THE HIGH COURT

[2015 No. 582JR]

Between:

BARRY WHITE

Applicant

– and –

THE BAR COUNCIL OF IRELAND,

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 31st March, 2017.

I. Overview

1. In its judgment of 8th December last, the court indicated that it would make the order for costs sought by (i) Mr White against the State parties, and (ii) the Bar Council against Mr White. Though an application for an 'order over' was sought by Mr White in the initial costs application, the court indicated that it would appreciate fuller argument in this regard, in particular by reference to s.78 of the Courts of Justice Act 1936. A further hearing-date was set, further argument was heard, and this judgment has resulted.

II. Legal Background

(i) Statute.

2. Section 78 of the Courts of Justice Act 1936, which is concerned with the potential liability of an unsuccessful defendant for the costs of a successful defendant, provides as follows:

> *"Where, in a civil proceeding in any court, there are two or more defendants and the plaintiff succeeds against one or more of the defendants and fails against the others or other of the defendants, it shall be lawful for the Court, if having regard to all the circumstances it thinks proper so to do, to order that the defendant or defendants against whom the plaintiff has succeeded shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay and pays to the defendant or defendants against whom he has failed."*

3. The form of s.78 suggests the form of the order to be made where a court is satisfied to exercise its discretion thereunder in a plaintiff versus two-defendant scenario, viz. an order in favour of the plaintiff against unsuccessful Defendant A, an order in favour of successful Defendant B against the plaintiff, and an order that unsuccessful Defendant A pay (in addition to the plaintiff's own costs) "by way of recoupment the costs which the plaintiff is liable to pay and pays" to Defendant B.

4. Whether what is often referred to as an 'order over', i.e. an order for the payment of costs directly by the unsuccessful defendant to the successful defendant, is properly available under s.78 is perhaps a moot point. Delany and McGrath in their learned text *Civil Procedure in the Superior Courts* (3rd ed.) assert, at para. 23–115, that "*[A]n order under s.78 is often made by way of an order over*". However, it does not appear that such a form of order is what the section, at least expressly, contemplates; such an order would seem an order supplementary or complementary to the form of order expressly contemplated by s.78 in the particular circumstances that it is concerned with. Moreover, depending on the precise order made, and how the 'order over' comes into play, such an order could see the risk of non-payment of Defendant B's costs shift, contrary to what s.78 provides as regards the circumstances with which it is concerned, from the plaintiff (who, in the form of order expressly contemplated by s.78 must pay those costs and then obtain recoupment) to Defendant B (who, pursuant to an 'order over' must look directly to Defendant A). In practice, such a shifting of risk may not be desirable given the respective income, wealth and/or credit standing of the plaintiff and Defendant A. However, Ó'Dálaigh C.J.'s observation in Rice (considered below) that s.78 "*is an enabling provision; not a restrictive one*" may suggest why the practice of 'orders over' under s.78 appears, as Delany and McGrath suggest, to endure.

5. At the further hearing of the within application it became clear that what is being sought by Mr White at this time is (a) that the court exercise the discretion vested in it under s.78 of the Act of 1936 by ordering that, in the circumstances of this case, it is proper that Mr White recover from the Minister for Justice and Equality, in addition to his own costs, the further costs which Mr White shall be obliged to pay to the Bar Council of Ireland, such costs to be taxed in default of agreement, or (b) an 'order over' to be made in respect of the Bar Council of Ireland's costs as against the Minister.

(ii) Case-Law.

6. Section78 has generated a limited line of case-law in the just over 80 years since it was enacted; the principal case-law of interest is considered below. The court has also been referred in this regard to Professor Delany's learned and helpful text The Courts Acts 1924–1997 (2d ed.), 159-161.

a. *Owens v. Stringer*(1938) Ir Jur Rep 64

7. This High Court decision is authority for the proposition that where at a late stage in proceedings (in that case on the morning of the trial of an action in personal injuries proceedings brought against the owners of two vehicles), one defendant admits liability and has judgment entered against him, he is liable, as an unsuccessful defendant to have an order for recoupment of costs made against him under s.78 on the basis that it has been necessary for the plaintiff to be prepared for trial against both defendants.

b. *Parkinson v. Peelo*(1939) 73 ILTR 218

8. In this case a landlord and her tenant were both occupiers of a wooden platform erected at the rear of the landlord's house at 13, Lower Leeson Street, Dublin 2. The platform was contiguous to that part of the house which the tenant occupied under lease from the landlord, but was not included in the demise. The tenant used the platform for various purposes, including the storage of coal. The landlord knew that the tenant used the platform, but did not know that he used it for storing coal. The platform was in an unsafe

condition; this was known to the tenant, but not the landlord. The plaintiff, a coal-man delivering a bag of coal purchased by the tenant's employee on behalf of the tenant, fell through the platform and was injured.

9. In an action by the plaintiff against the landlord and her tenant, it was held that the plaintiff was the tenant's invitee and the landlord's licensee, and that therefore the tenant was liable to the plaintiff in damages; but the landlord, being unaware of the dangerous condition of the premises, was not. When it came to costs, O'Byrne J. ordered, pursuant to s.78, that the tenant, as unsuccessful defendant, should recoup to the plaintiff the costs of the landlord, as successful defendant. *Parkinson* is notable for the making of the order, rather than any observation made in the making of same.

c. *Maher v. Great Northern Railway Co. (Ireland)and Warren*(1942) 76 ILTR 189

10. The plaintiff sued Great Northern Railway Company (as bus-owner) and Mr Warren (as car-owner) pursuant to Lord Campbell's Act (an Act of the Westminster Parliament that allowed relatives of people killed in fatal accidents occasioned by the wrongdoing of others to recover damages), following a collision between a bus and a car. The matter went to trial and ended in the trial judge giving a direction in favour of Mr Warren, with the jury finding in favour of the Great Northern Railway Company.

11. Following successful appeal to the Supreme Court against the direction aforesaid, the Supreme Court ordered (i) a new trial concerning the liability of Mr Warren and (ii) that the costs of the first trial abide the result of the second. The jury at the second trial found against Mr Warren. The trial judge then ordered that Mr Warren (against whom the plaintiff had been successful) pay to the plaintiff by way of recoupment the costs which the plaintiff was liable to pay and paid to the Great Northern Railway Company (against which the plaintiff had been unsuccessful).

12. The plaintiff claimed that the said order for costs yielded an indemnity to the plaintiff for the general costs of the first action against both defendants. Mr Warren submitted that: (i) the Supreme Court had directed a new trial on the issues raised in his defence and to which Mr Warren had limited his defence; (ii) in the pre-action correspondence, Mr Warren had not alleged that the Great Northern Railway Company's negligence was solely responsible for the accident; and, consequently, (iii) that the costs which Mr Warren should pay to the plaintiff were the costs incurred by the plaintiff in prosecuting his case at both trials on the issues raised by the defendant.

13. The Irish Law Times Reports describe Maguire P. as having "*thought that the meaning of section 78 was clear; it clearly allowed the Court to order that the plaintiff be recouped the costs which he was liable to pay and did in fact pay to the successful defendant. But he was asked by the plaintiff to say that it went further and empowered the Court to order that the unsuccessful defendant should recoup the plaintiff the costs incurred by him in connection with the proceedings against the successful defendant, and he would not consider it at all illogical for the legislature so to have provided, but in his Lordship's view the section did not permit that. The language of it seemed clear; it referred only to the costs payable by the plaintiff to a successful defendant*."

14. This Court must admit to reading s.78 differently. Section 78 empowers the court "*to order that the defendant or defendants against whom the plaintiff has succeeded shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay and pays to the defendant or defendants against whom he has failed.*" (Emphasis added). The liability to pay arises pursuant to such order as the court makes as to costs and it seems to the court, with respect, that there is nothing in s.78 to stop the court ordering full or partial recoupment of all of the costs that it has ordered to be paid, on whatever basis, in the costs order aforesaid. (That s.78 allows for partial recoupment has been settled by the Supreme Court in Rice (considered later below)).

d. *Wilson v. Minister for Finance*(1944) IR 142

15. Acceptance of money lodged by Defendant A and the related discontinuance of proceedings against Defendant B entitles a plaintiff to avail of an order for recoupment under s.78 against Defendant A. In *Wilson*, the plaintiff sued the Minister for Finance and a Ms Jacob for damages for negligence. The Minister, while denying liability, lodged £50 in court. The plaintiff then (i) discontinued the action against Ms Jacob, and (ii) applied for leave to accept the money lodged and an order under s 78 of the Act of 1936, recouping him the costs paid to Ms Jacob on discontinuance.

16. It was held by the Supreme Court that by the acceptance of the money lodged in court and the service of the notice of discontinuance, the plaintiff had succeeded against the Minister and failed against Ms Jacob within the meaning of s.78. In those circumstances, it was ordered that the Minister was to pay by way of recoupment, the costs which the plaintiff was ordered to pay Ms Jacob.

17. The court is, of course, bound by the majority judgment; however, there is a notable dissenting judgment by O'Byrne J. who considered that no order could be made under s.78 because it could not, in his opinion, be said "*that the plaintiff has failed in his action because he can begin a new action founded on the same cause of action, though before proceeding therewith he may have to pay the costs of the discontinued proceedings. Though for the time bring the action is ended, I am of the opinion that the plaintiff has not failed in that action, and, unless he has failed, the Court has no jurisdiction to make an order under s 78*."

e. *Byrne v. Lancaster and Gartland*(1958) Ir Jur Rep 51

18. The plaintiff in this case sued two alleged dog-owners for the killing of his sheep. The plaintiff sought an order that the defendant against whom he had succeeded should pay by way of recoupment to the plaintiff the costs that the plaintiff was liable to pay to the defendant against whom the plaintiff had failed. It was held by Shannon J., in the Circuit Court, that as it was reasonable and proper at the commencement of the proceedings for the plaintiff to join the successful defendants, the order sought should be made. Though the report in the Irish Jurist Reports is brief, it includes the arguments of counsel, both of whom were later to become Superior Court judges, and is worth quoting at some length:

> *"NIALL MCCARTHY, FOR THE PLAINTIFF: The plaintiff seeks an order under s.78 of the Courts of Justice Act, 1936. Once it is established that, at the commencement of proceedings, it was reasonable for the plaintiff to join the successful defendant, then the unsuccessful defendant, whose wrong caused the action to be brought, must bear the consequences….*
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> *SEAN GANNON, FOR THE UNSUCCESSFUL DEFENDANT: This application is frequently brought where the plaintiff is in doubt who is the responsible person such as in negligence actions involving two motor cars. Here the plaintiff was right in saying that two dogs were involved, but joined a person who was the owner of neither of the dogs and accordingly the first named defendant is in no way responsible for that circumstance. The plaintiff could not have been affected by the*

first-named defendant in such a way as to join the second-named defendant….

MCCARTHY, IN REPLY: The cases cited to oppose the application are cases where the cause of action was different. Here the cause of action was the same against both defendants and it is immaterial as to why a successful defendant obtained a dismiss of the action.

JUDGE SHANNON:...In my opinion the law is perfectly clear on the authorities cited to me and on the meaning of section 78 of the Courts of Justice Act, 1936. The question is – was it reasonable to join the successful defendant? Once I find, as I do, that it was reasonable to do so, then I must exercise my discretion in favour of the plaintiff. It is clear from all the authorities cited to me by counsel that, once it has been established that it was reasonable and proper for the plaintiff to join the successful defendant in an action grounded on the same cause of action, then, in the ordinary case, irrespective of the fact that the successful defendant was dismissed from the action, the order sought should be made."

f. *Clancy v. North End Garage* (Wexford) Ltd (1969) IR 122

19. The plaintiff, a butcher's messenger boy, suffered personal injuries when he was involved in a collision with the first defendant's car while cycling to work on his employer's pedal-bike. He sued the first defendants for alleged negligence on the part of the driver, and he sued his employer for permitting him to ride a pedal-bike with defective brakes. The plaintiff was successful against the first-named defendants but not against his employer. The trial judge directed that the first defendants recoup the plaintiff for the costs that he should pay to the second defendant.

20. Ó'Dálaigh C.J. (Walsh J. concurring) held that the plaintiff should be allowed recover from the first-named defendants the amount of the employer's costs on the basis that the plaintiff had been in peril that his action against the first-named defendant might fail and that his action against the second-named defendant was reasonable. While this Court of course accepts the majority judgment as binding, the dissenting judgment of Fitzgerald J. makes for interesting reading. It turns out, per Fitzgerald J., that the messenger boy concocted the false case about the defective brakes immediately after the accident and persisted in it at the trial until compelled to confess to its falsity. Thus, per Fitzgerald J., at 131:

"In my opinion the plaintiff's advisers should have been aware at the outset that the origin of the plea of defective brakes was based on the plaintiff's story. They could have ascertained that it was false but, in any event, the plaintiff himself always knew that it was false. He or his advisers never abandoned this false case until he was forced to do so in cross-examination at the trial. It was he, and he alone, who created the situation where the condition of the brakes was made an issue….I do not consider that the first defendants could reasonably have been expected to withdraw their plea of contributory negligence having regard to the information…that the plaintiff had blamed the brakes. This proved to be correct when the plaintiff in the witness box tried unsuccessfully to stand over his false story."

21. Clearly unimpressed by the foregoing, Fitzgerald J. considered that the liability for the costs of the employer's defence ought to rest with the person whose persistent falsehoods had caused the employer to be joined as a defendant. The majority, however, took a different view, viz. that (i) the first-named defendants had persisted in a plea of contributory negligence against the plaintiff, even when he threatened to join his employer and indicated that he would seek to make the first-named defendants liable for any costs that he might be ordered to pay his employer, (ii) it had been advantageous to the first-named defendants to have the employer joined because if it could be shown that the bicycle he supplied was deficient, then the jury would likely relieve the first-defendants of a part of the liability which, absent the employer as defendant, they would have to pay in full, and (iii) the first-named defendants had insisted that the employer be retained as a defendant until all the evidence was given (at which point the trial judge directed the jury to find that the employer had not been negligent).

22. So although the root of the difficulties that had arisen was the plaintiff's persistent falsehoods, the advantages perceived by the majority in the Supreme Court to have been derived by the first-named defendants from the joining and retention of the employer as defendant (notwithstanding that such perceived advantages rested ultimately on the plaintiff's falsehoods) were held to justify the recoupment order. Ó'Dálaigh C.J. concluded, at 129:

"The first defendants were not without hope that they could escape responsibility for the accident by proof that Keane [the employer] had supplied the plaintiff with a defective bicycle. The plaintiff gave the first defendants the opportunity of avoiding being asked to recoup to the plaintiff the costs of Keane (i.e., if Keane were to be added as a defendant and was found not to be at fault) but, looking to their own advantage, the first defendants declined to avail of this opportunity. In these circumstances the plaintiff was in peril that he might fail against the first defendants; his action in joining Keane was, therefore, in my judgment reasonable."

23. It might perhaps be contended that the last-quoted text to some extent 'glossed over' the aspect of matters that gave Fitzgerald J. such concern, *viz*. the plaintiff's falsehoods (which were not known to be such by the first-named defendants) and led to the plaintiff being rewarded for persisting in his falsehoods to the extent of joining his employer as a defendant to court proceedings and then continuing to persist in his false case until he was forced to admit the truth of matters under cross-examination at trial. But for the purposes of the within application, what is perhaps notable about the last-quoted text is the straightforward application of a reasonableness test by the majority. Fitzgerald J. makes no express observation as to the applicable test, though it seems implicit in his judgment that he was also applying a reasonableness test, albeit that he reached a different conclusion from the majority as to where the balance lay between the parties. Specifically, there is no mention in Clancy of the propriety of joining a defendant; by contrast, it will be recalled that in *Byrne*, Shannon J. refers to the instance where it has been established that "*it was reasonable and proper for the plaintiff to join the successful defendant*". Although it does not seem to the court that a discretionary power would readily fall to be exercised in circumstances where some impropriety presented, it is notable that a test of reasonableness (and reasonableness only) is applied by the Supreme Court, by which court's decisions this Court is, of course, bound.

g. *Rice v. Toombes*(1971) IR 38

24. This case concerned the question of partial recoupment. In the High Court the plaintiff sued two defendants. He failed against one and succeeded against the other, though only to the extent of a verdict for £250 which could have been recovered by way of Circuit Court action. The plaintiff then applied to the trial judge, Murnaghan J., for an order for recoupment to the plaintiff by the unsuccessful defendant of the costs which the plaintiff had been ordered to pay the successful defendant. Murnaghan J. refused the application, considering that, if it were granted, it would burden the unsuccessful defendant with the High Court costs of the successful defendant in addition to the costs on a decree of £250. It appeared therefore that, in the view of Murnaghan J., a so-called 'order over' under s.78 could be made only in respect of all the costs payable and paid by the plaintiff to the successful defendant, and that an order could not be in respect of part thereof, here so much of the costs as would be appropriate to a decree

of £250 in the Circuit Court.

25. In deciding that s.78 does allow for the making of partial recoupment orders, Ó'Dálaigh C.J. (Walsh and Budd JJ. concurring) observed as follows, at 40–41:

> *"Do the words "the costs which the plaintiff is liable to pay and pays the successful defendant" permit of a recoupment order being made in respect of part of those costs? In this Court Mr Doyle, counsel for the unsuccessful defendant, admitted that it was reasonable on the facts of the case for the plaintiff to have sued both defendants. Moreover, Mr Doyle has submitted that s 78 of the Act of 1936 allows of a recoupment order in respect of part of the costs, and he has said that he, in effect, indicated in the High Court that his client was willing to accept an "order over" limited to Circuit Court costs. He added that he was willing to abide by that position in this Court. It is counsel for the plaintiff, Mr Hamilton, who argued that the section is an all-or-naught provision. The unsuccessful defendant could, he submitted, have moved to remit the action to the Circuit Court; and he pressed the Court for an order over in respect of the High Court costs which he must pay the successful defendant….If Mr Hamilton's construction of the section is correct, the Court would be faced with deciding which is more equitable: that the unsuccessful defendant should, in respect of the successful defendant's costs, be made to bear a heavier burden than he is required to carry in respect of costs awarded against himself; or that the plaintiff (who, it is agreed, acted reasonably in suing the successful defendant) should nevertheless go without any recoupment because the recoupment machinery, if operated, only allows of a recoupment order which would be manifestly excessive in this instance.*
>
> *In my opinion there can be little doubt that the construction of s 78 of the Act of 1936 put forward by Mr Doyle is correct. The section is an enabling provision; not a restrictive one. Its purpose is, in a proper case, to allow recoupment. The section permits of a recoupment order being made in respect of all the costs paid by the plaintiff to the successful defendant, but the section does not require that the recoupment should be total. The words "the costs which the plaintiff is liable to pay and pays" are as applicable to part as to the whole of the costs.*
>
> *Therefore, I would propose that an order over should be made against the unsuccessful defendant but limited to such part of the costs which the plaintiff pays the successful defendant as is equivalent to the costs recoverable in the Circuit Court on a decree for £250."*

h. *O'Keeffe v. Russell*(1994) 1 ILRM 137

26. These were proceedings in which Ms O'Keeffe succeeded against one defendant (a bank) and failed against another (a firm of solicitors). The trial judge ordered that the unsuccessful defendant pay costs and that Ms O'Keeffe should pay the costs of the successful defendant. On appeal, Ms O'Keeffe argued that the trial judge should have exercised his discretion under s.78 of the Act of 1936 to order that, in addition to Ms O'Keeffe's costs, the unsuccessful defendant should pay by way of recoupment the costs that Ms O'Keeffe was obliged to pay to the successful defendant. Holding in favour of Ms O'Keeffe in this regard, Finlay C.J. observes as follows, at 149:

> *"[I]t seems to me inevitable that there is a genuine alternative claim and alternative potential liability between these two defendants, and that in those circumstances it was a case in which the discretion vested by s.78 in the court should have been exercised in favour of making an order over for the costs of the first named defendants".*

27. The last-quoted formulation suggests that where there is a genuine alternative claim and alternative potential liability between two defendants, and the plaintiff succeeds against one and not the other, then a recoupment order under s.78 ought typically to issue.

i. *Foley v. Independent Newspapers (Ireland) Ltd*(1994) 2 ILRM 61

28. Five months after the decision of the Supreme Court in O'Keeffe, Geoghegan J. delivered a High Court judgment in Foley in which, opining on the discretion continuing to arise under s.78 (there in refusing an order under that provision) he observed that "*In theory… Section 78…confers jurisdiction to make an order for costs over in any case in which there is more than one Defendant. But the Court must properly exercise the discretion vested in it*."

(iii) Key Principles Arising.

29. Is it possible to identify any key principles from the foregoing case-law as regards the making of recoupment orders under s.78 of the Act of 1936? It appears to the court that the following principles apply:

> (1) Where at a late stage one of several defendants admits liability and has judgment entered against him, he is liable, as an unsuccessful defendant to have an order under s.78 made against him where it has been necessary for the plaintiff to be prepared for trial against all defendants. (Owens).
>
> (2) The liability to pay costs arises pursuant to such order as the court makes as to costs; consequently, it seems to the court that there is nothing in s.78 to stop the court ordering full or partial recoupment of all of the costs that it has ordered to be paid, on whatever basis, in the costs order. (So, at least, it seems to this Court for the reasons stated previously above. Cf. Maher in which Maguire P. was of the view that s.78 does not envision the payment of the plaintiff's party and party costs but only the costs payable the plaintiff to that defendant).
>
> (3) Acceptance of money lodged by Defendant A and the related discontinuance of proceedings against Defendant B entitles a plaintiff to avail of an order for recoupment under s.78 against Defendant A. (Wilson).
>
> (4) When it comes to the making of an order under s.78, once it has been established that it was reasonable for the plaintiff to join the successful defendant (in Byrne in an action grounded on the same cause of action)[1] then in the ordinary case, irrespective of the fact that the successful defendant was dismissed from the action, such an order should be made, if sought.*(Byrne, Clancy, O'Keeffe*).
>
> [1] Various circumstances can present. In *Clancy*, the Supreme Court pointed to the fact that the plaintiff was in peril that he might fail against Defendant A and that his action in joining Defendant B was reasonable. In O'Keeffe the Supreme Court pointed to "*a genuine alternative claim and alternative potential liability between these two defendants*".

(5) When the discretionary power under s.78 is applied in any instance presenting, the Court must properly exercise the discretion vested in it. (Foley).

(6) Section 78 is an enabling provision, not a restrictive one. Its purpose is, in a proper case, to allow recoupment. The section permits the making of a recoupment order in respect of all the costs paid by the plaintiff to the successful defendant; it does not require that the recoupment should be total. The words "*the costs which the plaintiff is liable to pay and pays*" are as applicable to part as to the whole of the costs. (*Rice*).

III. The Arguments of the Parties at Hearing.
(i) Mr White's Principal Arguments.

30. The following aspects of the main proceedings were flagged by counsel for Mr. White at the within application:

– first, the refusal of the Minister for Justice to include Mr White's name on the panel, which refusal was subsequently quashed, was a decision based on an erroneous conclusion of law that Mr White was not regulated, which conclusion was prompted and informed by correspondence and meetings between representatives of the Bar Council and the Minister and her representatives.

– second, Mr White only learned from the opposition papers filed by the Bar Council of the nature of the correspondence between the Bar Council and the fact that a meeting had been held from which a collective position had emerged to implement a new procedure requiring confirmation of membership of the Law Library as a condition of eligibility for inclusion on the panel. The Minister did not refer to this correspondence or meeting in her statement of opposition or in the first affidavit filed on her behalf; indeed she only did so when her failure in this regard was highlighted by Mr White following perusal of the Bar Council's opposition papers. Indeed it is possible that but for the involvement of the Bar Council in the proceedings, there might have been no disclosure of these material events; this is a factor to which the court has had some regard.

– third, the Minister adopted the submissions of the Bar Council in relation to the rule of law precluding practice by a former judge and sought to oppose the proceedings on the basis that applicable legislation required Mr White to be a member of the Law Library and also to be regulated before the Bar Council was entitled to notify a barrister's name for inclusion on the panel. Thus, by reason of the connecting factors between the Bar Council and the Minister in their opposition to the proceedings, it was proper and necessary that both parties be represented before court.

– fourth, the questions of law ultimately determined by the court in the main proceedings could not properly have been determined without the involvement of the Bar Council as there were a number of related issues which the court was required to determine before arriving at the conclusions it did in its judgment.

– fifth, the appropriateness of joining the Bar Council in the proceedings, even though relief was not secured against them, is acknowledged in the court's judgment of 8th December last in which it acknowledged, at para. 1, that "*[I]t is very difficult to see [that the Bar Council]...would not have been involved in the within proceedings in some guise, at least at the trial stage, whether as respondent, notice party or perhaps even* amicus curiae".

(ii) The Minister's Principal Arguments.

31. The Minister places emphasis on the reference by Shannon J. in Byrne, *op. cit*. to it having been "*reasonable and proper for the plaintiff to join the successful defendant in an action grounded on the same cause of action*". (Emphasis added). Emphasis is also placed by the Minister on the reference by Finlay C.J. in O'Keeffe, op. cit. to there being "*a genuine alternative claim and alternative potential liability between these two defendants*". (Emphasis added). Starting from the just-quoted propositions, the Minister makes the following observations:

a. As regards Mr White's case against the Bar Council.

– first, two defendants were named in these proceedings and fundamentally different claims were made against each defendant; it is true that the claims had a degree of linkage in terms of the issues in one case being relevant to another but they were still fundamentally different claims.

– second, the claim against the Bar Council was an attack upon Regulation 5.2.1 of the Code of Conduct of the Bar of Ireland. The Plaintiff was seeking an order striking down that rule, seeking an order from the Court to condemn that rule. If the Plaintiff had succeeded in obtaining that relief, the Plaintiff could then have joined the Law Library and practised in any court in Ireland. As a member of the Law Library, the Minister would have had to put Mr. White's name on the panel.

– third, if successful in the just-described case, Mr. White would have had to join the Law Library after he succeeded in his claim against the Bar Council. So if Mr. White had succeeded against the Bar Council it would not have meant per se that the Minister had to put his name on the panel. This extra step would have been involved.

– fourth, it follows from the second and third points that the claim against the Bar Council was unnecessary. There was no need to sue the Bar Council. It was not a necessary party to the proceedings.

b. As regards Mr White's case against the Minister.

– fifth, the case against the Minister was a simple straightforward challenge to the Minister's decision, a judicial review application for an order to strike down that decision and Mr White succeeded in that.

– sixth, that success was the true relief that Mr. White wanted. He wanted to be placed on the panel and the only way in which that could have been achieved would be via the Minister's decision being struck down. He did not want, at the end of the day, to be a member of the Law Library and regulated by the Bar Council.

– seventh, the findings regarding Rule 5.21 of the Code of Conduct of the Bar of Ireland were not relevant to that decision.

– eighth, Mr. White has sought to conflate the two cases (very understandably, the Minister maintains) because of the above-quoted propositions from applicable case-law on which the Minister places especial reliance.

IV. Discussion
32. Three points arising from the foregoing appear to the court to be of especial significance in resolving the application at hand.

33. First, the court does not see that *Byrne* and *O'Keeffe* seek to constrain the application of s.78 to where there is *"the same cause of action" (Byrne) or "a genuine alternative claim and alternative potential liability" (O'Keeffe).* Rather, they involve the recognition and application of transcendent legal principle in cases where such further factors present.

34. Second, that transcendent principle, it seems to the court also applies in the circumstances of the within application: reasonableness is what counts in applications such as those now presenting. Was it reasonable in all the circumstances of a particular case to join both parties? For the reasons offered by counsel for Mr White in his submissions, the court's answer to the question just posed in the context of the within case is 'yes'.

35. Third, although the Minister has sought to present the claims against the Minister and the Bar Council as having been fundamentally different, it seems to the court having regard to the factual matrix to which reference was made by counsel for Mr White in his submissions that the proceedings against the Minister and the Bar Council were fundamentally joined together by the circumstances. Shortly put, the critical issue that underlay the entirety of the within proceedings concerned the regulation of a barrister who previously held the job of judge. That is why Rule 5.2.1 of the Code of Conduct of the Bar of Ireland came to pervade the case.

V. Conclusion
36. Having regard to all of the foregoing, the court will exercise the discretion vested in it under s.78 of the Act of 1936 and order that, in the particular circumstances of this case, it is proper that Mr White recoup from the Minister for Justice and Equality, in addition to his own costs, the further costs which he is liable to pay and pays to the Bar Council of Ireland, such costs to be taxed in default of agreement.