

THE HIGH COURT

[2023] IEHC 123
[2022 No. 4507 P]

BETWEEN

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

PLAINTIFF

AND

ENOCH BURKE

DEFENDANT

DIRECTION of Mr. Justice Brian O'Moore delivered on the 9th day of March, 2023.

1. At a hearing on the 14th of October 2022 the parties were informed that this action would be subject to case management with a view to an early trial. Mr. Burke objected to this approach, and in due course brought a motion seeking to stay the progress of these proceedings in any way at the level of this Court until his appeals to the Court of Appeal were heard and determined. Had this motion been successful, the position today would have been that the action would be at a very embryonic stage (given that the judgments on Mr. Burke's appeal were delivered earlier this week) and a trial would have been a long way off. However,

Mr. Burke's motion was refused, and on the 19th of December 2022 directions were give as to the delivery of pleadings in this case. After the pleadings closed, further directions were proposed on the 31st of January 2023 with regard to the delivery of witness statements, the making of discovery by the school, and the provision of written legal submissions. In that judgment, I suggested that a trial date of the 21st of April (for 6 days) would be achievable but went on to say that an earlier hearing (in March of this year) would be possible

2. The parties were asked to respond to the proposed directions by close of business on the 3rd of February. Mr. Burke did engage by that time, asking for a much earlier hearing date given that his dismissal from the staff of the school was due to take effect on the 21st of April 2023 and that certain of the reliefs he sought in this action (by way of counterclaim) were, he said relevant to the legality of the process which preceded his dismissal. Precisely because the making of procedural directions was not the time to decide on the scope of Mr. Burke's pleaded case, the merits of his case, or whether he could obtain any reliefs from the Court given his continuing contempt, there was clearly merit in having the trial in March. The response of the school to the directions proposed in my judgment of the 31st of January arrived on the 8th of February, over four days late. No explanation was provided for this failure to meet the deadline contained in the judgment.

3. In my subsequent decision of the 14th of February 2023, revised directions were given "to facilitate the possibility that the trial might take place this Term" , described later in the decision as "a trial in March" which it was felt was "now...achievable". It was also noted that the school had not taken issue with Mr. Burke's correspondence of the 3rd of February in which he sought a hearing as soon as possible after the Court of Appeal hearing (which was scheduled for the 16th of February).

4. No objection was taken by either party to the revised directions, nor to the prospect of a trial before the end of March.

5. The decision of the 14th of February stipulated that the parties were to inform the Chancery Registrar on the 1st of March if the directions with regard to discovery and witness statements had been complied with as of that date and, if they had been, the parties "will then be informed of the trial date". The relevant directions were that the school's witness statements were to be delivered by the 22nd of February (along with the school's discovery), and Mr. Burke's witness statements were to be delivered by the 28th of February.

6. On the 1st of March, the Chancery Registrar was informed that both sets of witness statements had been delivered, but Mr. Burke complained that the

school's discovery was "still awaited". This meant that a trial date for later this Term could not be fixed on the 1st of March.

7. On the 3rd of March, therefore, the parties were written to in these terms;

"As all witness statements have been delivered, it is still intended that the trial of this action will go ahead this month.

"However, it is unsatisfactory that the question of discovery has not yet been resolved and that (on Mr. Burke's account) the school's solicitors have not responded to his discovery requests.

"The parties are therefore asked to update me, by email, on the position with regard to discovery by 5 pm on the 8th of March."

It would have been plain from the Chancery Registrar's email that, if the discovery had been made by the 8th of March, the trial of the action would be listed for a date in March without further notice to the parties. This was what was due to happen on the 1st of March had the discovery been made by then.

8. Notably, the date of this email (the 3rd of March) was the day by which the school had been ordered to deliver its written submissions. This did not happen

on that date, the school did not look for any extension of time, and as will be seen the school's submissions remain outstanding.

9. On the evening of the 3rd of March (at 19.13) Mr. Burke emailed the school's solicitors (copying my registrar) noting that the school's submissions were to have been delivered by close of business that day, but that this had not been done. I am not aware of any reply.

10. It was my intention on the 8th of March 2023 to set the trial date for later this month. In order to do so, it was necessary to know the position on discovery. To that end, and also given the email from Mr. Burke complaining about the non delivery of the school's submissions, the parties were asked that day by email from my registrar (at 11.18) to address two questions;

"1. Has the discovery to be made by the Plaintiff been agreed? If not, why not?

2. Has the Plaintiff delivered its written legal submissions? Was this done within the stipulated time? If not, why not?"

The email concluded that the Court would be in a position to decide on a trial date "on receipt of full answers to these questions".

11. This email was copied to both parties. The school's reply was not. It omitted Mr. Burke. The reply read;

"Thank you for your email seeking an update for the Court on the preparations for trial.

"With regard to discovery, we confirm that we have today written to Mr. Burke in response to his request of 20 February, enclosing documentation. Please note that we wrote to Mr. Burke in relation to his request by emails dated 22 February and 2 March and we attach copies of same for your attention.

"With regard to our written submissions, regrettably it has not been possible as yet to finalise same but we are dealing with this as a matter of urgency. We will be in a position to deliver same by no later than Monday next the 13th of March. We trust this may be acceptable and apologise for the delay."

12. The response from my registrar, copied to Mr. Burke, noted that it was not acceptable that the submissions were late, and that a unilateral decision was taken (by the school's side) to extend the date for delivery of submissions. This was

done without any notification to the Court. The email sought clarity about whether the school had agreed in full to provide the discovery sought by Mr. Burke, and whether he had now been given all the documents to be discovered to him. The email concluded;

"It would be appreciated if the parties could confirm the position this afternoon, so that a trial date can now be fixed."

13. Two replies were received. The first (at 18.00) was from Mr. Burke. On discovery, he confirmed that he had received documentation from the school, expressed his "serious concerns regarding the response of the Plaintiff to [his] discovery request" but concluded;

"However, as an early trial is essential for the reliefs sought, I ask for a trial date to be fixed nonetheless."

14. On the school's submissions, Mr. Burke's position was that he had yet to receive these despite the fact that they were due on the 3rd of March.

Importantly, on the basis of Mr. Burke's email the trial date could now be set. Discovery was no longer an issue.

15. The second response to the email sent by the Chancery Registrar on the afternoon of the 8th of March was an email timed at 18.13, from the school's solicitors. Having expressed a willingness to appear before the Court "in relation to the matters" contained in the registrar's email, it went on;

"1. We apologise that the Court was not specifically requested to extend the time for submissions. Unfortunately, the discovery request by Mr. Burke was much more extensive than indicated to the Court and this has delayed matters but the Court should have been appraised and requested to extend the time;

"2. Mr. Burke received relevant documents earlier today. We are not yet aware whether he is satisfied with the documents provided;

"3. With respect both to the fixing of a date for the trial and Mr. Burke's disposition to the revised directions made by the Court on 14 February last, we respectfully request that the matter be listed for mention on a date and at a time convenient to the Court."

16. The interplay between the making of discovery and the preparation of legal submissions is not immediately apparent, a point made by Mr. Burke in an email from him received this morning. In that email (timed at 10.24) Mr. Burke states

correctly that his legal submissions are due tomorrow (the 10th of March), and of course this cannot be done because of the ongoing failure of the school to provide its submissions. Mr. Burke concludes by enquiring why the Court is not directing that the school "abide by the Direction and deliver their submissions?"

17. As the Court has consistently sought to move this action on, notably by the making of procedural orders, it was always the case that revised directions were going to be made to ensure that written submissions were in place before the trial. Dealing with a wave of emails has not assisted the process.

18. Subject to one last matter arising from the correspondence, a trial date can now be fixed and final revised directions made.

19. The outstanding matter is the request, contained in the email of yesterday evening from the school's solicitors, for a hearing to deal with (1) Mr. Burke's "disposition" to the revised directions made over three weeks ago and (2) the setting of a trial date.

20. I do not understand what is meant by the first of these issues. No complaint is made that Mr. Burke has failed to abide by the Court's directions. If it is intended now to revisit these directions, or the reasons why they were made, it is simply too late. The Court and the parties have operated on the basis that the

directions of the 14th of February were made to facilitate a trial this month, and that is what is to happen.

21. With regard to the proposal that there be a hearing on the question of the trial date, it was plain to the parties since the 31st of January that there was a possibility of a trial this month. It was equally clear to the parties since the 14th of February that I had decided on a trial in March if the directions about discovery and witness statements were met. The parties were informed, in terms, in the latter ruling that they would be told of the trial date on the 1st of March without any further court appearances. The fact that notification of the trial date was deferred to the 8th of March changed nothing about the way in which it was to be fixed. No reason has been put forward by the school as to why the Court should now change entirely the way in which the trial date is to be set, and I do not propose to do so.

22. I am also very conscious of the observations of Whelan J at the conclusion of her judgment, in these proceedings, delivered on the 7th of March 2023. At paragraph 87, Whelan J stated;

"In large measure the issues identified by the appellant are matters that fall to be determined at the substantive trial and it is in the interest of all parties

particularly the school and the student body that the substantive hearing take place in early course."

23. Not only do I respectfully agree with these sentiments, it will be obvious from my previous judgments (and the summary of events contained in this decision) that for some time this Court's aim has been to achieve an unusually early trial. It has not been explained to me by the school why I should defer fixing a hearing date until the matter can be mentioned to me, especially since the earliest that this can realistically be done is during the course of the week beginning the 13th of March.

24. The trial of this action will begin on Tuesday the 28th of March. The school's written legal submissions are to be delivered to Mr. Burke on or before 4 pm on the 13th of March. Mr. Burke had previously a week from receipt of the school's submissions to deliver his own. Given the St Patrick's Day Holiday, Mr. Burke will now have until 4 pm on the 22nd of March to serve his written legal submissions on the school's solicitors. The trial books are to be lodged by 4 pm on the 24th of March. This is to be done by the school's solicitors, as the school is the moving party in the proceedings. The trial books are to include books of authorities, which should be agreed if possible.

25. There are three outstanding matters, namely the review of Mr. Burke's compliance with Court Orders, the costs of the stay motion, and the costs of the contempt motion. As the simple fixing of a trial date has proved more complicated than it should, the decisions on these remaining interlocutory issues will now be given during the week commencing the 13th of March.