THE HIGH COURT

[2024] IEHC 236

RECORD NO. 2024 198 HP

IN THE MATTER OF B, A MINOR, BORN IN 2009,

IN THE MATTER OF THE CHILD CARE ACT 1991 (AS AMENDED),

IN THE MATTER OF ARTICLES 40.3, 41, AND 42A OF THE CONSTITUTION,

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 (AS AMENDED)

BETWEEN:

B. (A MINOR)

SUING BY HIS MOTHER AND NEXT FRIEND Y.

PLAINTIFF

-AND-

THE CHILD AND FAMILY AGENCY

DEFENDANT

T, Q, THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM, THE MINISTER FOR HEALTH, THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, IRELAND, AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Jordan delivered on the 3rd day of April 2024.

1. The Plaintiff is the Mother of B. and she is acting as his next friend in these proceedings. He is 14 years of age having been born in 2009. He was previously in the care of the Child and Family Agency pursuant to an interim care order made in December 2021 and which was followed in January 2022 by a special care order (which order was extended twice). He was

later the subject of a special care order which was made in December 2022 and which order was again extended twice. B. has a diagnosis of ADHD and other medical conditions associated with child trauma. Notwithstanding his period in special care, he has remained a very troubled and vulnerable boy.

2. A third special care order was made by this Court on 14 December 2023 and a fourth special care order was made on 14 March 2024.

3. Recent reporting indicates that the situation is getting worse. Although the recent special care orders sought by the Child and Family Agency were granted they have not been given effect and B. has not been admitted to special care. It seems clear that he is at very serious risk of death or serious injury and of committing serious crime. He is apparently suffering ongoing abuse at the hands of adults and continuing on a path of criminality and drug addiction in the drugs underworld which he now appears to inhabit.

4. The Plaintiff asserts that there is a systemic breach of the High Court orders and that there is no end in sight.

5. According to the Plaintiff, these proceedings are an attempt to bring measured and focussed proceedings in which a declaration is sought that the Child and Family Agency is in contempt of Court because of its failure to comply with the special care orders. It has been clearly stated, and is repeated in the written submissions of the Plaintiff, that no application is being made to arrest or detain any representative of the Child and Family Agency. The Plaintiff submits that a declaration that the Defendant is in contempt of Court is something worthwhile – and is of itself something of utility because it would be a matter of the utmost seriousness for a public body to be held in contempt.

6. The Defendant does acknowledge that there has been a failure to comply - but disputes the Plaintiff's entitlement to seek the declaration sought in plenary proceedings.

7. The Plaintiff and the Defendant did agree certain facts for the purpose of the hearing.

8. The Notice to Admit Facts of the Plaintiff dated 14 March 2024 resulted in the following facts being admitted by the Defendant; -

(a) The Plaintiff child (B.) was born in 2009. His mother is Y. and is his next friend in these proceedings.

(b) B. was previously in the care of the Defendant pursuant to an interim special care order made on 29 December 2021. On 10 October 2022, B. transitioned out of special care into a step-down facility. [*Note – the sequence of the special care orders is recited above*].

(c) B's behaviour regressed soon after his move to the step-down facility.

(d) On 15 December 2022 solicitors for the CFA stated in correspondence that:

'The Agency accepts that this is a situation in which there is a legal obligation to bring an application for special care but this is not possible at present. The Agency is making every effort to resolve the situation, but it is not understood how further proceedings will bring about any different outcome, because at present, there is no way for the Agency to accommodate the young person in special care.'

(e) On 16 December 2022 B. through his mother applied for leave to seek judicial review in proceedings bearing the record number 1108/2022 JR. The matter was listed for hearing on the 21 December 2022. The CFA immediately secured a place in special care for B. and the matter did not proceed to hearing.

(f) B. was the subject of a second special care order on 23 December 2022. The order was extended on two occasions and B. moved to a residential unit on the 18 September 2023 and his special care order expired on the 21 September 2023.

(g) Upon discharge from special care, B. immediately returned to high-risk behaviours. He was sleeping rough in the city centre, suspected of involvement in the sale of class A

drugs, and was entrenched in this criminal drug using world and surrounded by drug selling and drug using adults daily.

(h) On 25 October 2023, the matter was listed for a post discharge review and the CFA informed the High Court that it did not intend to apply for a special care order and that B. was discharged from the special care post discharge review list [*Note – this should read - …and B. was removed from the special care post-discharge review list*].

(i) The presiding judge noted that the position was '*starker than ever'* for B. and that it was '*very difficult to understand how the Agency could decide that B. met the statutory requirements for special care a few months ago but he no longer does'*. The Court did not make any findings but did note that '*one factor may be a shortage of beds'*.

(j) On 31 October 2023, B. through his mother sought leave to seek a judicial review in proceedings bearing the record number 1231/2023 JR, seeking, inter alia, an order of mandamus compelling the CFA to apply the provisions of s.23F of the Childcare Act 1991 forthwith, and to apply for a special care order for him without any further delay.

(k) An expedited timetable was fixed by the High Court, with the substantive hearing date set for 16 November 2023. This hearing date was vacated on consent. On 23 November 2023 B. was approved by the Special Care Committee for special care; however, no application for special care was then made by the CFA. A further hearing date was set for the 15 December 2023. On 14 December 2023, 49 days after referring the matter to the Special Care Committee, the CFA applied for a special care order and informed the Court that there was no place available in special care for the child. The High Court (Jordan J.) granted the CFA's application for a special care order for B.

(l) During the entirety of the special care order of 14 December 2023, no special care placement was allocated to B, and so the High Court order was never complied with and a new order (not an extension) was sought by the CFA on 14 March 2024.

(m) On the 16 January 2024, solicitors for the CFA informed the Plaintiff that B's placement with Threesteps terminated on 15 January 2024 and that an apartment was made available to B. for one week with staffing on a 2:1 basis 24/7.

(n) B. is currently residing in an unregulated placement.

(o) B's special care order of 14 December 2023 expired at midnight on 13 March 2024.

(p) A new special care order was granted in respect of B. on 14 March 2024.

(q) At the date of the agreement of this notice to admit facts (*15 March 2024*), that order has not been complied with.

9. The Notice to Admit Facts of the Defendant dated 15 March 2024 resulted in the following facts being admitted; -

(i) The operation of special care units is regulated and each of the special care units are subject to periodic inspection by HIQA.

(ii) There are physical beds available in purpose-built special care unit(s).

(iii) Restrictions on availability of beds in special care results from the non-availability of staff rather than from any limitation on the number of beds.

(iv) The Agency does not have sufficient personnel to open the additional beds, despite the Agency having devoted monetary resources to the development of the special care system.

(v) The Agency is not in a position to increase capacity in special care safely until staffing levels are increased.

(vi) To increase capacity in special care without appropriate staffing levels would breach their regulatory obligations and put the operation of the special care units at risk.

(vii) It is not that the Agency cannot obtain staff simpliciter: it is rather that it cannot obtain staff at the current rate of pay presently sanctioned by the Minister for Public Expenditure and Reform.

(viii) As a public body operating within the constraints of public service pay agreements agreed at a national level, the possibility of the Agency offering individualised conditions of employment to staff working in special care is not an option for the Agency.

10. The Defendant did also request the Plaintiff to admit that -

(ix) The agency is exhausting all avenues in an attempt to increase the capacity of special care.

(x) The agencies failure to comply with the special care order in this case to date is due to the lack of capacity in special care caused by insufficient staffing levels.

11. In a letter of the 18 March 2024 the Plaintiff solicitors stated:

'*We refer to the above matter and to your notice to admit facts.*

The Plaintiff will admit paragraphs 1 to 8 inclusive, but not 9 and 10.

We note that there has been no positive plea by the Defendant that it is exhausting all avenues in an attempt to increase the capacity of special care, or that its failure to comply with the special care order in B's case to date is due to the lack of capacity in special care caused by insufficient staffing levels. No evidence has been provided to support these assertions. This absence of evidence was in part the reason why the Plaintiff had no choice but to seek the declaration that is sought in the proceedings, initiating them in mid-January.

In our replies to your client's notice for particulars, we referred to evidence in a judicial review dating back one year ago, and we are aware of evidence put before Heslin J. in another judicial review in MMcD and JB six months ago. Beyond that, no

evidence has, yet, been provided as to what steps the Defendant has since taken, and is currently taking, to comply with its legal duties.'

12. Although there was an opportunity to do so, the Defendant did not call any evidence in the proceedings in relation to the matters referred to at paragraphs 9 and 10. It could have done so on an entirely without prejudice basis. While the Defendant was perfectly entitled to rely on a procedural defence it is difficult to comprehend why the Defendant, an organ of the state, did not embrace the opportunity to fully and comprehensively explain the reason for non-compliance with the Court order. It is not unreasonable for the mother of B. to call for a comprehensive explanation and evidence on this issue in circumstances where the life, health, safety, development and welfare of her son is at risk and when the special care order obtained by the CFA for that very reason is not being given effect by it.

13. Turning then to the procedural issue that is raised by the Defendant.

14. Order 41, Rule 8 of the Rules of the Superior Courts provides : -

'Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order which shall be served upon the person required to obey the same, other than an order directing a mortgagor to deliver possession to a mortgagee, or an order under section 62 subsection (7) of the Registration of Title Act 1964, there shall be endorsed a memorandum in the words or to the effect following, viz.:

"If you the within named A.B. neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order.'

15. The latter memorandum is known as the penal endorsement. It is quite fundamental when it comes to contempt proceedings. In terms of the time for compliance the Court need

not now decide any issue arising in that regard but will observe that special care orders are by their very nature intended to have immediate effect.

16. Order 44, Rules 1-4 of the Rules of the Superior Courts provide ; -

'1. An order of attachment shall direct that the person against whom the order is directed shall be brought before the Court to answer the contempt in respect of which the order is issued, and shall be in the Form No 11 in Appendix F, Part II.

2. An order of committal shall direct that upon his arrest the person against whom the order is directed shall be lodged in prison until he purge his contempt and is discharged pursuant to further order of the Court, and shall be in the Form No 12 in Appendix F, Part II.

3. Save in respect of committal for contempt in the face of the Court or committal under rule 4 no order of attachment or committal shall be issued except by leave of the Court to be applied for by motion on notice to the party against whom the attachment or committal is to be directed.

4. When the person against whom an order of attachment is directed is brought before the Court on his arrest, the Court may either discharge him on such terms and conditions as to costs or otherwise as it thinks fit or commit him to prison for his contempt either for a definite period to be specified in the order, or until he shall purge his contempt and be discharged by further order of the Court.'

17. At paragraph 149 of her judgment in *Pepper Finance Corporation (Ireland) DAC v Persons Unknown in Occupation of the property known as 2 Little Mary Street Dublin 1* [2022] IECA 170 Whelan J. states:

'149. To invoke the "criminal or quasi-criminal" coercive jurisdiction of the High Court is a serious and significant step. In the instant case since the orders were extensive and included both mandatory and prohibitory terms, the principles governing

mandatory orders must apply. As Costello P. made clear in Fox v. Taher (Unreported, High Court, 24th January 1996), prior to taking such a drastic step, it is a strict prerequisite that valid service of the order has been effected, '[t]he object of effecting service is to bring home to the defendants the nature of the proceedings and the documents relating to them.'

150. No authority was identified for the proposition that a party seeking to attach or commit another can dispense with the procedural requirements or elect to bring such an application and later mend its hand.

151. Clarke J. in Moore v. Dun Laoghaire Rathdown County Council emphasised the importance of compliance with the relevant court rules: "As pointed out in Shell E & P Ireland Limited and ors v McGrath and ors [2013] 1 I.R. 247, rules of court are a form of delegated or secondary legislation and thus form part of the law." (para. 3.4) He further stated, referring to a requirement to serve notice on a tenant: "3.5 It cannot be assumed or accepted that it was intended that no useful purpose could be served by that legally mandated procedure." I am satisfied that these observations apply to any relevant court rules in the case of both public and private bodies and entities who invoke the coercive powers of the Court.'

18. At paragraph 157 Whelan J. continues:

'Before invoking the contempt jurisdiction of the High Court, it was incumbent upon the respondent to ensure that all appellants were properly served with same in accordance with the procedural requirements.

158. No copy of the order of Mr. Justice Noonan of the 15th January, 2021 with the endorsement of the memorandum in compliance with O. 41, r. 8 RSC was served on any of the occupants of either property prior to the issuing of the Motion seeking attachment/committal for contempt of court. It was served subsequently in July 2021. I

am satisfied that this omission is fatal to an application for attachment or committal as sought in the within proceedings. The service in July 2021 did not cure the fundamental procedural deficiency. That position is well-established in cases such as Hampden v. Wallis (1884) 26 Ch. D. 746. In that case the copy of the order served did not have endorsed upon it a notice as required by the Rules warning the person required to obey same that he would be liable to process of execution if he failed to obey it.

159. That position is reinforced by the decision in Re Bramblevale Limited [1970] Ch. 128 from which the following principles can be inferred;

A Court of competent jurisdiction can only punish as a contempt of court a breach of an injunction where it is satisfied beyond reasonable doubt:

(i) That the terms of the injunction are clear and unambiguous

(ii) That the alleged contemnor has been validly served with proper notice of all of the terms of the injunction

(iii) Breach of the terms of the injunction are proven to a standard beyond reasonable doubt.

160. Since what was sought in the motions issued on 12th February, 2021 were contempt based remedies the omission to have validly served in advance a copy of the order of the 15th January, 2021 which had materially varied the orders of the High Court of the 25th November, 2020 was fatal to Pepper's claim for relief by way of attachment or committal.

163. …service of an application for attachment and committal is to be effected personally save where the rules themselves expressly permit service of such an order on a solicitor such as O. 31, r. 21 RSC provides. It is noteworthy that decisions dating from at least Re Bennet, ex parte Malachi (1834) 3 L.J. Bcy 86 and thereafter make clear the necessity to demonstrate a personal demand served upon the alleged

contemnor prior to the institution of proceedings seeking attachment. There was no authority identified to the court on behalf of Pepper to demonstrate that the court was entitled to effectively retrospectively deem good an application for attachment and/or committal invalidly or precipitately instituted based on evidence that subsequent to institution of the application, the alleged contemnor came to be fixed with notice of the making of the order in question through service upon his solicitor and elected to challenge the validity of the proceedings on procedural grounds rather than complying with the terms of the order belatedly shown to have been brought to their attention.'

19. Whelan J. says at paragraph 184 that *'an individual cannot be held guilty of contempt for infringing an order of the Court which he/she has not been validly served.'*

20. And at paragraph 189:

'The fundamental importance of strict compliance with the requirement to effect valid service of orders prior to invoking the coercive jurisdiction was emphasised by Laffoy J.in Airscape Ltd v. Powertech Logistics Ltd & anor [2007] IEHC 43:

"14. The court was referred to an old Irish decision dating from 1893, Prior v. Johnston 27 I.L.T.R. 108 in which the court made no order on an application to attach a defendant for non-compliance with an order to file accounts because of failure to serve the defendant with a copy of the order containing the necessary penal endorsement. The court refused the defendant his costs. Counsel for the applicant sought to draw a distinction between an application for an order of attachment and an application for an order of sequestration, suggesting that O. 41, r. 8 need not be complied with when attachment, that is to say, imprisonment, is not being pursued. No authority was cited in support of that proposition and, in my view, as sequestration against the property of a director of a company is a penal sanction, as a matter of principle, such a distinction is not tenable.'

21. The judgment of the Court of Appeal was upheld by the Supreme Court - [2023] IESC 21. Although the judgment was somewhat narrower than that delivered in the Court of Appeal, Mr. Justice Hogan, on behalf of the Supreme Court, did point out at paragraph 67 of his judgment; '*the Court is concerned not with the substantive merits of the order, but rather whether these has been contumacious disregard of its terms by the alleged contemnor'*.

22. Hogan J. continues:

> *'The resolution of this question turns essentially on whether the appropriate safeguards as to notice and service have been complied with so that the alleged contemnor is made aware of his or her obligations. So, the requirements as to personal service of the original order and personal service of the penal endorsement apply in all such cases, irrespective of the subject matter of the original proceedings. To put it another way: the fact that the underlying dispute concerned a family home or dwelling did not in and of itself mean that the obligations regarding notice and service in contempt proceeding were thereby somewhat elevated. These obligations apply in all contempt proceedings, irrespective of the underlying subject matter of the dispute.'*

23. Hogan J. found himself in general agreement with the approach of Whelan J. in the Court of Appeal. He stated:

> *'I consider that before any question of contempt of court could arise there would need- in general at least - to be proper service of both the original summons in the first instance and in the case of alleged subsequent default in respect of non-compliance with any order, the personal service of the penally endorsed order required by Order 41 Rule 8.'*

24. At paragraph 84 Hogan J, on behalf of the full Supreme Court, pointed out that service of the order in compliance with Order 42 Rule 8 was '*fundamental'*.

25. The decision in Pepper Finance must be read in the context of the facts in that case and sight should not be lost of the essence of the requirement concerning service – it must be what is termed "valid service" or "proper service". This is manifestly so when one has regard to Order 121 Rule 7 which provides ; -

> *'Where personal service of any document is required by these rules or otherwise and it appears to the court that prompt personal service cannot be effected, the court may make an order for substituted or other service, or for the substitution for service of notice by letter, advertisement or otherwise.'*

26. These Plenary proceedings initially sought a significant range of remedies but the remedy sought was quickly limited to the Declaration of Contempt referred to above. It is at one level understandable why the Plaintiff embarked on the Plenary action seeking a whole range of relief [and later limited the relief being sought with a view to expediting the hearing]. After all a full Plenary action was probably considered likely to generate greater publicity and have a greater impact in terms of getting a bed in secure care for B. The Plaintiff and her advisors probably considered it the best of the available options in order to hopefully achieve that end.

27. However, in terms of the relief now being sought this Plenary action might well be said to be akin to an exercise aimed at re-inventing the wheel.

28. It may well be that the contempt jurisdiction requires up-dating both in terms of procedure and available sanctions – but it is a well settled and discrete jurisdiction. Anyone accused of contempt does face the possibility of significant sanctions if found guilty of contempt of Court – and is entitled to have the correct procedure followed.

29. The fact that a person or body failing to give effect to a Court order is aware of the potential consequences does not mean that he, she or it is not entitled to the same procedural

safeguards and requirements as a person entirely ignorant of the potential consequences. Put another way, everyone is entitled to have the correct procedure followed.

30. The correct procedure when seeking to invoke the contempt jurisdiction of a Court is to bring a motion for attachment and committal in accordance with the Rules. Separate considerations apply when a Court is dealing with a contempt in the face of the Court and/or when proceeding on its own motion. Here, we are dealing with an assertion of Civil Contempt made by the Plaintiff.

31. A Court dealing with a contempt motion will conduct a hearing and decide whether or not there is a contempt. Any finding of contempt is of significance. The Court is not obliged to go further at that point and Courts frequently afford the contemnor an opportunity to comply with the Court order and/or to otherwise purge the contempt. The Court has a discretion as to what, if any, sanction to impose.

32. A Court has broad powers in relation to the service of notice of proceedings on other parties and there is no obvious reason why notice of a contempt motion could not be directed to be served on other parties if the Court considered it desirable that this be done.

33. It is true that the High Court has a wide jurisdiction to grant Declaratory Orders. However, there is no good reason or need to resort here to the High Courts Declaratory Jurisdiction as the contempt jurisdiction and procedure is clear and long established. Importantly, the existing Contempt Jurisdiction allows for a finding of contempt without more.

34. This Court is not persuaded that the Plaintiff is entitled to the Declaration sought in these Plenary proceedings. Even if the order with the Penal Endorsement was validly served before the Plenary Summons was issued (and it was not), the Court sees no good reason or justification or basis for deviating from the procedure laid down in the rules for dealing with contempt applications. Quite apart from anything else granting such a Declaration could cause

significant issues in the event of subsequent efforts to have sanctions imposed on the contemnor and/or in similar proceedings brought in accordance with the rules.

35. The Court will therefore decline to grant the Declaration sought in these proceedings and will hear the parties in relation to any matters arising on Thursday 11th. April next after the Special Care List is concluded.