

THE HIGH COURT

[2023] IEHC 41

[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 31st day of January, 2023.

1. The case management of proceedings is a regular feature of civil litigation in Ireland. Every case in the Commercial Court is subject to active case management. In the Chancery and Non Jury Lists universal case management is not practical, given the amount of actions in these lists, but it is nonetheless applied to many cases of different types. Case management is expressly provided for in the Chancery and Non Jury Lists by Order 63C of the Rules of the Superior Courts. While the entirety of that Order has not been commenced, Order 63C Rules 4 and 5 (which have been in operation for some years) provide;

“4. A Judge may, at any time and from time to time, of that Judge’s own motion and having heard the parties, or on the application of a party by motion on notice to the other party or parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.

5. (1) Without prejudice to the generality of rule 4, a Judge may—

(a) of that Judge’s own motion and after hearing the parties, or

(b) on the application of a party by motion on notice to the other party or parties,

make any of the following orders or give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule:

(i) as to whether the proceedings shall continue—

(I) with pleadings and hearing on oral evidence,

(II) without formal pleadings and by means of a statement of issues of law or fact, or of both law and fact,

(III) without formal pleadings and to be heard on affidavit with oral evidence, or

(IV) without formal pleadings and to be heard on affidavit without oral evidence;

(ii) fixing any issues of fact or law to be determined in the proceedings;

(iii) for the consolidation of the proceedings with another cause or matter pending in the High Court;

(iv) for the defining of issues by the parties, or any of them, including the exchange between the parties of memoranda for the purpose of clarifying issues;

(v) allowing any party to alter or amend the party's indorsement or pleadings, or allowing amendment of a statement of issues;

(vi) requiring delivery of interrogatories, or discovery or inspection of documents;

(vii) requiring the making of inquiries or taking of accounts;

(viii) requiring the filing of lists of documents, either generally or with respect to specific matters;

(ix) an order in accordance with Order 36, rule 9(2);

(x) an order to the effect provided for in Order 39, rule 61(1) and (2);

(xi) providing for the exchange of documents or information between the parties, or for the transmission by the parties to the Registrar of documents or information electronically, including the filing or delivery of an affidavit of discovery and copies of the documents (not including documents over which privilege is claimed) in any schedule thereto, on such terms and subject to such conditions and exceptions as a Judge may direct;

(xii) for the examination upon oath before a Judge, Registrar or other officer of the Court, or any other person, and at any place, of any witness, in accordance with Part II of Order 39;

(xiii) on the application of any of the parties or of the Judge's own motion, an order under Order 56, rule 8 or an order under Order 56A, rule 2;

(xiv) fix a timetable for the completion of pleadings, interlocutory applications and other pre-trial steps, and may for that purpose adopt any proposed timetable agreed by the parties or submitted by a party (which may be in the Form 1 in Appendix JJ) if satisfied that it is reasonable.

(2) Without prejudice to any enactment or rule of law by virtue of which documents or evidence are privileged from disclosure, to assist him in deciding whether or not to make any order or give any direction in accordance with sub-rule (1), the Judge may direct the parties, or any of them in relevant proceedings, to provide information in respect of the proceedings, including:

(a) a list of the persons expected to give evidence;

(b) particulars of any matter of a technical or scientific nature which may be at issue or may be the subject of evidence;

(c) a reasoned estimate of the time likely to be spent in—

(i) preparation of the proceedings for trial;

(ii) the trial of the proceedings, and

(iii) the examination or cross-examination (as the case may be) of each or any witness intended to be called by that party or by any other party;

(d) particulars of any arbitration arrangements or ADR process (within the meaning of Order 56A, rule 1) which may be available to the parties.”

2. A number of things are clear from this Order.

Firstly, it expressly contemplates that the Court, regardless of the parties, may initiate and oversee the active management of any action before it.

Secondly, the question of whether or not to manage proceedings in this way is entirely within the discretion of the Court. The discretion is a broad one.

Thirdly, the powers set out in Rule 5 are not exhaustive. However, the range and variety of the type of orders which the Court is expressly authorised to make under Rule 5 emphasise the breadth of powers available to the Court to enable effective case management of actions.

3. In the current case, the parties were notified of the possibility that Orders would be made for the case management of this action. On the 14th of October 2022 the Plaintiff ("the school") accepted the principle of case management, while the Defendant ("Mr. Burke") objected on the principal ground that an early trial of this action would render moot his appeal to the Court of Appeal against four interlocutory Orders made by this Court. Notwithstanding this objection, the school was directed to deliver a Statement of Claim and Mr. Burke was directed to deliver a Defence (and Counterclaim, if any). No trial date was fixed, and no other directions were made as to, for example, the disclosure of documents, the delivery of witness statements or the provision of written submissions for the hearing of the action.

4. In deciding that this action be case managed, the following factors were relevant;

(a) Mr. Burke was, at the time the motion was heard, a teacher at the school. As a general rule disputes between employers and employees should be moved on with some despatch if it is possible to do so. However, this will not always be the case.

(b) Apart from the general proposition just described, there is the specific nature of this dispute. The differences between the school and Mr. Burke, and these proceedings, are inevitably disruptive for the children attending the school. They are also likely to be distracting for the teaching staff, and the parents of pupils. The action should therefore be brought on and not be allowed to fester.

(c) There are interlocutory injunctions currently in place against Mr. Burke. By their very nature, these orders merely involve holding the ring pending a full hearing of the matters in dispute between the parties. In the past, interlocutory injunctions have remained in place for too long and have effectively taken the place of final orders. This is undesirable, and for some time now judges in the Chancery List have (in deciding interlocutory injunctions) often given directions to move on the underlying case.

(d) At the time that case management was first suggested to the parties, Mr. Burke was incarcerated for his contempt of court. That in itself was a sufficient reason for serious consideration to be given to an expedited hearing of the action. The

Order which Mr. Burke was breaching was an interlocutory one, which would last only until the trial of the action or final judgment in the case. An early hearing was therefore in the interests of justice, not least because the school might well not succeed at the trial of the action and Mr. Burke would then no longer be subject to measures resulting from his non compliance with the interlocutory injunction.

5. All of these factors suggested strongly that these proceedings be case managed to an early trial. In addition, it should be remembered that a student in the school is caught up in the dispute giving rise to this action. Long drawn out proceedings are unlikely to be easy for that individual, and this constitutes a supporting reason for expediting the action.

6. Mr. Burke then brought a motion seeking to stay the Order of the 14th of October 2022, and seeking a more general stay on the progress of the action pending the determination of his appeals. He has never explained in any real way how he is prejudiced by having to deliver a Defence and Counterclaim, and therefore has not even attempted to justify any stay on that portion of the October Order. Equally, he has never even sought to show why discovery should not be agreed or ordered or why witness statements should not be provided by the school (or by him). Mr. Burke's main objection was to a trial proceeding before the Court of Appeal had an opportunity to decide his applications to it.

7. At the hearing of his motion, Mr. Burke arranged his submissions under three headings. I have set these out in summary form, but have carefully considered everything put forward by Mr. Burke in his written submissions, his affidavit evidence and his oral presentation.

8. The first argument advanced by Mr. Burke was that, by reference to the judgment of Clarke J in *Okunade v Minister for Justice* [2012] IESC 49, there was a strong case that an appeal would succeed. Unfortunately, in this context Mr. Burke addressed the Court exclusively on the prospects of the success of his appeal against the earlier High Court Orders. He did not address the strength of his appeal against my Order of October 2022 admitting the action to case management and directing an exchange of pleadings, despite the fact that it was that Order he was seeking to stay. Mr. Burke therefore concluded his submission on this point by

“And what should have happened in September was that when the school, the plaintiff, came in with their unlawful request, they should have been told in no uncertain terms, "Be gone with your unlawful request, the religious rights of citizens in this State are inviolable". And they could have added to that and said that, "the Christian belief in male and female is a laudable and reasonable religious right which no earthly Court can render void". That's what should have

happened. They should have been told under no circumstances can an injunction of this sort be granted. And we know that's not what happened.”

9. Mr. Burke did not address the strength of his appeal against the Order of the 14th of October, or against the decision to fast track these proceedings. Inasmuch as the strength of the appeals against the four orders made by other judges is of any relevance, those appeals will now proceed before the trial of this action takes place. This is the direct result of the bringing of this motion by Mr. Burke.

10. Mr. Burke’s second argument is that, should the action before the High Court proceed, he will be caused irreparable harm. As it happens, this submission is also addressed by the reality that the appeal hearings are scheduled to take place on the 16th of February whereas the earliest that the trial can now occur is either late March or shortly after Easter. However, even without this consideration, Mr. Burke’s second argument is unconvincing. It had a number of strands. For example, he insisted that “there needs to be a trial of the judges”; this shows a complete misunderstanding of the appeal process in this jurisdiction, at least. The judges whose decisions are under appeal are not themselves on trial. Equally, Mr. Burke’s argument that his continuing imprisonment “normalises prejudice against religious belief” is unstateable. Mr. Burke’s continuing defiance of court orders normalises such unacceptable and fundamentally antisocial behaviour, and his

imprisonment is solely the result of his insistence on attending on private property when ordered not to do so. A further element of this second submission is that the Court of Appeal may find that the school does not even have an arguable case. If that happens, he argues that the action will not go to a hearing as there is no real case for Mr. Burke to meet. This last strand of the second submission is the most impressive, but ignores the fact that at the interlocutory stage the most that any court can do is to decide that (on the legal submissions and evidence put forward at that time) an arguable case is not made out. It does not necessarily dispose of the underlying action. Mr. Burke accepted that the school could press on to a trial regardless of the outcome of the hearing before the Court of Appeal. In any event, the appeals are now listed before any trial can occur so (subject to the Court of Appeal) they can be heard and potentially determined in advance of the trial.

11. Mr. Burke's third submission was on the balance of convenience, which he said supported granting a stay. However, this again focused on the disadvantages (as advanced by Mr. Burke) of having the trial of the action in advance of the hearing of the appeals. As already described, and dependent entirely on the Court of Appeal, this consideration has been overtaken by events. If this was not the case, however, the balance of convenience supports an early trial as this will bring finality (at least at High Court level) in respect of all of the substantive disputes between the school and Mr. Burke. The trial judge will not be influenced by comments or findings of judges dealing with interlocutory

applications, nor will she or he be overborne or affected in any way by Mr. Burke's imprisonment (which was in place at the hearing of his motion). These findings are also relevant to Mr. Browne's second submission, alleging irreparable prejudice should the action at the level of this court be allowed to proceed.

12. Mr. Burke has therefore not established that the October Order, or the ongoing progress of this action at the level of this Court, should be stayed. On the 19th of December 2022 I gave my Decision on this motion, and indicated that the full judgment would be given during the course of January 2023. I also gave revised directions as to pleadings, which were complied with by Mr. Burke and the school. Finally, I directed that the pleadings be sent to the Chancery Registrar on the 19th of January 2023, which would facilitate the giving of further case management directions. Unfortunately, the full set of pleadings did not reach the Chancery Registrar until the 25th of January.

13. Having now considered the pleadings, I believe that the following directions may be appropriate;

- (1) The school will deliver witness statements on or before the 27th of February 2023.
- (2) By the same date, the school will make discovery to Mr. Burke of all documents relating to the matters in dispute in this action. The matters in dispute

are to be assessed by reference to the pleadings. If the parties cannot agree on the categories of discovery which are appropriate (by reference to the pleadings) the Court can decide.

(3) The pleadings do not seem to give rise to any need for Mr. Burke to make discovery to the school. Again, if the school wishes to apply for such discovery they can do so. However, this should not delay the directions contained at (1) and (2).

(4) Mr. Burke will deliver his witness statements by the 27th of March 2023.

(5) The school will deliver written legal submissions on or before the 6th of April 2023.

(6) Mr. Burke will deliver his written legal submissions on or before the 15th of April 2023.

(7) The trial can begin immediately after the Easter break, possibly as early as the 21st of April 2023. The hearing should last about 6 days.

14. These are merely proposed directions at this time. If either the school or Mr. Burke wish to suggest alternative directions, this should be done (at least initially) by correspondence to each other copied to the Court. If needs be, there can then be a hearing in respect of the appropriate directions that are required in order to move the case forward. The school and Mr. Burke should state their respective positions on the directions suggested in this judgment by close of business on Friday the 3rd of February.

15. The proposed directions would have been more stringent were it not for the fact that the Court of Appeal hearing is taking place in mid February, and the parties will no doubt have to devote some time to preparing for it. If the parties want to move at greater pace, then a trial date can be fixed for late March rather than for after Easter.

16. The costs of this motion will be decided at the next suitable opportunity.