

**THE HIGH COURT
JUDICIAL REVIEW**

[Record No. 2019 / 404 JR]

ROBERT BRADSHAW

APPLICANT

V.

THE COUNTY REGISTRAR FOR THE COUNTY OF TIPPERARY

FIRST NAMED RESPONDENT

AND

GEORGE ROSS

SECOND NAMED RESPONDENT

AND

THE DEPT OF AGRICULTURE, FOOD AND THE MARINE

NOTICE PARTY

EX TEMPORE Judgment of Mr. Justice Heslin delivered on 15th September 2020

1. By order made on 1 July 2019, MacGrath J. made an order granting the Applicant liberty to issue and serve a motion seeking leave, returnable for the 16 July 2019. No such motion was issued and on the 16 July 2019 the requirement for a formal motion was dispensed with. Mr. Finan, for the First Named Respondent, has made clear in his written and oral submission that it was not appropriate for the First Named Respondent to have been named. In fairness to Mr. McCoy, for the Applicant, he very properly acknowledges today that it was wrong for the Applicant to have named the First Respondent in these proceedings. Mr. Finan is not of the view that the leave and the substantive applications be heard together, something which Mr. McCoy suggested on the Applicant's behalf, pointing out that it is not unusual for the court to take that attitude in certain circumstances. However, and for the reasons set out in this decision, I am satisfied that it is appropriate to take that course. Mr. McCoy has made it clear that there was and is no objection to the First Named Respondent's name being removed and I am so ordering, effectively without objection, the parties reserving their positions in respect of costs.
2. Ms. Ahern makes clear that the Second Named Respondent's position is that the matter should be dealt with as a leave application alone. In deciding the appropriate approach to take, this Court has to be mindful of the optimum use of scarce resources and it is clear to me that the Applicant and the Second Named Respondent have in their affidavits engaged with the substantive reliefs sought and this is particularly clear from the very detailed written submissions filed by the Second Named Respondent and by the Applicant which address the substantive relief, and do not merely address the question of leave. At the outset, however, I want to make clear that in this decision, I propose to address both the test for leave and the application for judicial review had the test been met. I also want to emphasise that any comments I make in this decision as regards the substantive application itself are not to be interpreted as confirmation that the test for leave was or is met.
3. In the present case the Applicant seeks an order of certiorari quashing the order made by the Tipperary County Registrar on the 25 March 2019 in proceedings entitled George Ross v. Robert Bradshaw, Record No. 15 of 2013. The relief sought by the Applicant is set out

in the Applicant's ex parte docket, which is dated 24 June 2019, and in the Applicant's statement of grounds also of that date.

4. I have carefully considered the contents of all affidavits filed in the present proceedings as well as the exhibits in this matter, namely the Applicant's affidavit dated May 2019, now I pause to observe that no specific date appears to be included in the jurat, but the affidavit is said to have been filed on the 24 June 2019. I have also carefully considered the contents of the replying affidavit of Mr. Frank Nyhan solicitor for the Second Named Respondent, which was sworn on the 10 July 2019, as well as the Applicant's affidavit sworn on the 15 November 2019 and the affidavit of Mr. Frank Nyhan sworn on the 13 February 2020. I have also considered the contents of the Second Named Respondent's statement of opposition which is dated the 11 July 2019 in response to the Applicant's statement of grounds.
5. Notwithstanding the removal today of the First Named Respondent from these proceedings, it is appropriate to refer also to the contents of the affidavit sworn on the 4 October 2019 by Mr. John Boyle solicitor with the Judicial Review Section of the Office of the Chief State Solicitor. Mr. Boyle exhibits a letter which is dated the 15 July 2019 which was sent by the CSSO to the Applicant and which sets out the position of what was the First Named Respondent. Among other things, that letter points to a line of Superior Court authority, including the Supreme Court's decision in *O'Connor v. Carroll* [1999] 2 IR 160, which makes it clear that it is not necessary or appropriate for a judge to defend or actively participate in judicial review proceedings in respect of an order made by them where no allegation of male fides or impropriety is made against them. It is submitted in the letter which Mr. Boyle exhibits that the same legal principle applies equally to orders made by County Registrars. It was made clear in that letter that there was no allegation of *male fides* on the part of the County Registrar and that the *legitimus contradictor* should be the Second Named Respondent alone. That is a submission which is properly conceded today on behalf of the Applicant as correct. However, Mr. Boyle avers on 4 October 2019 that no response was furnished by the Applicant to the CSSO's 15 July 2019 letter. The acknowledgment made today was not made prior to today, despite the First Named Respondent's submissions.
6. I have also considered all submissions made to the court, both on behalf of the Applicant and on behalf of the Respondents. These included detailed written submissions by the Applicant dated 10 September 2020, those submissions by the First Named Respondent dated 11 September 2020, and the Second Named Respondent's submissions of 1 September and 11 September 2020.
7. The decision of this Court flows from the evidence before it and, therefore, it is appropriate and necessary to set out the relevant facts which emerge from an analysis of the evidence and to do so at some length. The facts can be fairly summarised as follows:
8. On 10 March 2013 the Second Named Respondent, Mr. George Ross, commenced Circuit Court proceedings against the Applicant, Mr. Robert Bradshaw, under Circuit Court Record

No. 00015 of 2013. The sum of €9,215.00 was claimed in the said proceedings and Mr. Ross was successful in that claim.

9. By order of His Honour Judge O'Sullivan, dated 4 July 2014, the Applicant in the present proceedings was ordered to pay to the Second Named Respondent in these proceedings, the sum of €9,215.00 together with costs, to be taxed in default of agreement. I have had sight of a copy of the said order which is exhibited.
10. The Applicant in these proceedings appealed the Circuit Court's order. On 30 November 2015, the High Court dismissed the appeal, affirming the Circuit Court's order and granting costs, both of the Circuit Court proceedings and the High Court appeal, in favour of Mr. Ross (who is the Second Named Respondent in today's proceedings). Again, I have had sight of the relevant order, being that made on 30 November 2015 by Barr J., sitting in Kilkenny.
11. The costs were duly taxed and the County Registrar certified the costs due on foot of the 30 November 2015 order in the sum of €4,202.00. I have had sight of the relevant certificate of taxation, which is dated 8 October 2018.
12. I have also seen the Circuit Court execution order which, it is not in dispute, was returned "*nulla bona*", the Applicant in the present proceedings having failed to discharge the sums due to the Second Respondent.
13. The total sum due was €13,417.00, comprised of the judgment sum of €9,215.00 plus the taxed costs of €4,202.00.
14. On 28 January 2019, the Second Named Respondent's solicitor, Mr. Nyhan, made an ex parte application to the Tipperary County Registrar, on behalf of his client, seeking a Conditional Order of Garnishee or, in the alternative, the appointment of a receiver by way of equitable execution over certain grant payments which the Applicant in the present proceedings receives from the notice party.
15. On 28 January 2019, the County Registrar ordered that Messrs. Ciaran O'Keeffe solicitors be appointed as receiver by way of equitable execution over the sum of €13,417.00 and the matter was adjourned to 25 February 2019, with liberty granted to serve the Applicant in these proceedings and the third named respondent by ordinary and by registered post. I have had sight of the Circuit Court order made by the County Registrar on 28 January 2019, perfected on 6 February 2019.
16. The respondent wrote to the Applicant by registered post on 08 February 2019 in an attempt to serve the motion, grounding affidavit and Conditional Order dated 28 January. The envelope was returned "not called for".
17. The Second Named Respondent, therefore, made an ex parte application for substituted service, by ordinary post only. That application for substituted service came before the Circuit Court on 25 February 2019 at which point, by order made on that date, the court permitted service by ordinary pre-paid post and adjourned the substantive matter to the

County Registrar's motion list in Clonmel Courthouse at 10:30 a.m. on Monday 25 March 2019. I have seen a copy of the Circuit Court's 25 February 2019 order.

18. It is not in dispute that the relevant motion, grounding affidavit and Conditional Order were served on the Applicant on or about the 7 March 2019. Indeed, the Applicant acknowledges receiving the 7 March 2019 letter from Mr. Nyhan's office and exhibits same in his May 2019 affidavit, along with the motion papers which the 7 March 2019 letter enclosed. The 7 March 2019 letter from Frank Nyhan and Associates Solicitors to the Applicant specified the title of the Circuit Court proceedings and stated the following:
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"Dear Sir,

We enclose herewith by way of service upon you notice of motion and grounding affidavit together with copy conditional garnishee order made returnable for [with the following words appearing in bold] Clonmel Circuit Court, the Courthouse, Nelson Street Clonmel Co. Tipperary on 25th March 2019".

The letter concluded with the following statement: -

"Your attendance in court on this date is imperative and we recommend you seek legal advice on the enclosed".

19. In light of the foregoing it is beyond doubt that the Applicant had some two and a half weeks' advance notice of the application which was listed for 25 March 2019 and it is also beyond doubt that the Applicant was explicitly advised that his presence was "imperative" and he was advised to seek legal advice.
20. It is not in dispute that at no stage between the Applicant's receipt of the 7 March 2019 letter serving the motion papers, and the hearing date of 25 March 2019, did the Applicant communicate or attempt to communicate with the Second Named Respondent or his solicitors to indicate that he was in any difficulty regarding the return date or to articulate any proposed defence or opposition to the application itself.
21. At approximately 9:41 a.m. on the morning of the 25 March 2019, a note was received from the Applicant stating that: - *"Due to unforeseen circumstances beyond my control I am unable to attend court today 25/03/2019, may I please request a short adjournment".*
22. In para. 6 of his May 2019 affidavit the Applicant avers that the said note was written upon a copy of a letter from the Second Named Respondent's solicitors and was sent to the Courts Service and to the solicitors for the Second Named Respondent *"by post on the 22nd March 2019"* as well as by email and fax on the 25 March 2019. No explanation was given by the Applicant in either of his affidavits as to why, if he knew it was impossible for him to attend court on Monday 25 March, he chose to post such notification to the Circuit Court and to the Second Named Respondent's solicitors on Friday 22 March. Nor has any explanation been given in the Applicant's affidavits as to why he did not contact the relevant parties at any stage over the previous two and a half weeks.

23. No evidence is before the court which would allow this Court safely to conclude that it was, as a matter of fact, impossible for the Applicant to attend the Circuit Court on the 25th March.
24. In para. 6 of the Applicant's May 2019 affidavit, reference is made to the Applicant's mother and to the Applicant being one of her carers. That affidavit is stated to have been filed on the 24 June 2019 by the Applicant and that is the same date as the Applicant's ex parte docket seeking leave from the High Court to apply for judicial review. The reason for the Applicant's inability to attend court on the 25 March 2019 is very clearly stated by the Applicant in para. 6 of his May 2019 affidavit in which he makes the following averment: -
- "6. *I say that I was unable to be present at that Honourable Court due to unforeseen circumstances and that I requested a short adjournment. My mother suffers from dementia and I was required as one of her carers to be with her at this time*".
25. No mention whatsoever is made in the said May affidavit, in connection with a then anticipated leave application, to the Applicant being in the High Court on the 25 March 2019, yet in para. 5 of the Applicant's affidavit sworn on the 15 November 2019, four months after the order made by this Court by MacGrath J., the Applicant avers, for the very first time, that the reason he was "*unable*" to attend Clonmel Circuit Court on the 25 March is because he was "*in the High Court in Dublin on 25 March 2019*". The Applicant goes on to say that it was in those circumstances that he sent the email to Mr. Nyhan which is referred to in para. 13 of Mr. Nyhan's affidavit, that being the 9:41 a.m. notification on the 25 March.
26. In the Applicant's legal submissions which, needless to say, do not comprise a sworn document, the Applicant says, at para. 15, the following: - "*The Applicant has clarified in a subsequent affidavit that the reason why he was unable to be present before the First Named Respondent was that he was attending with counsel and solicitor at the Four Courts in order to resolve another matter that was then pending before this Honourable Court.*" By way of observation, para. 15 in the Applicant's submissions goes further than the contents of the Applicant's 15 November 2019 affidavit. The 15 November 2019 affidavit makes no reference to counsel or to a solicitor which the Applicant suggests he retained in relation to the Four Courts matter or the High Court matter, but inexplicably not the Circuit Court matter.
27. There is no evidence on affidavit, nor is it claimed in the Applicant's legal submissions, that his presence in the High Court was *required*, for example as a witness in a trial or subject to a subpoena, as opposed to a *choice* which the Applicant made.
28. It also has to be said that, nowhere in the Applicant's 15 November 2019 affidavit, is any mention made of his mother or of the very specific reason he told this Court for his inability to attend the Circuit Court on the 25 March, insofar as the affidavit of May 2019 was before this Court in July 2019, namely, the very specific reason that he was required to be one of his mother's carers and required "*to be with her*".

29. Nor is any explanation proffered as to why he failed to tell this court, in July 2019, that the real reason for his absence from the Circuit Court on the 25 March 2019, if that is what the Applicant now claims, was his presence in Dublin in the High Court and not his mother's care.
30. What can be said with certainty in my view is that two entirely different reasons have been proffered by the Applicant in two separate sworn affidavits, both of which are mutually exclusive and self – evidently contradictory. If the Applicant was truly in Dublin in the High Court on the 25 March 2019, he cannot also have been caring for his mother. It will be recalled that in para. 6 of the Applicant's May 2019 affidavit, he was very specific, averring that as one of her carers he was required "*to be with her at this time*". He cannot have been with her at this time providing care and, at the same time, be in Dublin at the Four Courts with counsel and solicitor, or without, attending to some matter.
31. No explanation has been offered as to why the Applicant swore affidavits on two different occasions which contain two different and mutually contradictory explanations for why the Applicant could not attend the Circuit Court on the 25 March 2019. If the first version of events is true, and the Applicant was required to care for his mother and to be with her at the time, the second version of events cannot be true, and the Applicant cannot have been in Dublin in the High Court.
32. Now, it is not for this Court to resolve disputes on affidavit, but what this Court is presented with, somewhat unusually it has to be said, is not a dispute in terms of the facts as averred as between the Applicant on the one side and any respondent on the other; rather it is an entirely inconsistent version of events sworn to by the Applicant. This is wholly unsatisfactory and renders the Applicant's affidavit evidence wholly unreliable in my view in respect of a crucial matter.
33. The Applicant also, it has to be said, is plainly seeking to rely on affidavits by way of a sworn averment as to his presence in Dublin which he did not disclose to this Court in July 2019. In addition to the foregoing unreliability, and in my view lack of candour, it has to be said that if the Applicant had been required in the High Court on the same day as the Circuit Court application, it is simply not credible that he received no advanced notice of that fact. Yet, the evidence proffered in the present application is that it was not until 9:41 a.m. on the morning of the Circuit Court application that the Applicant flagged his unavailability by email and fax and asked for an adjournment.
34. No reason whatsoever was given by the Applicant to explain the foregoing other than to say he was unavailable. Neither the care of his mother nor any commitment in the High Court in Dublin were offered in the Applicant's note faxed and emailed at 9:41 a.m. on the morning of the 25 March 2019, despite this being the obvious time for the reason for the Applicant's unavailability to be stated clearly. This has never been explained and again is another unsatisfactory aspect in my view of the affidavit evidence before the court which is proffered in the context of both a leave and an application for judicial review.

35. Returning to the chronology of relevant facts, the first notification which the Circuit Court or the Second Named Respondent's solicitor received that the Applicant would not be attending court was at 9:41 a.m. on the 25 March 2019. As explained earlier, the Applicant had known for over two and a half weeks that the application was due to proceed on the 25 March 2019 and had been informed in advance that his presence in court was "imperative". Indeed, the Second Named Respondent's solicitors had, by letter of 7 March 2019, specifically suggested that the Applicant obtain legal advice. There is no evidence that the Applicant attempted to do so.
36. In the circumstances, counsel for the Second Named Respondent was instructed to proceed with the application on 25 March 2019 before the County Registrar. When the matter was called, counsel highlighted to the court at the outset that the note seeking an adjournment had been received from the Applicant and the County Registrar confirmed that he had received the same note. Counsel informed the County Registrar of their instructions to proceed with the matter, in circumstances where the Applicant had engaged since 2013 in resisting the Second Named Respondent's claim and having regard to the necessity on the previous occasion to seek substituted service.
37. The County Registrar agreed to proceed, agreeing that the matter should proceed and, having read the papers, he opined that the Applicant had had ample opportunity to engage a solicitor to appear on his behalf. The County Registrar ordered that the conditional order appointing a receiver by way of equitable execution be made absolute together with ordering costs in the Second Named Respondent's favour. I have also had sight of that order which was made on the 25 March 2019, being the order challenged in the present proceedings.
38. The said order was served on the Applicant on 2 April 2019, as the Applicant acknowledges at para. 9 of the Applicant's May 2019 affidavit. It is also a matter of fact that at no point has the Applicant indicated an intention to show cause as to why the conditional order of garnishee ought not to be made absolute and that the foregoing was a position as of the date of service of the order on the Applicant.
39. Earlier in this decision, I pointed to certain fundamental contradictions which have not been explained in the affidavit evidence proffered on behalf of the Applicant and which render that affidavit evidence unreliable. I have already identified what can fairly be said in my view to be a lack of candour on the Applicant's part and in my view the foregoing justifies, of itself, a refusal of what is in every case discretionary relief and also in my view justifies a refusal of leave to seek judicial review. But the following can also be said in relation to events of the 25 March 2019 in the Circuit Court having regard to uncontroverted evidence before the court.
40. No party to legal proceedings is entitled to an adjournment as of right. The Applicant asked for one less than an hour prior to an application being listed for which as the Applicant was well aware, his presence in court was imperative. In seeking an adjournment, the Applicant neither offered a reason nor did he state that he intended to show cause or to oppose the application at a future date in the event of the adjournment

application being successful. To grant or not to grant the adjournment applied for was plainly a matter for the Circuit Court and, as a matter of fact, it decided against adjourning the matter before it, of which the Applicant had received over two and a half week's advance notice. That decision not to grant an adjournment is not the subject of a challenge, but in my view it could hardly have been said to have been an unreasonable decision.

41. By asking for an adjournment in such circumstances, namely, without giving any reason for the Applicant's supposed unavailability, and seeking the adjournment with less than an hour to go before the application was returnable, the Applicant must have been aware of the distinct possibility that an adjournment would not be guaranteed. Indeed, his note requesting an adjournment is consistent with the fact that the Applicant knew that it may, or may not, be granted. Yet, what steps did the Applicant take to ensure the application would be opposed if that was his intention, in the event of the application for an adjournment not being granted?
42. Did the Applicant take steps to ensure he was present in court. The answer is no, despite being told his presence was imperative.
43. Did the Applicant arrange for legal representation in his absence? Again, the answer is no, despite having been advised in writing in advance to seek legal advice.
44. Did the Applicant inform the court that he had tried but had encountered any specific difficulties in obtaining legal representation? Again the answer is no.
45. Did the Applicant state those grounds which he intended to rely upon to oppose the application? Again, the answer is no.
46. Did the Applicant even state that he had such grounds? Once more, the answer is no.
47. Did the Applicant make any reference to any intention to oppose the application in the future? And once again the answer is no.
48. It is in those factual circumstances that the Circuit Court decided to proceed. Thus, once the Circuit Court decided not to adjourn the application it was an application which proceeded, and being an application which proceeded, it was, as a matter of fact, based upon the evidence before this Court, wholly uncontested when it proceeded. Nobody was there by or on behalf of the Applicant. Nobody advised the court verbally or in writing of the fact that the application was opposed, much less of any grounds for such opposition. It was, in fact, an unopposed application.
49. The present challenge is based on the submission that the County Registrar lacked jurisdiction. I must reject that submission in light of the evidence and having regard to O. 18, r. 1(1)(v) of the Circuit Court Rules and I take the view that the application was uncontested in circumstances where the Applicant did not show cause, did not flag any intention to show cause or grounds which he said he intended to rely upon and chose not to attend the court, despite having ample notice of the hearing and knowing that his

presence was imperative as well as failing to arrange for any representation to be made on his behalf at the hearing of which he was well aware, the application to adjourn having been declined.

50. Even if I am entirely wrong in that view, I am satisfied that the Applicant's wholly inconsistent and thereby unreliable accounts given in two affidavits, one sworn in May 2019, which was before this Court in July 2019, and the other sworn on 15 November 2019, upon which the Applicant purports to rely today, deprive the Applicant of any entitlement to leave and to relief.
51. It is also a fact that the Applicant could have, but failed to, appeal the County Registrar's order to a judge of the Circuit Court, pursuant to O. 18, r. 7 of the Circuit Court Rules. No explanation has been given by the Applicant as to why he did not appeal the County Registrar's order to a judge of the Circuit Court.
52. Equally, the Applicant could have, but failed to, bring an application to set aside the absolute order to the County Registrar, pursuant to O. 39, r. 3 and O. 18, r. 1 (1) (v). Again, no explanation is given for the Applicant's failure to this.
53. By so doing the Applicant failed to pursue appropriate alternative remedies which were undoubtedly open to him to pursue and which would have constituted cheaper, quicker and more appropriate alternatives to an application for judicial review, costs being one issue relevant to this Court's exercise of discretion, as is clear from the decision of Twomey J. in *LON v. District Court Judge Daly* [2016] IEHC 285.
54. It is uncontroversial to say that there is a wealth of authority that, where there is an adequate alternative remedy available and an Applicant for judicial review fails to avail of same, the court is likely to exercise its discretion against the Applicant.
55. In my view, it is an entirely proper exercise of this Court's discretion in the present case to refuse the reliefs sought by the Applicant and, in this regard, I am guided by the principles derived from authorities including *EMI Records v. The Data Protection Commissioner* [2013] 2 IR 669 and in taking the foregoing view I am not of the view that the test for leave has been met.
56. For the reasons I have explained, and despite the undoubted skill with which Mr. McCoy for the Applicant has presented the Applicant's case, I am satisfied that justice requires the dismissal of these proceedings in light of the evidence before this Court. The reasons have been set out in some detail earlier in this decision, but can be summarised as follows: -
 - (i) The unreliability of entirely contradictory sworn statements made by the Applicant in his May 2019 and November 2019 affidavits;
 - (ii) What can fairly be said to be a lack of candour on the Applicant's part insofar as what was before this Court in July 2019 and what the Applicant subsequently purports to rely upon in his November 2019 affidavit;

- (iii) The fact the application which the Circuit Court heard and granted on 25 March 2019 was uncontested. The only contest on the day, if it can fairly be called a contest, was a note asking for an adjournment. That request was considered and declined. Once that happened, and thereafter, there was no contest whatsoever in relation to the substantive application;
 - (iv) The Applicant's failure to pursue more appropriate alternative remedies. This latter finding is one which takes full account of the decision of the then Chief Justice O'Higgins in the *State (Abeglen Properties Ltd) v. Dublin Corp.* [1994] IR 381 case and Mr. Justice Barron's decision in *McGoldrick v. An Bord Pleanala* [1997] 1 IR 479. In my view, a weighing up of the relative merits of an appeal to a Circuit Court judge, against the County Registrar's decision, versus a judicial review application to this Court, undoubtedly results in the conclusion that a Circuit Court appeal was far more appropriate, including from the perspective of speed, cost and the taking up of scarce court resources. I am also satisfied that, even if the central argument made by the Applicant is that the County Registrar lacked jurisdiction, such an argument was one which the Applicant could and in my view should, have ventilated before a judge of the Circuit Court, satisfied as I am that the Circuit Court was in a position to deal with such an argument.
57. Insofar as the test to seek leave for judicial review is concerned, the test requires, among other things, that the court form the view that the facts averred in the affidavit(s) would be sufficient, if proved, to support a stateable ground for the form of relief sought. In my view, the Applicant has not satisfied this element of the test. I say this for two reasons. First, due to the fundamental inconsistencies in the two versions of what the Applicant says are relevant facts (namely the mutually incompatible reasons for his inability to attend the Circuit Court on 25 March 2019). Secondly, the facts which emerge from the affidavits demonstrate that the application was uncontested before the County Registrar, the adjournment having been declined.
58. Another element in the test for leave to seek judicial review is that the court must be satisfied that the Applicant has not failed to pursue a more appropriate alternative remedy. For the reasons given in this decision, I take the view that the Applicant has failed to pursue a more appropriate alternative remedy.
59. In short, I am satisfied that the Applicant neither satisfies the test for Leave, nor is entitled to Judicial Review, had he satisfied the relevant test for leave.
60. Despite the skilled and professional way in which Mr. McCoy has presented the Applicant's case, for the reasons set out in this decision, I am satisfied that the interests of justice require that the within proceedings be dismissed.