

**THE HIGH COURT**

**[2023] IEHC 36**

**[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 26th day of January, 2023.**

1. While the origins of the dispute between the Plaintiff ("the school") and the Defendant ("Mr. Burke"), and the progress of this action, have been described elsewhere, the facts relevant to this contempt motion should be set out here. On the 7th of September 2022 Barrett J made an Order in these terms;

“1. An interlocutory injunction restraining the Defendant from attending at the premises of Wilson’s Hospital School for the duration of his paid administrative leave.

2. An interlocutory injunction restraining the Defendant from attempting to teach any classes or any students at Wilson's Hospital School for the duration of his paid administrative leave.
3. An interlocutory injunction restraining the Defendant from interfering with the appointed substitute teacher's duties and teaching.
4. An interlocutory injunction restraining the Defendant from failing to comply the directions of the Plaintiff Board.
5. An interlocutory injunction restraining the Defendant from trespassing on the property Wilson's Hospital School."

2. At the time of the making of this Order, Mr. Burke was already incarcerated for breach of an Order of Stack J. The Order of Stack J was made on the 30th of August 2022, on the school's ex parte application. Mr. Burke did not comply with that Order, and on the 5<sup>th</sup> of September 2022 he was jailed for contempt by Order of Quinn J.

3. On the 7<sup>th</sup> of September, Mr. Burke was duly served with the Order of Barrett J bearing a penal endorsement. Mr. Burke was then committed to prison for his contempt of the Order made that day. Mr. Burke remained in prison until released by Order of the 21<sup>st</sup> of December 2022. Throughout that lengthy period, and despite the opportunity provided by several court appearances, Mr. Burke

refused to purge his contempt. The reasons for his release are set out in a Ruling bearing the neutral citation 2022 IEHC 719.

4. When Mr. Burke was released, Wilson's Hospital School was closed for the Christmas holidays. It reopened on the 5th of January 2023. That morning, Mr. Burke attended at the school and was seen standing outside the office of the Deputy Principal, Mr. Galligan. Mr. Galligan then informed Mr. Rogers and Mr. Milling (respectively the Chairman of the school's Board of Management and the school Principal) that Mr. Burke was in the school. Mr. Rogers, in his affidavit grounding the current motion, takes up the story as follows (at paragraph 6); -

" Mr. Milling and I went to speak to Mr. Burke. Mr. Milling informed him that he was on administrative leave and that he had been directed previously by Mr. Galligan and myself not to attend the school premises or grounds. Mr. Milling also informed him that he was in breach of a High Court Order. Mr. Burke was asked on a number of occasions to leave the premises and he replied 'I am here to work' or words to that effect."

5. At paragraph 7 of his affidavit, Mr. Rogers sets out how the school dealt with this fresh breach of the Order of Barrett J

“Ultimately due to Mr Burke’s refusal to leave the school premises and his refusal to go into Mr Galligan’s office the principal had to set up a workspace for the day on the corridor close to Mr Burke with a table and chair. The principal did this to ensure that there was limited interaction, if any, between Mr Burke and the students. Mr Burke was insistent on staying on the corridor and there was a genuine concern about what interactions and disruption could occur. The principal also cornered off the portion of the corridor where Mr Burke was located for the same reason signs indicating that there was no entry and that students were to use an alternative route”

6. While, at the hearing of this motion, Mr. Burke cavilled with the accuracy of the phrase 'cornered off' he gave no evidence on affidavit materially contradicting any of this testimony on the part of Mr. Rogers.

7. On the 6th of January 2023, Mr. Burke again attended at the school. Again, Mr. Milling set up a workstation in the corridor so that he could 'observe the situation' while getting some work done. On that day, Mr. Burke was handed a letter by Mr. Rogers, which asked Mr. Burke to leave the premises immediately and to undertake in writing by 5 pm that afternoon that he would comply with the Order of Barrett J. If this did not happen, the letter went on, an application would be made to this Court by the school for his 'attachment and/or committal and/or sequestration of [his] assets and/or any other appropriate measure due to [his]

ongoing contempt of court.' The letter was signed by Mr. Rogers, on behalf of the Board of Management. The evidence is that Mr. Burke did not leave the school on the 6th of January, did not give the undertaking sought, and attended at the school on Monday the 9th of January.

8. In these circumstances, the school issued a motion seeking the following;

“1. An Order for the Attachment and Committal of the Defendant for failure to comply with Orders of this Honourable Court made on 7 September 2022 on an interlocutory basis restraining the Plaintiff from inter alia attending at the premises of Wilson’s Hospital School

2. An Order for the sequestration of the Defendant’s assets within this jurisdiction for failure to comply with Orders of this Honourable Court made on 7 September 2022 on an interlocutory basis restraining the Plaintiff from inter alia attending at the premises of Wilson’s Hospital School.

3. Such further or other order or direction as this Honourable deems fit;

4. Costs, including the cost of this application.”

9. The motion was to be returnable to the 11th of January 2023 but it could not be heard on that day. This was because the motion could not be issued in time through the Central Office of the High Court, as the Order of Hunt J directing short service had not been taken up. On the 11th of January, Mr. Burke

nonetheless informed the Court that he was in a position to deal with the application there and then. This readiness on the part of Mr. Burke to deal with the contempt motion meant that it could be listed for hearing at an early date, which was the 17th of January 2023.

10. On the afternoon of the 16th of January, the solicitors for the school served written submissions in respect of the motion. In these submissions, the school's position was that not only sequestration of assets but also the imposition of a fine on Mr. Burke was being sought. The submissions, which at 6 pages in length are unusually brief, include a section headed;

'When a Fine or Sequestration of Assets may be Ordered.'

11. In this section of the submissions, there is a quote from the judgment of Humphreys J in *Meath County Council v Hendy* [2020] IEHC 142 which concludes that 'financial orders...' might be imposed on contemnors.

12. The next section of the submissions is headed;

'Inherent Jurisdiction of this Honourable Court - Some Other Order - Fine'

13. The first paragraph under this heading reads;

“18. It may be the case that this Honourable Court is of the view that neither sequestration of assets nor committal to prison are appropriate Orders. It is open to this Court to fine Mr Burke in whatever amount and in whatever manner it thinks appropriate”

14. There then follows a reference to three authorities, namely *Hendy, Curely v Galway Corporation* [2001] IEHC 53, and *Irish Shell Ltd v Ballylynch Motors Ltd* (Supreme Court, Lynch J). In all of these, the decisions were cited solely in order to show that in appropriate cases a fine can be imposed.

15. In light of these submissions, when the motion was due to be heard on the 17th of January Mr. Burke was asked whether he wished to have time to deal with the school’s written submissions, or to put in replying submissions. He answered that he was ready to proceed.

16. While the motion did not seek an Order imposing fines on Mr. Burke, it was plain from the written submissions of the school that such an Order was being suggested as one which the Court should consider making. This was underscored by the submission of the school's counsel at the hearing. She stated that the school did not seek the imprisonment of Mr. Burke. While sequestration was put forward by the school, counsel went on;

"And we also recognise, Judge, that there is a third option open to this Court, which is arising from the inherent jurisdiction of this honourable Court, which is not to sequester the assets, not to commit Mr. Burke to prison, but to fine him instead in whatever amount and in whatever manner that this Court deems fit."

17. Counsel's opening submissions concluded;

"So, Judge, we're very much in the Court's hands. I say that the essential proofs are satisfied; I say that Mr Burke remains in contempt of court. And I'm – the plaintiff Board is very conscious of the fact that it is our desire to proceed with a disciplinary hearing on the 19<sup>th</sup> of January. And in those circumstances, we're asking the Court to consider either sequestration of assets or perhaps a fine. Those are my submissions, Judge."

18. In his submission, Mr. Burke addressed the suggestion that he be fined. He did it in this fashion;

"... Secondly, the Counsel mentioned 'a third option' which she dangled before the Court, which was that I should be fined. Now Judge, I simply say that that's an abomination, and it's doubly an abomination that not only do



families and teachers and civil servants in this country have to grapple with housing crisis and inflation and homelessness, but now they're going to get fined, for the first time in the history of the State, for the expression of their religious beliefs. That's an utterly preposterous allegation to be made by Counsel for the school; that is utterly preposterous. It's base, it's ignorant and it's a despicable suggestion that a school would make against a teacher who has served the school and lavished the school with a wealth of talent and honour and goodwill for four years.

JUDGE: The wealth of talent is your own, is it, Mr Burke? I just want to understand what you're saying.

MR BURKE: Yes, Judge, it's a summary statement of the approach –

JUDGE: Very good

MR BURKE: -- the generous approach and kind approach that I've always adopted towards the school and towards my students, as is well known, I believe, to the Court”

19. Mr. Burke then sought to distinguish the authorities relied upon by counsel for the school. I will return to this when I consider the main thrust of Mr. Burke's submissions.

20. While the imposition of fines was not one of the reliefs sought in the motion, therefore, it was clearly something that was fully debated between counsel and Mr. Burke at the hearing. However, it was appropriate that Mr. Burke be asked expressly whether or not he was taking any procedural point about the contents of the notice of motion. The following exchange therefore occurred;

“JUDGE: All right, Mr Burke. Now just before you sit down, if you don’t mind, I want to ask you about two things. Firstly, the decision in particular of Mr Justice Humphreys, talks about the imposition of a fine in lieu of imprisonment. And the phrase you used earlier on was that school was looking for sequestration or similar measures, by which I took it that you were referring to a fine. The notice of motion does not specifically seek that you be fined, so do you have an objection on procedural grounds to me considering a fine, Mr Burke?

MR BURKE: Just a moment, Judge, please.

JUDGE: It’s a yes or no question, Mr Burke.

MR BURKE: Judge, I take grave and serious objection to the question, and therefore, I’m making no comment on this, Judge.”

21. It is clear from the transcript that Mr. Burke took some time to consider the answer to my question. What may not be obvious, but is worth recording, is that

Mr. Burke talked with a brother and sister (the latter of whom has been described as his 'legal adviser') before stating his position.

22. Applications either to punish a contemnor, or to seek orders to coerce that individual to comply with existing Court Orders, require care to be taken to ensure fairness of procedures. The approach is set out in the judgment of Hardiman J in *IBRC v Quinn* [2012] IESC 51, at paragraph 40 of his judgment;

“One could find legal authority for the proposition that an application to commit for contempt has to be approached with great caution, over a period of many centuries. This is because it is a procedure which allows a person to be locked up, sometimes “without limit of time”, without the procedures and protection which normally apply when a person is on risk of his liberty. It is therefore essential, in the public interest (and not simply to protect the rights of an individual), that there be a “meticulous observation of procedural justice” in such a case. The most important aspect of procedural justice is, as Fennelly J. put it “In a case where the charge is that he is in breach of a court order, he should be told what the order is and how he is alleged to be in breach. It seems to me axiomatic that these procedures must be observed before the Court makes a finding that the person is in breach of the order”. The nature of this obligation to notify the person whose imprisonment is sought is that “the order allegedly breached should be

indicated with absolute clarity and precision in the Motion for Attachment and Committal and the evidence alleged to establish breach of that order should be led in proper form after due and timely service of the motion.”.

23. In this case, there is no doubt that Mr. Burke is fully aware of the content of the relevant Order, of the way in which it is alleged he is in breach of this Order, and of the evidence supporting the motion. As noted earlier, he has not really disputed this evidence. As will be seen shortly, his defence to the motion is that the Order of Barrett J is itself 'void ab initio', and that there is accordingly no jurisdiction to make any further Order against him.

24. With regard to the nature of any further measures to be directed against Mr. Burke, there is no doubt that he was aware before the hearing of the motion that the school was asking the Court to consider fining him, and of the legal basis for the imposition of such fines. Mr. Burke was given the opportunity to put in submissions to address the entirety of the school's submissions (including the proposal that he be fined) and the motion would have been adjourned to facilitate him in this regard. He refused the offer. He addressed, as completely as he wished, the idea that he be fined. He was invited to make a procedural objection to any consideration of fines by the Court, and declined to do so. In all these circumstances, it is open to the Court to impose a fine on Mr. Burke notwithstanding the fact that the motion does not expressly seek such relief. In

any event, the Court has (subject to fair procedures) a broad discretion in deciding on the appropriate measures to be put in place to ensure respect for its Orders.

## MR. BURKE'S POSITION

25. Mr. Burke provided affidavit evidence, affirmed on the morning of the hearing. This affidavit set out Mr. Burke's version of the history of the events that lead to the Orders of Stack J and Barrett J. This section concluded (at paragraphs 16 to 18);

“16. These Orders are invalid, being manifestly unconstitutional and lawful. Hence, they are void ab initio i.e., without legal effect, an absolute nullity from their inception.

17. I have breached no valid Order of this Court.

18. Any sequestration of my assets by this Court, or similar measure, would be ultra vires i.e., beyond the legal power or authority of the Court. The Plaintiff's application should be utterly rejected in its entirety.”

26. The Constitution, upon which Mr. Burke so heavily relies, sets out a clear hierarchy in respect of the administration of justice in Ireland. Decisions of the High Court are not subject to review and reversal by this Court. Decisions of this Court are appealed to the Court of Appeal or, in unusual circumstances, directly

to the Supreme Court. Mr. Burke has invoked this appeal procedure, and his application to the Court of Appeal is to be heard in a matter of weeks. It is the Court of Appeal which will determine whether or not the relevant Orders of this Court are valid. Unless the Order of Barrett J is reversed on appeal, expires by being overtaken by the outcome of the trial of this action, or is set aside on foot of a settlement of these proceedings, it remains an effective Order of the High Court which must be obeyed. The essence of Mr. Burke's evidence, and his subsequent oral submission, to the effect that the Order of Barrett J is void (because Mr. Burke believes it to be) is entirely misconceived. In advancing this argument, Mr. Burke is placing his views above those of the High Court and (possibly) somewhere below those of the Court of Appeal. Inasmuch as Mr. Burke is inviting me to set aside the Order of Barrett J, or otherwise find it to be void, he is simply asking me to do something which is constitutionally impermissible.

27. The balance of Mr. Burke's affidavit sets out two contentions. The first is that his suspension is 'manifestly unconstitutional and unlawful'. The second is a repeat of the assertion that the Orders of Stack J and Barrett J are also unconstitutional and unlawful. These two arguments, like the earlier, fall foul of the fact that this Court cannot (for very good reason) reverse earlier Orders made by judges of equal jurisdiction, at least for any of the reasons set out by Mr. Burke.

28. Mr. Burke's oral submissions in large measure consisted of reading out sections of his affidavit, and elaborating upon the points made in that document. One aspect of the affidavit evidence, which has not yet been noted in this judgment, is the assertion that the former Principal of the school had made a 'false reference to the Equal Status Act 2000' in her interactions with Mr. Burke. Again, this allegation (even if true) does not allow Mr. Burke to continue to disobey Court Orders without suffering any consequences. This serious claim is one which was properly for the hearing of the interlocutory injunction and may also be a matter for the trial of the action.

29. Mr. Burke also sought to distinguish the decisions in the Meath County Council and Galway Corporation cases on the basic ground that both involved illegal dumping, which is not a right protected by the Constitution, whereas religious beliefs are so protected. However, this argument fails to appreciate that the essence of these two decisions involved the appropriate response by the Court to continued defiance of its Orders. That is exactly the issue before the Court on this motion. It is also the case that compliance with the Order of Barrett J in no way compromises Mr. Burke's religious beliefs. This important fact is noted both in my Ruling freeing Mr. Burke, and in the recent judgment of Dignam J refusing him an injunction against the school restraining the continuation of the disciplinary process; see the latter judgment at [2023] IEHC 22. As I observed in

my Ruling of the 21st of December 2022, no religious belief is offended or violated by staying at home or by refraining from entering on private property.

## FINDINGS

30. All findings of fact are made on the criminal standard, namely beyond reasonable doubt. Applying that level of proof, it is clear that Mr. Burke has on the 5th, 6th and 9th of January 2023 breached the Order of Barrett J., and did so consciously, deliberately and therefore wilfully. The elements of the Order which have been breached are those prohibiting Mr. Burke from attending at the school premises 'for the duration of his paid administrative leave' and prohibiting him from 'trespassing on the property' of the school. On the 6th of January 2023, Mr. Burke also breached the provision of the Order restraining him from 'failing to comply with the directions of the Plaintiff Board'. The relevant direction of the school board is contained in the letter of that date, demanding that Mr. Burke leave the school premises and not to return for the duration of his suspension. Of course, without the consent of the Board of Management Mr. Burke had no right to be on the school premises. On the evidence before me, no such consent is forthcoming; the opposite is the case.



31. It is clear that Mr. Burke does not recognise the validity of the Order of Barrett J, and that Mr. Burke intends to continue to go to the school in defiance of what this Court has directed. The reason given by Mr. Burke for his attendance - that he was at the school 'to work' - is quite surreal. He was not provided with access to a classroom, was obviously not rostered to give any lessons, and was asked to leave by the school authorities. It simply cannot be the case that Mr. Burke truly expected that he would be permitted to carry out any duties in the circumstances that applied on the 5th, 6th, and 9th of January 2023. At the hearing of the motion on the 17th of January, Mr. Burke gave no reason to believe that he would comply with the Barrett Order. On the contrary, everything put before the Court by Mr. Burke himself in evidence and in submissions make it plain that he will continue to disobey the Order made by Barrett J on the 7th of September 2022. The continuing contempt of court on the part of Mr. Burke therefore requires further measures to be taken.

#### THE APPROPRIATE RESPONSE

32. Three possible measures were canvassed at the hearing. The first is the imprisonment of Mr. Burke. This is not immediately attractive, given the findings in my Ruling releasing Mr. Burke in December. For the moment, I will not direct that he return to prison. The second proposed measure is the sequestration of Mr. Burke's assets. This is not an appropriate relief. Even if available in these

circumstances, the temporary deprivation of Mr. Burke's assets does not seem likely to persuade him to comply with the Barrett Order. The third alternative is a fine, which will now be considered.

33. It was once believed that a fine, being thought of as an essentially punitive measure, was appropriate to punish criminal contempt of court (such as the publication of an article prejudicing criminal proceedings, or the disruption of proceedings in court). Precisely because of this punitive element, there was doubt about the ability of courts to levy fines on persons who disobeyed a court order (civil contempt). This uncertainty was removed by the judgment of Cross J in *Phonographic Performance Ltd v Amusement Caterers (Peckham) Ltd* [1964] 1 Ch. 195, where the power to impose fines for breach of court orders was put beyond doubt. The judgment of Cross J has been cited, with approval, in a number of Irish authorities. The position with regard to the measures that can be taken to deal with civil contempt is set out pithily by Fennelly J in *IBRC v Quinn* [2012] IESC 51 at paragraph 95;

"The position seems to me to be clear. A person who has been found guilty of contempt of court, may be required by an order of a court to purge his contempt. Where, following a finding of contempt, a person refuses to obey the court order, he may be imprisoned by order of the court until he undertakes to obey the order, i.e., purges his contempt. Imprisonment is not

the only remedy. In certain types of case, a court has been known to impose a daily or other periodic fine. In the case of a corporation, assets may be sequestered."

34. A daily fine is in my view the correct response to the continuous breach of the Order of Barrett J. in the truly unusual circumstances of this case. Mr. Burke will be given some time to tell the Court that he will purge his contempt and obey the Order made by Barrett J. Given his persistent refusal to comply with that Order, the stance which he has consistently taken to the effect that the Order is invalid, and the familiarity that Mr. Burke has with the issues, the period given to him to inform the Court that he will obey will be a brief one. In the event that Mr. Burke does not purge his contempt, then the fine will take immediate effect.

35. There remains the question of the amount of the daily fine. Factors to be taken into account include the public interest (*Re Agreement of Mileage Conference Group of Tyre Manufacturers Conference Ltd* [1966] 2 All E.R. 849), the means of the contemnor (*Alridge, Eady & Smith on Contempt*, Fourth Edition) at 14.108, the length of defiance (*Borrie & Lowe, The Law of Contempt*, Third Edition at 637), and the contrition shown by the contemnor (*ibid*, at page 638). No other considerations were suggested by either side.

36. In this case, contrition is not a factor. The defiance of court orders has gone on for an extremely lengthy period. The disruption caused to the school by the most recent contempt is set out carefully and without contradiction by Mr. Rogers in his grounding affidavit. On this evidence, it would be 'increasingly difficult in the medium term' for the ongoing disruption (caused by Mr. Burke's attendance at the school) to be tolerated. It is not in the public interest, or consistent with the need to secure compliance with the orders of any court, for Mr. Burke's ceaseless contempt of court to be ignored or dealt with in a way that is unlikely to be effective. All of these considerations suggest that the daily fine be one which has a real impact on Mr. Burke and his finances.

37. Mr. Burke was asked to assist the Court by providing information on two matters;

(a) His assets. Mr. Burke stated that he was 'making no comment' as the motion brought by the school was 'preposterous' and 'reprehensible'.

(b) His income from grinds, which had featured in his oral submissions. Mr. Burke's response was that the question was 'made in a vacuum of all of the - all of the clear submissions that have glistened before the Court in the last half an hour.' The submissions in question were Mr. Burke's own.

38. Mr. Burke added, in apparent support of his refusal to assist the Court, that he had done nothing wrong. This is not correct. He has unapologetically and repeatedly breached a Court Order, disrupting the operation of a school which he professes to serve.

39. It should be noted that it was explained to Mr. Burke that the questions about his assets and his income were asked because the case law states that they should be considered; the inquiries were not the result of any prurient interest. Despite this, any information about these topics was refused by him. The only information given to the Court was the school's estimate that Mr. Burke's salary was in the region of 48,000 euro gross a year.

40. Taking the relevant factors into account, inasmuch as they are known to me, I have decided that Mr. Burke will pay a daily fine of 700 euro unless he purges his contempt. This amounts to just shy of 5,000 euro per week. This figure should persuade Mr. Burke to end his utterly pointless attendance at a school which does not want him on its property. If the daily fine that is now being imposed on Mr. Burke does not have the desired effect, it can always be increased. I will list the motion for 10 am on the 10th of February 2023 to monitor Mr. Burke's compliance with the relevant Order. In the event he continues not to obey the Order as of that date, then consideration will be given to what level of daily fine is likely to change Mr. Burke's behaviour. On that date, I will also decide

who pays the costs of the current motion. This saga, as I described it at the conclusion of the contempt hearing, has led to a slew of court appearances, which are potentially extremely expensive. It is desirable that the liability for costs be decided as the case progresses, and I will endeavour to do that on the adjourned date.

#### EVENTS AFTER THE MOTION WAS HEARD

41. The contempt motion was heard on the 17th of January 2023, as mentioned earlier in this judgment. At the end of the hearing, the parties were told that my decision would be delivered on or before the 27th of January. Later on the 17th of January, Dignam J delivered his judgment refusing Mr. Burke an interlocutory injunction against the school. Mr. Burke had sought such an Order to restrain a disciplinary hearing proceeding against him. In light of the judgment of Dignam J, the daily fine has been assessed without assuming any continuing payment of salary to Mr. Burke. It should be noted, however, that neither party sought to re-enter the contempt motion for the purpose of informing me of any developments on foot of the Dignam judgment which might influence or otherwise affect the decision on the contempt motion. This is notwithstanding the fact that the parties were aware of the fact that this judgment would be delivered this week.

## DECISION

42. Mr. Burke has breached the Order of Barrett J on the 5th, 6th, and 9th of January 2023 in the manner described earlier in this judgment. He does not accept the validity of the Order, and will certainly continue to disobey it unless the Court acts. In particular, Mr. Burke has not hidden his intention to continue to attend at the school, thereby not complying with a number of provisions of the Order of the 7th of September 2022. At this time, the appropriate measure to deal with this civil contempt of court is to impose a daily fine. Mr. Burke can, if he wishes, tell the Court that he will obey the Order and thereby seek to purge his contempt. If he does not do so by 2 pm on Friday the 27<sup>th</sup> of January 2023, he will then be subject to a fine of 700 euro for every day or part of the day that passes until he purges his contempt or until the relevant part of the Order of Barrett J is vacated. The first such day will be Friday the 27<sup>th</sup> of January itself. The position will be reviewed at the hearing on the 10th of February 2023. At that hearing, it is intended that the costs of the motion will be decided.