

REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE

Submission by the Professional Regulatory and Disciplinary Bar Association in relation to Order 95 of the Rules of the Superior Courts, 1986

1. The Professional Regulatory and Disciplinary Bar Association (PRDBA) is a specialist bar association whose members practise in the area of professional regulatory law.
2. This Submission is made pursuant to the request issued on 29 November 2017 by the Civil Justice Review Group. This Submission addresses issues under the area of *“improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure”*.
3. At present, Order 95 of the Rules of the Superior Courts, provides for certain applications to the High Court in relation to professional disciplinary bodies to be made by way of special summons. The current rule is out of date, has not been amended to reflect many legislative changes, and does not refer to many professional disciplinary bodies whose legislation require applications to be made to the High Court. In addition, there is an overlap between Order 95 and Orders 84B and 84C which deal with procedure in statutory applications and statutory appeals. The PRDBA suggests that Order 95 is unnecessary and could be omitted from the Rules of the Superior Courts.
4. When Parliament first introduced regulation of the professions, it was not generally thought necessary to have a procedure for either confirmation or appeals to decisions in Court. For example, s.29 of the Medical Act 1858 allowed the General Medical Council direct the Registrar to erase the name of a medical practitioner from the Register, without confirmation by the Court. The Rules of the Supreme Court (Ireland) 1905 do not appear to have made reference to professional disciplinary bodies.
5. By 1962, the legal position had changed and Order 95 of the Rules of the Superior Courts 1962 set out the procedure to be followed in an appeal to Court under s.29 of the Medical Practitioners Act 1927, s.33 of the Dentists Act 1928, s.39 of the Veterinary Surgeons Act 1931, s.49 of the Nurses Act 1950 or sections 30 or 39 of the Opticians Act 1956. At that stage, appeals were brought by way of petition. The rules only provided for confirmation of a disciplinary body’s decision in relation to s.34(4) or 36(6) of the Veterinary Surgeons Act 1931.
6. The introduction of this rule reflected this decision by the Oireachtas to grant a statutory appeal to professionals against decisions to erase them from the relevant register. For example, by s.29(3) of the Medical Registration Act 1927 it is provided that:

“Any person whose name is erased from the Register under this section may within three months after the receipt by him of the notice mentioned in the foregoing sub-section appeal to the High Court in accordance with Rules of Court against the judgment of the Council in consequence of which his name was so erased from the Register...”

7. A further change to the procedure in professional disciplinary applications was a consequence of the decision of the Supreme Court in *In Re Solicitors Act 1954*.¹ In that case, the Supreme Court found that the power to strike a solicitor off the roll of solicitors was, when exercised, an administration of justice and that to entrust such a power to persons other than judges was to interfere with the necessity of the proper administration of justice.
8. As a consequence of this decision, it was clearly necessary to provide for judicial involvement in the imposition of sanction in certain professional disciplinary matters. This was recognised by the Supreme Court in *K v An Bord Altranais*² where the Supreme Court found that, in relation to the Nurses Act 1985:

“The essence of the procedure contained in this Act for the regulation of the registration and disciplining of members of the nursing profession is that it is in the court, namely the High Court, that the decision effective to lead to an erasure or suspension of the operation of registration must be made. The necessity for that procedure to vest that power unequivocally in the court, in my view, arises from the constitutional frailty that would attach to the delegation of any such power to a body which was not a court established under the constitution, having regard to the decision of the former Supreme Court in In Re Solicitors Act.

...

In order for the Court to be the effective decision making tribunal leading to a conclusion that the name of a person should be erased from the Register or the operation of registration should be suspended it is, in my view, essential that having regard to the particular facts and issues arising in any case, it is the Court who should make the vital decision.”

9. As a consequence of these decisions, professional disciplinary statutes typically provide for applications to the High Court in order to confirm all but the most minor of sanctions, as well as to provide for appeals. The Rules of the Superior Courts, 1986, again made provision for applications in relation to professional disciplinary bodies by a new Order 95. Instead of prescribing appeals to be by way of petition, it provided for appeals by way of special summons.
10. The Rules of Court refer to the Veterinary Surgeons Act 1931, the Medical Practitioners Act 1978, the Dentists Act 1985 and the Nurses Act 1985. Although there has been some amendment to these rules since 1986, the rules as currently in existence have not been updated since provision was made, in 2004, for the Teaching Council Act 2001 and therefore make no reference to the Medical Practitioners Act 2007, the Nurses and

¹ [1960] I.R. 239

² [1990] 2 I.R. 396

Midwives Act 2011 or the many other statutes, such as the Health & Social Care Professions Act 2005, which regulate many professions.

11. In particular, Order 95 has not been amended since the introduction of Orders 84B and 84C by statutory instrument in 2007³. However, despite the introduction of Orders 84B and 84C the practice of utilising a special summons for statutory applications and appeals relating to professional disciplinary matters has, as far as the PRDBA is aware, been followed for the various professions regulated by statute⁴, even where the relevant enactment is not referred to in Order 95.⁵
12. In circumstances where Orders 84B and 84C make provision for statutory applications and statutory appeals, the PRDBA suggests that it is unnecessary to have a separate Order 95 in relation to professional disciplinary bodies.
13. In particular, quite apart from the issue of necessity, the PRDBA notes that this is an area in which there is relatively frequent legislative change. Accordingly, the PRDBA suggests that it would impose an unnecessary burden on the Superior Court Rules Committee to follow each legislative change in the area of professional regulation so as to ensure that the Rules of Court are continuously up to date.
14. Accordingly, the PRDBA suggests that such a rule might be omitted from a revision of the Rules of the Superior Courts.
15. Consideration might also be given to making provision in Order 84B for the procedure to be followed in relation to applications for costs in statutory applications. Notwithstanding the decision of the High Court in *Medical Council v Boateng*⁶ which upheld the entitlement of a regulator to seek costs under the Rules of the Superior Courts on an application for confirmation of a sanction, despite absence in the relevant legislation of reference to costs, an amount of uncertainty appears to remain in relation to the making of such applications. It might, in particular, be specifically provided that if an Applicant intends to seek an order for costs, in an application that might otherwise be made *ex parte*, the application shall be served on the party against whom costs are to be sought.

³ SI No 14 of 2007

⁴ The Solicitors profession being an exception and having a specific Order, Order 53, dealing with the various applications, to be made by way of motion and affidavit, arising under the Solicitors Acts.

⁵ Presumably with reliance on Order 3 rule 22. It should be noted however that Order 3 rule 21 paragraph (a) which provided for the use of the special summons procedure in “any other proceeding which is required or authorised by law to be brought in a summary manner and for which no other procedure is prescribed by these Rules” was deleted by SI No. 14 of 2007 – being then superseded by the introduction of Orders 84B and 84C.

⁶ [2011] IEHC 34