Neutral Citation [2015] IEHC 512

THE HIGH COURT

[2014 No. 8357P]

BETWEEN

ALAN P. TOAL

PLAINTIFF

AND

THE HONORABLE SOCIETY OF KINGS INNS BARRISTERS DISCIPLINARY TRIBUNAL

AND

THE GENERAL COUNCIL OF THE BAR OF IRELAND

AND

THE PROFESSIONAL PRACTICES COMMITTEE OF THE BAR OF IRELAND

AND

THE BARRISTERS PROFESSIONAL CONDUCT TRIBUNAL

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 28th July 2015

Introduction

1. On the 6th May 2015, I made an Order dismissing the present action, together with various consequential orders. I did so because, having failed in two preliminary applications before me, the plaintiff, through Counsel, indicated that he did not intend to open his case or, indeed, to take any further part in the proceedings.

2. In refusing the second of those two preliminary applications, I indicated that I would set out my reasons in a written judgment to be delivered later. This is that judgment.

The first preliminary application

3. The first preliminary application, made without prior notice at the commencement of the trial, sought the adjournment of the trial for an indefinite period on two grounds: first, because the plaintiff's legal representatives asserted that they were not then ready to proceed; and second, because they submitted that, in common with every other judge of the High Court, I should consider myself disqualified from trying the action.

i. preparedness

4. In relation to the preparedness ground, the following facts are not in issue. The firm of solicitors having carriage of the plaintiff's case were instructed in September 2014. The proceedings issued in October. The pleadings closed in December. After some initial difficulty finding Counsel willing or available to act, Senior Counsel was instructed on behalf of the plaintiff in January of this year. On the 24th March, by agreement between the parties, Gilligan J. fixed the 5th May as the date for the commencement of the trial of the action. Discovery of documents was to be made by each of the defendants in accordance with an agreed timetable.

5. On Monday, the 27th April, and again on Thursday, the 30th April, an application was made to me on behalf of the plaintiff to adjourn the trial of the action on the ground of the failure by the Barristers Professional Conduct Tribunal ("the Conduct Tribunal") to comply with the agreed timetable for making discovery. It is common case that the Conduct Tribunal made its discovery one week and one day late. I refused both of those applications, observing on each occasion that, while I would take whatever steps may be necessary to ensure that the plaintiff was not disadvantaged at trial in relation to the late discovery of any document or documents, I was not prepared to vacate the trial date in the absence of the identification of some specific difficulty or prejudice attributable to that delay.

6. In making a further application for the adjournment of the trial on the morning that the trial was due to commence before me, Counsel for the plaintiff again sought to rely on the Conduct Tribunal's delay in making discovery. In addition, Counsel complained that some further documentation had been disclosed just that morning on behalf of both the General Council of the Bar of Ireland ("the Bar Council") and the Professional Practices Committee of the Bar of Ireland ("the Committee") and, further, that the plaintiff wished to take issue with a claim of public interest privilege that had been raised previously by the Honorable Society of King's Inns Barristers Disciplinary Tribunal ("the Disciplinary Tribunal").

7. In response, Counsel for the Bar Council and the Committee submitted that only two additional documents had been discovered to the plaintiff by his clients; that the existence of each of those documents was already known to the plaintiff; and that the disclosure of their contents could not give rise to any new issue or concern. Counsel for the Disciplinary Tribunal responded that, although the privilege it asserts against the disclosure of its internal communications - as those of an adminstrative tribunal exercising quasi-judicial functions – is, in his submission, a well-established one, in order to prevent any unnecessary delay in the opening of the case instructions would be taken concerning whether that privilege might be waived, failing which it was acknowledged that another judge would have to hear the plaintiff's challenge to the assertion of that privilege, since it may be necessary, as part of the Court's deliberations, to inspect the documents at issue.

8. In the course of argument, it emerged that the relevant claim of privilege had been asserted in an affidavit of discovery delivered on the 22nd April 2015; had been challenged by letter dated the 27th April 2015; and had been reasserted in a letter of reply dated

the 28th April 2015, subsequent to which motion papers in respect of a proposed challenge to that claim were first produced in court on the 5th May 2015, in the course of the plaintiff's application for an adjournment of the trial.

9. Having considered the facts and argument that I have just summarised, I refused the plaintiff's application on the same basis as I had twice refused a similar application on behalf of the plaintiff previously, i.e. that while I was prepared to take all steps necessary to prevent the plaintiff from being disadvantaged by any specific difficulty or prejudice that might be identified attributable to the late discovery of any document or documents (or any privilege found to be wrongly asserted over the contents of any such document), I was not prepared to adjourn the trial of the action on the basis of an assertion of unspecified general prejudice that may be caused thereby.

ii. bias and the rule of necessity

10. The second ground upon which the plaintiff based his first preliminary application is that, in acknowledgment of the fact that every judge of the High Court (including myself), and of the Court of Appeal and Supreme Court is a bencher of the Honorable Society of King's Inns ("the Society"), I should adjourn the trial of the present action to await the possibility that the Government might introduce, and the Oireachtas might pass, legislation that would alter that position in some way so that the action might then be heard before a judge of the High Court who is not a bencher, and whose decision would be capable of appeal to an appellate court comprised of judges none of whom is a bencher.

11. In that regard, I was informed by Counsel for the plaintiff that a letter marked "extremely urgent" had been sent to the Attorney General by fax at 5.30 p.m. on the previous day, the 4th May 2015, a bank holiday. The letter was copied to the President of Ireland and to the Minister for Justice and Equality. In it, the Attorney General was requested to bring the matter to the attention of the Government on the basis that "if [the plaintiff's] constitutional rights are to be vindicated … it is now necessary for the Government to immediately legislate to proscribe the benching of judges and [of the] Attorney General by the [S]ociety and, upon it having done so, to then appoint a sufficient number of non-benched individuals as judges so as to allow [the plaintiff] to litigate the matter at first instance and if necessary on appeal."

12. In making the submission I have just described, Counsel for the plaintiff approached the matter as though it were an issue of first impression. Counsel cited no authority for the plaintiff's argument and, although he acknowledged, in passing, the existence of the legal doctrine of the rule of necessity, he did so only in order to assert that it could have no application to the present case, which he described as unprecedented and unique. When asked why the argument had not been raised in the appropriate manner and in good time prior to a trial date fixed many weeks earlier, in proceedings that had been commenced more than six months ago and in which Senior Counsel had been instructed several months previously, Counsel for the plaintiff informed the Court that the issue simply had not occurred to the plaintiff's legal representatives until, as part of their final preparations for the trial of the action, they had met on the previous Sunday, the 3rd May.

13. In response to that submission, Counsel for the Disciplinary Tribunal provided a short chronology of the events that have given rise to the present action. He stated that the proceedings have at their root a complaint made by a member of the public who is a former client of the plaintiff. That complaint was made to the Bar Council and the Conduct Tribunal in March 2010, in relation to a series of alleged events that concluded in February 2010 but which began a number of years before that. Matters proceeded before the Conduct Tribunal until December 2012, when they came before the Disciplinary Tribunal. Hearings before it commenced in February 2013 and, after certain unavoidable delays, a substantive hearing took place in April 2014, followed by a decision delivered in June 2014, making findings of misconduct against the plaintiff. The matter was then adjourned for a further hearing on the question of sanction and it was at that point that the present proceedings were instituted in October 2014. The Disciplinary Tribunal subsequently indicated that it would not deal with the issue of sanction on foot of its decision pending the determination of these proceedings, on the proviso that the proceedings were to be determined promptly in the interest of all parties.

14. Counsel for the Disciplinary Tribunal then submitted as follows. The Society has exercised a disciplinary function in relation to the barristers' profession for centuries under the common law. That function has been provided for in every iteration of the Rules of the King's Inns ("the Rules"), certainly since the plaintiff was called to the Bar. Upon his or her call to the Bar, every barrister signs a memorial undertaking to comply with the Rules. The Rules provide in the clearest possible terms that all judges of the Superior Courts are *ex officio* benchers of the Society.

15. These proceedings having commenced in October 2014, on the 28th November 2014, the plaintiff's legal representatives were furnished, at their request, with a copy of every iteration of the Rules published from 2000 to the present, recording the various amendments to the Rules during that period. Accordingly, the first-defendant submits that the relevant rule is one that should be known by all barristers – including the plaintiff - from the commencement in practice of each; that the rule has been at all times evident from the Rules available to all barristers; and that the rule is, in any event, one contained in the copies of the Rules that were furnished to the plaintiff's legal representatives on the 28th November 2014.

16. On the legal argument raised by the plaintiff, Counsel for the Disciplinary Tribunal had this to say. It is not the first time that proceedings have come before the courts in which all members of the judiciary have an interest in the subject of a claim and which, on a strict view of the rule of bias, none should hear, but of course the law has to accommodate such a situation and does so through the application of the rule of necessity.

17. Within the limited period afforded to the defendants to consider the relevant law on an application of which they had little or no prior notice, the Disciplinary Tribunal identified two decisions of particular relevance. The first is that of *O'Byrne v. Minister for Finance* [1959] 1 I.R. 1, a case in which both the High Court and the Supreme Court applied the rule of necessity in considering a challenge brought by the widow and executrix of a deceased judge of the Supreme Court (and, earlier, of the High Court) to the deductions from that judge's remuneration that had been made in respect of his liability to income tax, and assessments of his liability to super-tax or sur-tax, on the ground that such deductions were expressly prohibited under Article 68 of the Constitution of the Irish Free State, which provided in relevant part that the remuneration of judges of the Supreme Court and High Court "*may not be diminished during their continuance in office.*" As it transpired, the action was dismissed in the High Court and the appeal against that decision was dismissed by the Supreme Court. But in each instance, it is clear that the Court was being asked to consider an issue in which each judge comprising it was directly and necessarily interested.

18. The second case relied upon by the defendants is that of *Flynn v. Allen and The Honorable Society of King's Inns*, unreported (High Court, Lynch J.), 2nd May 1988. It involved an application brought on behalf of the Society to strike out three separate sets of proceedings as against it or those of its benchers individually sued in that capacity. In the first two sets of proceedings the Society itself was identified as the second-defendant and, in the third set of proceedings, certain benchers of the Society (including certain judges of the Superior Courts) appear to have been randomly selected by the plaintiff to be sued as representative defendants on the

Society's behalf. In dealing with those applications, the Court addressed - of its own motion - the same point that the plaintiff in this case now raises. Lynch J. did so in the following terms:

> "Now, the actions are in effect actions brought by the plaintiff against the first defendant in the case of the first two actions, the second defendants being in effect Benchers of the King's Inns. In the case of the third action, as I have said, it is against some of the Benchers who are named individually, though not all. Even though I am not one of those Benchers named in [the third action], I am, of course, as is every other High Court judge and judge of the Supreme Court a Bencher of the King's Inns and I am conscious of the fact that in one sense I myself could be said to be a defendant in these matters.
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> Be that as it may, the matter has to come to be decided by some Judge of the High Court and it has come before me and I must not shirk my duty in dealing with it.
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> I have been referred to the decisions of the High Court and the Supreme Court in the case of *O'Byrne v. Minister for Finance and the Attorney General* [1959] 1 I.R. 1 and of course the difficulty that arises here arose there. The necessity for proceeding notwithstanding that unfortunate difficulty was emphasised and I accept that is so and that I should and must deal with the matter."

19. Lest it be imagined that the jurisprudence just described represents an eccentric adventure of the common law embarked upon uniquely in Ireland, Counsel for the Disciplinary Tribunal further relied upon the following passage from Hogan and Morgan, *Administrative Law in Ireland* 4th edn. (Dublin 2010) (at para. 13.98):

> "Throughout the common law world, the no bias rule gives way to necessity in as much as the disqualification of the adjudicator will not readily be permitted to destroy the ony tribunal with power to decide. Consider, for example*, O'Byrne v. Minister for Finance* in which the High Court and Supreme Court were obliged to pass judgment on the constitutionality of legislation rendering them (and their judicial brethren) liable to income tax on their salaries."

20. In Woolf, Jowell, Le Sueur (eds.), *De Smith's Judicial Review* 6th ed. (London 2007), the matter is addressed in the following terms (at para. 10-059):

> "There are two ways in which the doctrine of "necessity" has been held to apply. First, if the person who makes the decision is biased, but cannot effectively be replaced, e.g. if a quorum cannot be formed without him. Secondly, where the administrative structure makes it inevitable that there is an appearance of bias.
>
> *Illustrations*
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> • If proceedings were brought against all the superior judges, they would have to sit as judges in their own cause; 2 Roll.Abr. 93, pl.6; and 16 Vin.Abr (end edn), 573 *et seq,* citing 15th-century cases. In such a situation, a judge may even, in theory, be obliged to hear a case in which he has a pecuniary interest; *Great Charte v Kennington* (1742) 2 Str. 1173; *R. v Essex Justices* (1816) 5 M. & S. 513; *Grand Junction Canal Co v Dimes* (1849) 12 Beav. 63; *Dimes v Grand Junction Canal Proprietors* (1852) 3 H.L.C. 759 at 778-779; *Ranger v Great Western Ry* (1854) 5 H.L.C. 72, 88. " (footnotes inserted)

21. Amongst the cases cited in a footnote to a later portion of the same paragraph are: "*Philips v Eyre* (1870) L.R. 6 Q.B. 1; and *The Judges v Attorney General for Saskatche*wan (1937) 53 T.L.R. 464 (judges required to rule on the constitutionality of legislation rendering them liable to pay more income tax); *Willing v Hollobone (No. 2)* (1975) 11 S.A.S.R. 118 (magistrates not disqualified for bias, *inter alia*, because the ground applied to all magistrates); *Re Caccamo and Minister of Manpower and Immigration* (1977) 75 D.L.R. (3rd) 720 (disqualification applicable to all immigration officers)."

22. I pause here to note that, in so far as the plaintiff's argument suggests, without expressly stating, that the rule of necessity properly considered cannot apply to the case at hand because it is unnecessary or inappropriate for the judiciary to play any part in the regulation or supervision of the Bar, I should point out that that does not seem to be a view that commands any support either in this jurisdiction or, indeed, in most, if not all, of the rest of the common law world.

23. To take a single example, in *Anonymous v. Grievance Committee for the Second and Eleventh Judicial Districts of the State of New York* 136 A.D.2d 344; 527 N.Y.S. 2d 248, the Appellate Division of the Supreme Court of New York considered an appeal against the refusal of a preliminary injunction to stay an investigation into an alleged violation of the applicable attorney professional conduct rules by the appropriate committee charged with that responsibility in the relevant part of New York State.

24. The Grievance Committee had commenced an investigation, sua sponte, concerning whether the applicant attorney was in breach of a rule requiring disclosure of an attorney's name and address in the text of any advertisement published by that attorney. The applicant wished to challenge the relevant rule on free speech grounds. However, the "Rules of Professional Conduct (22NYCRR)" of which that rule was one were promulgated as "Joint Rules of the Appellate Divisions of the New York Supreme Court." The Appellate Division (per Mangano J.P., Thompson, Lawrence and Weinstein JJ concurring) dealt with the bias issue in the following terms:

> "Before turning to the merits of the instant appeal, we "dispose of any speculation" that because this court promulgated 22 NYCRR 691.22(k), the members of this court should decline to participate in the instant appeal (*Matter of Morgenthau v Cooke*, 56 NY2d 24, 29, n 3) … Since this court has exclusive jurisdiction over this case at this stage of the proceedings, and no other judicial body without similar interests exists to which this appeal could be referred for disposition "the present members of the court are required to hear and dispose of it under the Rule of Necessity" (*Maresca v Cuomo*, 64 NY2d 242, 247, n 1, *appeal dismissed* 474 U.S. 802; *Matter of Morgenthau v Cooke*, *supra*).

25. As cases such as the one I have just cited illustrate, there is a widely held view that the judicial arm of government plays an important and necessary role in the regulation or supervision of practising lawyers.

26. Both Counsel for the Bar Council and the Committee and Counsel for the Conduct Tribunal adopted the submissions made on behalf of the Disciplinary Tribunal on the application of the rule of necessity to the circumstances of the present case.

27. Although, in opening his application, Counsel for the plaintiff had not informed the Court of either the relevant decision in *Flynn v. Allen* or the binding authority constituted by the judgment of the Supreme Court in *O'Byrne v. Minister for Finance*, in his reply he invited the Court to refuse to follow Flynn as wrongly decided and to distinguish the facts in *O'Byrne* from those at issue in the

present case, as, in the former, neither the Court nor any of its constituent judges was a party to the action.

28. In *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976-1977] ILRM 50, Parke J. stated:

> "I fully accept that there are occasions on which the principle of stare decisis may be departed from but I consider that these are extremely rare. A court may depart from a decision of a court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the judge disregarded or misunderstood an important element in the case or the argument submitted to him or the authorities cited or in some other way departed from the proper standard to be adopted in judicial determination."

29. Those principles were reformulated more recently by Clarke J. in *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189 in the following terms:

> "It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority –v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area may be said to have advanced in the intervening period."

30. *O'Byrne v. Minister for Finance* was a case in which the rule of necessity was applied, if not expressly invoked, by the High Court and Supreme Court. In *Collins v. County Cork VEC*, unreported, High Court, May 26, 1982, Murphy J. expressed the view that it was the "clear constitutional duty" of the Supreme Court to decide the *O'Byrne* case, "notwithstanding the interest which the members of the court had in the outcome." In *O'Neill v. Irish Hereford Breed Society Ltd* [1992] 1 I.R. 431 (at 449), Murphy J. again described the relevant constitutional duty to decide the issue that arose in *O'Byrne* as "inescapable."

31. The rule of necessity was considered in some detail, and applied, by the United States Supreme Court in *U.S. v. Will* 449 U.S. 200 (1980). That case involved an appeal by the United States Government against certain decisions of the U.S. Federal District Court striking down various statutory provisions freezing cost of living increases in federal judicial salaries at the suit of a number of United States District Court Judges, as contrary to the Compensation Clause of the United States Constitution whereby the compensation of federal judges "shall not be diminished during their Continuance in Office." Delivering the opinion of the Court, in which all other Members joined, except Blackmun J., who took no part in the decision of the cases, Burger C.J. addressed the issues of jurisdiction, disqualification and the rule of necessity in the following terms 9 (at 210-218):

> " A
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> Jurisdiction
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> Although it is clear that the District Judge and all Justices of this Court have an interest in the outcome of these cases, there is no doubt whatever as to this Court's jurisdiction [449 U.S. 200 211] under 28 U.S.C. 1252 9 or that of the District Court under 28 U.S.C. 1346 (a) (2) (1976 ed., Supp. III). 10 Section 455 of Title 28 neither expressly nor by implication purports to deal with jurisdiction. On its face 455 provides for disqualification of judges under specified circumstances; it does not affect the jurisdiction of a court. Nothing in the text or the history of 455 suggests that Congress intended, by that section, to amend the vast array of statutes conferring jurisdiction over certain matter on various federal courts.
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> B
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> Disqualification
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> Jurisdiction being clear, our next inquiry is whether 28 U.S.C. 455 or traditional judicial canons operate to disqualify all United States judges, including the Justices of this Court, from deciding these issues. This threshold question reaches us with both the Government and the appellees in full agreement that 455 did not require the District Judge, and does not now require each justice of this Court, to disqualify himself. Rather, they agree the ancient Rule of Necessity prevails over the disqualification standards of 455. Notwithstanding this concurrence of views resulting from the Government's concession, the sensitivity of the issues leads us to address the applicability of 455 with the same degree of care and attention we would employ if the Government asserted that the District Court lacked jurisdiction or that 455 mandates disqualificaiton of all judges and justices without exception.
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> In federal courts generally, when an individual judge is disqualified from a particular case by reason of 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualifed. In the cases now before us, however, all Article III judges have an interest in the outcome; assignment of a substitute District Judge was not possible. And in this Court, when one or more Justices are recused but a statutory quorum of six Justices eligible to act remains available, see 28 U.S.C. 1, the Court may continue to hear the case. Even if all Justices are disqualified in a particular case under 455, 28 U.S.C. 2109 authorizes the Chief Justice to remit a direct appeal to the Court of Appeals for final decision by judges not so disqualified. However, in the highly unusual setting of these cases, even with the authority to assign other federal judges to sit temporarily under 28 U.S.C. 291-296 (1976 ed. And supp. III), it is not possible to convene a division of the Court of Appeals with judges who are not subject to the disqualification provisions of 455. It was precisely considerations of this kind that gave rise to the Rule of Necessity, a well-settled principle at common law that, as Pollack put it, "although a judge had better not, if it can be avoided, take part in the decision in a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929).
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> C

Rule of Necessity

The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could acts as judge of a case in which he was a party when there was no provision for appointment of another judge. Y. B. Hil. 8 Hen. VI, f. 19, pl. 6. Early cases in this country confirmed the vitality of the Rule.

The Rule of Necessity has been consistently applied in this country in both state and federal courts. In *State ex rel. Mitchell v. Sage Stores Co.,* 157 Kan. 622, 143 P.2d 652 (1943), the Supreme Court of Kansas observed:

> "[I]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." Id., at 629, 143 P.2d, at 656.

Similarly, the Supreme Court of Pennsylvania held:

> "The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest – where no provision is made for calling another in, or where no one else can take his place – it is his duty to hear and decide, however disagreeable it may be." *Philadelphia v. Fox* 64 Pa. 169, 185 (1870).

Other state and federal courts have also recognized the Rule. The concept of the absolute duty of judges to hear and decide cases within their jurisdiction revealed in Pollack, *supra, and Philadelphia v. Fox, supra*, is reflected in decisions of this Court. Our earlier cases dealing with the Compensation Clause did not directly involve the compensation of Justices or name them as parties, and no express reference to the Rule is found. See, *e.g., O'Malley v. Woodrough*, 307 U.S. 277 (1939); *O'Donoghue v. United States* 289 U.S. 516 (1933); *Evans v. Gore*, 253 U.S. 245 (1920). In Evans however, an action brought by an individual judge in his own behalf, the Court by clear implication dealt with the Rule:

> "Because of the individual relation of the members of this court to the question…, we cannot but regret that its solution falls to us…. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decisions on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go." *Id.*, at 247-248.

It would appear, therefore, that this Court so took for granted the continuing validity of the Rule of Necessity that no express reference to it or extended discussion of it was needed." (footnotes omitted)

32. Turning back from the persuasive opinions of respected jurists in other common law jurisdictions to the decision in *Flynn v. Allen*, I can find nothing in it which suggests that Lynch J. disregarded or overlooked any relevant authority in that case. Nor is there any suggestion that the principles underpinning the decision have been in any way altered or amended, much less doubted or reversed, in any subsequent jurisprudence. Accordingly, I view the present action in the same light as Lynch J. considered the application in *Flynn v. Allen*, which is to say "the matter has to come to be decided by some Judge of the High Court and it has come before me and I must not shirk my duty of dealing with it."

33. On the second point, I do not think that the facts of the present case can be distinguished from those at issue in *O'Byrne v. Minister for Finance* (or, indeed, in *Flynn v. Allen*) in any meaningful way. I am not a party to the present action, nor is the Society of which I am a bencher. The first-defendant – the Society's Barristers Disciplinary Tribunal – is comprised of benchers, although, needless to say, I am not and was not a member of it. In that sense, I am in a broadly equivalent position to that of the Court in both *Flynn v. Allen* (where both the judge and certain defendants were benchers of the Society) and *O'Byrne v. Minister for Finance* (where both the Court and the deceased spouse of the plaintiff were judges). On the other hand, because no action has been brought against the Society, as opposed to its Barristers Disciplinary Tribunal, I am not so directly interested in the proceedings as could have been said about Lynch J. in *Flynn v. Allen*.

iii. the separation of powers

34. I do not accept that the decision in *Flynn v. Allen* can be distinguished from the present case simply because here the plaintiff's solicitors have written to the Government demanding immediate legislative action along certain lines they have prescribed. It has at all times been open to the Government and, indeed, the Oireachtas to legislate as it sees fit in relation to this or any other matter – it does not require an invitation, or demand, from the plaintiff's solicitors to make the enactment of relevant legislation a possibility where otherwise it would not have been. Moreover, even if it is correct to suggest that situations like the present one, which have been found to require the application of the rule of necessity throughout the common law world, can instead be readily avoided through some form of appropriate legislative intervention, a proposition which I very much doubt, in my view it would be fundamentally inconsistent with the doctrine of the separation of powers to adjourn any action (thereby abdicating or, certainly, suspending the judicial function) pending the suggested introduction of relevant legislation by the Executive or its enactment by the Oireachtas.

35. As Finlay C.J. put the matter in *Crotty v An Taoiseach* [1987] IR 713 (at 772):

> "[The separation of powers] involves for each of the three constitutional organs not only rights but duties also; not only areas of activity and function, but boundaries to them as well. With regard to the legislature, the right and duty of the courts to intervene is clear and express.
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> 1. Articles 15.4, 34.3.2°and 34.4.4° vest in the High Court and, on appeal, in this Court the right and duty to examine the validity of any impugned enactment of the Oireachtas, and if it be found inconsistent with the Constitution, to condemn it in whole or in part.
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> 2. Article 26 confers on this Court the duty upon the reference to it by the President of a Bill passed or deemed to have been passed by both Houses of the Oireachtas, to decide whether such Bill or any specified provision or provisions of such Bill is or are repugnant to the Constitution or to any provision thereof.
>
> 3. The courts do not, in my opinion, have any other right to intervene in the enactment of legislation by the Oireachtas."

iv conclusion

36. For all of the foregoing reasons, I was satisfied that the trial of the plaintiff's action was one that I should, and must, deal with on its merits and without further unnecessary delay. Therefore, I refused the plaintiff's application for an adjournment. However, since the relevant argument had by then taken up the greater part of what should have been the opening day of the trial, on the application of the plaintiff's Counsel I adjourned the commencement of the trial until the following day.

The second preliminary application
37. The trial did not commence the following morning. Instead, Counsel for the plaintiff submitted that, in view of the Court's rulings of the previous day, the plaintiff was being deprived of his right to a fair hearing before an independent and impartial judge, in breach of the Constitution of Ireland, the European Convention on Human Rights, and the Charter of Fundamental Rights of the European Union. Counsel for the plaintiff then stated "that the plaintiff will not be taking any further steps in this proceeding as presently constituted lest he be seen to be participating or acquiescing in a proceeding that he believes to be unlawful."

i. application for an Article 267 reference

38. Somewhat peculiarly, having just made that statement, Counsel for the plaintiff next requested the Court to make a reference for a preliminary ruling to the Court of Justice of the European Union ("the CJEU"), pursuant to the terms of Article 267 of the Treaty on the Functioning of the European Union ("the TFEU"), in respect of three questions that the plaintiff wished to have referred. Subsequently, Counsel for the plaintiff clarified that his instructions were to take no further part in the proceedings should his application for a preliminary reference to the CJEU be refused.

39. Once again, it was acknowledged that the application was being made without prior notice of any kind to either the defendants or the Court. Counsel for the plaintiff could provide no satisfactory explanation for the plaintiff's failure to raise the matter in the appropriate manner in good time prior to the date fixed for the trial of the action or, indeed, as part of the application that had been made on the previous day. Nevertheless, I permitted the application to proceed.

40. The question that the plaintiff sought to have referred to the CJEU was, in substance, whether my refusal to acknowledge myself and every other judge of the Superior Courts disqualified from hearing the plaintiff's action (or any appeal thereon) and, therefore, to adjourn it *sine die*, amounts to a breach of the plaintiff's right under Article 47 of the *EU Charter of Fundamental Rights of the European Union* 2010/C 83/02 ("the Charter") to an effective remedy against the violation of the rights and freedoms guaranteed to him by the law of the European Union through a hearing by "an independent and impartial tribunal previously established by law."

41. In support of the plaintiff's application for a reference, reliance was placed on a wide range of decisions of the CJEU on the question of what constitutes a "court or tribunal of a Member State" for the purposes of Article 267 of the TFEU. However, that does not seem to me to be of assistance to the plaintiff in circumstances where calling into question the status of this Court as a "court or tribunal of a member state" capable of requesting a preliminary ruling from the CJEU, as the plaintiff's Counsel appeared to do in suggesting that this Court fails to meet the necessary criteria of independence and impartiality, could only have the effect of calling into question the Court's jurisdiction to do the very thing that the plaintiff is asking it to, *i.e*. to make a reference. For the avoidance of doubt, I am satisfied that this Court has the necessary characteristics to fall squarely within the expression "court or tribunal" as a concept of Community law under Article 267 of the TFEU.

42. The field of application of the Charter is addressed by Article 51 of that instrument, which states:

> "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
>
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

43. In Case C-206/13 *Siragusa v Regione Sicilia – Soprintendenza Ben Culturali e Ambientali di Palermo*, 6 March 2014, the CJEU reiterated that it has no jurisdiction to examine the compatibility with the Charter of national legislation falling outside the scope of EU law (at paragraph 21). It is only where legislation (or other national law) that falls within the scope of EU law is at issue, that the CJEU, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation (or law) is compatible with the fundamental rights the observance of which the Court ensures; Case C-617/10 *Akerberg Fransson* [2013] ECR, paragraph 19, and the case-law cited).

44. The CJEU continued (at paragraph 22) that, taking into consideration the explanations relating to Article 51 of the Charter, in accordance with the requirement to do so under the third subparagraph of Article 6(1) TEU and article 52(7) of the Charter, the obligation to respect fundamental rights defined in the context of the European Union is binding upon the Member States only in respect of matters covered by EU law.

45. At paragraph 24 of the judgment, the CJEU further clarified that the concept of "implementing Union law" as referred to in Article 51 of the Charter, requires a degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 16.

46. The CJEU then stated as follows (at paragraph 25):

> "In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it (see Case C-309/96 Annibaldi [1997] ECR I-7493, paragraphs 21 to 23; Case C-40/11 *Iida* [2012] ECR, paragraph 79; and Case C-87/12 *Ymeraga and Others* [2013] ECR, paragraph 41)."

47. In the context of an express reference in the first of the three questions in respect of which the plaintiff seeks a preliminary reference to "the exercise of the right of establishment and [the right] to provide services [in] any Member State pursuant to Article 15 of the Charter" and an assertion in argument by the plaintiff's Counsel that the imposition of the sanction of suspension from practice could prevent the plaintiff from engaging in practice as a lawyer elsewhere in the EU, it appeared to be suggested in the

course of the present application, for the first time, that the plaintiff's right of establishment or right to provide services in another Member State as a matter of Union law is indirectly in issue in these proceedings.

48. However, nothing has been pleaded that would suggest any intention, much less attempt, by the plaintiff to exercise any such right of establishment or right to provide services in any other Member State. There is nothing in the plaintiff's 74-page statement of claim or in the 11-page general indorsement of claim contained in the plenary summons issued on his behalf that would enable the Court to identify any relevant provision of Union law the implementation of which might be in issue in these proceedings, despite the noteworthy prolixity of each of those documents.

49. And, of course, in circumstances where the plaintiff has adopted the position that the preliminary reference he seeks must precede the commencement of the trial of his action, upon which he is not otherwise willing to embark, there is no relevant evidence (indeed, no evidence whatsoever) before the Court at this stage of the proceedings that would permit the Court to conclude that the plaintiff's complaint concerns any legal measure involving the implementation of EU law.

50. Accordingly, I can find no basis to conclude that any issue arises in these proceedings concerning either the interpretation of the Treaties or the validity or interpretation of any act of any institution, body, office or agency of the Union such as would confer upon this Court a discretion to request the CJEU to give a preliminary ruling upon it and the plaintiff's application must therefore fail *in limine*.

51. Lest I am mistaken in that view and, should it arise, in order to facilitate a more comprehensive and effective appeal, I propose finally to consider the issue of whether it would have been appropriate to exercise the relevant discretion to request a preliminary reference, had I been persuaded that a question of the implementation of EU law is in issue in this case.

52. In the first place, I do not accept that this Court consitutes a court or tribunal against whose decisions there is no judicial remedy under national law. While it may be argued that the members of the Court of Appeal and Supreme Court are each susceptible to the same objection of bias that the plaintiff makes in respect of myself and every other judge of the High Court, it is possible that on appeal to either of those courts a different view may be taken on the validity or application of the rule of necessity in the circumstances presented. Accordingly, I do not consider myself bound to bring the matter before the CJEU, as I would be if I did constitute such a court or tribunal and if none of the exceptions to that requirement was otherwise applicable.

53. Second, in my view the position in this case is far closer to that contemplated by the European Court of Justice in *Irish Creamery Milk Suppliers Association v. Ireland* (Cases C-36/80 and C-71/80) [1981] ECR I-735 than that which arose before this Court in *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 I.R. 251. Unlike the latter, this is not a case that involves a challenge to specific provisions of national and EU law that speak for themselves. Nor is this a case in which a ruling is sought that only the CJEU could provide on the validity of Community law.

54. In the *Irish Creamery Milk Suppliers Association* case, the European court of Justice dealt in the following terms with an issue raised concerning the discretion to make a preliminary reference:

> "First Question
>
> 4. The first question raised by the High Court of Ireland is worded as follows:
>
> > 'Was the decision by the High Court, at this stage of the hearing, to refer to the European Court under Article 177 of the Treaty, the question set out in paragraph 2 below a correct exercise on the part of the High Court of its discretion pursuant to the said Article?'
>
> 5. Before an answer is given to that question it should be recalled that Article 177 of the Treaty establishes a framework for close cooperation between the national courts and the Court of Justice based on the assignment to each of different functions. The second paragraph of that Article makes it clear that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling.
>
> 6. The need to provide an interpretation of Community law which will be of use to a national court makes it essential, as the Court has already state in its judgment of 12 July 1979 (Case 244/78 *Union Laitiere Normande* (1979) ECR 2663) to define the legal context in which the interpretation requested should be placed. From that aspect, it might be convenient, in certain circumstances, for the facts of the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice so as to enable the latter to take cognizance of all of the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give.
>
> 7. However, those considerations do not in any way restrict the discretion of the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties, which will have to take responsibility for giving judgment in the case and which is therefore in the best position to appreciate at what stage in the proceedings it requires a preliminary ruling from the Court of Justice."

55. In this case, I am satisfied that it would be entirely inappropriate to contemplate a preliminary reference to the CJEU before the issues have been identified and the factual matrix in which they arise has been defined. I pause here to note that the plaintiff failed to comply with a direction issued by the Court that he produce an issue paper no later than the day prior to the commencement of the trial with a view to having it agreed between the parties. As I have already observed and by way of a single example, it seems to me that, insofar as a suggestion has been made in the context of the present application for a preliminary reference that an issue arises concerning the plaintiff's right of establishment or right to provide services in another Member State, before making a preliminary reference it would first be necessary to properly identify that issue, whether in the pleadings exchanged or in an issue paper agreed, or both, and, potentially, to establish in evidence the relevant facts, in order to permit the CJEU to take cognisance of the features of fact and law which may be relevant to any interpretation of EU law that it may be called upon to give. In circumstances where that has not been done, I am of the view that, even if a question of the implementation of EU law was potentially in issue in this case, it would be entirely premature to request a preliminary ruling from the CJEU at this point in the proceedings, and I would have exercised my discretion to refuse to make such a request accordingly.

Conclusion

56. The foregoing are my reasons for refusing the various preliminary applications that have been made on behalf of the plaintiff. Having announced to the parties that I was refusing the plaintiff's application for a preliminary reference to the CJEU, I afforded the

plaintiff a further brief opportunity to consider whether he was prepared to open his case, following which I was informed that the plaintiff had instructed his legal representatives that he did not wish to take any further part in the proceedings. In those circumstances, I acceded to an application made on behalf of each of the defendants for an Order dismissing the case against it.