THE HIGH COURT

[2024] IEHC 453

[Record No. 2022/4507P]

BETWEEN

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

PLAINTIFF

AND

ENOCH BURKE

DEFENDANT

JUDGMENT of Mr Justice Mark Sanfey delivered on the 19th day of July 2024.

Introduction

1. The facts surrounding the suspension of the defendant from his post as a teacher at Wilson's Hospital School, a co-educational boarding and day school in County Westmeath, have been set out in numerous judgments of this Court and the Court of Appeal, and widely reported in the media. I do not propose to set out the factual background here, other than to the extent necessary to explain the ruling which I am giving in this judgment.

2. The circumstances in which the present application came to be heard by the court are set out later in the judgment. Essentially, it is an application to this Court to set aside a judgment and order made by Owens J of this Court on 19 May 2023 and 17 July 2023 respectively.

3. The present application does require some context as to the numerous applications in the proceedings prior to the hearing before Owens J. I therefore set out below a brief summary of the litigation prior to that hearing before dealing with the judgment of Owens J.

The litigation prior to May 2023

4. The defendant ('**Mr Burke**') has been suspended on pay by way of administrative leave since 22 August 2022. On 05 September 2022, Quinn J made an order committing Mr Burke to prison for his failure to comply with the order of Stack J on an interim basis on 30 August 2022. Barrett J subsequently made an interlocutory order on 07 September 2022; both of these orders restraining Mr Burke *inter alia* from attending at the school premises, or from attempts to teach classes or students at the school.

5. Mr Burke refused to purge his contempt. However, on 21 December 2022, O'Moore J released Mr Burke from custody for reasons set out in his judgment: see [2022] IEHC 719. On 19 January 2023, Dignam J refused an application by Mr Burke heard on 12 September 2022 for an interlocutory order restraining the plaintiff from holding a disciplinary meeting in respect of his situation: see [2023] IEHC 22.

6. Mr Burke attended at the school on 05 and 06 January 2023 in defiance of the order of Barrett J. The school issued a motion seeking his attachment and committal, and this application came before the court on 17 January 2023. O'Moore J held that Mr Burke had breached the order of Barrett J on a number of occasions to that date, and held that Mr Burke should be fined "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…": [2023] IEHC 36 at p.23 of the judgment. This order was to take effect from 27 January 2023. O'Moore J subsequently addressed on a number of occasions the issue of case management of the proceedings with a view to getting it on to trial: see [2023] IEHC 41, [2023] IEHC 67, [2023]

IEHC 78 and [2023] IEHC 123. He also dealt with issues arising from the measures taken in respect of the contempt of court: see [2023] IEHC 144.

7. Mr Burke appealed against the decisions of Stack J, Barrett J, Dignam J, and a further decision of Roberts J of 14 September 2022 refusing certain reliefs sought on foot of the *ex parte* docket which had been before Dignam J on 12 September 2022. That appeal was dismissed: see the judgments of the Court of Appeal at [2023] IECA 52 (Birmingham P, Whelan J and Edwards J). The costs of the appeal were awarded against Mr Burke: see [2023] IECA 133.

The judgment of Owens J

8. A disciplinary hearing in respect of Mr Burke was held by the plaintiff ("**the Board**") on 19 January 2023. Mr Burke was dismissed from his employment by the Board on that date with effect from 21 April 2023. Mr Burke appealed that decision; he then sought an injunction restraining the members of the appeal board from holding a hearing of that appeal on the grounds of alleged bias: see *Enoch Burke v Seán O Longáin, Kieran Christie and Jack Cleary* [2024] IEHC 207 and [2024] IEHC 206. Dignam J refused the application, and awarded the defendants their costs of defending the application, with certain costs excluded: see [2024] IEHC 208.

9. Pursuant to the directions of O'Moore J, the trial in the proceedings got on quickly, and was heard by Owens J over four days – 28, 29, 30 and 31 March 2023. The Board sought a declaration that the decision on 22 August 2022 to put Mr Burke on paid administrative leave was lawful. The Board also sought an injunction restraining Mr Burke from trespassing on school premises and damages for trespass.

10. Mr Burke counterclaimed in the proceedings. In his judgment, Owens J referred to the counterclaim as follows: -

> "15. On the first day of trial of this action Enoch Burke was disorderly and in persistent contempt of court. He was excluded from further participation, except on condition that he undertake to comply with rulings of this Court. During the hearing he was repeatedly contacted and advised that he was welcome to resume participation if he gave this undertaking. He chose not to respond or to make his intentions clear. As a result of this lack of clarity, some evidence and arguments addressed issues which do not require to be decided.
>
> 16. As Enoch Burke's counterclaim has not been advanced, any claims which he makes in it must be dismissed. These include his claim for an injunction preventing continuation by the Board of his suspension.
>
> 17. This counterclaim also included claims for declarations that the disciplinary process conducted against him was an unlawful interference with constitutional rights and that a report prepared by the school principal was compiled in breach of natural justice and otherwise than in accordance with an administrative circular governing disciplinary sanctions.
>
> 18. Dismissal of the counterclaim operates as a final determination of all other issues capable of being raised in answer to the Board's claim. It is unnecessary for this Court to determine claims by Enoch Burke that the Board interfered with his constitutional rights".

11. It is certainly the case that Mr Burke alleged a breach of his constitutional rights in his defence and counterclaim. The terms in which he did so are addressed at paras. 37 and 38 below.

12. The order of the court on foot of the judgment of Owens J was made on 17 July 2023, and perfected on 23 August 2023. It referred to Mr Burke's exclusion from the court, and set out the following orders relevant for present purposes:

"(1) The Counterclaim of the Defendant do stand dismissed as said Defendant failed to advance same.

(2) The Defendant be restrained forthwith from entering or trespassing on premises at Wilson's Hospital School in possession or control of the Plaintiff without the consent of the Plaintiff.

(3) The court doth declare that the suspension of the defendant by the Plaintiff from his post as a teacher in Wilson's Hospital School pending final decision as to whether he should be dismissed for gross misconduct in accordance with his contract of employment was and is lawful.

(4) The Plaintiff to recover as against the defendant damages in the sum of €15,000 in respect of trespass by the Plaintiff on premises at Wilson's Hospital School in the possession or control of the Plaintiff together with the costs of the action for the declaration and injunction including all costs reserved to the trial of the action and of or incidental to the proceedings but excluding the costs of defending the counterclaim except for costs relating to any defence to counterclaim and notice for particulars arising from the counterclaim…".

Subsequent events.

13. Mr Burke did not comply with the second order set out above. The Board applied on 05 September 2023 to Egan J for short service of a notice of motion for attachment and committal of the defendant. Mr Burke swore a substantial affidavit on 07 September 2023 in opposition to that motion. He alleged that ten judges of the High Court and three judges of the Court of Appeal had each "…consciously, deliberately and intentionally stripped and defrauded me of my constitutional rights to freedom of religion and freedom of conscience…" [para. 29]; he averred that "…the order of Judge Owens, being plainly repugnant to the Constitution and unlawful, is invalid. Hence it is void ab initio, i.e. without

legal effect, an absolute nullity from its inception" [para. 31]; "…this Court has no authority whatsoever, either moral or legal, to order [the reliefs sought in the notice of motion]" [para. 32].

14. Heslin J gave an *ex tempore* judgment on 08 September 2023: see [2023] IEHC 528. The court ordered that the defendant be conveyed to Mountjoy Prison "to be detained therein until he purges his contempt and is discharged pursuant to further order of this Court" [order perfected 08 September 2023]. Having indicated his intention to commit Mr Burke for contempt, Heslin J stated at para. 40 of his judgment as follows: -

> "… [The imprisonment] will be of indefinite length until his contempt is purged, but I also want to adjourn the matter to a specific date, and that is for two reasons. First, so that the matter can be reviewed after a specific period, but second, and I want to make this equally clear: at any time in advance of the review date I am now fixing, it is open to the respondent to bring about an end, immediately, to his committal, and that simply means him making a decision which is for him to make. Namely, to change his mind, and to inform the court that he is willing to do what is required of him, by the court's order".

15. It fell to me, as judge in charge of the Chancery List, to deal with a number of appearances by Mr Burke before the court to review the application of the contempt order and to offer Mr Burke an opportunity to purge his contempt. It was made very clear to him by me on each occasion that he could purge his contempt by undertaking to the court to abide by its orders, and the orders of Owens J of 17 July 2023 in particular. The matter came before me on 03 October 2023, 12 December 2023, 27 February 2024, 22 March 2024, 14 June 2024, and on 28 June 2024; on each occasion, Mr Burke declined to give the undertakings sought. As a result, there was no reason for this Court to interfere with the order of Heslin J of 08 September 2023.

The present application.

16. On 14 June 2024, Mr Burke presented the court with a document entitled "Application to set aside judgment of Judge Alexander Owens". The document consisted of eight pages, and comprised a legal submission, in which Mr Burke claimed to be entitled to an order from the court setting aside the judgment – and presumably, the order which resulted from it – pursuant to the "inherent jurisdiction of the High Court". At para. 1 of the submission, Mr Burke claimed that "…Article 34.3.1 of the Constitution invests the High Court with *'full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal'*. This jurisdiction includes the authority to set aside unsound judgments of the High Court itself. Such authority is dictated by the necessity of constitutional justice"[italics in original] [footnotes omitted]. Mr Burke referred to an academic article and the decision of the Supreme Court of *P. v P.* [2001] IESC 76 in this regard.

17. From pp. 3 to 7 of his submission, Mr Burke set out a critique of the judgment of Owens J. He maintained that it "completely disregarded the constitutional rights enshrined in Article 42.2.1: *'Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen'".* He characterised this alleged disregard as "deliberate", and "a serious error of law and a breach of the duty of the court in its decision-making to *'uphold the Constitution and the laws'* (Article 34.6.1)" [italics in original]. Mr Burke was also severely critical of a portion of the judgment of Whelan J in the Court of Appeal, stating that her judgment "attempts to reduce constitutional rights to a nullity, totally absent of legal effect and void" [para. 25].

18. Mr Burke stated that the judgment of Owens J "…has completely undermined the constitutional provisions on religion and conscience…the judgment of Judge Owens is

therefore gravely flawed, unsound and infirm. The defendant requests that it be set aside" [paras. 27 to 28].

19. Mr Burke appeared to expect the court to deal with the matter immediately. I indicated that the Board was entitled to an opportunity to consider those submissions and respond to them. I said therefore that, rather than require a formal motion to be brought, I would treat Mr Burke's document as an application to the court to set aside the judgment of Owens J, on the basis that the Board would respond with a replying submission, and an affidavit if one were necessary to address factual matters.

20. However, I expressed reservations as to whether it were appropriate in all the circumstances to ask one High Court judge effectively to reverse the judgment and final order of another High Court judge. I said that I would require to be satisfied in the first instance that I had jurisdiction to entertain the application, and that I should do so in the present case. If so satisfied, I would hold a further hearing as to whether the application should succeed. The matter was adjourned for two weeks on this basis, and I made it clear to the Board that I expected its submissions to address this preliminary issue only in advance of 28 June 2024.

The Board's response.

21. The Board duly delivered "outline legal submissions" amounting to five pages. It did not furnish an affidavit. The written submissions suggested that there was "no jurisdiction for one High Court judge to review or set aside a decision of another High Court judge". The defendant's application was "entirely misconceived". The submissions referred to numerous authorities in this regard.

22. The Board submitted that the caselaw demonstrated that there is a jurisdiction to revisit a judgment prior to a final order being made, but that this should be exercised sparingly. While it acknowledged that there is a "further, even more constrained jurisdiction to review a final decision of court in truly exceptional circumstances…" [para. 12], the delay

in the present case and the failure to revisit the judgment before final orders were made were "incomprehensible". The Board submitted that it was "entirely without precedent for one High Court judge to set aside or review the decision of another High Court judge: *"…to do so is to open the door to chaos whereby a disappointed litigant can endlessly seek to have other High Court judges review their colleagues' decisions until he has exhausted their number or finally obtained a decision with which he is happy…"* [para. 14].

Mr Burke's submissions at the hearing.

23. The hearing of the preliminary issue as to whether Mr Burke's application should be entertained by the court took place on Friday 28 July 2024. Mr Burke made oral submissions supplementing the written submissions he had proffered. He emphasised that the application was "brought under the inherent jurisdiction of the High Court", and referred to Article 34.3.1 of Bunreacht na hÉireann, and submitted that the jurisdiction referred to in that sub-article was "particularly exercised in relation to constitutional issues, to constitutional rights".

24. Mr Burke accepted that the court had an interest in the principle of finality of litigation, and that "…for the court to exercise jurisdiction in this particular set of circumstances, it has to be, to some degree, exceptional and that word, exceptional, the caselaw makes very clear the test for that is whether or not there is a breach of constitutional rights raised, whether or not there is some substantial issue concerning a denial of the constitutional justice raised, that if it was not remedied would damage the authority of the court"….

25. Mr Burke's contention is that an email from the school's principal of 09 May 2022 constitutes a "demand that I endorse and affirm transgenderism, calling a boy they…". On being asked by the court on what legal basis he contended that the principal had no right to make this "demand", he contended that there was "no basis whatsoever in Irish law for calling someone they:…[A] person must be either of the male or female gender. That's where

it stands in law…". He described the very notion of being "instructed by the principal to call a pupil 'they'" as 'insanity' and 'the preserve of an unsound mind'".

26. Mr Burke contends that Owens J did not conduct any examination of whether or not the "demand" or "instruction" from the principal was lawful or legitimate. He describes this as "the heart of the fundamental denial of justice". He submits that the court had "a responsibility that day to uphold the Constitution and the law", but did not do so. He invoked his "constitutional rights, freedom of conscience and the freedom in professional practice of religion, Article 44.2 and Article 40…", and contends that the court did not examine or consider these rights.

27. Significantly, Mr Burke concluded as follows: -

> "…I am in prison because of orders arising from the judgment of Judge Woods [sic] and two years of my life have been taken from me because I refused to be compelled into calling a child they and for no other reason. Two years of my life have been taken from me. I've been taken from my classroom and I will not do that. I don't have to do that. I have a constitutional right. I will not surrender my Christian belief…".

The Board's submissions.

28. Mr Alex White SC made submissions on behalf of the Board. He submitted that the application was "entirely unsustainable", "devoid of merit" and "bound to fail". He described the application as "an impermissible attempt to lodge an attack on [the judgment of Owens J] masquerading as, effectively…an attempt to set up a proxy appeal of another judge's judgment, properly made and issued…".

29. Mr White referred to the principles enunciated by Finlay CJ in *Bellville Holdings Limited v the Revenue Commissioners* [1994] 1 ILRM 29 where it was stated that it is "…only in special or unusual circumstances that an amendment of an order passed and perfected, where the orders of a final nature, should be made by the court. The finality of

proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not lightly be breached".

30. Counsel laid particular emphasis on a passage from the judgment of Clarke J (as he then was) in *Re McInerney Homes Limited* [2011] IEHC 25, where, at para. 3.1 of the judgment, Clarke J stated as follows:

> "It is important to commence a review of the court's jurisdiction by noting that the timing of an application which is designed to seek to go behind a ruling of the court is a matter of some considerable importance. Where proceedings have come to their natural conclusion, whether in a court of first instance or, in the event of an appeal, as a result of a determination of the court which has the final appellate role in the circumstances of the case, then it can, at least in litigation involving the rights and obligations of parties, be said that the ruling of the court is a final ruling which can only be displaced in very limited circumstances, such as where it can be demonstrated that the judgment of the court had been procured by fraud or the like. In such cases the fact that a party may come across new evidence or wish to advance a new argument or, indeed, both, is not, in itself, a basis for reopening the case unless it is appropriate to infer from the relevant new evidence that there was fraud or other unconscionable conduct on the part of its opponent. In those circumstances the necessity to bring finality to proceedings outweighs any possible injustice that might be caused in an individual case. It is important to note that, if it were possible to reopen proceedings on a significantly less stringent test, then the finality of every case would be called into question with a significant collective injustice to all parties to all litigation. It is that consideration that outweighs any possible injustice on the facts of an individual case."

31. Having reviewed the authorities set out in the Board's written submissions, counsel submitted that they demonstrate that the jurisdiction to set aside the judgment is "exceptional, only in special or unusual circumstances", and that it "tends as a rule to be one that is only invoked prior to final orders…". He contended that the application "…can't be used as a backdoor appeal".

32. Counsel submitted that, while constitutional issues were invoked by Mr Burke, he did not advance those points before Owens J. Those points were fully contested by the Board. Counsel stated that, after Mr Burke's exclusion from the court as set out in para. 15 of the judgment of the court set out above, the judge repeatedly and daily during the course of the four-day hearing directed that Mr Burke be informed that he would be facilitated in participating in the hearing if he were prepared to undertake to comply with the rulings of the court. This is reflected in para. 15 itself. As Owens J puts it, "… [Mr Burke] chose not to respond or to make his intentions clear".

Mr Burke's reply.

33. Mr Burke replied to counsel's submissions. In relation to the application being a "proxy appeal", as Mr White put it, Mr Burke said "I agree that merit based complaints, the natural course, is an appeal. That is not what's before the court here. It's a substantial issue of constitutional justice".

34. The court put to Mr Burke that Owens J had taken the approach that Mr Burke had chosen not to advance his constitutional rights because he would not give an undertaking in the terms sought by the court. Mr Burke responded that the court "had to take into account my constitutional rights". The court asked "[E]ven though you chose not to prosecute them?" Mr Burke responded "even though whatever, judge…[the court] had to take into account my constitutional rights and it didn't, that is the point".

Analysis and decision.

35. For the purpose of this judgment I have listened to the digital audio recording of the hearing before me. While I have not reproduced in this judgment every submission or argument made by Mr Burke or Mr White, all submissions both written and oral have been taken into account.

36. The sole issue before me is whether the court has jurisdiction in all the circumstances to entertain the application by Mr Burke to set aside the judgment of Owens J delivered on 19 May 2023.

37. Mr Burke contends that he invoked constitutional rights in the pleadings leading up to the trial before Owens J. In this, he is correct. At para. 16 of his defence, he pleads that the "direction and/or decision [to place him on administrative leave] was manifestly unlawful and unconstitutional…". In his counterclaim, he repeats his defence and counterclaims, *inter alia*, as follows: -

> "(1) It is pleaded that Principal Niamh McShane's demand that all staff address a male student by a new name and the pronoun 'they' is manifestly unlawful and unconstitutional.
>
> (2) It is pleaded that the disciplinary process being conducted by the plaintiff, including the placing of the defendant on administrative leave, is in breach of, and an unlawful interference with, the defendant's rights under articles 40.6.1(i), 44.1 and 44.2 of the Irish Constitution."

38. At para. 13 of his counterclaim, Mr Burke sets out particulars of what he alleges are unconstitutional actions taken by the plaintiff in respect of him. He goes on to seek the following relief: -

> "A declaration that the disciplinary process being conducted by the plaintiff, including the placing of the defendant on administrative leave, is in breach of, and an unlawful

interference with, a defendant's rights under Article 40.6.1.(i), 44.1 and 44.2 of the Irish Constitution".

39. In its Reply and defence to counterclaim, the Board joins issue with the defence, and pleads in relation to paras. 1, 2 and 13 of the counterclaim as follows: -

"3. In relation to the plea at paragraph 1 of the counterclaim it is denied that 'Principal Niamh McShane's demand that all staff address a male student by a new name and the pronoun 'they' is manifestly unlawful and unconstitutional' as alleged or at all. Each and every particular at paragraph 1 of the counterclaim is denied as if same were set forth herein and traversed seriatim.

4. It is denied that the disciplinary process being conducted by the plaintiff, including the placing of the defendant on administrative leave, is in breach of, and an unlawful interference with, the defendant's rights under Articles 40.6.1 (i), 44.1 and 44.2 of the Irish Constitution as alleged or at all. Each and every particular of paragraph 2 of the counterclaim is denied as if same were set forth herein and traversed seriatim. …

14. It is denied that the plaintiff its servants or agents are guilty of wrongdoing, breach of contract and breach of duty as alleged at paragraph 13 of the counterclaim as alleged or at all. Each and every particular of paragraph 13 of the counterclaim is denied if same were set forth and traversed seriatim".

40. It is very clear from the pleadings generally that the Board stood over its actions and sought to have their lawfulness acknowledged by court order. The primary relief it sought was "a declaration that the decision to put the defendant on paid administrative leave is lawful". Notably, it also sought injunctions restraining the defendant from attending at the school or attempting to teach any classes or students while on paid administrative leave. Equally, the Board rejected any suggestion that there had been a breach of constitutional rights.

41. This, then, was the position on the first day of the hearing before Owens J. However, as para. 15 of the judgment makes clear, Mr Burke's conduct resulted in his being excluded from the court. It is clear that he would have been facilitated in resuming participation in the hearing if he undertook to comply with the rulings of the court. He was repeatedly contacted and advised of this position. If he had given the undertaking, he could have pursued his claim that his constitutional rights were being infringed. He chose not to do so.

42. As para. 16 of the judgment makes clear, as Mr Burke's counterclaim was not being advanced by him, the claims made in it were dismissed. Mr Burke's contention is that, despite the fact that he chose not to advance his claims of breach of his constitutional rights – indeed, chose not to do so if the price of advancing his claims was to undertake to the court to behave himself in a manner to be expected of any litigant before the courts – the court should nonetheless have taken up the matter and investigated whether there had been a breach of his rights, even though he would not attend in court to make that claim himself.

43. It is suggested that the court should have done so in circumstances in which the claims of breach of constitutional rights were strenuously contested by the Board, and where the proceedings had been initiated by the plaintiff specifically for the purpose of procuring orders acknowledging the lawfulness of the Board's conduct.

44. Mr Burke seeks to sidestep the criticism that he chose not to seek to vindicate his own rights by saying that the fact that he did so is "wholly irrelevant". His view is that the court should nonetheless have addressed the issue of the alleged breach of his constitutional rights as part of the court's inherent jurisdiction.

45. The court asked Mr Burke why he did not appeal the judgment and order of Owens J. He appears to accept that if the "merits" of the decision were an issue, an appeal would be appropriate, but contends that the present case is different because it involves "a substantial issue of constitutional justice".

46. Mr Burke argues that the present circumstances come within the principle that a court's final order can be reviewed where the circumstances are "truly exceptional". The exceptionality for which he contends appears to stem from a belief that the breach of his constitutional rights is so self-evident and egregious that the High Court must intervene and overrule the judgment of Owens J. Counsel for the Board on the other hand not only makes the point that the Board strenuously denied any breach of constitutional rights and was ready to meet any such claim at the hearing, but reminds the court that his client has constitutional rights; the children of the school, their parents and the school staff whose interests are at the heart of the Board's endeavours most certainly have constitutional rights. There are times when breaches of constitutional rights are evident and easily recognised; when constitutional rights are the subject of litigation, it is more often the case that whether or not a breach of such rights has taken place requires careful consideration of the circumstances and the rights of all parties involved. Those rights must be carefully assessed so that competing rights may be evaluated and reconciled in a manner consistent with the requirements of constitutional justice.

47. Just such an exercise might have had to be conducted if Mr Burke had chosen to prosecute his claim that his constitutional rights had been breached. However, he chose not to do so. In circumstances where his claims of breach of his rights were utterly and completely contested by a party who had launched the proceedings specifically to obtain judicial acknowledgement of the lawfulness of its actions, there can be no question of any alleged breach of his constitutional rights being so "truly exceptional" that the court would have to consider whether it should have to intervene on Mr Burke's behalf, notwithstanding that he chose not to do so himself.

48. As the caselaw makes clear, the importance of finality in litigation requires that the re-opening of final decisions be possible only in very extreme circumstances. Clarke J, as he

then was, gives the example of "where it can be demonstrated that the judgment of the court had been procured by fraud or the like". It is certainly not to be countenanced in circumstances where a litigant has consciously chosen not to advance his claim at trial, and particularly where he has chosen not to appeal the impugned decision.

49. The course of litigation is straightforward. The parties contest the trial; the party against whom adverse findings or orders have been made has – in almost all cases, and certainly in the present case – a right of appeal. Mr Burke has no reasonable or plausible explanation as to why he did not avail of this right. He comes to this Court seeking to have the judgment of Owens J set aside some thirteen months after it was delivered. There can be no doubt that counsel for the Board is correct in describing the present application as a proxy appeal; it is a belated substitute for a trial which Mr Burke chose not to contest in March 2023.

50. In my view, Mr Burke's present application falls so far short of the "truly exceptional" circumstances in which the court might entertain an application to set aside a final order that I consider Mr White's characterisation of the application as "an abuse of the processes of this Court" to be justified. The suggestion that Owens J should have done other than he did – to dismiss claims which Mr Burke had chosen not to advance – is absurd and unstateable in law.

51. Mr Burke, as we have seen, contends that "two years of my life have been taken from me…". This presumably is a reference to his suspension and his lengthy periods of imprisonment for contempt. As it happened, I released Mr Burke from prison on 28 June 2024 notwithstanding that he had continued to refuse to purge his contempt. I reminded him that the order of Owens J remains valid, and that he must comply with it.

52. However, it is necessary to be clear about this. Owens J ordered that "the defendant be restrained forthwith from entering or trespassing on premises at Wilson's Hospital School

in possession or control of the plaintiff without the consent of the plaintiff". It is for repeated breach of this order, and for no other reason, that Mr Burke has been imprisoned.

53. Mr Burke thinks that the order is made in breach of his constitutional rights. However, it is a valid order of this Court, and Mr Burke will comply with it, or face the consequences. It is not open to Mr Burke to conclude unilaterally that the order of the court breaches his constitutional rights and is thus "void ab initio", such that he does not have to comply with it. He does not get to pick and choose which order of the court directed to him that he will obey. He is being required to do no more than any other litigant – to obey the orders of the court. He has been imprisoned because he chooses not to obey the order of the court – the very same court which he now expects to come to his aid and uphold his allegations of breach of his constitutional rights, notwithstanding his refusal to contest the original trial or to appeal the judgment of the court.

Conclusion

54. There will be an order dismissing the application. My preliminary view is that the Board is entitled to its costs of the application as against Mr Burke. If either party is of the view that a different order is warranted, they may proffer a written submission of not more than 1,000 words by Friday 26 July. I will then finalise the order of the court without further recourse to the parties.