APPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

JUDICIAL REVIEW

Court of Appeal Record No:2023/121

High Court Record No.: 2022/722JR

Neutral Citation Number [2024] IECA 45

Woulfe J.
Ní Raifeartaigh J.
Power J.

Between/

G.M.

Applicant/Appellant

AND

I.M.

Respondent

JUDGMENT of Mr. Justice Woulfe delivered on the 28th day of February, 2024

Introduction

1. This is an appeal by the applicant/appellant (described in this judgment as "the applicant") against an order of the High Court that a previous order of that Court granting the applicant leave to apply for judicial review be set aside, and also that the proceedings be dismissed and that the respondent recover against the applicant the costs of the proceedings.

2. These judicial review proceedings arose out of very protracted family law proceedings between the same parties. The applicant and the respondent had formerly been in an intimate relationship and have a child together. The parties have been estranged for a number of years now, and the long running and highly contentious litigation has related primarily to matters such as access by the applicant to their child and payment of maintenance by the applicant.

3. The District Court made an order dated the 8th December, 2015, varying a previous order for access made by the Court dated the 30th July, 2015. It was stated in the written submissions of the parties in this appeal that the District Court also made an order on the 8th December, 2015 in respect of maintenance, but this Court has not had sight of any such order. In any event, it appears that the respondent appealed this decision of the District Court to the Circuit Court, and that both issues of access and maintenance featured in the appeal proceedings, which were not finally determined until the 23rd May, 2022. The trial judge stated in the Court below that these proceedings had previously been listed before the Circuit Court for hearing on more than forty occasions.

4. Both the Court below and this Court have had the benefit of a transcript of the hearing before the Circuit Court on 23rd May, 2022, which provides an accurate description of what transpired at that hearing. After some preliminary discussion with counsel, the

Circuit Court judge dealt first with the issue of access and continued a previous order with one small variation, but this aspect of the Circuit Court hearing does not appear to feature in the judicial review proceedings.

5. The Circuit Court next dealt with the issue of maintenance. The respondent's representatives furnished the Court with an up to date spreadsheet setting out arrears of maintenance payable by the applicant, and the respondent gave oral evidence to verify the figures. It appears from the transcript that the applicant's counsel did not seek to cross examine the respondent, or to challenge these figures in any way. Having heard this evidence, the judge decided to give judgment against the applicant for the outstanding maintenance in the sum of €3,265.

6. The Circuit Court also dealt with the issue of ongoing maintenance. The judge decided to discharge the existing maintenance order, and made an alternative order that the applicant pay 50% of the child's educational, medical and dental expenses, and the cost of two extra-curricular activities as chosen by the respondent. Again, the applicant's counsel did not seek to challenge this order when it was proposed by the judge.

7. The Circuit Court then came on to the issue of costs, and the applicant's counsel stated that his side was opposing an order for costs being made against the applicant. The Court considered a report from a cost accountant which had previously been requested by the Court, and which had been exhibited in an affidavit sworn by the respondent. In his report Mr. Stephen Fitzpatrick furnished his professional opinion on the legal costs which had arisen on a party and party basis up to the 7th January, 2021.

8. While the applicant did not seek to introduce any evidence to rebut any of the contents of Mr. Fitzpatrick's report, his counsel did make submissions opposing an order for costs against the applicant, and relating to quantum. The judge then made her ruling, and stated that she had no doubt that the costs in the matter had been significantly

increased by the applicant's unmeritorious conduct, including his constant breaches of the access order and constant applications to the court, and also by his misleading the professional therapist involved. In the circumstances she decided to order that the applicant pay 50% of the costs as measured in Mr. Fitzpatrick's report, and also the costs of his report.

9. During submissions on costs, counsel for the applicant stated that the matter of bringing repeated litigation could be dealt with by way of an Isaac Wunder order instead of by way of a costs order. At the conclusion of the hearing, having stated that she was varying the period for reviewing access from eighteen months to twenty months, the judge stated that in the meantime she was making an Isaac Wunder order restricting the applicant from taking any further proceedings in the District Court, the Circuit Court or in any other court. The Court then purported to make such an order restricting any such proceedings without the leave of the Court.

The Judicial Review Proceedings

10. The relief sought and the grounds set out in the applicant's statement required to ground his application for judicial review ("statement of grounds") dated the 19th August, 2022, can be briefly summarised as follows. As regards the relief sought, he first sought an order for leave to bring the application "as required by" the Circuit Court order dated the 23rd May, 2022, which presumably related back to the Isaac Wunder order made by that Court. He then sought, *inter alia*, an order of *certiorari* quashing the Circuit Court order made on that date, and a declaration that the Court acted in breach of its duties by relying on evidence which was not properly before the Court and not permitting the applicant to give or produce evidence in the course of the hearing which took place on that date.

11. As regards the grounds upon which such relief was sought, the applicant pleaded that the Court relied on evidence which was not properly before it when making the order dated the 23rd May, 2022. He stated that during the course of this hearing, the Court permitted the admission of information into evidence which was not provided on affidavit or adduced in the course of oral testimony. Furthermore, the Court did not permit any cross examination of this evidence even when requested by counsel for the applicant. He also pleaded that the Court denied the applicant the right to submit evidence supporting his claim and denying the claims made against him, and that the procedure followed by the Court in conducting the hearing was in contravention of the Rules of Court and the applicant's constitutional rights. Finally, he stated that the Court had also informed the applicant that it would refuse any application to take up the Digital Audio Recording ("DAR") transcript of the hearing in the future.

12. The applicant swore a verifying affidavit on the 19th August, 2022. At para. 4 he averred that the respondent was permitted by the Court to adduce a handwritten note averring to monetary sums which she claimed was owed by the applicant, and that there was no formal report from an accountant, financial adviser or any other qualified expert vouching the figures adduced in Court. At para. 5 he stated as follows:

> "There was no affidavit or oral testimony averring to the information relied upon by the Court. Further to this, counsel for the applicant sought to cross examine the respondent in relation to the financial information that was submitted to, and accepted by, the Court. This request was not considered nor permitted by the Court. The Court also refused the submission of any evidence by the applicant, whether in the form of oral testimony, affidavit or otherwise. The applicant was prevented from submitting evidence before the Court."

13. At para. 6 the applicant averred that the Circuit Court had granted an order which relied upon the financial information that was improperly before it, and that the Court had informed the applicant that any future application to take up the DAR would be refused. He then stated as follows (at para. 7):

> "I say that the manner in which the Circuit Court hearing on the 23rd May, 2022, was conducted denied the applicant his rights to due process in accordance with the Rules of Court and the Constitution. The applicant was prevented from submitting any evidence to Court while the respondent was permitted to submit evidence that was not properly before the Court. In consequence of this, the Court granted an order which has significant financial consequences for the applicant. Furthermore, the Court acted with prejudice against the applicant by stating that it would refuse any application for the DAR before any such application came before the Court."

14. An *ex parte* application for leave to apply for judicial review was made to Simons J., as vacation judge, on the 19th August, 2022. It appears that the application was said to be urgent on the basis that the three month time limit prescribed for the taking of judicial review proceedings under O. 84, r. 21 of the Rules of the Superior Courts was set to expire. Simons J. made an order on that date granting leave, for the reliefs and on the grounds as summarised above.

15. The respondent then issued a motion dated the 19th October, 2022, seeking to set aside the grant of leave. In her grounding affidavit sworn on the same date she averred that the applicant had failed to provide a full and comprehensive background with regards to the protracted nature of the family law proceedings, and she set out some of the background including the numerous court hearings and the "financially ruinous legal costs" involved.

16. The respondent went on to state that the contents of paras. 4 and 5 of the applicant's affidavit (sworn on the 19th August, 2022) were replete with factual inaccuracies, and that she was advised that the Circuit Court hearing on the 23rd May, 2022 was conducted and heard in accordance with fair procedures and natural justice. She averred that she swore three affidavits in respect of the appeal of the District Court order, all of which were served on the applicant, but at no time did the applicant seek to provide a replying affidavit to any one of these three affidavits. As regards the applicant's claim that there was no expert report provided to vouch the figures adduced in the Circuit Court, the respondent averred that the applicant knew well that his solicitor was provided with a copy of the cost accountant's report by letter dated the 3rd February, 2021, and she exhibited a copy of the said letter which enclosed a copy of that report along with a schedule of arrears of maintenance.

17. At para. 15 of her affidavit the respondent continued as follows:

> "I further say that it is also astonishing and concerning that the Applicant in his grounding affidavit would aver to the fact that "There was no affidavit or oral testimony averring to the information relied upon by the Court". I say that this is factually incorrect and the Applicant well knows that the report of Mr. Fitzpatrick was exhibited in the third and supplemental affidavit of I, your Deponent herein, sworn on the 14th of January, 2022. I further say that it is incorrect and untrue to assert and/or aver that the Applicant's counsel was refused an opportunity to cross-examine your Deponent herein, with regards to the report of Mr. Fitzpatrick. I say that both the Applicant and his legal advisers had in their possession a copy of the said report of Mr. Fitzpatrick in excess of 18 months prior to the hearing in May, 2022 and at no time did they seek to challenge same or have same rebutted by way of the Applicant herein engaging

the services of his own expert to rebut any of the contents of Mr. Fitzpatrick's report."

18. The respondent concluded by saying that the proceedings before the High Court were grounded upon an affidavit that was manifestly and factually incorrect, and was pursued in breach of the Isaac Wunder order granted by the Circuit Court on the 23rd May, 2022.

19. The applicant did not file any replying affidavit in response to the application to set aside the grant of leave.

The High Court Judgment

20. In his judgment, Simons J. felt that it was necessary first to address the restraining order purportedly imposed by the Circuit Court. He held that the respondent's procedural objection to the grant of leave, based on this order, was not well founded. He felt it unnecessary to determine whether the Circuit Court possesses its own independent jurisdiction to make a restraining order in respect of proceedings before it, and he then concluded on this point as follows (at para. 16):

> "Whatever the precise position may be in this regard, the Circuit Court most certainly does not have jurisdiction to impose a restriction on the right of access to the High Court. The High Court exercises a supervisory jurisdiction over the Circuit Court, by way of judicial review, and the Circuit Court cannot frustrate the exercise of that supervisory jurisdiction by purporting to oblige a party to obtain prior permission from the Circuit Court before having recourse to the High Court. If and insofar as the order of 23 May 2022 purports to impose such an obligation – and it is not apparent from the transcript that this is what the Circuit Court judge actually intended – this represents an error on the face of

the record. This aspect of the order cannot oust the High Court's full original jurisdiction to entertain these judicial review proceedings."

21. The trial judge went on to consider the principles applicable to setting aside a grant of leave. He noted that the Supreme Court has held that the High Court has an inherent jurisdiction to set aside an order granting leave to apply for judicial review which has been made on the basis of an *ex parte* application (*Adam v. Minister for Justice* [2001] 3 I.R. 53), but has emphasised, however, that this inherent jurisdiction should be exercised sparingly and only in exceptional cases.

22. Simons J. stated that one circumstance in which it may be appropriate to set aside the grant of leave is where there has been material non-disclosure on the part of an applicant. He cited authority to the effect that on any application made *ex parte* the utmost good faith must be observed, and the applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the applicant has failed to make sufficient or candid disclosure, the *ex parte* order may be set aside on that very ground.

23. The trial judge turned next to applying these principles to the circumstances of the present case. It was apparent to him that the applicant's characterisation of the Circuit Court hearing on the 23rd May, 2022, was grossly misleading. First, it was simply untrue to say that there was no evidence before the Circuit Court in relation to the outstanding maintenance payments, in circumstances where the respondent had given sworn oral evidence to the Court on that date and specifically confirmed that there was a sum of €3,265 outstanding. Secondly, the averment that counsel for the applicant had sought to cross examine the respondent was also untrue. Thirdly, the applicant's averment that no supportive affidavit had been sworn by the respondent was incorrect

as the respondent had, in fact, filed three affidavits in support of her appeal from the District Court.

24. More generally, Simons J. held that the applicant had failed to disclose the convoluted history of these family law proceedings, the case having been listed for hearing before the Circuit Court on more than forty occasions, with multiple interim orders having been made. The false impression created by the applicant's verifying affidavit was that the appeal had been determined in a peremptory manner by the Circuit Court.

25. For completeness, the trial judge considered whether the complaint made by the applicant might relate to the costs order, rather than just that part of the order regarding arrears of maintenance. On his understanding of the applicant's statement of grounds, no complaint was actually made in relation to the costs order. However, even if the statement of grounds were to be given an expansive interpretation so as to capture such a complaint, the information provided to the High Court at the time of the *ex parte* application had been misleading. It was incorrect to say that there was no expert report before the Circuit Court vouching the figures for costs, in circumstances where the legal cost accountant's report had been before that Court at the hearing on the 23rd May, 2022, and the applicant's counsel had made no meaningful attempt to challenge the accuracy of that report.

26. Simons J. stated that it was imperative that a person, who seeks to invoke the High Court's supervisory jurisdiction by way of judicial review, makes material disclosure at the time of the *ex parte* application for leave. It is an abuse of process for an individual to seek to invoke the supervisory jurisdiction, in circumstances where the lower court or public authority has acted lawfully, by exaggerating events to create the false impression of there having been significant errors. Here, the misstatements in, and omissions from, the statement of grounds and verifying affidavit could not be

overlooked as merely technical or peripheral; rather, they went to the very heart of the applicant's case. The trial judge held that the description of the hearing before the Circuit Court, as per the statement of grounds and verifying affidavit, was grossly misleading and conveyed the false impression that the Court had acted in breach of fair procedures and in breach of the basic rules of evidence.

27. In conclusion, Simons J. stated that he would not have made his order granting leave had an accurate description of the Circuit Court hearing been provided to him at the time of the *ex parte* application. Now that the true circumstances of the case had been put before him, he proposed to set aside the grant of leave. He emphasised that this was not being done to "punish" the applicant for his material non-disclosure, nor to serve as a "warning" to other litigants. Rather, it reflected the reality that the applicant's case, now that it had been laid bare, did not meet the threshold prescribed for the grant of leave. The pleaded case, namely that the Circuit Court hearing had been conducted in breach of fair procedures, was simply untenable.

Grounds of Appeal and Submissions on Appeal

28. The applicant filed a notice of appeal dated the 30th May, 2023. The essential ground of appeal is that the Court below incorrectly found that the non-disclosure was material to the application for leave, as any non-disclosure was immaterial to the specific claim made by the applicant.

Submissions of the Applicant

29. The applicant first submits that while the Court below considered his application for leave in terms of the challenge to the Circuit Court orders regarding outstanding maintenance and costs, it is important to establish that the applicant clearly applied for

leave to judicially review the entirety of the orders made by that Court on the 23rd May, 2022, as per para. (d)(ii) of the applicant's statement of grounds. He points out that the Circuit Court also made an Isaac Wunder order, and submits that the High Court only considered the issue of that order in the context of the respondent's procedural objection to the Court's jurisdiction, but stopped short of a full consideration of his challenge to that order.

30. It was conceded by the applicant in his written submissions that his grounding affidavit incorrectly stated that there was no evidence before the Circuit Court in respect of the issues of maintenance and costs. It is stated that the applicant had a number of changes in counsel and solicitor during the course of the Circuit Court proceedings, and, as such, there was a lack of clarity as to the evidence that was before the Circuit Court on the 23rd May, 2022, which only became clear once the DAR was made available after the grant of leave.

31. During the oral hearing counsel for the applicant was asked about the applicant's averment, at para. 5 of his verifying affidavit, that his counsel had sought to cross-examine the respondent at the Circuit Court hearing, but that this request was not considered nor permitted by the Court. Counsel stated in reply that there had been some indication on file to this effect, but it was now clear from the DAR that this was not the case, and he conceded that this averment was also incorrect.

32. While the applicant concedes the above errors, notwithstanding same, he submits that there are still some other stateable grounds for judicial review which were pleaded but have not been properly addressed by the High Court, and that any non-disclosure only applies to part of the grounds for granting leave. He submits that these other grounds still stand, including the grounds that he was not afforded an opportunity to provide his

own oral testimony in response to the evidence adduced by the respondent, and his challenge to the making of the Isaac Wunder order.

33. As regards being denied the right to submit his own evidence, the applicant relies on a passage from the transcript (at p. 107) where the trial judge said to counsel for the respondent; "Your client will give me evidence; I'll take the evidence and I will make whatever orders are necessary". As regards the Isaac Wunder order, counsel for the applicant submitted that while there might not appear to be a direct challenge to the Isaac Wunder order in the statement of grounds, there were nevertheless some matters pleaded which ought to be read as encompassing such a challenge.

Submissions of the Respondent

34. In her submissions the respondent first considers the issue of whether the applicant sought judicial review of the entirety of the Circuit Court order. She submits that it is clear from the applicant's statement of grounds and his verifying affidavit that he was seeking relief on specific grounds. As regards para. (d)(ii) of the statement of grounds, it is submitted that the applicant did not seek an order quashing the entirety of the Circuit Court order dated the 23rd May, 2022, and that this is clarified by way of specificity in the succeeding paragraphs. It is said to be clear from the applicant's pleadings that his application for leave concerned the Circuit Court's conduct of the hearing concerning the maintenance and/or the costs aspect of the proceedings.

35. The respondent notes that there is no reference in the statement of grounds or verifying affidavit to the restraining order made by the Circuit Court, otherwise known as an Isaac Wunder order. The words "Isaac Wunder order" do not appear anywhere in the applicant's pleadings. Insofar as the applicant argues that the reliefs sought at para. (d)(ii) of the statement of grounds encompasses the Isaac Wunder order, the respondent

submits that there is nothing in para. (e) setting out any grounds upon which any such relief is sought.

36. The respondent acknowledges the principle that the jurisdiction to set aside leave should only be exercised sparingly, and in exceptional cases, but submits that the current case meets the requisite standard of being an exceptional case. She cites certain authorities to the effect that an *ex parte* order may be set aside on the grounds of material non-disclosure, and submits that the High Court correctly applied the law when it exercised its jurisdiction to set aside the grant of leave in the present case.

37. The respondent submits that it is clear that there was material non-disclosure on the part of the applicant, and that it is also clear that his failure to disclose was more than a mere innocent omission. In addition, the applicant misrepresented the nature of the proceedings and the conduct of these proceedings.

Decision

The Relevant Principles

38. The jurisdiction to set aside a grant of leave is not referred to in O. 84 of the Rules of the Superior Courts. In her judgment in 2001 in *Adam and Iordache* [2001] 3 I.R. 53, McGuinness J. stated (at 69) that, so far as she aware, counsel for the appellants were correct in saying that there was no specific Irish authority prior to the present cases which established that the High Court had jurisdiction to discharge an order for leave already given. Even if it were true that the jurisdiction point had not specifically been argued and decided, there were, however, cases where the inherent jurisdiction of the Court to discharge leave had been assumed and put into effect, and she cited the judgment of Kelly J. in *Adams* [2001] 2 ILRM 401 (*"Adams*") and the earlier case of *Landers v. An Garda Síochána Complaints Board* [1997] 3 I.R. 347.

39. McGuinness J. went on to consider the English case of *R. v. Secretary of State for the Home Department ex p. Chinoy* [1991] C.O.D. 381. In that case two judges of the Queen's Bench Division considered an argument that, if there was any jurisdiction to set aside an order giving leave, it was a jurisdiction which might only be exercised in the case of non-disclosure or in the case of new factual developments since the date of the grant of leave. In the course of his judgment Bingham L.J. commented as follows:

> "I would unhesitatingly accept that those are grounds upon which the Court could exercise its discretion to set aside leave previously given. But I would not accept the suggestion that the Court's jurisdiction may only be exercised where non-disclosure or new factual developments are demonstrated. It seems to me that it is a jurisdiction which exists and which the Court may exercise if it is satisfied on *inter partes* argument that the leave is one that plainly should not have been granted.
>
> I would, however, wish to emphasise that the procedure to set aside is one that should be invoked very sparingly. It would be an entirely unfortunate development if the grant of leave *ex parte* were to be followed by applications to set aside *inter partes* which would then be followed, if the leave were not set aside, by a full hearing. The only purpose would be to increase costs and lengthen delays, both of which would be regrettable results. I stress therefore that the procedure is one to be invoked very sparingly and it is an order which the Court will only grant in a very plain case. I am, however, satisfied, as I have indicated, that the Court does have a discretion to grant such an order if satisfied that it is a proper order in all the circumstances."

40. McGuinness J. then concluded as follows (at 71):

> "In my view the learned trial judges in the instant cases, O'Donovan J. and Morris P., were correct in deciding that this Court has a jurisdiction to set aside an order granting leave which has been made on the basis of an *ex parte* application. However, I would accept the submission of counsel on behalf of the applicants in…*Adam*, with which counsel on behalf of the respondents agrees, that this jurisdiction should only be exercised very sparingly and in a very plain case. The danger outlined by Bingham L.J. in the passage quoted above would be equally applicable in this jurisdiction. One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument – perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this Court. If that appeal succeeded, the matter would return to the High Court for full hearing followed, in all probability, by a further appeal to this Court. Such a procedure would result in a wasteful expenditure of court time and an unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice. The exercise of the Court's inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases."

41. As regards the exercise of this jurisdiction, this was discussed by Kelly J. in *Adams*. He noted (at 416) how reference was made by the English Court of Appeal in *St. George's Healthcare NHS Trust v. S.* [1998] 3 WLR 936 to the duty of full and frank disclosure in seeking orders *ex parte*. He then continued as follows:

> "That is reminiscent of the statement made by Kennedy C.J. in *Brennan v. Lockyer* [1932] I.R. 100 at p. 107, where he said in relation to the order in question there:

> ‘That, in my opinion, is one of the very matters to which on an *ex parte* application of this kind, the long established rule requiring *uberrima fides* on the part of the applicant ought to be strictly applied.’
>
> On any application made *ex parte* the utmost good faith must be observed, and the applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the applicant has failed to make sufficient of candid disclosure, the *ex parte* order may be set aside on that very ground.”

42. As noted by the trial judge, this passage has since been expressly approved of by the Supreme Court in *Ryan v. Governor of Mountjoy Prison* [2021] 1 I.R. 590.

Application of the Principles

43. The core complaint made by the applicant in these proceedings is that the Circuit Court judge conducted the hearing on the 23rd May, 2022, in contravention of his constitutional right to fair procedures. The trial judge held that there had been material misstatements of fact and/or material non-disclosure on the part of the applicant, and that the grant of leave should be set aside. I am satisfied that his decision was correct, with one possible minor qualification, for the following reasons.

44. The trial judge held that the applicant was guilty of non-disclosure in a general sense by having failed to disclose the convoluted history of the family law proceedings, where the true position was that the case had been the subject of over forty hearings before the Court. The trial judge was correct to find that the false impression created by the applicant was that the appeal had been determined in a peremptory manner by the Circuit Court, and that the applicant’s characterisation of that hearing was grossly

misleading, and in my opinion this clearly amounted to material non-disclosure on the part of the applicant.

45. The first more specific aspect of the applicant's complaint was his statement that the Circuit Court permitted the admission of information into evidence which was not provided on affidavit, or adduced in the course of oral testimony. The trial judge correctly held that this statement was simply untrue, as the respondent had filed three affidavits in support of her appeal, none of which had been replied to by the applicant, and she had given sworn oral evidence to the Court on the 23rd May, 2022. The applicant conceded before this Court that his affidavit "incorrectly stated that there was no evidence before the Court in respect of the issues of maintenance and costs". In my opinion, this incorrect statement by the applicant was one of the material misstatements of fact which justified setting aside the grant of leave.

46. The second more specific aspect of the applicant's complaint was his statement that the Court did not permit any cross-examination of the respondent's evidence, even when requested by counsel for the applicant. The trial judge held that this averment was also untrue, as was evident from the transcript, and again the applicant's counsel conceded before this Court that this averment was also incorrect. In my opinion, this incorrect statement was another part of the material misstatements of fact which justified setting aside the grant of leave.

47. The third more specific aspect of the applicant's complaint was, as per para. 4 of the statement of grounds, that the Circuit Court also denied him the right to submit evidence supporting his claim and denying the claims made against him. At para. 5 of his verifying affidavit he stated as follows:

> "The Court also refused the submission of any evidence by the Applicant, whether in the form or oral testimony, affidavit or otherwise. The Applicant was prevented from submitting evidence before the Court."

48. As regards the submission of any affidavit evidence by the applicant, it is clear that the Circuit Court did not refuse same; as set out above, the applicant simply failed to file any replying affidavit in response to the three affidavits filed by the respondent in support of her appeal. As regards the submission of any oral evidence by the applicant, he relies upon a particular comment made by the judge during the Circuit Court hearing, which arose as follows.

49. The transcript records (at p. 3) that at the outset of the hearing the judge confirmed that the issue of outstanding maintenance had to be dealt with by her, and she said that a spreadsheet had been furnished by the respondent, and she said that she would ask the respondent to verify that for her. Counsel for the respondent confirmed that the relevant spreadsheet being furnished to the Court was an up to date spreadsheet in relation to arrears, and the judge then stated as follows:

> "Your client will give me evidence; I'll take the evidence and I'll make whatever orders are necessary. Thank you."

50. The applicant asks this Court to draw an inference from this single statement made by the judge that she was thereby saying that she would only receive oral evidence from the respondent, and that she was thereby refusing to allow the applicant to give any oral evidence. In my opinion, such an interpretation of this one statement taken in isolation is unwarranted and somewhat unfair, for the following reasons.

51. Firstly, the statement in question can be read as the judge simply stating that she would take on board all of the evidence, including the evidence to be given by the respondent, and she would make the necessary orders in the light of all of that evidence.

Furthermore, the inference now suggested by the applicant does not appear to accord with the understanding of counsel for the applicant on the day in question. The transcript records that almost immediately after this statement, the applicant's counsel said that his understanding was that it had been his client's intention to call the access supervisor, however she was not in a position to attend. The judge noted that she had given a report which was quite positive, and counsel did not seek an adjournment to allow her to give oral evidence at a later date. It is noteworthy, however, that it was her unavailability to attend which was stated as preventing the applicant from calling her as a witness, and not any supposed ruling made by the Circuit Court judge.

52. Secondly, there is no indication on the transcript that the applicant intended to call, or sought to call, any oral evidence other than the access supervisor. If the applicant truly wished to do so, and truly believed that he was prevented from doing so by some ruling made by the Circuit Court judge, then it was incumbent on his counsel to say this and to register his protest at the time, *i.e.* during the course of the hearing. The lack of reality to this claim is demonstrated by the fact that, during the course of this judicial review, the applicant has continued to fail to point to any specific oral evidence which he wanted to submit, but was prevented from doing so.

53. In my opinion, this third more specific aspect of the applicant's complaint amounts to another part of the material misstatements of fact which justified the trial judge in setting aside the grant of leave.

Qualification

54. I referred above to one possible minor qualification. This arises on foot of the applicant's fallback position, which was that even if this Court held that his application for leave contained material misstatements of fact and non-disclosure which justify the

setting aside of most of the grant of leave, a stateable ground for judicial review should still survive comprising his challenge to the making of the Isaac Wunder order, as any misstatements of fact or non-disclosure were not material to that challenge.

55. In his judgment Simons J. stated (at para. 8) that there is "no direct challenge" by the applicant to the making of the Isaac Wunder order, which phrase seems to leave open the possibility of there being an indirect challenge. The applicant highlights para. (d)(ii) of the reliefs sought in his statement of grounds which seeks an order of *certiorari* "quashing the order…dated the 23rd of May 2022", and he submits that he thereby applied for leave to judicially review the entirety of the orders made by the Circuit Court on that date, including the Isaac Wunder order made at para. 6 of that order. The respondent submits that there is nothing in para. (e) of the statement of grounds setting out any grounds upon which any relief regarding the Isaac Wunder order is sought, and notes that there is no express reference to same in the applicant's verifying affidavit.

56. One turns then to the order of the High Court granting leave dated the 19th August, 2022. The Court ordered that the applicant should have leave to apply by way of application for judicial review "for the reliefs set out at paragraph D (i) – (viii)" in the statement of grounds "on the grounds set forth at paragraph E therein". On the face of it this grant of leave appears wide enough to encompass the seeking of an order of *certiorari* quashing the Isaac Wunder order, as part of the relief set forth at para. (d)(ii) of the applicant's statement of grounds, albeit in the absence of any grounds upon which such relief is sought, as required by O. 84, r. 20(2)(a)(ii) of the Rules of the Superior Courts.

57. In my opinion, a court would normally allow an applicant to cure any such defect in his pleadings by way of an amendment to his statement of grounds, on the basis that the amendment would not represent any significant or serious enlargement of or change in

the applicant's case: see *O'Síodhacháin v. Ireland*, unreported, Supreme Court, 12th February, 2002.

58. The question which now arises is whether a grant of leave in respect of a challenge to the Isaac Wunder order should still be permitted, notwithstanding the circumstances of material misstatements and non-disclosure present in this case, if necessary, in conjunction with a direction that the statement of grounds be amended. The point of principle arising is whether in general material misstatements and non-disclosure lead to the setting aside of only the leave in respect of which the misstatements and non-disclosure were material, but not some other possible aspect of the leave granted in respect of which the misstatements and non-disclosure were not material? At the hearing of this appeal, I asked counsel for both parties if they knew of any authority on this point, but neither was able to assist the Court, and my own subsequent researches did not bear any fruit.

59. However, I note and agree with the comments of the trial judge as to the reason for setting aside the grant of leave, as summarised at para. 27 above. Simons J. emphasised that this was not being done to punish the applicant for his material non-disclosure, nor to serve as a warning to other litigants. Rather, it reflected the reality that the applicant's case, now that the misstatements and non-disclosure had been identified, did not meet the threshold prescribed for the grant of leave.

60. It seems to me that the logical consequence of this line of reasoning is that if an applicant's misstatements and non-disclosure are only material to certain aspects of his application for judicial review, but are not material to another aspect, then it is not appropriate to set aside the entire grant of leave, including that other aspect, in order to punish the applicant for his misstatements and non-disclosure. The applicant may still

have a surviving basis for a judicial review challenge which meets the prescribed threshold, and in a sense that aspect can be severed from the tainted aspects.

61. In the present case the applicant's misstatements and non-disclosure were of a serious nature, and must be deprecated by this Court, and clearly justified the trial judge in setting aside almost all of the grant of leave. Notwithstanding same, in my opinion the misstatements and non-disclosure were not material to the applicant's intended challenge to the Isaac Wunder order, which on balance I would find the grant of leave did encompass. In the circumstances, I would vary the order of the Court below to the limited extent of not setting aside the grant of leave on that one aspect of his challenge to the Circuit Court order.

62. I should add that I have reached the above conclusion to vary the High Court order, albeit only to this limited extent, with considerable reluctance, having regard to the history of this matter, including the applicant's previous unmeritorious conduct during the family law proceedings as referred to at para. 8 above, and his conduct during these proceedings, and in particular the serious level of material misstatements of fact and non-disclosure by him, and the absence of any affidavit by him explaining and apologising for same. Some of these matters remain highly relevant, however, in the context of costs, and I will return to same below.

Conclusion

63. In conclusion, I would affirm the decision of the High Court but vary it to the limited extent of not setting aside the order that the applicant had leave to apply by way of application for judicial review for the relief set out at para. (d)(ii) of his statement of grounds dated the 19th August, 2022, insofar as that relief relates to para. 6 of the Circuit

Court order dated 23rd May, 2022, and also leave to apply for the general consequential reliefs set out at para. (d)(vi) – (viii).

64. The issue which may then arise is whether the small outstanding balance of these judicial review proceedings should be remitted to the High Court for determination, in conjunction with any appropriate directions which might arise, bearing in mind that such a remittal would, inevitably, give rise to further costs.

65. As was stated by this Court in *M. v. M.* [2019] 2 I.R. 402 (at para. 22), the effect of O. 84, r. 22(2A) of the Rules of the Superior Courts is that the respondent is the *legitimus contradictor* to these proceedings, and it is up to her to decide whether or not she wishes to support the correctness of the remaining part of the decision sought to be challenged, *i.e.* the Isaac Wunder order. This is so in spite of the fact that the respondent is not the party against whom relief is sought, or who made the decision which is sought to be reviewed.

66. I would ask the Office to list this matter for a brief supplemental hearing on the nature of the consequential orders which may now arise. At that hearing the respondent should first inform the Court of her decision as to whether or not she wishes to support the correctness of the one remaining decision which the applicant has been held to be entitled to challenge. If she does wish to do so, then the Court would wish to be addressed on whether the small balance of these proceedings should be remitted to the High Court for determination, and as to any directions which might be appropriate. In that event, the attention of the parties is drawn to the decision of this Court relating to remittal in *Chen v. Minister for Justice and Equality* [2021] IECA 99, at para. 83 and at paras. 89 - 95.

67. With regard to costs, all costs issues can also be dealt with at the proposed supplemental hearing.

68. As this judgment is being delivered electronically, I note that each of Ní Raifeartaigh J. and Power J. have indicated their agreement with it and with the orders I propose.