Opinion of panel -to the Chief Justice

On the power to remove a Commissioners for Oaths

1. The Chief Justice has, by virtue of his Office, a power by statute to appoint a commissioner for oaths, but nowhere in the legislation is there found an express power to remove a person from the office of commissioner and the Chief Justice has asked us to consider whether such a power exists and from where it might derive. As ancillary to that question we have been asked to consider how, if such power exists, it might be exercised.

2. We were greatly assisted by written and oral submissions from both the Attorney General and the Law Society of Ireland.

3. Three issues have been identified for the purposes of the exercises.

4. The first is whether the Supreme Court has jurisdiction to deal with the question in the absence of a specific case being brought before the Chief Justice in which someone seeks to have a commissioner removed from office.

5. The opinion is not intended to resolve or determine any existing dispute or question in controversy in litigation or to determine rights or liabilities. The panel considers, therefore, that it is not acting in a judicial capacity in giving this opinion, which is advisory only. We are members of the Supreme Court, but this opinion is not given by us as judges of that Court. We propose to deal with the other questions raised in that capacity.

6. The second question is whether the Chief Justice has a jurisdiction to remove a commissioner for oaths. The answer involves a consideration of the history of the legislation and the statutory vesting in the Chief Justice of the power of appointment.

Origin of the office

7. The office of commissioner for oaths is ecclesiastical in origin, and it was one of the ecclesiastical "faculties" granted by the Pope or his archbishops before the Reformation. The Irish Act of Supremacy ((1537) 28 Hen. VIII c. 5) confirmed the King,

as Lord of Ireland, as the Supreme Head of the Established Church of Ireland. The Irish Act of Faculties ((1537) 28. Hen VIII. c. 19), at s. 2, transferred the legal power of the granting of faculties from the Pope to the Archbishop of Canterbury under the authority of the King, without prejudice to the pre-existing rights of the Irish bishops to make appointments as they had done before the passing of the Act (s. 21) and allowing the King to appoint persons to carry out such appointments in Ireland with the same authority of the Archbishop of Canterbury (s. 22).

8. Prior to the Supreme Court of Judicature (Ireland) Act 1877, the Commissioners for Oaths (Ireland) Act 1872 had vested in the Courts of Queen's Bench in Ireland the power to appoint "a fit or proper person" to take affidavits. The balance of that Act deals with the manner by which affidavits duly made before a commissioner may be used in court for the registration of judgments.

9. It was that power that was transferred to the Lord Chancellor by the Supreme Court of Judicature (Ireland) Act 1877. Insofar as the office was ecclesiastical in origin it may be seen as part of the chancery division of the courts, but that fact alone does not offer any assistance in answering the question posed, as the Chief Justice does not act in a judicial capacity in exercising the power of appointment. We return to this point below.

Legislative background

10. The Supreme Court of Judicature (Ireland) Act 1877 is the starting point for the analysis, and by s. 73 the power to appoint a commissioner to take oaths or affidavits became vested in the Lord Chancellor.

11. That power became immediately transferred to the Chief Justice by the Courts of Justice Act 1924 by which the Courts of Justice of Saorstát Éireann were established. Section 19(3) expressly makes provision for the transfer of the power to appoint a commissioner for oaths:

"19(3) There shall be transferred to the Chief Justice and vested in him the appointment of notaries public and of commissioners to administer oaths."

12. The subsection does not define the power, and its sole purpose is to transfer the power previously vested in the Lord Chancellor to the Chief Justice.

13. Section 19(3) was repealed by s. 3 of the Courts (Supplemental Provisions) Act 1961, s. 10(1)(b) of which vested in the Chief Justice "the power of appointing notaries public and commissioners to administer oaths":-

"10.—(1) There shall be exercisable by the Chief Justice ….

(*b*) the power of appointing notaries public and commissioners to administer oaths,"

14. The exercise of that power to appoint is not constrained by any limitations. It is not, however, a power that is judicial but, rather, must be seen as one of the administrative functions of the Office of Chief Justice.

15. We think it can fairly be said that the power to appoint is created by the Act of 1961, in contrast to the Act of 1924 which had merely vested an existing power for the purpose of the establishment of the Free State.

16. The 1961 Act makes no express provision for the removal of a commissioner for oaths.

17. It is, however, useful to consider the historic context, as an express power to revoke an appointment is contained in the older legislation.

<u>The statutory power to remove</u>

18. The Supreme Court of Judicature (Ireland) Act 1877 did provide a power to remove an officer of the Supreme Court of Judicature and of other named courts in s. 73:-

"… Any officer of the Supreme Court of Judicature, or of the Court of Appeal, or of the High Court, or of any Division: or Judge thereof … may be removed by the

person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal."

19. That statutory power to remove a commissioner from office was exercisable only with the approval of the Lord Chancellor.

20. It might be said that s. 73 vests in the Lord Chancellor the power to remove a commissioner for oaths from office, but some difficulty with that interpretation is apparent from the fact that while the express power to remove is one vested in the person with power of appointment, it is a power to be exercised only with the approval of the Lord Chancellor. This raises doubts whether the power to remove expressly contained in s. 73 extends to the removal of those officeholders who themselves are appointed by the Lord Chancellor, and a plain reading of the provision suggests that the process of removal is one initiated by someone other than the Lord Chancellor.

21. However, although the Supreme Court of Judicature (Ireland) Act 1877 has not been repealed by the Statute Law Revision Act 2007, it seems to us, as noted above, that the modern power to appoint a commissioner derives from the Act of 1961. That being so, it seems to us that the power of revocation contained in s. 73 of the Supreme Court of Judicature (Ireland) Act 1877 may not correctly be read as applying to or regulating the power of the Chief Justice created by the Act of 1961.

22. Other arguments support this view.

23. The Commissioner for Oaths Act 1889 had some application to Ireland and was also not repealed by the Statute Law Revision Act of 2007. It seems, however, that a reading of the provisions of s. 1, by which a commissioner for oaths may be appointed to administer or take an oath or affirmation in England or elsewhere for the purposes of civil proceedings in the Supreme Court, regulates procedures in the Supreme Court of in England and Wales, and is correctly read as applying to and empowering the Lord Chancellor to remove or revoke those appointments. That is certainly the view taken in the

1890 edition of Stringer, *Oaths and Affirmations in Great Britain and Ireland*, at p. 3.[1] That is a view we share.

24. It is also consistent with the fact that the Act of 1889 does not appear to otherwise expressly amend the Supreme Court of Judicature (Ireland) Act 1877, which must be seen as governing the position in Ireland.

25. Further, s. 72(5) of the Solicitors (Amendment) Act 1994, which confers upon solicitors holding a practising certificate the powers of a commissioner for oaths, provides that "nothing in this section shall affect the power to appoint commissioners for oaths under section 73 of the Supreme Court of Judicature (Ireland) Act 1877", thus suggesting a legislative view that the historic basis of the present power is the Act of 1877 and not that of 1889. We note that the Act of 1994 does not make reference to the express statutory power created by s. 10(1)(b) of the Act of 1961, an omission we do not comprehend, but the conclusion we draw does not wholly depend on whether the source of the power to appoint is the Act of 1877 or that of 1961.

26. Finally, neither s. 19(3) of the Act of 1924 nor section 10(1)(b) of the Act of 1961, which confer the power of appointment on the Chief Justice, carry forward the power of revocation. Because of the view that we take that the Act of 1961 is the modern source of the power to appoint, and was not merely the transfer of an already existing power, we consider that the power to revoke has no legislative basis, and may not be found by implication to apply to the modern legislation from either s. 73 of the Supreme Court of Judicature (Ireland) Act 1877, or the Act of 1899.

27. It therefore does not seem to us that it is safe to rely on s. 73 as providing a basis to conclude that there exists an express statutory power in the Chief Justice to remove a warrant of appointment from a commissioner for oaths.

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1 Page 2 and later at p. 33 of his fourth edition (1928)

28. We will now consider whether the power to revoke a warrant of appointment may be said to be inherent.

Is the power inherent?

29. The warrant of appointment provides as follows:-

> "by the Courts (Supplemental Provisions) Act, 1961, and of all other powers me thereunto enabling, I, [*name*], Chief Justice, do hereby appoint [*name*] to be a Commissioner to administer Oaths in the several Courts established under the Courts (Establishment and Constitution) Act, 1961, for [*name*] to have and to hold the said Office during my pleasure together with all Fees, Profits and Advantages to the same belonging or in anywise appertaining."

30. To say that an appointment is during the "pleasure" of the Chief Justice means that the position may not be held against his wishes. The old Latin phrase is *durante bene placito regis*. It would seem that in the modern context the expression must mean that the commissioner for oaths serves by and under the authority of the Chief Justice.

31. The language used in the warrant of appointment suggests that the power to remove a commissioner is essential if the Chief Justice has reason to withdraw his authority. A commissioner who does not have the authority of the Chief Justice cannot continue to administer oaths or affirmations, as this is a role engaged on behalf of the Chief Justice and only under his authority. Thus, it seem to us that the power to remove is inherent in the fact that the warrant of appointment expressly confers the office of commissioner at the pleasure of the Chief Justice.

32. The power to remove thus understood is consistent with the fact that the authority of the Chief Justice is to appoint a commissioner to serve "at his pleasure".

33. But, it is useful to view the question from the history and current importance of the role of commissioner in the functioning of the courts.

The role of the commissioner for oaths

34. Section 1(2) of the Commissioner for Oaths Act 1889 gives the rather tautological definition of a commissioner for oaths:-

> "A commissioner for oaths may, by virtue of his commission, in England or elsewhere, administer any oath or take any affidavit for the purposes of any court or matter in England …"

35. The proffering of evidence by affidavit or statutory declaration in lieu of oral testimony is permitted or, in some cases, required by the Rules of Court, or sometimes by convention. Without some means by which evidence could be taken in documentary form without requiring oral evidence, the day-to-day administration of justice would be cumbersome, expensive, and time-consuming. In non-court matters, the production of evidence by statutory declaration preserves that evidence: for example, in the context of a title to land where the statutory declaration may form a link in, or background explanatory information regarding, the title.

36. The act of administering the oath is the solemn exercise of witnessing the swearing or affirmation by the deponent of the affidavit as that person's means of authenticating and verifying the truth of the contents thereof. The commissioner and the declarant or deponent thereafter sign the relevant document to signify the making of that oath or affirmation, the act of signature being an act of confirming performance of the swearing of the oath or the making of the affirmation.

37. The commissioner for oaths plays an important part in authenticating evidence, thus one of the requirements to be appointed as commissioner to administer oaths is that that person be "fit and proper". There are other requirements, such as that the commissioner, if he or she derives authority under the Solicitors (Amendment) Act 1994, may not administer an oath of a deponent who is a client of that solicitor or his or her firm.

38. The solemnity of the document thereby created is evident from the fact that, subject only to the Rules of Court, the affidavit is admitted as evidence, and any interlineation,

alteration, or erasure may not be made thereto save with leave of the court, unless the interlineation or alteration is, itself, authenticated, including by the commissioner administering the oath.

39. These factors and examples point to the solemnity of the process of taking or administering an oath and the importance to the proper functioning of the administration of justice that the person so administering the oath or affirmation, and thereafter authenticating and signifying its making, was correctly done be a person of suitable character and fit for that purpose. That solemnity and the importance of the role in the proper management of court functions suggest that the Chief Justice must have an inherent power from his Office to remove the warrant of authority.

Argument by analogy

40. No case law directly on point was offered in argument, although reference was made to the decision of the Master of Faculties for Notaries Public in *Re.: Charles Goble Champion, A Notary Public* where an inherent power to strike a notary from the roll was considered to derive from the fact that the Master of the Faculties was the custodian of the power and of the roll of notaries public:-

> "On these grounds I have come to the conclusion that I have as Master of the Faculties an inherent power to deal with the role of notaries public of which I am the custodian, and therefore a proper cause — a cause likely to interfere with the proper discharge of the functions of a notary public — it is competent for me as Master of the Faculties to remove the name of a notary public from the roll."[2]

41. While there is no Faculty or other regulatory body for commissioners for oaths in Ireland, this judgment gives a useful template in any consideration of the inherent power. We consider the judgment in more detail below.

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2 [1906] P. 86, 93.

The position of solicitors

42. Every solicitor who has a practising certificate has, by virtue of s. 72 of the Solicitors (Amendment) Act 1994, all the powers of the commissioner for oaths. A solicitor who administers an oath or affirmation in the exercise of that power does not derive his or her authority from the warrant of the Chief Justice. The lapse of the practising certificate brings an end to the statutory ancillary power.

43. The superior courts have, of course, an inherent supervisory role over solicitors and other officers of the court, and this is expressed in s. 78 of the Supreme Court of Judicature (Ireland) Act 1877, preserved under s. 61 of the Act 1961:-

44. "61. —All persons who, immediately before the operative date, were solicitors of the courts mentioned in column (2) of Part I of the Seventh Schedule to this Act and all persons who, immediately before the operative date, were commissioners to administer oaths shall on the operative date become respectively solicitors of the courts mentioned in column (3) of the said Part I and commissioners to administer oaths."It is now acknowledged that the supervisory role of the court over solicitors is one that is exercised with caution, and Hogan J. in *A.C.C. Loan Management Ltd. v. Barry & Ors.* [2015] IECA 224, [2015] 3 I.R. 473 explained the limitations of the inherent jurisdiction, which he accepted continues to exist, but considered did not extend to the jurisdiction to grant a formal declaration that a solicitor was guilty of misconduct.[3]

45. We do not consider that the regulatory functions of the courts over its officers may be called in aid in the regulation by the Chief Justice of a commissioner for oaths appointed under the statutory power, as the Chief Justice is not exercising a judicial function in the making of the appointment and his function is wholly statutory in origin.

How the power is exercisable

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3 See also: the decision of Lardner J. in *I.P.L.G. v. Stuart* (Unreported, High Court, Lardner J., 19th of March 1992) and the provisions of the Solicitors Acts 1954 to 1994 which provide a supervisory power in the Law Society, and now the Legal Services Regulation Act 2015

46. The next question we have been asked to consider is how the Chief Justice may exercise the power to revoke the warrant of appointment of a commissioner for oaths. There being no procedure in the Rules of Court, the Chief Justice must be seen as having the power to fashion a formal procedure which would respect the principles of natural justice. It seems more likely that a decision to commence the process would arise from a complaint howsoever made, and it may even be necessary depending on the degree of dispute and conflict of facts that sworn evidence be taken, or perhaps even that a judge or panel of judges be appointed, to resolve the factual dispute.

47. The absence of a Faculty or other form of representative body such as that which exists in the case of notaries public in Ireland, where its faculty has both a representative and regulatory function, is likely to make the procedural exercise more difficult.[4]

48. The absence of a formal procedure would suggest that an application to the Chief Justice that he revoke a warrant of appointment could be brought by originating petition grounded on affidavit, but it seems to us that the Chief Justice has, inherent in his powers, the right to commence the process of his own motion.

49. Any process, having regard to the possible outcome and the deprivation of a power which carries a degree of solemnity and public respect, would be attended by careful procedural and substantive safeguards.

50. In the case of *Re.: Charles Goble Champion*,[5] the application to remove was commenced by way of a memorial presented to the Court of Faculties[6] by its regulatory society, and submitted in evidence the fact that the respondent had been struck off the roll of solicitors by the Lord Chief Justice of England for disciplinary cause. The memorial, having been presented, called upon the respondent to attend and show cause why he should not be struck off the roll and the report of the Lord Chief Justice was annexed to the

4 E.R. O'Connor, *The Irish Notary* (Professional Books Limited, 1987), at p. 53 who also considers that a notary may, by rule, be removed by order of the Chief Justice on his own motion.
5 Above at p. 8.
6 Incidentally, a power exercised on behalf of the Archbishop of Canterbury

memorial and served upon him. The judgment records that a hearing took place at which the respondent appeared in person. The Court ultimately made its ruling having listened to the argument of the respondent in reliance on the findings of fact by the Lord Chief Justice and without ordering a fresh inquiry into the facts.

51. The Court did not rule out the possibility of conducting its own inquiry into facts but did not, in the circumstances, consider it necessary to do so.

52. We anticipate a similar form of process in any application in this jurisdiction.

53. It seems to us, in principle, that the process is one that should be regulated by statute with accompanying rules of court.

54. The removal of a solicitor who derives a power to administer oaths and affirmations from statute and his or her practising certificate will be governed by the formal statutory procedure for complaints and disciplinary actions against solicitors. We consider it desirable that legislation would make admissible, in any application or process to remove a warrant of appointment of a commissioner for oaths, any findings of misconduct on the part of the solicitor by his or her regulatory body.

55. Once a solicitor ceases to have a practising certificate under s. 72 of the Act of 1994, the power of a commissioner for oaths ceases in that person.

General recommendation

56. We commend the recommendation by the Law Reform Commission in its Consultation Paper on Reform of the Courts Acts, LRC 97-2010, and s. 16 of the draft Bill annexed thereto which provides that the Chief Justice may make regulations, or by practice direction prescribe requirements, *inter alia* as to the revocation of an appointment of a commissioner for oaths.

Summary

57. In summary, we are of the view that the Chief Justice does have a power to remove a commissioner for oaths, and that, there being no statutory source of that power, it exists as an inherent power in the light of the fact that the Chief Justice is to appoint a commissioner to serve under his or her authority and "at his pleasure".

58. The power is exercisable by the Chief Justice on application, or on his or her own motion, and would respect the principles of natural justice.

59. The inherent power of the courts to regulate its own officers, or otherwise discipline a solicitor as officer of the court, does not offer an indirect means by which a commissioner for oaths may be removed, although once removed from practice a solicitor cannot derive the power to act as commissioner from s. 72 of the Solicitors (Amendment) Act 1994.

60. Statutory intervention is desirable to clarify the power to remove, and to provide a suitable procedure.

Nothing further occurs to us at present.

Dated 27 November 2020

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Elizabeth Dunne

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