THE HIGH COURT

[2023] IEHC 144

[2022 No. 4507 P]

BETWEEN

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

PLAINTIFF

AND

ENOCH BURKE

DEFENDANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 16th day of March, 2023.

1. This is my judgment on three issues. They are;

The costs of Mr. Burke's motion to stay the proceedings.

The costs of the school's motion in respect of Mr. Burke's continuing contempt.

The review of the measures taken in respect of that contempt of court.

2. With regard to (1), the school seeks its costs on the basis that Mr. Burke failed completely in his motion seeking a stay. My judgment on that motion was delivered on the 31st of January 2023. It is correct to say that Mr. Burke did not obtain any relief on foot of his application. On that basis, the school submits, costs should follow the event.

3. Mr. Burke makes a number of submissions, many of them quite misguided. He submits that he did not initiate the action, which is of no relevance to the question of costs in either motion. He says that it was "right" that his appeal take precedence over any further movement of the High Court proceedings, which of course is the very issue decided against him on his motion. He says that his constitutional rights were "set at nought", and therefore this should have been remedied "quickly and as a matter of priority" - again, Mr. Burke is arguing the merits of the motion rather than addressing costs considerations.

4. Mr. Burke submits that he would be "in effect [be required] to pay for the profession and practice of his religion." This is wrong. Requiring Mr. Burke to pay the costs of a procedural motion which has failed does not penalise him for his religious beliefs. Equally, requiring him to pay the costs of a motion brought because of his egregious disobedience of a Court Order is not a penalty visited upon Mr. Burke on religious grounds. As pointed out in my judgment of the 21st of December 2022, requiring someone not to trespass on private property in no way violates any religious beliefs.

5. Mr. Burke further argues that the "exceptional public importance" of the action constitutes grounds for no costs to be awarded on either motion. However, each motion must be seen as a thing in itself. The stay application was (as already observed) a procedural motion which failed. Regardless of the context of the overall action, and of the issues potentially

engaged in it, it is difficult to see how justice is served by ordering that the school bear the costs of a misconceived motion which Mr. Burke chose to bring. Equally, it would be quite unjust if the school had to discharge the costs of the contempt motion, which was brought by it in light of Mr. Burke's deliberate and continuing disregard of a Court Order. This is so even if it transpires that the underlying issues in the case include the question of Mr. Burke's constitutional entitlements. These entitlements could and should have been litigated without Mr. Burke's conscious and ceaseless contempt of court.

6. Mr. Burke submits that, in light of the judgment of Dignam J [2023] IEHC 22, the disciplinary proceedings taken by the school have "gone irremediably wrong". However, that argument conflates the decision on the costs of these two discrete motions and the possibility that Mr. Burke might succeed on some grounds at the trial; that possibility will crystallise (or not) at the hearing. It does not excuse the wasteful stay motion brought by Mr. Burke nor does it insulate him for responsibility for the costs of the contempt motion which the school reasonably felt obliged to bring.

7. Mr. Burke next takes issue with the limited extent of the school's involvement in the stay motion. Again, this argument is misconceived. The school successfully resisted the motion. The extent of the costs it incurred in doing so will in due course to be assessed by the appropriate independent costs adjudicator.

8. Mr. Burke further submits that the conduct of the school and its counsel support the making of no order as to costs on both motions. Relying on section 169 (1) of the Legal Services Regulation Act 2015, he submits that a "false affidavit" was sworn by the school's

chairman on the 9th of January 2023 in resisting Mr. Burke's injunction application (which resulted in the judgment of Dignam J to which I have already referred). Of this averment, Mr. Burke baldly states that it "was a lie". In fact, the portion of the judgment upon which Mr. Burke himself relies includes a statement by Dignam J that Mr. Rogers swore to something "that was manifestly incorrect..." The judge expressly refuses to make any finding that Mr. Rogers told a lie. The judge goes on to say (in text not underlined in the version produced by Mr. Burke) that Mr. Rogers exhibited the very minute which was used to undermine the account contained in the text of the Rogers affidavit.

9. Mr. Burke adds to his allegation about Mr. Rogers by claiming that the school's counsel (by referring solely to the contentions quote from the Rogers affidavit in her written submissions) was guilty of "grave misconduct".

10. In assessing Mr. Burke's submission on this point, I am guided by the treatment of Mr. Rogers' evidence by Dignam J. None of the disputed evidence was deployed before me in either motion and, indeed, the evidence had not even been given by Mr. Rogers before I gave my Decision on the stay motion (on the 19th of December 2022). Dignam J expressly does not find that Mr. Rogers lied to the Court. In light of that finding, and in the absence of any argument on this issue before me at any time, Mr. Rogers' averments do not disentitle the school to its costs on either the contempt or the stay motions if the school is otherwise entitled to such costs. An even longer bow is drawn by Mr. Burke with regard to the decision by counsel to include the relevant quote in her written submissions. To accuse counsel of "grave misconduct" in these circumstances is utterly without justification.

11. In advancing this submission, Mr. Burke describes his own conduct in these proceedings. One can see the logic of this, and its potential relevance. If the conduct of the parties is a consideration in deciding the costs of these two motions, it may be important to consider Mr. Burke's own behaviour in contradistinction to that of the school. Mr. Burke summarises his own behaviour as follows;

"...the Defendant has at all times conducted himself in a proper manner in these proceedings."

12. This self praise beggar's belief. There is much that could be said about Mr. Burke's behaviour, but it may be sufficient to observe that a person who has refused (on utterly spurious grounds) to comply with a Court Order for some six months has not behaved properly. However, one should also note the baseless traducing by Mr. Burke (in certain submissions) of judges such as Barrett J, Stack J, and Roberts J. as well as Mr. Burke's conduct in disrupting not one but two sittings of the Chancery List (on the 10th and 13th of February). The events of the 10th of February 2023 are summarised in my ruling given that day and bearing the citation [2023] IEHC 67.

13. I therefore conclude that the evidence of Mr. Rogers does not in itself justify the refusal of the costs of the school in respect of two motions in which this evidence never featured. Any infirmity in the evidence of Mr. Rogers will be put to him at the trial, in the event that he gives evidence. His failure to give evidence can be the subject of submission at the trial, if appropriate.

14. Finally, Mr. Burke complains that the school did not make discovery in accordance with directions I gave on the 14th of February 2023. That failure is not such as to cause me to refuse the school its costs, not least because it has nothing to do with the two motions and is capable of being dealt with by the trial judge in the event that it has occasioned any cost or expense to Mr. Burke. The failure to make discovery on time is not, in my view, the sort of behaviour that s. 169 (1) is designed to address.

15. In brief, Mr. Burke brought a motion, it put the school to expense, it failed completely, he should pay the school's costs notwithstanding the elaborate arguments which he has put forward.

16. With regard to (2), the school submits that Mr. Burke was warned (in my judgment of the 21st of December 2022) that appropriate measures could be sought by it should his contempt resume after his release. Mr. Burke broke the Order of Barrett J on the first day the school reopened, and the school reasonably and properly brought a motion arising from this contempt. I accept that the school had no option but to bring the contempt motion. Indeed, having procured the Order of Barrett J in the first place, it would have been strange had it stood idly by while the Order was being openly breached.

17. Mr. Burke's submissions on the costs of this motion broadly mirror his arguments on the costs of the stay motion, and these are rejected for the reasons set out earlier. Mr. Burke makes one argument tailored to the contempt motion. It is to the effect that his "inability to comply with the Order of Barrett J is because that Order has denigrated and set at nought his constitutional rights." This oft stated position of Mr. Burke ignores entirely the legal reality

that, until the Barrett Order is varied or set aside, it is an Order of the High Court with which he must comply. Mr. Burke could have complied with the Order without violating his religious beliefs, but he has chosen not to do so. Instead, Mr. Burke has acted as though he can determine whether or not Court Orders are lawful. That is not his entitlement.

18. Mr. Burke also seeks to re argue the contempt motion (by reference to the Equal Status Act 2000), but the motion will not be reopened simply because Mr. Burke has lost.

19. Finally, on this discrete submission, Mr. Burke says that he has "caused no disruption at the school", refers to an affidavit which has been considered by the Court, and says that "it was wholly unnecessary for [the school] to bring" the contempt motion. Of course, this evidence was not put before the Court when the contempt motion was being argued and decided. In addition, Mr. Burke's account is not consistent (to put it mildly) with the evidence on the motion put forward by the school and the evidence subsequently advanced by it in respect of Mr. Burke's continued breach of the Order of Barrett J. Fundamentally, Mr. Burke is once more confused as to his proper role. It is not to decide whether or not Orders are lawful, and it is not to decide whether or not there is any mischief caused by disobeying them. Mr. Burke breached the order of Barrett J at the first opportunity. The school brought a motion arising from that breach. Albeit late in the day, the school sought the imposition of a periodic fine. Despite invitation by the Court, Mr. Burke did not raise any procedural objection to the school seeking that he be fined. Mr. Burke was fined and (as we will shortly see) persisted in his contempt. The school is therefore entitled to the costs of the motion.

20. With regard to (3), the evidence of the school is that Mr. Burke has breached the Order of Barrett J on every day since the 26th of January 2023 (when the fines were imposed) other than "days when the school is officially closed such as the weekend or the mid-term break or when he is attending the Four Courts in relation to the ongoing litigation." Mr. Burke does not dispute this. Indeed, in his replying affidavit Mr. Burke says that since his release from prison on the 21st of January 2022 he has "continued to report for work."

21. For the sake of completeness, it should be noted that Mr. Milling (the school principal) has given evidence of Mr. Burke's continued presence causing "considerable disruption and unease for staff, students, parents and the wider school community". He goes on to swear that Mr. Burke's presence "is inimical to the proper functioning of the school." Mr. Burke rejects this evidence, and states that he has support from various quarters. One example he gives of such support is that, after his arrest by An Garda Siochana on the grounds of the school a student asked Mr. Burke 'how was your day?"; another asked him "are you going back to prison?" While these inquiries may be viewed as somewhat equivocal and not necessarily supportive, the fact that the police felt it appropriate to arrest Mr. Burke on school premises does not suggest that his presence on the grounds is particularly helpful.

22. In any event, the difference in the accounts given by Mr. Milling and Mr. Burke need not be resolved here. The basic fact is that Mr. Burke has continued to breach the Court Order of Barrett J up to, at the very least, the 1st of March 2023.

23. On the 26th of January 2023 this Court imposed a daily fine of 700 euro on Mr. Burke until either he purged his contempt or the Order of Barrett J was varied. The Order has not

been varied. Indeed, the decision of Barrett J has been upheld by unanimous judgments delivered by the Court of Appeal on the 7th of March 2023. On that basis alone, the 700 euro daily fine has run from the 27th of January to today's date. However, for the purpose of the Order now to be perfected, I will fix the amount to be recited in the Order as 23,800 euro, being the sum due in respect of the fines as of the 1st of March 2023 (namely the date for which there is evidence of the ongoing breach). The judgment imposing the fines did not give Mr. Burke any deferral with regard to their payment. The fines accumulate on a daily basis and are therefore payable on a daily basis. For the purpose of the Order, the data for payment of the fines accrued up to the 1st of March will be 4 pm on the 23rd of March 2023. That modest indulgence of Mr. Burke is solely for the purpose of ensuring clarity in the Order.

24. There remains the question of whether the fine should now be increased. I have come to the view that there are two possible reasons for Mr. Burke's continuing contempt. One is that the fine is too low. The other is that he does not really believe that the fines will ever be enforced.

25. Taking a proportionate approach to the measures to be invoked in order to secure Mr. Burke's compliance with an Order found to be lawful and constitutional both by the High Court and the Court of Appeal, the correct option is not to increase the daily fine (at least at this stage) but to crystallise the sums due as of the 1st of March 2023, to have the Order perfected, and thereby permit the school to take the appropriate steps to enforce the fines. There are clear and obvious steps which can be taken, including the sequestration of Mr. Burke's assets. The earlier application for sequestration as a coercive measure was refused. However, sequestration of Mr. Burke's assets in order to enable collection of his fines is a

different proposition. In any event, as and from 4 pm on the 23rd of March the school is at large as to what steps it wishes to take to enforce the fines and Mr. Burke will be at risk of such measures for as long as it takes for the fines to be paid.

26. Needless to say, the daily fine of 700 euro will continue to run until the relevant Order of Barrett J is materially varied or set aside or until Mr. Burke purges his contempt. The parties will be notified, in good time, of the next review date. At that time, the compliance by Mr. Burke with Court Orders from the 2nd of March on will be reviewed.

27. While this judgment was being finalised, an unusual letter from Mr. Burke was brought to my attention. It was received by the Chancery Registrar at 5 pm on the 15th of March. The letter from Mr. Burke concluded with concern that fines were in place (and may well be increased, with other measures imposed) for breach of an Order that was obtained by use of "false statements". My ruling of the 10th of February 2023 dealt with this issue. At paragraph 4 of that ruling, I stated;

"As the erroneous affidavits [of the school] appear not to have been deployed before me, the correct course of action is that these errors be brought to the attention of the relevant judges, which both the school and Mr. Burke are free to do."

The relevant judges were identified in that ruling, and they included Barrett J. As far as I know, Mr. Burke has not mentioned the school's erroneous affidavits to any of these judges. He has not asked any of these judges to review or set aside their Orders on the ground that such Orders were obtained by the school's use of "false" evidence of any kind. This is despite the fact that he was invited to do so in my ruling of over a month ago. It is not for me to

decide that any of my colleagues were misled in a way that meant their decisions were materially influenced by evidence that was “false”, as each of them is available to hear such an application themselves. These judges are the best people to decide if their Orders would have been granted had “false” evidence not been put before them. That is why it is neither necessary nor appropriate for me to have the question of the admitted errors in the school’s affidavits listed before me.

28. Mr. Burke's account contained in his letter of yesterday is quite inaccurate. Fundamentally however, he does not in any way explain why he did not take up the proposal in my ruling on the 10th of February to go back to the relevant judges and ask them to revisit their Orders. Nothing in this recent letter changes the decisions I have made as outlined in this judgment.