

THE HIGH COURT

WARDS OF COURT

[2022] IEHC 664

Record No: WOC2602

IN THE MATTER OF SOM, A WARD OF COURT

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 23 November 2022

Summary

1. This is an application to set aside the Court Order of 23 March 2022, whereby I ordered that SOM, a man suffering from autism and intellectual disability, be moved from his residential placement in Co. Cork (the “current facility”), to a separate facility also in Co. Cork (the “proposed facility”), following a partially contested two-day hearing in July 2021 and judgment in August 2021 giving conditional approval to the move to the proposed placement.
2. By this application, the Committee seeks to set aside the Order of 23 March and seeks an Order that SOM remain at the current facility, albeit with additional supports not currently in place.
3. In deciding upon this difficult issue, I have tested the application by reference to what I believe is in SOM’s best interests, viewed from a long-term perspective. Having carefully considered the additional evidence not available to me either when I gave judgment in August or made the final Order of 23 March, it seems to me that those interests remain best served by SOM moving to the proposed facility. I therefore decline to grant the relief sought.

Background

4. This case has been one of the longest and most difficult wardship matters to come before the High Court in recent years. It has been before the High Court on 46 different occasions between June 2018 and the present day, due in no small part to the very complex clinical picture that SOM presents.
5. The relevant facts have been set out in my judgment of 4 August 2021 and I do not need to repeat them in full. However, some background is necessary to explain my decision on this motion. When the proceedings were first instituted in 2018, SOM was very unwell, and the Committee were very unhappy with his placement at the current facility. He was exhibiting very extreme vomiting behaviour.
6. This behaviour had been going on since 1998 so it was not new but, having improved in 2015, it had deteriorated again, and he was down to 7 stone. Because of the excessive vomiting, his potassium levels were also very low, and his health was therefore a cause of significant concern, including in relation to possible adverse cardiac events. He was exhibiting other behaviours of concern. For example, he was shredding his clothes very frequently and not in an environment where same could be controlled by the staff. He was engaging in property damage which often resulted in injury to himself. He was often to be found outside his house seeking to enter the houses of other residents and eating their food, or on a number of occasions, on the road outside the property and exposing himself to danger in that way. I refer to certain of those difficulties in my August 2021 judgment at paragraph 27.
7. One of the core complaints made by the Committee was that the management and staff at the current facility were not trained in autism specific behavioural supports and that this was giving rise to many of the problems. A separate complaint was that there was no multidisciplinary team (“MDT”) available to SOM. A third complaint was that there

was no prescribing nurse on the staff of the current facility and that because of SOM's complex health needs, a full-time nurse was required as part of the service to be available to him when necessary.

8. It was in this context that the application to move SOM arose. A significant time period went by between the date when the possibility of moving SOM was first mooted, and the date upon which the HSE identified a proposed service provider, thus permitting a motion on transfer to be brought and determined. That was because the HSE had significant difficulty in identifying an alternative provider given the complexity of SOM's care. Many service providers declined to provide care to him. Ultimately the Brothers of Charity offered to provide a bespoke service for SOM in their premises at the proposed facility in Cork.
9. I was required to determine whether SOM should move to the proposed facility, having heard significant evidence about the type of placement that was proposed and the supports that would be offered. In particular, it was proposed that a house would be specially renovated for SOM to suit his needs and that he would be the only resident in that house, that a full MDT would be provided to SOM, the majority of whom would be staff members at the proposed facility and therefore on-campus and that there would be a nurse available as part of that MDT on the campus. It was identified that the staff working with SOM would have autism specific training.
10. Despite the placement answering many of the requirements that had been identified as not just necessary, but indispensable by the Committee, the Committee had grave reservations about the proposal. This was because SOM had been in residential care in the proposed placement in 1996 and, according to the Committee, had a very traumatic experience there. SOM returned home to live with his parents in 1998.

11. At the hearing in July 2021, the Committee expressed her concern at the transfer to the proposed facility and indicated that she thought that SOM was suffering from PTSD due to his experiences there. However, as I note at paragraph 2 of my judgment, on the second day of the hearing, the Committee indicated she was consenting to the proposed transfer because of the gravity of the situation in relation to SOM's health in his placement in the current facility and because no other realistic proposals had been made in respect of any other placement. At no time did she identify that SOM had suffered sexual abuse in the proposed facility in 1991 but rather that SOM had suffered traumatic experiences during his time there.
12. In my judgment I expressed concerns about SOM's likely reaction to a move to the proposed facility given what I had been told about his negative experiences on that campus and indicated that I would withhold a final approval of the plan until I obtained expert psychological evidence as to the likely effect of any such move on him. I received two reports from Mr. Feehan, Senior Psychologist with the Brothers of Charity, of 28 September and 7 October 2021 that I discuss in more detail below. In short, he concluded that there was no reason why a transition to the proposed facility was not possible or desirable and he identified the requirements to promote a successful transition.
13. It was originally intended that SOM would move in December 2021. The transition took significantly longer than was intended for various reasons and the proposal now is that SOM will move to the proposed facility in December 2022. There were continuing reservations by the Committee despite her agreement to the move, so much so that it was necessary that an Order be made in December 2021 directing that the Committee sign the comprehensive services plan for SOM in the proposed facility.
14. Having received the comprehensive services plan and having heard submissions from both parties in March 2022 – where the Committee argued that the transfer Order ought

not to be made final – I made Orders approving the comprehensive service plan and gave final approval to the plan to transfer SOM by Order of 23 March 2022.

SOM's current presentation

15. In early 2021, before the motion to move SOM came on for hearing, the management of the current facility changed. A private operator, that provides residential care and which has a speciality in service users with autism, obtained the contract to manage the current facility and accordingly took over SOM's care. Since the private operator took over, SOM's presentation has changed considerably. He started to put on weight and has now entered the normal range for an adult of his height and age for the first time since 2015.
16. His negative behaviours have considerably reduced. He no longer engages in headbanging apart from one incident in the last year, although it is important to note that this in fact significantly ceased after 2015. The behaviour where he shredded his clothes is being appropriately managed in that there is now an allocated time each day for him to shred a t-shirt. However, it is clear from the report of the private operator of 19 October 2022 exhibited to the affidavit of Katherine Kelleher in response to this motion that there has been an increase in behaviours of shredding in recent months. SOM shreds anything in a variety of fabrics.
17. Because of the importance of SOM's vomiting behaviours as a factor in this decision, I have included below a table of his weight from 2002 to 2022. This table comes from the Positive Behaviour Support Services ("PBS") report of 28 September 2022. PBS are a behavioural support organisation within the Brothers of Charity. That table shows that his vomiting behaviours and consequent weight loss and weight gain are cyclical. At present, his vomiting behaviours have significantly improved, and that has resulted in a steady weight gain since the start of this year. As of August 2022, he was 63.5kg, being within a healthy weight range for an adult male of his age. He now vomits in an

appropriate place and time each day. The PBS report identifies the steps that are taken to manage his vomiting and the gaining of weight by SOM shows that those steps have been successful.

Time point	Weight
Sept 2002	Approx. 6 and half stone. (Periods in hospital due to low weight and low potassium levels)
Aug 2007	Approx. 6 stone, 6 lbs (in hospital due to weight)
Aug 2010	Approx. 10 stone 3lbs
Oct 2012	Approx. 9 stone 3 lbs (60kg)
Nov 2013	10 stone 2 lbs
Oct 2014	10 stone 5 lbs
Dec 2015	9 stone 2 lbs
Nov 2017	Approx. 8 stone 8lbs
May 2018	Approx. 8 stone 1lbs
May 2019	Approx. 7stone 3 lbs (46kg)
Jan 2020	Approx. 7 stone 3 lbs (46kg) Potassium level 2.4 in January & life threatening at that stage.
2021	No data available
14.1.22	58kg i.e. 9 stone 2 lbs
26.7.22	62.8kg
3.8.22	62.9 kg

17.8.22	63.5 kg i.e. 10 stone (Potassium 4.1)
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18. There has been an increase in behaviours of entering neighbouring cottages in recent months. SOM has attempted and often succeeds to enter other cottages on the grounds via open doors or windows. This was behaviour that had been identified as a difficulty in the hearing before me in July 2021.

Events prior to application to vary Order of March 2022

19. No motion was originally brought to set aside the Order. Rather, the Committee wrote on 24 September 2022 saying that she rescinded any signature that consented or infers consent to SOM residing at the proposed facility and that “[y]ou will understand the revocation given the PTSD [SOM] now suffers having been sexually abused at [the proposed facility] and having been removed from there with a prolapsed rectum”.

20. This letter demonstrates a failure on the Committee’s part to appreciate the respective roles of the Court and the Committee in a wardship situation. An Order had been made that SOM would move residence, after extensively hearing the Committee through her legal team consisting of solicitor, junior and senior counsel on the issue. Following the Order, the question of the Committee’s consent was not relevant. In the circumstances her purported rescission had no legal effect. Nonetheless it was of serious concern, both because of the nature of the allegation and because it signalled a withdrawal of the support of the Committee for the placement.

21. By letter of 11 October 2022, Ms. Nagle from the Brothers of Charity replied noting that the Brothers of Charity categorically denied that any sexual or physical abuse occurred while SOM was in the care of the services and noted that the safeguarding officer attempted to engage with the Committee in relation to her concerns at that time and that

she did not make any specific allegations. It recorded that the Committee confirmed at a meeting on 11 February 1998 she would not make a direct statement or allegation on the matter. Ms. Nagle also pointed out that proceedings were issued during 1999 in which the Committee outlined that she did not return SOM to his residence in the proposed facility in 1998 because she was bonding with him. Ms. Nagle noted that evidence was given by the GP that there was no evidence of a prolapsed rectum from his records of attendance to SOM at that time. Ms. Nagle noted that the Committee never provided any evidence to support the claim but asked that if any such evidence existed, it should be provided, and she would investigate. She concluded that it was difficult to comprehend the Committee would raise the issue 24 years later, having engaged so proactively towards the proposed placement.

Motion to vary Order of March 2022

22. The matter came before me and I directed that if there was an issue about SOM's move on foot of the Order, then an application could be made by Notice of Motion. A motion was brought on 8 November 2022, grounded on an affidavit of the Committee sworn on 8 November.
23. The Committee identifies that as of March 2021, the private operator took over the running of the current facility service from its previous provider. She notes that in her view the recent excellent improvements in SOM's health following the private operator takeover are consistent and not transitory. The Committee believes that, given these improvements, a move to the proposed facility would be a retrograde step as SOM would experience trauma and his good health markers and behaviours would go into decline.
24. The Committee notes that she has a positive relationship with the private operator's team and receives regular emails and has regular conversations regarding SOM's care, activities and improvements. In her experience, there has been a marked improvement

in SOM's wellbeing over the last 2 years and SOM's baseline anxiety levels have reduced accordingly. It is submitted that this improvement in SOM's condition is recorded in the PBS report.

25. The Committee requests that if the Court is minded to grant the relief sought in the Notice of Motion, the Court should direct that the HSE provide a service plan that identifies the services SOM will receive and that specifically addresses what autism specific training the staff will receive and how the need for a nurse will be addressed.
26. Finally, the Committee stresses that her primary concern is for SOM's wellbeing and emphasises that she and her family are SOM's best advocates, as has been acknowledged by various parties including Professor Shanahan in his letter of 18 October 2022 and by Mr. Feehan in his report of 19 October 2022 where he sets out that SOM's parents "*are excellent and knowledgeable advocates for their son*". The Committee submits that she and her husband as SOM's parents know him better than anybody else, that they love him and seek the best for him. It is acknowledged that others share this ambition, but she submits that they have heard SOM's cries for 44 years and know what they mean.
27. A replying affidavit was sworn on behalf of the HSE on 14 November. The deponent, Ms. Katharine Kelleher, solicitor, sets out that it is the position of the HSE that to deprive SOM of the opportunity to avail of the bespoke placement and services in the proposed facility that have been designed, planned and constructed with his specific needs in mind would not be in his long-term best interests.
28. She notes that while it is very positive, and a great relief, that SOM's health has improved, at no point in the case has it ever been suggested that a stabilisation of SOM's health was the only concern with the placement in the current facility. She further submits that it was never suggested that if SOM's health improved, the placement would become appropriate; on the contrary, his significant health difficulties served to underpin

the urgency of an alternative placement where he could avail of consistent and professionally lead clinical and social services in the same setting to yield the best possible outcome into the future.

29. She emphasises that SOM's presentation is multifactorial and cyclical in nature. The clinical and social reports available confirm that his physical health and psychiatric presentation have "waxed and waned" over the years, and that therefore it cannot be assumed that he will not experience a decline in his health in the future, given the lack of evidence for such an assumption.
30. Ms. Kelleher goes on to address the future of the placement in the current facility, noting that the current private operator contract will end in March of 2024. She contends that the entire purpose of the placement in the proposed facility is that it is a centre managed and operated by the Brothers of Charity that has been in operation for many decades. It has a larger cohort of current staff employed on the campus, including professional clinical and nursing staff as well as support care workers and, additionally, further staff are being specifically recruited to work with SOM. Further, she identifies that these staff are being provided with autism specific training and that they are likely to have greater longevity by virtue of their status as public sector employees.
31. She observes that a significant benefit of the placement in the proposed facility will be the clinical nursing staff employed by the Brothers of Charity assigned to provide specific care and attention to SOM. In this respect Ms. Kelleher draws attention to the comments of Dr. Obousy, HSE psychiatrist, who insisted on the importance of clinical lead nursing care for SOM due to his complex presentation and health needs during the hearings before this Court. Ms. Kelleher exhibits a planned schedule for staff working with SOM which identifies an enhanced staff nurse, a clinical nurse manager, a social care worker and a care assistant as all being assigned to SOM's care.

32. Ms. Kelleher avers that the position of the HSE is that, while it accepts the move to the proposed facility will cause upheaval, it does not accept that there has been a material change in SOM's circumstances justifying him remaining in the current facility. It is submitted that the past 12 months have been devoted to planning for the transition and to making the move as smooth as possible for SOM and that there has been extensive engagement with the Committee in relation to the preadmission plan.
33. Ms. Kelleher avers that a meeting was held on 16 December 2021 between the HSE, the Committee and the clinical and operational leads of the Brothers of Charity. There was a long discussion of the necessary assessments for a comprehensive service plan for SOM. The MDT assessments then commenced on 10 January 2022 and the service plan was delivered on 9 February 2022. Ms. Kelleher states that the Committee had extensive input into the plan that was finally approved by the Court on 23 March 2022.
34. Finally, the HSE stress that it is the view of the professionals involved that (a) the move, despite the challenges, is in SOM's best interests and (b) that if SOM's closest family members do not support the transition and the placement, those challenges may be overwhelming to SOM and to the staff involved.

Relevant Evidence

35. The documents exhibited by the Committee included the report from PBS referred to above. This is a truly impressive report. It notes that the team of four clinicians that comprise the PBS service were all involved in compiling the report because of the complexity of SOM's needs. The conclusion section included the following:

“The contrast between [SOM's] historic and current presentation is striking ... The PBS Service, comprised of four highly trained and experienced behaviour support professionals, each of whom express reservation about what is the next best step for [SOM]. There is an ethical obligation to raise the ethical question

as to whether, given [SOM's] progress in the last two years, he should be asked to move service provider. It is essential this clinical opinion is expressed to others who inform the decision making in regard to service provision.

The first principle of any health intervention or service provision is "do no harm". [SOM] has a history of responding in a life-threatening way to stressful situations. He has been very ill and injured as a result of his behaviour.

Moving house is stressful for the majority of the population. It can be reasonably anticipated that such stress, together with a change in staff, daily routine etc. will lead to an escalation in behaviour at some point, whether there is an immediate or delayed emotional response.

It cannot be predicted to what extent behavioural change would occur in the context of a move. Any recourse by [SOM] to increased vomiting or any instance of severe headbanging could be harmful, and it is not an exaggeration to say potentially life threatening.

...It should be clarified that the PBS Service is not questioning the Brothers of Charity Service capability to provide a positive service for [SOM]. The question is whether he should be asked to leave the place and people he has formed a close bond and settled in, when it has been demonstrated that with appropriate care plan implementation he is now doing well there."

36. I was also provided with a Brothers of Charity update to the HSE of October 2022 provided in anticipation of SOM's move to the proposed facility, with various appendices. This included a risk assessment based on the HSE risk matrix. This document evaluated the risks of the move using the HSE risk assessment tool. This tool evaluates both the likelihood of the event and the seriousness of the event and gives a score out of 5 for each. The total score is achieved by multiplying the two scores

together. Any risk with a score of 15 or more is described as a red risk. SOM was identified as having 3 red risks:

- Risk of increase in overall anxiety as a result of change in service provision, staffing and home environment, with associated risk of self-induced vomiting: The likelihood was assessed as 5/5 and the impact as 3/5 giving a total score of 15 i.e. a red risk. The risks associated with that vomiting included risk of hospitalisation due to dangerously low potassium levels, which can lead to death; risk of heart failure which can lead to death; tonic-clonic seizures; risk of electrolyte imbalance risk of damage to kidneys, oesophagus and gastrointestinal tract; and risk of significant decrease in weight in the past as low as 40 kg.

- Risk of injury from traffic if near road in community and SOM runs off to access locations/items - The likelihood was assessed as 3/5 and the impact as 5/5 giving a total score of 15 i.e. a red risk.

- Risk of increase in anxiety as a result of imminent change with associated risk of an increase in headbanging. The likelihood was assessed as 3/5 with the impact as 5/5 giving a total score of 15 (red risk). The nature of the risks included risk of detached retina, noting that this has already occurred in the right eye as a result of headbanging in the past so that if this occurs in the left eye this could result in total or near total blindness; risk of concussion; risk of long-term brain damage; risk of infection if resulting in an open wound; risk of injury to staff if they try to intervene.

37. It is important to understand that the vomiting and headbanging risks are not being attributed to the move *per se*. Rather, these are well-established behaviours of SOM that have been present for many years and have been cyclical in nature i.e. they present more acutely at particular times. The risk assessment identifies them because those risks are considered to be increased by anxiety generated by the move to the proposed facility.

38. Next, I wish to describe the letter of 19 October 2022 from Mr. Feehan, where he noted *inter alia*, that significant alterations and refurbishments have been completed to date in the proposed facility for the transfer but that the service has had difficulties in having discussions with SOM's parents about further progressing the transfer due to their wish that SOM should not reside at the proposed facility. He points out that:

“This difficulty is a concern because if there is a principled objection from the family for [SOM] to move to [the proposed facility], this will definitely mitigate against the proposed transfer. We tried to work in an inclusive and systemic manner with all stakeholders to our clients. It would be counterproductive to continue working on the transition to [the proposed facility] if key stakeholders such as his parents are in opposition to the transfer.

...

[SOM] is a sensitive man who is highly attuned to his parents'. This parental difficulty is a barrier to the transition as [SOM] will most likely sense his parents' concern.”

39. I should also identify the report from the Cope foundation of 23 October 2020, exhibited by Ms. Kelleher, commissioned by the HSE and requesting an assessment of SOM's current support needs. A very detailed 29-page report was provided. In the conclusion section the following passage appeared;

“[I]t is our assessment that both the complexity and challenging nature of [SOM's] high-risk behaviours that challenge, most notably, his purging/vomiting behaviours, has resulted in those around [SOM] becoming understandably anxious for his welfare.

...

Related to this is a theme for all involved in [SOM's] life; the pressing concern and worry for [SOM's] health and wellbeing, in particular for his body weight and how this impacts his everyday life. [SOM's] physical health, which is viewed as crucial by all involved appears stable at present. Significant effort has been made and continues to be focused on this area...

...

Steady and consistent progress has been achieved and this is evidenced by his current stabilised weight and potassium levels. However, concern remains regarding his physical health and his resilience to potential illness given his well described historical cyclical presentation. Should [SOM] regress to his fore described presentation in November 2019 staff at CAA are very concerned that they will be unable to meet his medical needs as they have had to rely on community supports such as public health which has not been sufficient.” [the current facility was formerly known as CAA].

40. The Committee also exhibited a letter from SOM's GP, of 18 October 2022 stating that SOM has remained stable in weight with no vomiting behaviours or weight loss. However, that evidence does not display a close knowledge of SOM since the GP was obviously not aware that SOM continues to vomit on a daily basis.

Approach of the Committee

41. Importantly, although the sexual abuse allegations had been presented as the basis of the Committee's objection to the move to the proposed facility, in fact they were not identified as the basis for the decision to bring the motion. Instead, as noted above, the application was made on the basis that that the current facility had proved to be a suitable place for SOM, demonstrated in part by his weight gain, and that therefore he ought to remain there but with the application of additional supports as detailed below.

42. The Committee's endorsement of the current facility as a suitable placement albeit with additional supports in the motion is a relatively new position. The minutes of the meeting between the Committee and SOM's father, and the HSE, of October 2022, exhibited by Ms. Kelleher, records that the Committee were seeking to have SOM placed in a community house in a location other than the proposed facility.

43. In respect of the additional supports sought at the current facility, the relief sought at paragraph 3 of the Notice of Motion seeks that the matter be listed for further review on such date as the Court finds appropriate. The basis for this relief is explained in the Affidavit of the Committee at paragraph 19 as follows:

"I say and believe that there is now the real possibility that [SOM's] condition can improve further at [the current facility], if the staff who work with [SOM] continue to receive updated autism specific training. I also say and believe that any concerns about the suitability of [the current facility], such as the absence of a nurse, should be capable of being addressed through the HSE arranging for such a nurse to attend as required. I have advised staff on [SOM's] bloods, etc., whilst [SOM] has not been assigned access to a nurse. To this end I would ask that, if the Court is minded to grant an Order providing that [SOM] reside at [the current facility], the Court directs the HSE to provide a service plan that identifies the services that [SOM] will receive and that specifically addresses what autism specific training the staff will receive and how the need for a nurse will be addressed."

44. In this respect, the Committee appear to be seeking to relitigate part of the case heard in July 2021 and determined in August 2021 i.e. whether SOM needs and can avail of nursing and MDT supports provided by the residential provider who cares for him, as well as staff trained in supporting persons with autism. That question was determined

by deciding that SOM did need those facilities and should accordingly move placement to the only service provider in a position to offer those facilities i.e. the Brothers of Charity in the proposed facility. The Committee is now seeking to vary that Order so that SOM stays in the current facility but with those additional and extensive supports.

45. There can be no question of asking the Court to direct the HSE to provide the on-site MDT, nursing care and autism training in the current facility. The availability of the services in the proposed facility has been identified as critical for SOM's health and well-being over the long term. Their availability in the proposed facility, and unavailability elsewhere, is a key consideration in adjudicating upon this motion. The HSE put a proposal before the Court, having accepted the contention of the Committee that the services in question were required for SOM's care. That proposal was to provide those services in the proposed facility in a purpose-built house for SOM. That proposal was accepted by the Court.

46. It is for the HSE to put before the Court options in relation to a ward's placement and for the Court to decide whether the proposed option is in the best interests of the ward. It is not part of the High Court's wardship jurisdiction to design placements for wards. That would be to exceed the Court's jurisdiction and would constitute an interference with the executive powers of the State. In those circumstances, I cannot entertain any application to compel the HSE to provide the services that the proposed facility has been set up to offer, in a different location not set up to provide those services. That means that the choice is between a placement that offers the services that SOM needs – the proposed facility - and one that does not – the current facility.

Criteria to be applied in deciding motion

47. Criticism might be levelled at the Committee for the failure to raise this issue significantly earlier, or for her inconsistent approach, both in relation to the motivation

for bringing the motion and the nature of the placement requested. However, it seems entirely inappropriate to consider the conduct of the Committee in deciding upon this application save as it directly impacts the question of SOM's placement. First, questions of the correctness of the Committee's conduct are quite distinct to the question of what is in SOM's best interests. Second, I accept that the Committee has acted in good faith to achieve what she believes to be the best outcome for her son SOM. She has undoubtedly been a tireless advocate for SOM as I identified in my previous judgment. Accordingly, the only criteria I will apply in adjudicating on the motion is the best interests of SOM.

Weighing of factors

48. I turn now to consider the weighing of the various factors relevant to whether I should set aside the Order of March 2022.

49. In favour of the placement at the proposed facility are the following factors:

- (i) This is a bespoke placement designed for SOM and significant time and expense have been expended on it by the HSE and the Brothers of Charity. A house has been specially commissioned for SOM and renovated at considerable expense. A comprehensive service plan has been put in place and approved by the Court. There has been and continues to be extensive planning for SOM's arrival. This may be seen from the Brothers of Charity update and the appendices to that document, including the risk assessment carried out. The risk assessment identifies that no less than 13 people were involved in compiling the document. The level of planning for SOM's visit may be understood by the 20-page PBS report quoted above which covered the following areas:
 - (a) Approximately 30 reports on SOM's medical history to be used as sources.

- (b) SOM's history and presentation including detailed examinations of his preferences, cognitive and communication skills, physical and mental health, medication history and placement history.
- (c) A functional behavioural assessment identifying his behaviours of most concern including vomiting and headbanging and property damage, covering his behavioural history and weight over time before examining each behaviour individually.
- (d) Conclusions and short-term recommendations as identified at paragraph 34 of this judgment.
- (ii) SOM will have a full multidisciplinary team on site, as opposed to the position in the current facility where the private operator outsources the vast majority of the MDT services.
- (iii) SOM will have an enhanced staff nurse and a clinical nurse manager as well as a social care worker and care workers available to him on site for significant portions of each day in the proposed facility. No nursing support is provided by the private operator at all. Because of the nursing care, should SOM's condition deteriorate, the proposed facility will have the expertise on site to manage his condition. The private operator does not have that expertise available.
- (iv) The persons working with SOM will have ongoing autism specific training.
- (v) The staff at the proposed facility are employed by the Brothers of Charity and as such are equivalent to HSE workers and are therefore not as susceptible to "churn" as persons employed by a private provider as is the case with the current facility. This is important for SOM as continuity of staff is vital to maintain consistency of approach.

- (vi) The placement at the proposed facility is stable. On the other hand, the private provider have only a 3-year contract for the operation of the current facility with the HSE, and SOM's service provider may change again with possible negative consequences.

50. In favour of a continued placement in the current facility are the following factors;

- (i) SOM's weight and behaviours are stable, and his health is no longer a cause of concern because of his weight gain.
- (ii) Maintaining the status quo means no change for SOM. As identified in the risk matrix, change for SOM is likely to cause him significant anxiety and that anxiety is likely to prompt an increase in behaviours such as vomiting and shredding and possibly headbanging.
- (iii) The staff in the current facility have identified a *modus operandi* that is working with SOM.

SOM's previous experiences in the proposed facility

51. I must also consider the impact of SOM's previous experiences in the proposed facility.

In my view the evidence is very mixed as to whether a move to the proposed facility would adversely impact SOM because of his prior experience there. On the one hand, I have the evidence of his mother that SOM was badly traumatised in the proposed facility in the period 1996 to 1998, has very negative memories of it and found it extremely difficult to even drive in the direction of the proposed facility, or to visit it. SOM first went to the proposed facility when he availed of respite services in 1996. In December 1996 SOM was admitted to the proposed facility as part of a crisis intervention. On 12 February 1998 SOM returned home and did not return to the proposed facility as a resident.

52. Mr. Feehan, Senior Psychologist with the Brothers of Charity, accepts in his report of 7 October 2021 that although there is no report on file indicating that SOM was physically or sexually abused in the proposed facility when he was living there, he sees no reason to doubt the source of his stress or trauma as being of social or sensory origin. He notes that “[l]iving with other clients (in 1998 he may have lived with up to 8 or 9 other young adults) would not have been conducive to his quality of life. I also understand that [The Committee] reported a poor relationship with one of the residential house parents at that time”.
53. On the other hand, since I gave judgment in August 2021, SOM has visited the proposed facility three times by way of preparatory visit. The private provider’s staff report some anxiety on SOM’s part when he visited the proposed facility as part of his preparation for moving. However, on one of those visits, Mr. Feehan observed SOM and although he noted he displayed reluctance to exit the car, he found no evidence of distressed or self-injurious behaviours. He says SOM did display anxiety symptoms during the visit, but he concludes that he did not observe anxiety symptoms of significance or concern during the visit.
54. Additionally, in his report of 28 September 2021, Mr. Feehan notes that SOM had been to the proposed facility in recent years in the company of a former member of staff, now deceased, and that he understood that SOM had no negative reaction while on the proposed facility’s campus or afterwards. In conclusion, Mr. Feehan identifies that there is no reason why a transition to the proposed facility is not possible or desirable.
55. In summary, while it is difficult to be certain of SOM’s views on the proposed facility, I have received expert evidence that SOM will be able to transition to the proposed facility. I am also influenced by the fact that the environment SOM will inhabit in the proposed facility i.e. a single occupancy house, will be entirely different to that which

he experienced when he lived there previously. Moreover, SOM is well known to the Brothers of Charity who provided his day service (albeit not at the proposed facility) for many years.

Decision

56. Weighing all those factors up, it seems to me that the current Order ought not be disturbed. The current facility is not a stable placement in that the private provider have only been retained on a three-year basis, are halfway through that contract, and its workers are less likely to remain in place given its private status.
57. Crucially, the current facility does not have in place the supports that have been identified as necessary for SOM's well-being, not just now but over the longer term. SOM is aged 44 and his placement must be suitable for him as a long-term option. The current facility does not have the nursing care that he may require or the MDT support and may not have the ongoing autism training that the Committee has identified as crucial.
58. I have identified above that SOM's presentation is cyclical. It is excellent news that his weight has increased and that he is more stable. In fact, this makes it a suitable time to move him. However, there can be no guarantees that his presentation will not alter in the way that it has over the last 20 years, as indicated by the chart above setting out the weight changes he has experienced over the years. Indeed, some of his behaviours have increased in recent months i.e. shredding and entering other residents' houses. It cannot be assumed that his behaviour will not change. If those behaviours change, the proposed facility is in a position to manage them.
59. On the other hand, if the proposed facility placement is not proceeded with now and SOM remains in the current placement, it is unlikely he will be able to avail of an alternative placement equivalent to the proposed facility if his health and behaviours

deteriorate, given the difficulties the HSE experienced in obtaining a suitable service provider and the amount of time it has taken to put the package together. It is necessary to protect SOM from the situation identified as a potential risk in the Cope Report i.e. where the staff would be unable to meet his medical needs if they had to rely on community supports such as public health that was insufficient.

60. Moreover, I am influenced by the fact that the excellent PBS report has identified the steps that have been successful in helping to stabilise SOM (see page 19 of the report). Those steps can be replicated in the proposed facility. The report also carefully identifies the specific steps that should be taken when SOM moves to the proposed facility.

Conclusion

61. I am only too aware that my decision is not without risk to SOM. I have very carefully considered the risk factors identified by the PBS report, and set out in the risk matrix. The principal risks seem to be as follows. First, as identified by the PBS, the move itself may trigger a reoccurrence of the excessive vomiting behaviours, with a consequent decrease in SOM's weight. SOM has been in the current facility on a part time residential basis from 2004 and on a full-time basis from 2009. It will undoubtedly be an enormous change for him and will take him some considerable time to adjust to his new home. It is likely that in the short term the move will precipitate an increase in his behaviours. However, as identified above, SOM's vomiting behaviour has been cyclical in nature over many years, and it may well increase again even without the trigger of a move. Should it worsen, I am comforted by the knowledge that he will be in a place that has the capacity to manage that behaviour, unlike the position in his current placement.
62. Moreover, the detailed setting out of the risks by the Brothers of Charity was part of a process designed to identify and manage those risks. That in and of itself gives me comfort that measures are being put in place to address SOM's likely response –

hopefully on a short-term basis - to the move. What works for SOM to minimise his behaviours has been carefully identified and will be replicated in the proposed facility.

63. There is also the separate risk that the Committee and SOM's wider family will not support the placement and in that way its success will be undermined. However, although I know it will be difficult for the Committee to adjust to SOM's move, I am confident that she and SOM's wider family, including his father, are absolutely committed to SOM and will do everything they can to improve his well-being, including supporting this move. Not supporting the move will impact negatively on SOM and the Committee will wish to avoid that consequence.

64. In summary, the unfortunate reality is that whether SOM goes to the proposed facility or remains in the current facility, there are risks to him. Those risks cannot be eliminated. The best I can do is identify where the least risk lies. For the reasons set out in this judgment I conclude that placing SOM in the proposed facility represents the lowest risk option when considered from a long-term perspective.

65. Accordingly, I refuse to grant the relief sought in the Notice of Motion.

66. The parties may apply to the Registrar to have the matter listed for a costs hearing if necessary on an appropriate date.

67. This judgment is the subject of an Order under s.27 of the Civil Law (Miscellaneous Provisions) Act 2008.