. 12.34:

> *"The rule in its original form may be stated as follows. While persons dealing with the company are assumed to have read the public documents of the company (i.e. the memorandum and articles) and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more: they need not enquire into the regularity of the internal proceedings – the indoor management – of the company and may assume that all is being done regularly."*

71. While that rule primarily relates to third parties entering into contracts with officers of the company, who are purporting to act on behalf of the company, the court is satisfied that the principle established in that case extends to other actions taken by officers of the company on its behalf.

72. The court is satisfied that where the company secretary and a director of the company lodge a complaint on behalf of a company, the respondent is entitled to accept that application for an inquiry, without inquiring into whether the company secretary and director have been properly authorised in that regard.

73. Where one of them, being the company secretary/director, had extensive dealings with the respondent in relation to procedural matters on behalf of the company, it was not necessary for the Tribunal at the outset of the substantive hearing to inquire into whether the director was properly authorised, either by a resolution of the Board of Directors, or by a resolution of the members of the company in general meeting, to bring the application before the Tribunal for an inquiry and to make a complaint on behalf of the company.

74. The court is satisfied that adopting a realistic and sensible approach to the circumstances as presented to the Tribunal, it was entitled to assume that Mr. Fleming had the requisite authority, either from the Board of Directors, or from the members in general meeting, to make the complaint to the respondent on behalf of the company and to represent the company before the respondent for the purposes of the inquiry. In the course of

presenting the application/complaint on behalf of the company, the necessary authorisation of the company would have to be proven in evidence.

75. The court is further satisfied that it would not be appropriate to grant an order of prohibition in the circumstances of this case. It may be possible for a party to seek such an order, prior to the holding of an inquiry by an administrative body, where it is clear that that administrative body could not possibly have jurisdiction in the matter. For example, if the respondent in this case had ordered that an inquiry be held into the conduct of a person, who was an accountant and not a solicitor. In such circumstances, the person concerned could seek an order of prohibition to prevent the Tribunal embarking on an inquiry, because it would be very clear from the outset that the Tribunal did not have jurisdiction to rule on the conduct of accountants.

76. However, where the respondent could have jurisdiction to entertain a complaint against a solicitor, where such complaint was made on behalf of another person, subject to that authority being properly proved at the hearing of the inquiry; this court should not make any assumption that proof of the necessary authority by means of a resolution of the Board of Directors, or the members, will not be established, when the person seeking the inquiry goes into evidence at the hearing of the substantive application.

77. In the course of argument, counsel for the applicant referred to the decision in *Aston Colour Print Ltd* as support for the proposition that proof of such a resolution is necessary. That case concerned a dispute between the directors and controllers of the company, as to whether the necessary resolution had been passed that the company should be placed in examinership. It was in those circumstances, where there was a dispute as to the making of the necessary resolution, that Kelly J. (as he then was) held that proof of the necessary resolution was required to establish the jurisdiction of the court to place the company into examinership. That decision does not establish that in the circumstances of this case, the respondent could not embark on the inquiry, until proof of the necessary resolution had been furnished.

78. One has to remember that proof that the application for an inquiry was made with the authority of the company, does not mean that such authority has to be contained in writing. At the hearing of the inquiry, it would be a necessary proof that the company had resolved to make a complaint against the applicant under the 1960 Act. However, it would only be if proof of the making of the necessary resolution, either by the Board of Directors or by the members, was not forthcoming, that the Tribunal would lack jurisdiction. If such proof was absent at the conclusion of the company's case, the necessary application could be made on behalf of the applicant.

79. Even if the court is wrong in its conclusion that the Tribunal was entitled to proceed on the basis that Mr. Fleming had been validly authorised to act on behalf of the company in making an application for an inquiry on its behalf, the court is satisfied that having regard to the ruling that had been made by the respondent on the preliminary issue of whether Mr. Fleming could represent the company at the hearing before the respondent; the

respondent could not have embarked on an examination of the jurisdiction issue after it had ruled against the company on the representation issue.

80. The respondent could not have required the notice party to establish that Mr. Fleming had the necessary authority to make the application for an inquiry on its behalf, because the notice party was not legally represented at that hearing. Accordingly, the company could not have called the necessary evidence to establish that Mr. Tom Fleming and Mr. Sean Fleming had the required authority to act on behalf of the company when submitting the forms DT1 and DT2.

81. It is a fundamental requirement of fairness of procedures that both parties to a dispute are entitled to be heard. Once the respondent had reached the conclusion that the company could not be represented before it by its company secretary/director, it could not have ruled on the jurisdiction point, as the company did not have a right of audience before it on 11th February, 2020, due to the fact that it did not have legal representation before the respondent on that date. If the respondent had made any determination on the jurisdiction issue, without affording the company an opportunity to be heard on that aspect, it would have breached the principle of *audi alteram partem.*

82. For this reason, the court holds that the respondent did not act unlawfully or unfairly in refusing to deal with the jurisdiction point that had been raised by counsel on behalf of the applicant, having regard to its earlier ruling that the company did not have standing before it to make representations on any substantive issue.

83. Having regard to the findings made by the court on the jurisdiction issue, it is not necessary for the court to make any finding in relation to the issues of waiver and acquiescence that were raised in the course of argument at the bar.

Decision.

84. For the reasons set out herein the court makes the following findings in relation to the key issues that arise for determination in these proceedings:

    (a) The court is of the view that ordinarily it would be inappropriate for this court to interfere in the ongoing conduct of an inquiry before an administrative Tribunal; however, there are unusual circumstances in this case which make it appropriate for the court to deal with the issues that have been raised on this judicial review application. In particular, the fact that there has been a lengthy hiatus in the conduct of the inquiry, due to matters that are unrelated to the inquiry, being the onset of the COVID-19 pandemic, the court is satisfied that it is appropriate to allow the applicant to raise the issues that he has in these proceedings.

    (b) For the reasons set out herein, the court is satisfied that the respondent had jurisdiction under its rules of procedure, as well as an inherent jurisdiction, to grant an adjournment, where it considered that it was necessary in the interests of fairness and justice to do so. The court is satisfied that in granting the adjournment

in the circumstances that arose in this case, the respondent acted reasonably, logically and in accordance with the dictates of fairness and justice.

(c) The court is satisfied that where an officer of a company swears an affidavit on its behalf; where he represents the company at procedural hearings in advance of the substantive hearing and purports to represent the company at the substantive hearing; the Disciplinary Tribunal hearing the matter was entitled to proceed on the basis that the director had been properly authorised to represent the company; subject to proof of the necessary authority being established in the course of the complainant's evidence.

85. Akin to the application of the rule in *Royal British Bank v Turquand*, the respondent was not obliged to enquire into the indoor management of the company, to ensure that Mr. Fleming was properly authorised to represent the company before it. The fact of his having the required authority at the time that the application was first lodged, would be one of the necessary proofs to be adduced in evidence by the applicant at the hearing of the substantive application.

86. Even if the court is wrong in that finding, the court is satisfied that once the respondent ruled that Mr. Fleming did not have a right of audience before it to represent the company, and therefore the company itself did not have a right of audience at that hearing; it would have been contrary to the dictates of justice and fairness for the Tribunal to have determined the jurisdictional issue, without giving the company an opportunity to be heard on that issue. Accordingly, the respondent was correct to decline to make a finding on the jurisdiction issue.

87. During the course of the hearing before this court, the applicant furnished a further affidavit sworn on 10th December, 2021, which exhibited a medical certificate from St Vincent's University Hospital dated 21st October, 2021. This medical certificate had come into the possession of the applicant's solicitor on 19th November, 2021. It related to the health of Mr. P. at that time. In the medical certificate, Mr. P.'s treating consultant, stated that Mr. P. was terminally ill and was receiving palliative treatment.

88. While no specific submission was made to the court on the basis of this affidavit, or the medical certificate exhibited therein, if it transpires that Mr. P. will not be in a position to give evidence before the respondent when the inquiry resumes, either in person, or through a remote platform, or by means of evidence taken on commission, the applicant will be in a position to make whatever application he may be advised by his legal advisers to be appropriate in those circumstances. This court does not know whether Mr. P. will be in a position to give evidence before the respondent at some future date. The court cannot speculate in that regard.

89. For the reasons set out herein, the court refuses all the reliefs sought by the applicant in these proceedings.

90. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matter that may arise.