THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 326

Record Number: 2019/123

McGovern J.
Donnelly J.
Power J.

BETWEEN

A.B.

RESPONDENT/APPLICANT

- AND –

X.Y.

APPELLANT/RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 20th day of December 2019

Background

1. This is an appeal against the order and judgment of the High Court delivered on 8 March 2019. It relates to contentious family issues in the context of the High Court's extending the time within which to bring judicial review proceedings and its quashing of a Circuit Court order which had directed the procurement of an expert report on the welfare of the parties' children in the context of an application concerning access rights.

2. The judicial review proceedings arose following attempts by the appellant to enforce an order of the High Court which had been made by Abbott J. on 6 October 2014. That order provided, inter alia, that the appellant's then current access arrangements in respect of his children were to continue pending further Court order and without prejudice to any subsequent orders that may be made by the District Court in respect of the appellant's access. The High Court judge made a further order "remitting any issues relating to access rights to the Dublin Metropolitan District Court".

3. Seeking to enforce the terms of that order, the appellant brought before the District Court an application for an enforcement order pursuant to s. 18A(1) of the Guardianship of Infants Act 1964 ("the 1964 Act"). When that application came before the District Court on 13 July 2017, it ordered that the breach of access summons be struck out on the grounds that the District Court did not have jurisdiction to deal with the matter.

4. That order was appealed to the Dublin Circuit Family Court and the appeal was heard on 6 February 2018. The respondent opposed the appeal. On that day, the Circuit Court judge ordered that a report be prepared by Ms Caoimhe Ní Dhomhnaill pursuant to s. 47 of the Family Law Act 1995 ("the 1995 Act"). This is a report on any question affecting the welfare of a party to the proceedings or any other person to whom they relate, in this case, the children of the parties herein.

5. The matter was adjourned, for mention, to 23 February 2018.

6. On the adjourned date the Circuit Court judge amended the principal order of 6 February 2018 by substituting Professor Jim Sheehan as the appointed author of the s. 47 report and, to that end, ordered the respondent's solicitors to make contact with him within 7 days of the date of the order.

7. It is in respect of that order of 23 February 2018 that the respondent, on 11 June 2018, brought an application, *ex parte*, for leave to apply for judicial review. She grounded her application upon an affidavit sworn on the same day. In the *Ex Parte* Docket, she sought, *inter alia*, leave to apply for an order of *certiorari* quashing the order of the Circuit Court and, if necessary, an order extending the time for the institution of the proceedings. On that day, Noonan J. granted leave to apply for reliefs sought at para. (d) of the Amended Statement of Grounds. It should be noted that an order extending time was not specified among the reliefs sought at para. (d) but the Amended Statement of Grounds asserted that good and sufficient reasons existed for extending time and that the appellant would not be prejudiced thereby. Such an order was sought, formally (if deemed necessary), in the Notice of Motion.

Evidence

8. There were six affidavits before the High Court. In determining this appeal, it is necessary to set out a synopsis of the evidence given in each. In the interests of brevity, averments and submissions have been paraphrased.

The First Affidavit

9. In the affidavit of 11 June 2018 ('the first affidavit') the respondent provided details of her marriage to and divorce from the appellant and gave particulars in respect of their three children. She recalled the appellant's conviction and subsequent incarceration in October 2014 and of her being informed of a release date of 17 May 2018. She set out the terms of two orders of Abbott J. made on 7 February and 6 October 2014. She described earlier District Court guardianship proceedings which the appellant had taken in relation to the children's schooling. She averred to the following matters. In the Circuit Court proceedings of 6 February 2018, her counsel had objected to the hearing on the grounds that the court lacked jurisdiction. The judge had refused to listen. She had made the impugned order directing the preparation of a s. 47 report by Ms Caoimhe Ní Dhomhnaill. The judge said that she knew that the respondent was objecting to the order being made. She did not attend court when the matter was in for mention on 23 February 2018 but she was represented by counsel. On that day, the judge substituted Professor Sheehan as author of the s. 47 report. He had seen the children before. The judge indicated, again, that she was aware of the respondent's objection. In her affidavit, the respondent then set out the provisions of s. 18A(1) of the 1964 Act. She had been advised that enforcement of High Court orders should not be sought in the District Court but in the High Court. The appellant could have and did not apply to the District Court for an order in respect of access. In the penultimate paragraph of her affidavit she stated:

'Although the Order of the Dublin Circuit Family Court was made on 23rd February 2018, I was not aware of same until I had sight of it on 1st June 2018. I became aware of the relevance of the Orders on the 1st May 2018 when I was contacted by Professor Sheehan. At no stage did I agree

to this Order. I say that as soon as I became aware of the parameters of the Order I sought advice from my Solicitors.'

10. In granting leave, ex parte, the High Court (Noonan J.) also granted, inter alia, a stay on the Circuit Court order of 23 February 2018 with liberty to the appellant to apply on 48 hours' notice in respect of the said stay.

11. For reasons set out below, over three weeks passed before the appellant was aware of the making of the order by Noonan J. Having learnt of the imminent judicial review application, he attended the offices of the respondent's solicitors on 28 June 2018 and was served, personally, with the proceedings.

The Second Affidavit

12. The next day, 29 June 2018, the appellant swore an affidavit to ground his application to set aside the stay on the order of the Circuit Court. He averred to the following: prior to his incarceration in October 2014, he had regular contact with his two younger children. In prison, letters addressed to his children were intercepted at the request of his former wife. Efforts made to see his children, including during periods of temporary release and after his incarceration were unsuccessful, leaving him in an ongoing situation of being denied access to his children. That is why he brought enforcement proceedings which resulted in the order of the Circuit Court which the respondent now sought to have quashed. He had not received any correspondence about the judicial review. It had been sent to Loughan House on 15 June 2018. By the respondent's own admission, she was aware that he would be released from Loughan House on 17 May 2018. Her legal advisors were well able to reach him by telephone whenever needed. He learnt of the judicial review proceedings when he called Professor Sheehan on 24 June 2018 to inquire about the status of the report.

13. He objected to the proceedings. Among his objections to the judicial review were the following: the respondent was outside the time limit for bringing the application. It was merely the latest in a long sequence of actions designed to prolong his estrangement from his children. The respondent was mis-using the proceedings to facilitate her wilful and persistent non-compliance with the High Court order of Abbott J. It was 'a blatant mistruth' for her to say that the grant of an extension of time and a stay on the order would not cause him to suffer any prejudice. To make such a statement in an ex parte application was tantamount to misleading the court. The court had not been properly apprised of the prejudicial effect upon him of such an extension. It was a serious matter. There is a 'golden rule' in ex parte applications. The respondent had a duty of candour and did not disclose all relevant matters. She knew he was anxious to re-establish a relationship with his children. The proceedings were designed to frustrate this. She had not appealed the High Court order. She has failed to comply with its terms. She was using his enforcement application as a vehicle to launch a belated appeal against the High Court order. The order of 11 June 2018 prolongs a process that has been long and stressful. The effluxion of time undermines his relationship and bond with his children. The respondent is seeking to prolong that separation and then use it in support of an argument that his rights as a parent have diminished.

The Third Affidavit

14. On 16 July 2018, the respondent filed a replying affidavit to the one filed by the appellant on 29 June 2018. She made the following averments: the Circuit Court judge was incorrect in making the order. She had given the respondent no opportunity to set out the true circumstances pertaining to access over the years. In the opinion of the judge, the children were afraid to ask to see their father. The judicial review application was not about access but concerned, rather, the trial judge's jurisdiction to make the orders that she made. Further assessment of the children was not in their interests. They should be permitted to give their views directly to the court. The appellant's access to his children had diminished prior to his incarnation, as a result of his own behaviour. The children have suffered greatly. They do not want to see their father. She never denied he was their legal guardian. Through his conduct he had alienated himself. Attempted access arrangements between the appellant and his children had failed and damage had been caused to them over the years. There were difficulties in the relationship between the appellant and his children pertaining to school matters. It was not possible to serve the appellant with the judicial review proceedings because she did not know his address. He contacted her solicitors on 26 June 2018 following which service was effected, personally. She was not prolonging his estrangement from his children. He could bring an access application before the District Court and have it 'fast-tracked' but he chose not to do so. He failed to take into account the children's welfare. He had walked out of the District Court and lodged an appeal. The moment she saw a copy of the Circuit Court order she had immediately sought advice. Until she saw an actual copy of the Circuit Court order she had not realised its parameters. The children were happy. It was not in their interests to undergo further assessment. The appellant was not prejudiced by the stay.

The Fourth Affidavit

15. On 11 September 2018 the appellant swore an affidavit by way of reply and averred as follows: correspondence seeking to arrange access including at Christmas 2016 and 2017, had gone unanswered. In the Circuit Court hearing on 6 February 2018 the respondent had argued that the order of Abbott J. was stale and/or dormant and therefore not amenable to an enforcement order. The judge had listened carefully. She sought an expert report before making any decision regarding access. This was reasonable and proportionate. The DAR recordings would confirm that the respondent was afforded every opportunity to put her case. Her averment that she was not aware of the Circuit Court order of 23 February 2018 until she had sight of it on 1 June 2018 was 'a blatant untruth'. On 6 March 2018 her solicitors had written to Professor Sheehan confirming the Circuit Court order. They confirmed the respondent would be responsible for 50% of the fees and that she would make arrangements for the family to meet with Professor Sheehan. This letter puts beyond dispute that the respondent was absolutely clear in March 2018 as to the effect and implications of the Circuit Court order. It is unconscionable and not credible for her to assert that she was not aware of it and its import until 1 June 2018. She has made false and malicious statements about his parenting and his role as a father. He made calamitous business decisions and has been rightly punished but what the respondent says about his role and competence as a father is refuted. She has failed to comply with the High Court order. Her alleged ignorance of the Circuit Court order before 1 June 2018 is inconsistent with her actions in meeting Professor Sheehan on 15 and 29 May and agreeing to share the costs. Her actions were also inconsistent with her claim that she did not understand the parameters of the actual order until she had

received a copy. She was fully aware of its terms and effects. Her assertions to the contrary are incredible. Her averment that she never denied he was the children's legal guardian was another blatant untruth. It was because she had tried to exclude him from the children's lives that he was forced to initiate guardianship proceedings. These had been defended, rigorously.

16. The respondent was out of time when she brought her application for judicial review. She had not advanced any 'good or sufficient reason' for the court to extend the time. She had not demonstrated that the circumstances which resulted in her failure to make the application within the specified time were outside her control or were such that they could not, reasonably, have been anticipated by her. It was untrue that he would not suffer prejudice by the grant of an extension of time. If granted, it would cause real and indisputable prejudice. He had made persistent efforts to rebuild a relationship with his children of which the respondent was well aware. Time is of the essence. Its effluxion renders his endeavours more difficult. The respondent's ex parte application was based on sworn evidence that was selective and self-serving. It fell well short of the duty of full candour. This was something to which the court ought to have regard when considering the respondent's bona fides in applying for an extension of time.

The Fifth Affidavit

17. The next affidavit before the High Court was sworn by the respondent on 15 October 2018. She denied that the appellant made continuous efforts to see his children during periods of temporary release. She repeated a number of averments made in her earlier affidavits concerning the Circuit Court proceedings. She denied having told untruths. The moment she saw the Circuit Court order she immediately sought advice. She had met Professor Sheehan on two occasions in May and had conveyed her extreme concerns regarding the order. Thereafter, she obtained a copy of the actual order. She then met with her new legal advisers who proceeded with the judicial review application.

The Sixth Affidavit

18. The final affidavit that was before the High Court was sworn by the respondent on 19 December 2018. She said that while she was aware that an order had been made on 23 February 2018 appointing Professor Sheehan to carry out a s. 47 report, she did not know what such a report would involve. She told her former solicitors of her concerns and asked for advice on her options. They did not get back to her. She was unaware that it was possible to challenge the Circuit Court order and would have done so had she known. In the week of 7 May 2018 she asked Professor Sheehan to explain the scope of a s. 47 report. He told her that he did not know. She contacted her solicitors inquiring about an opinion from a family law barrister. She attended Professor Sheehan on 29 May because she was anxious not to be in breach of a court order. She told him that the children would be very uncomfortable with what was entailed in his preparation of a s. 47 report. Professor Sheehan said that she should go back to court. She contacted her current solicitors on 5 June 2018 and was informed of the possibility of a judicial review. She does not know why her former solicitors did not get back to her.

High Court Judgment

19. When the matter came on for hearing before the High Court, the trial judge had before him the sworn evidence of the parties as set out in the six affidavits referred to above. Before considering the issues arising in the proceedings, he set out certain statutory provisions, namely, O. 84, r. 21(3) of the Rules of the Superior Courts ("RSC"), s. 18(A) of the 1964 Act, and s. 47 of the 1995 Act.

20. The High Court dealt, firstly, with the application for an extension of the time. Order 84, r. 21(3) of the Rules of the Superior Courts provides: -

> "Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such a period if it is satisfied that: -
>
> (a) there is good and sufficient reason for doing so, and
> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either –
>
> (i) were outside the control of, or
> (ii) could not reasonably have been anticipated by the applicant for such extension."

21. In considering the application for an extension of time in this case, the trial judge accepted the explanation put forward by the respondent in her final affidavit of 18 December 2018. He recalled that she had informed her solicitors of her concerns about the s. 47 report which the Circuit Court had ordered and that she had sought their legal advice but that they did not come back to her. She was unaware that she could seek judicial review until she contacted her current solicitors. In the meantime, she had met with Professor Sheehan because she did not want to be in breach of the order. The trial judge noted that the appellant had raised the issue of estoppel based on the respondent's meetings with Professor Sheehan. On the question of extending the time he concluded (at para. 17 of the judgment):

> "I am satisfied that the applicant has shown 'good and sufficient reason' to extend time. The failure to make the application within the time allowed by the Rules arose out of a failure on the part of the applicant's previous solicitors to give the advice which she had sought. The applicant, presumably, would only have sought this advice if she were minded to contest the order for a s. 47 report. In this context, I do not believe that meeting Professor Sheehan on 29 May 2018, whilst awaiting legal advice, constitutes an estoppel as against the applicant. Further, having sought legal advice without response from her former solicitors, the applicant made contact with her current solicitors on 5 June 2018. These facts, to my mind, constitute circumstances 'outside the control' of the applicant. Further, I cannot see that any prejudice would accrue to the respondent by extending time for the purpose of making this application."

22. The trial judge then considered the application for an order of certiorari. Noting that the orders (sic) which the appellant claimed had been breached were orders (sic) made by the High Court, he found that any proceedings in respect of such alleged breaches should be taken in the High Court.

The District Court was correct in declining to hear the application under s. 18A(1) of the 1964 Act. The Circuit Court ought to have refused the appeal. He made an order in the following terms:

"(i) the time is extended within which the taking of Judicial Review proceedings may be made;

(ii) the Circuit Court order dated 23 February 2018 be quashed;

(iii) the respondent pays to the applicant the costs of the application including reserved costs; and

(iv) there is a stay of 21 days on the said Costs order only."

Grounds of Appeal

23. By notice dated 27 March 2019 the appellant seeks to set aside the order of the High Court made on 8 March 2019. The principal grounds of appeal relate to three areas, namely, the extension of time, the grant of certiorari, and the award of costs.

More specifically, the appellant claims that the High Court judge erred in law and in fact in:

(1) finding that the respondent had shown "good and sufficient reason" to extend the time for the bringing of the judicial review;

(2) finding that the factors pleaded by the respondent giving rise to the delay in the bringing of the judicial review proceedings were "outside of the control" of the respondent;

(3) finding that the appellant was not prejudiced by the decision to grant an extension of time for the bringing of the judicial review;

(4) finding that the respondent was not estopped by her conduct from bringing the judicial review proceedings;

(5) finding that the District Court did not have jurisdiction to hear the appellant's application under s. 18(A) of the 1964 Act;

(6) finding that the High Court order remitting to the Dublin Metropolitan District Court 'any issues relating to access rights' did not cover a breach of the access order by the respondent; and

(7) finding that, notwithstanding the circumstances and the nature of the proceedings, no exceptional circumstances arose that would merit not awarding costs against the appellant.

The First Issue: The Extension of Time

The Parties' Submissions

24. The appellant submits the High Court judge had erred in finding that the respondent had shown "good and sufficient" reason for not bringing the judicial review within the time specified under the Rules. The High Court had accepted only the reason offered by the respondent in her fourth affidavit, namely, the inactivity of her former solicitors, and had completely ignored the fact that

she had offered different reasons for the delay in her earlier affidavits to the Court. In her grounding affidavit she had made no mention of her former solicitors' inactivity as the reason for her delay. She had, instead, claimed that the delay had arisen because she was "not aware" of the making of the Circuit Court order until she "had sight of it" on 1 June 2018. The appellant submitted that this sworn testimony was contradicted in a number of respects by the respondent's own evidence. For example, she had sworn that she had objected to the Circuit Court prior to the making of the order and that her objection was noted on two occasions by the Circuit Court judge. Her alleged ignorance concerning the order was further contradicted by the fact that her solicitors had confirmed to Professor Sheehan that, on foot of the Circuit Court order, she would be meeting with him and discharging half of his professional fee. Her alleged ignorance of the order up to 1 June was further undermined by that fact that she had discussed her "extreme concerns" relating to the order with Professor Sheehan in May 2018.

25. By accepting the respondent's revised version of her reason for the delay as set out in the December affidavit—in which she had shifted the blame on to her previous solicitor and outside of her own control—the High Court judge, in the appellant's submission, had failed to engage in any way with the glaring contradictions and inconsistencies in the respondent's own sworn evidence. Having regard to the totality of the evidence presented to the High Court, the respondent had failed to show good and sufficient reason for extending the time. The case of *O'S. v. The Residential Institutions Redress Board* [2018] IESC 61 was relevant in that the Supreme Court had confirmed that the phrase "the circumstances that resulted in the failure" called for a broad interpretation encompassing all the relevant circumstances which had resulted in the failure to apply on time. Such a broad interpretation, he submitted, obliged the High Court "to carefully analyse the respondent's inconsistent, contradictory and evolving evidence as to the reasons for her delay which call into question the candour of the respondent and the reliability of her evidence".

26. In the appellant's submission, the High Court had also erred in finding that he was not prejudiced by its decision to grant an extension of time. He had set out how the judicial review proceedings were part of a protracted campaign designed to prolong his estrangement from his children and to raise barriers to the prospect of a reconciliation. The respondent's objection to the Circuit Court order of 23 February 2018—which had merely sought to obtain professional assistance to inform that court's decision—has had the effect of causing him significant detriment by continuing to deprive him of access to his children. During the hearing the appellant referred, specifically, to sub-rule (4) of O.84, r, 21 RSC and its reference to the "effect" which an extension of time may have on another party. In his case, the "effect" included the "inevitable outcome" of the decision to extend the time. He submitted that 22 months had elapsed since the Circuit Court judge had sought the s. 47 report. Such continuing estrangement from his children was evidence in itself, he claimed, that the High Court judge erred in finding no prejudice to the appellant by allowing an extension of time.

27. The respondent, for her part, submits that the extension of time granted by the High Court was relatively short (two and a half weeks). She had explained the circumstances leading to the delay

in her affidavit of 19 December 2018. She was present in the Circuit Court when the judge made an order appointing Caoimhe Ní Domhnaill as assessor for the s. 47 report. She was not present when Professor Sheehan had been substituted as author. She had asked her former solicitors for advice in relation to Professor Sheehan's appointment and even suggested that she might receive advice from a specialist family law barrister. She never received that advice. When she spoke to Professor Sheehan she asked him to explain the scope of a s. 47 report but, she claims, he said that he did not know. When she met him on 29 May 2018 he told her how he would go about preparing the report. She engaged new solicitors on 5 June 2018 and made the application on 11 June 2018. The respondent submits that the delay was outside her control insofar as she had no control over her former solicitors' failure to give her advice which she had expressly sought.

28. The respondent further submits that there could be no prejudice caused to the appellant by reason of the two and a half weeks of delay. In submissions and at hearing, it was argued that "prejudice" in this context must refer to some impairment to the appellant's ability to defend the judicial review proceedings and that no evidence of such impairment in this regard had been offered or suggested. Finally, the respondent submits that had the appellant made an appropriate access application to the District Court, the substance of his complaints would have been dealt with expeditiously and on their merits.

Legal Principles

29. The principles applicable to an appellate court in hearing an appeal are well known and have been set out by McCarthy J. in *Hay v. O'Grady* [1992] 1 IR 210 at p. 217. Essentially, where findings of fact made by the trial judge are supported by credible evidence, an appellate court is bound by those findings (emphasis added). As Clarke J. (as he then was) pointed out in *Doyle v. Banville* [2018] 1 IR 505, at p. 510, it is important that the trial judge's judgment engages with "the key elements of the case" made by both sides and explains why one is preferred over the other. An appellate court is not obliged to go through every tangential piece of evidence to find something that the trial court may have failed to consider. Its obligation is to address the competing arguments of both sides in whatever terms may be appropriate on the facts and issues arising. The court must consider, at least, what Clarke J. referred to as "the broad drift of the argument on both sides" so that it is clear why the court came to the conclusions it did.

30. When reviewing a discretionary decision of the High Court on appeal, the approach to be taken by this Court has been summarised by Irvine J. in *Collins v. Minister for Justice* [2015] IECA 27. At para. 79, the learned judge stated that the true position is as set out by MacMenamin J. in Lismore Builders Ltd (in Receivership) v. Bank of Ireland Finance Ltd & Ors [2013] IESC 6, namely:-

> '. . . that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammeled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.'

31. The jurisprudence of the Superior Courts in respect of an extension of time in judicial review cases has evolved over time. The meaning and scope of Order 84, r. 21 RSC was addressed recently in *O'S. v. The Residential Institutions Redress* Board [2018] IESC 61. In that case, the Supreme Court considered what may or may not constitute "good and sufficient reason" for an extension of time under Order. 84, r. 21(3)(a) RSC, as amended by S. I. No. 691 of 2011. Prior to the 2011 amendment, an applicant was confronted with a time limit and was obliged to act "promptly" but time could be extended for "good reason". Following the amendment, the "good reason" requirement was extended to both "good and sufficient reason". An additional mandatory requirement relating to the circumstances giving rise to the delay was also included.

32. In her judgment in *O'S.* Finlay Geoghegan J. traced the evolution of the manner in which the courts have approached applications for an extension of time. She noted that in *De Róste v. Minister for Defence* [2001] 1 I.R. 190, the discretionary nature of judicial review (including applications for an extension of time) was underscored by Denham J. (as she then was) who, at p. 208 of the judgment, stated that the exercise of a discretion involves "the balancing of factors". Denham J. set out a list of non-exhaustive factors that a Court could consider when determining whether there was "good reason" to extend the time. These factors included, inter alia, the nature of the order, the conduct of the applicant, the conduct of the respondent(s), the effect of the order on the parties or on third parties together with relevant public policy considerations. She recalled that the paramount consideration of a Court when exercising its discretion is the protection of justice.

33. In *Dekra Éireann Teo v. Minister for Environment* [2003] 2 IR 270, Denham and Fennelly JJ. approved of and applied the approach adopted by Costello J. in *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301, where he stated at p. 315:

> "The phrase 'good reasons' is one of wide import, which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights (*The State (Cussen) v. Brennan* [1981] I.R. 181)"

Fennelly J. observed in Dekra (at p. 304) that an applicant who is unable to furnish good reason for a failure to issue proceedings within the prescribed time limit, will not normally be able to furnish good reason for an extension of time.

34. The scrutiny of the case law by Finlay Geoghegan J. in *O'S.* led her to distil the relevant principles applicable to applications for an extension of time. The jurisprudence indicates clearly that an

applicant who does not apply within the time limit for bringing judicial review proceedings is required to furnish good reasons, which explain and objectively justify the failure to make the application on time and which would further justify the court granting an extension of time up to the relevant date. The case law also highlights the discretionary nature of the jurisdiction being exercised by the court when determining such an application, including, its role in protecting the right of access to courts. It sets out the kind of factors to which the court may have regard in determining such applications in the light of all the facts and circumstances that are relevant to the case. Finlay Geoghegan J. considered that the above principles, as articulated in the cases prior to the 2011 amendment—where "good reasons" for extending time were required—apply equally to the current requirement that the court should be satisfied that "good and sufficient reason" has been established. She did not consider that the inclusion of "and sufficient" involved any particular additional requirement. It only emphasizes that the reasons offered must be sufficient to justify the court exercising its discretion on all the relevant facts and circumstances to grant the extension of time. She concluded at para. 60 that: -

> '[. . .] the case law cited above, insofar as it applies to the extension of the time specified under O. 84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the Court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party.'

I will now turn to consider the application of the relevant legal principles to the facts of the instant case.

Discussion

Good and sufficient reason?

35. The Court must examine, firstly, whether the respondent had established "good and sufficient reason" which justified the High Court's exercise of its discretion in favour of granting an extension of time. The evidence demonstrates that the respondent had put before the High Court two different versions of her reasons for failing to bring the judicial review within the prescribed time.

The first reason was based on her alleged ignorance of the order; the second, on her alleged ignorance of the law.

36. Sketched briefly, the reason first offered by the respondent (in her grounding affidavit of June 2018) was that she did not know about or "was not aware of" the Circuit Court order until she saw it on 1 June 2018 and that she did not understand its relevance and that as soon as she received a copy of the order she immediately sought advice and brought the judicial review application shortly thereafter. This first reason is restated several times in the first three affidavits filed by the respondent.

37. Summarised, briefly, the second reason for the delay, offered six months later by the respondent, was that whilst she did know about the order she did not know what it involved. She told her solicitors of her concerns about the ordered s. 47 report and the legal advice she had sought from them was not forthcoming. She did not know that it was possible to challenge the Circuit Court order. Once she had changed solicitors she brought the judicial review application soon afterwards.

38. The first reason warrants some scrutiny because, on its face, it appears to be inconsistent with the respondent's overall evidence. Her sworn statement that she "was not aware of the making of the order until 1 June 2018" cannot be reconciled with the facts as she herself presented them. She swore that she had objected to the Circuit Court ordering a s. 47 report (with Ms Ní Dhomnaill as assessor) during the Circuit Court hearing on 6 February 2018. He legal counsel objected again on 23 February 2018. She swore that on both occasions the judge was aware of her objection. She had engaged directly with the judge who had put questions to her. She had objected to her children undergoing "another assessment". Her testimony in this regard went clearly to the merits and was not confined to an alleged lack of jurisdiction. If what the respondent swore in her grounding affidavit is true, namely, that she was not aware of the Circuit Court order until she had sight of it on 1 June 2018, then to what, one might ask, was she objecting? Furthermore, the substance of the order of 23 February 2018 directing the preparation of a s. 47 report was practically identical to the principal order, to which the respondent had objected on 6 February 2018. The main difference was the substitution by the Court of one appointed expert for another. Thus, the respondent's claim that it was the seeing of the actual order of 23 February 2018 that drove her to seek legal advice is not convincing.

39. It is significant, in my view, that the respondent, on both occasions when the matter was before the Circuit Court, had the benefit of the presence of solicitor and counsel. Any lack of awareness or understanding as to what had transpired at the hearing could have been raised with them, particularly, on 6 February 2018 when the respondent was present and the principal order was made. What is clear is that soon after the Circuit Court order of 23 February 2018 substituting Professor Sheehan as assessor, the respondent's solicitors wrote to him confirming that she, their client, would discharge half of his professional fee and would arrange for the family to meet him. He was reminded that he had prepared two previous reports in the matter and was given a copy of another expert's report. Thereafter, the respondent met with Professor Sheehan on 15 and 29 May 2018.

40. Having regard to the foregoing, I consider that the respondent's claim that she was not aware of the Circuit Court order and/or of its import until she had sight of it on 1 June 2018, as the explanation initially offered for her failure to apply on time, is not credible. This averment was contained in her first affidavit grounding her ex parte application. There is, indeed, an obligation of candour, a duty to tell the truth and to disclose all relevant matters when making such an application. It is an important matter and is not something to be taken lightly. The Court's decision on an *ex parte* application may have serious ramifications for others who are not before the Court.

41. Of course, it is clear from the judgment in this case, that the trial judge focused only on the respondent's second explanation for her failure to apply on time. The "shift" in her explanation is perplexing. The facts given in the alternative version were quite different from those given in the first. It was on the basis of those "alternative facts" that the trial judge concluded that the respondent had shown "good and sufficient reason" to extend time.

42. The Court observes that the trial judge did not consider, even in passing, the reasons for the delay put forward by the respondent in her first and, arguably, most important affidavit, namely, the one sworn in support of her ex parte application. If he had done so, he could not have failed to notice that a fundamentally different reason was being advanced by her in her later explanation. He would also have noticed the striking inconsistencies between a substantial part of her evidence and her alleged lack of awareness and/or understanding of the Circuit Court order which she had sought to impugn.

43. Those inconsistencies and contradictions in the respondent's evidence had been expressly brought to the trial judge's attention, at some length, in the appellant's affidavits. In the written judgment, however, the appellant's evidence is dealt with in a rather cursory manner by the trial judge (see para. 16 of the judgment).

44. In *O'S.*, Finlay Geoghegan J. did not consider that the inclusion of the term "and sufficient" in the Rules, as amended, had added any particular requirement necessary to engage the discretionary function. It served mainly to emphasise that the reasons offered must be sufficient to justify the Court's exercise of its discretion in all the circumstances. The present case, however, is one in which the requirement of sufficiency takes on some significance. Viewed in isolation and taken at face value, the second explanation for the delay furnished by the respondent may constitute "good reason" to extend time. However, when viewed in conjunction with her first explanation and in the light of the evidence as a whole, a shadow is cast as to whether it is a "sufficient" one, such as would justify the Court's exercise of its discretionary function in favour of extending time. It does not tally with her first explanation and the respondent has offered no excuse as to why her initial reasons for the delay had changed. Legal proceedings are an organic whole and must be regarded, holistically. In my view, the reasons accepted by the trial judge ought to have been considered in conjunction with all of the other evidence in the case and in the light of all the relevant circumstances.

All the relevant circumstances?

45. The next question for consideration is whether the reasons given for the respondent's failure to bring the judicial review within the prescribed time limits were considered by the trial judge in accordance with all the relevant facts and circumstances of the case. To my mind, these would include: -

(1) a High Court order granting access rights to his children was made in favour of the appellant in October 2014;

(2) the appellant could not exercise those rights during a period of incarceration, but he made attempts to remain in contact with his children;

(3) upon release, the appellant made a failed application for the enforcement of the High Court order in the District Court and appealed to the Circuit Court;

(4) the respondent objected to the Circuit Court appeal on the grounds of a lack of jurisdiction and on the merits;

(5) the Circuit Court ordered that a s. 47 report be prepared by Professor Sheehan (in place of Ms Ní Domhnaill) notwithstanding the respondent's claim that the children had settled following a traumatic experience and do not want a relationship with their father;

(6) what is in the "best interests" of children is, in principle, a matter to be determined by the courts in family law disputes where the parents cannot agree;

(7) the decision of the Court which the respondent seeks to challenge in the judicial review is one which raises a question of law on the jurisdiction, if any, of a lower court to enforce an order of the High Court;

(8) the order of the High Court granting access to the appellant has not been appealed by the respondent;

(9) the order of the High Court granting access rights to the appellant has not been enforced and, to date, remains extant;

(10) the appellant has not seen his children since October 2014 and claims that the judicial review, including, the grant of an extension of time within which to apply, causes a further and stressful prolongation of his estrangement from his children.

The Balancing Exercise

46. As noted by Denham J. in *De Róiste*, the exercise of a discretion involves "the balancing of factors" (p. 208). In balancing all relevant factors, the Court is obliged to have regard to the well settled principle of public policy that requires challenges to administrative decisions to be made promptly. A period of two and a half weeks is, admittedly, not a very long period to extend the time for the bringing of a judicial review application (if counted from the date of the principal order of 6 February 2018 to which the respondent was clearly opposed, then a delay of almost four weeks

had accrued). However, regardless of the duration, the fact remains that this Court must be satisfied that granting any extension of time is objectively justifiable having regard to all the prevailing circumstances.

47. Another matter that is required to be weighed in the balance, is the question of the effect which the extension of time may have on another party. As Costello J. recalled in O'Donnell, other parties may have acquired rights and so, in exercising its discretion, the Court must have regard to the rights of all concerned. Important constitutional rights of both parties (and of their children) are in issue in this case. The respondent's right of access to the court is a fundamental right and a period of eighteen days may not appear to be significant. However, the Court cannot disregard the fact that the appellant has not seen his children in over five years and has made various unsuccessful attempts to remedy that situation. In these circumstances, the High Court judge, in granting the extension of time, ought to have had regard to the effect of an extension upon the appellant herein.

48. It was argued on behalf of the respondent that any "prejudice" caused to the appellant by her failure to apply on time must be considered in terms of an inability or an "impairment" on the part of the appellant to defend the judicial review proceedings themselves. The appellant, on the other hand, argued for a more expansive interpretation. He submitted that "the effect" referred to in sub-rule (4) should be interpreted as extending to the consequences which a prolongation of proceedings would have upon him. Such prolongation, he claimed, was part of the respondent's ongoing effort to frustrate his right of access to his children. The Court, in this view, is entitled to take account of the fact that extending the time prolongs his estrangement from his children.

49. Considerations concerning the impact which a delay in bringing an application for judicial review may have on another party occur twice in O. 84, r. 21 RSC. Sub-rule (4) provides that the court may have regard to "the effect" on another party which an extension of time may have. Sub-rule (6) provides that nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply has caused or is likely to cause prejudice to a respondent or third party.

50. The reference in the Supreme Court judgment of Finlay Geoghegan J. to sub-rule (4) of O. 84, r. 21 RSC, in O'S. is important. The sub-rule was introduced in the 2011 amendment. In her view, it indicates "expressly" that the court may have regard to the impact of an extension of time on any respondent or notice party. There is nothing in the Supreme Court judgment to suggest that such an "impact" is limited to "prejudice" in defending the proceedings, as contended for by the respondent. Indeed, even in the dissenting opinion of O'Donnell J. he implicitly recognizes that prejudice is something that could be considered either in the narrow sense or more broadly. In discussing features for and against extending time in that case, he noted that one feature in favour was the fact that there was no question of another individual being prejudiced "either in the way in which they might meet the claim or *more generally*" (emphasis added).

51. In these circumstances, I consider that in conducting the balancing exercise required in applications to extend time, the general or overall effect upon a party which such an extension

might have *is* a factor to be weighed in the balance. The appellant in this case had raised, in some detail, the impact which extending the time would have upon him. It is difficult to see what, if any, consideration was given by the trial judge to the effect or impact that an extension of time would have upon the appellant. He stated only "I cannot see that any prejudice would accrue to the respondent by extending time".

Decision

52. In exercising a discretion to extend the time within which to bring a judicial review application, the overriding consideration must be the protection of justice (*De Róiste*). Its interests must be served. Time limits exist for a purpose and, in principle, they ought to be observed. Moreover, in the context of judicial review, they fulfil the important function of enabling people to know where they stand on foot of decisions of administrative bodies and to conduct their affairs, accordingly. If a practice were to develop whereby time limits were set aside lightly, adverse consequences for the judicial system would, inevitably, follow.

53. When all the factors considered above are placed into the balance and viewed in the light of all the relevant circumstances, I have concluded that the respondent has not adduced 'good and sufficient reason' for her failure to comply with the relevant time limit such as would justify, objectively, the court's exercise of its discretion in favour of granting an extension.

54. In reaching this conclusion, I have had regard to several considerations, including, what appears to have been a lack of full candour on the part of the respondent. This was evident in her failure to set out in her *ex parte* application the reason upon which she later relied for her failure to bring the judicial review application within the prescribed period. Her initial reason for the delay, namely, her alleged lack of knowledge about the making of the Circuit Court order until she had sight of it on 1 June, is characterized by its stark inconsistency with the rest of her evidence. Her testimony that it was not until she 'saw' the actual order that she realized its parameters and then immediately sought legal advice does not stand up to scrutiny, particularly, when viewed in the light of her clear objections in court to the ordering of a s. 47 report. There were other aspects of the respondent's evidence which raise, at least, a question as to her compliance with her duty of candour. Her sworn evidence that she did not know what a s. 47 report involved until she met Professor Sheehan is difficult to reconcile with her testimony that she had argued against obtaining such a report because it wasn't in the children's interest to undergo 'another assessment'. It also appears inconsistent with her own solicitor's correspondence of 6 March 2018. Insofar as the respondent claims that she attended Professor Sheehan because she was anxious not to breach a Circuit Court order, it has to be noted that compliance with a High Court order made in October 2014 has, as yet, to be observed.

55. In reaching my conclusion, I have also had regard to the effect, on both parties, of the order of the Circuit Court which the respondent sought to challenge. The effect on the appellant is that it may be a first step in a process that may lead to a reconciliation with his children. The effect on the respondent is that she will be obliged to engage in a process which involves meeting with Professor Sheehan, whom she knows from previous meetings, and cooperating in the preparation of his report. He is already known to the children having prepared two earlier reports in this matter.

Furthermore, I have also considered the Constitutional rights of both parties, including, the right of access to court and the rights of the family.

56. In coming to my decision, I have taken on board the fact that on both occasions before the Circuit Court, the respondent was represented by solicitors and counsel. Given her own account of the 6 February hearing, including, her exchanges with the Circuit Court judge on that date and her objection to the procuring of s. 47 report, it appears to me that she had ample opportunity to ask what her options might be after the first hearing. The provisions of the later court order were substantially the same as those in the principal order of 6 February and differed only in terms of the nominated author of the report.

57. As noted above, Clarke J. (as he then was) in *Doyle v. Banville* [2018] 1 IR 505, (at p. 510) observed that where there are contradictory versions of events and histories put forward by the parties, the court is obliged to consider, in broad terms, the essence of each side's argument. I am not satisfied that the High Court judge, in this case, discharged, sufficiently, his obligation in this regard. The judgment demonstrates that he did not engage, meaningfully, with all the evidence, including, the inconsistencies therein. By pointing to marked inconsistencies in the respondent's testimony, the appellant had raised an important issue concerning her failure to discharge her duty of candour at the *ex parte* stage of the proceedings and this is not addressed by the trial judge in his judgment. Nor did he consider, sufficiently, the views of *both* parties before coming to his decision to grant an extension of time. There is no reference in the judgment to the appellant's specific arguments against extending time. Furthermore, the appellant had raised, in some detail, the prejudicial effect which the grant of an extension of time would have upon him. None of his arguments in this regard was considered. The only reference to his submission in the part of the judgment dealing with an extension of time, was a single sentence about the appellant having raised the issue of estoppel from seeking judicial review, generally, based on the respondent's meeting with Professor Sheehan.

58. Having regard to all of the evidence in the case, the issue of the respondent's overall credibility was not given any or any sufficient weight by the trial judge when conducting the balancing exercise required in carrying out his discretionary function. There was a significant doubt about the reliability of the respondent's first explanation for her failure to proceed within the required time limit The second explanation, accepted by the trial judge, was not without its difficulties. Whilst she blamed her former solicitors for not providing advice as to her options, there was nothing exhibited to support her claim of having sought such advice. Furthermore, as noted above, the respondent was well within a position after the principal order had been made to discuss with her solicitor and counsel what her options were in the face of the Circuit Court judge's over-ruling of her objection to "another assessment2.

59. Nor does it appear that any account was taken by the trial judge of the fact that the second explanation the respondent offered for the delay (in terms of blaming her former solicitors) came rather late in the day and was an alternative explanation to the one she had originally given. As noted above, McCarthy J. in *Hay v. O'Grady* stated that where findings of fact made by the trial

judge are supported by *credible* evidence, an appellate court is bound by those findings (emphasis added). I agree. However, the finding of "good and sufficient reason" for the failure to comply with the time limit, in this case, was not supported by credible evidence. Examined, carefully, on its own merits and viewed in the light of all the other evidence and circumstances in the case, the reason advanced by the respondent was not sufficient to justify the court's exercise of its discretion to grant an extension of time. In such circumstances, this court is not bound by the trial judge's finding and it is entitled and, indeed, obliged to set it aside.

60. For the reasons set out above and in the light of the evidence as a whole I am not satisfied that there existed 'good and sufficient' reason to extend the time within which to bring judicial review proceedings in this case.

61. Having reached this conclusion it is not necessary to consider the remaining issues that arise in this appeal.

62. I would allow the appeal and vacate the order of the High Court dated 8 March 2019.