**THE HIGH COURT**
**CHANCERY**

[2021] IEHC 384
**[2018 No. 3713P]**

**BETWEEN**

**ROSEMARY CROWLEY**

**PLAINTIFF**

**AND**

**KAPSTONE LIMITED**

**DEFENDANT**

**JUDGMENT of Mr. Justice David Keane delivered on the 2nd June 2021**

**Introduction**

1. The plaintiff Rosemary Crowley moves for an order deeming the service of the plenary summons in these proceedings on the defendant Kapstone Limited ('Kapstone') to be sufficient or, instead, for an order granting leave to renew the summons.

**Background**

2. The proceedings commenced with the issue of a plenary summons on 26 April 2018. The summons identifies Kapstone as having its registered office at 2 Cluain Mhór, Clybaun Road, Knocknacarra, County Galway. In the general indorsement of claim contained in that summons, Ms Crowley seeks specific performance of each of two agreements made on 10 July 2017 for the sale to her by Kapstone of two adjoining properties – respectively, Kindle House and Hillcrest House – located on Ballymoneen Road, Knocknacarra, County Galway and, in addition or instead, damages for breach of those agreements.

3. Each of the two property sale agreements identifies the vendor as 'Ken Fennell as receiver of [Kapstone]' and schedules various documents establishing that Kapstone had mortgaged each of the properties to Allied Irish Banks plc, whose interest as mortgagee had been transferred successively to National Asset Loan Management Limited ('NALM') and Promontoria (Arrow) Limited ('Promontoria'), and that Ken Fennell had been appointed as receiver of each of the properties in December 2015. In short, the properties were being sold by Mr Fennell, as receiver, and not by Kapstone, as mortgagor.

4. The summons was not served on Kapstone.

5. On 14 October 2019, Meenan J made an order *ex parte* pursuant to O. 8, r.1(4) of the RSC renewing the summons for the prescribed period of three months, being satisfied that there were special circumstances for that extension, namely that it was intended to remit the proceedings to the Circuit Court.

**Procedural history**

6. Ms Crowley's inability to prove service of her plenary summons upon Kapstone in accordance with the rules became evident on 3 February 2021 during the remote hearing of her application, first, to join Mr Fennell as a defendant to the proceedings and, second, to injunct Kapstone and Mr Fennell from taking any step to sell the properties to any other purchaser(s) pending the trial of her action ('the first motion').

7. On 3 November 2020, Ms Crowley applied for, and was granted, liberty to issue the first motion returnable for 16 November. The motion duly issued the following day. It is grounded on an affidavit of Ms Crowley, sworn on 3 November. Mr Fennell swore an affidavit in reply on 13 November. Ms Crowley and Mr Fennell exchanged further affidavits, sworn on 17 November and 1 December respectively.

8. When it came to light during the hearing on 3 February 2021 that there was no evidence before the court to establish that the proceedings, as distinct from the motion, had been duly served on Kapstone, Ms Crowley applied for, and was granted, an adjournment to permit her to address that issue.

9. The present motion ('the second motion') issued on 11 February 2021 and was initially made returnable for 19 February (when the first motion also came back before the court). It is grounded on an affidavit of Owen Swaine, sworn on 8 February. Mr Swaine is a partner in the firm of solicitors representing Ms Crowley. Ms Crowley, who is a solicitor, is also a partner in that firm. Declan Murphy, a partner in the firm of solicitors representing Mr Fennell, swore an affidavit in reply on 18 February. Ms Crowley had served the motion papers on Mr Fennell, through his solicitors, although there was no requirement to do so under the rules.

10. After some discussion when the motion came before me on 19 February, Ms Crowley sought, and was granted, an adjournment to serve the papers in the second motion on Kapstone. That was duly done.

11. On 26 February, Mr Swaine swore a further affidavit in support of the second motion.

12. I heard the second motion on 4 March. There was no appearance by, or on behalf of Kapstone, and the application for the reliefs sought in the second motion proceeded, in effect, *ex parte*.

**The reliefs sought in the second motion**

13. In the second motion, Ms Crowley seeks one of two reliefs in the alternative: first, an order pursuant to O. 9, r. 15 of the RSC deeming the service of the plenary summons actually effected on Kapstone to be sufficient; or second, an order pursuant to O. 8, r. 1 of the RSC, granting leave to renew the plenary summons.

**Should the service actually effected be deemed sufficient?**

*i. the service actually effected*

14. The plenary summons issued on 26 April 2018. Mr Swaine avers that, in circumstances where he understood that the property sale agreements were still likely to be performed, he did not serve it, to avoid incurring unnecessary costs.

15. In an email of 8 October 2019, Ms Crowley's solicitors emailed Mr Fennell's solicitors, stating in material part:

> **'Re: Rosemary Crowley v Papstone (sic) Limited (In Receivership)**
> **High Court Record No. 2018/3713P**

...

As you are aware, our client has issued specific performance proceedings under the above High Court record number in connection with the properties known as Hillcrest House and Kindle House ('the properties').

...

[Mr Fennell's former solicitors] by letter dated 15 May 2018 and addressed to this firm agreed on behalf of their client [to take certain steps]. Based on this representation and understanding and at the request of [those solicitors] it was agreed that we would not serve the issued proceedings.

...

In the absence of an undertaking [to take certain specified steps] by close of business this evening we will have no option but to bring an immediate injunction application before the High Court to protect our client's position. We will then prosecute our specific performance proceedings and seek damages for breach of contract.'

16. On 14 October, Meenan J made an order renewing the summons for three months.

17. On 18 October, Ms Crowley's solicitors wrote again to Mr Fennell's solicitors, stating:

> 'Please confirm if you have authority to accept service of proceedings on behalf of your client or in the alternative we shall arrange to serve him by way of personal service.'

18. Mr Fennell's solicitors replied on 21 October, stating in material part:

> **'Re: High Court Record No. 2018/3713P**
>
> **Our client: Ken Fennell (as receiver) and Promontoria (Arrow) Limited**
>
> ...
>
> Please note that we have authority to accept service of proceedings in this matter on behalf of the above-named clients.

19. Mr Swaine avers that, 'in light of the text of [that letter]', he believed that Mr Fennell's solicitors had authority to accept service on behalf of Kapstone. For my part, I fail to see how the letter could be construed in that way.

20. On 22 October, Ms Crowley's solicitors wrote to Mr Fennell's solicitors again, stating:

> 'We refer to your correspondence [of 21 October] and note that you have authority to accept service of proceedings. We enclose herewith original plenary summons together with certified copy and copy order dated [14 October]. You might kindly

endorse acceptance of service on the original summons and return same to this office at your earliest convenience.'

21. On 30 October, Mr Fennell's solicitors wrote again, stating in material part:

> 'This office does not act for Kapstone Limited.'

22. In his first affidavit, Mr Swaine acknowledges that statement but suggests it should be qualified by the statement in the next paragraph that '[w]e will take instructions from our client on this matter and revert to you shortly'. However, the relevant sentence in the letter continues, 'but it would appear obvious that the defendant as named in your proceedings is incorrect', making it much more obviously a reference back to the statement in the preceding paragraph that '[y]ou have identified an incorrect defendant, where Kapstone Limited is not in receivership' It is exceedingly difficult to read the sentence fragment on which Mr Swaine seeks to rely as establishing a commitment on the part of Mr Fennell's solicitors to take instructions on whether they could enter an appearance on behalf of Kapstone. And even if it could be read in that way, there is no suggestion that Mr Fennell's solicitors ever received any such instructions.

23. On 14 August of the following year, 2020, Ms Crowley's solicitors emailed Mr Fennell's solicitors, writing in material part:

> 'The original summons in this matter was delivered to your firm by certified post, dated 22 October 2019. You acknowledged receipt of same by letter dated 30 October 2020.
>
> Unfortunately, despite numerous reminders to your firm, your firm has failed to return the original summons to this firm and, hence, have wrongfully obstructed us in progressing our client's proceedings.
>
> [Our counsel] advises that we will have to issue separate proceedings against your firm in order to obtain the original summons. This will obviously result in a costs order against your firm. This is not a course of action we want to take but, unfortunately, unless we are in receipt of confirmation by close of business this evening that we can collect the original summons by lunchtime on Monday next, 17 August 2020, we will be left with no option but to issue the threatened proceedings. We trust that his will not be necessary.'

24. On 26 August, Ms Crowley's solicitors wrote to Mr Fennell's solicitors in broadly similar terms, while adding:

> 'Despite our repeated and persistent requests that you return the original plenary summons to us you have failed, refused or otherwise neglected to do so. By email dated [14 August], Owen Swaine of our office wrote to your Declan Murphy to request that the original plenary summons be returned. [Your office] responded by email of the same date confirming that Mr Murphy was out of the office but would

return on [18 August]. Mr Swaine has since placed a number of calls to your office seeking to speak to Mr Murphy, but Mr Murphy has failed to return his calls.

Your firm has wrongfully retained the original plenary summons since October 2019. This has prevented our client from progressing that litigation by seeking judgment in default of appearance against your client. We have instructed counsel to draft an appropriate application deeming service sufficient and we are now in receipt of same. We confirm that an *ex parte* application of this nature will now be moved without further notice to you. We will use this letter to fix your client with the costs of that application.

...

We, therefore, ask that you confirm by close of business on Friday, [28 August], that you will return the original plenary summons to us. We also ask that you return the original plenary summons to us by close of business on Friday, [4 September]. In the event that you fail to complete either of these steps, we will be left with no option but to take the action that we have outlined in this letter – namely: (1) bring an application to deem service sufficient in the proceedings entitled Rosemary Crowley v Kapstone Ltd, Record No. 2018/3713P; and (2) commence fresh proceedings against your client.'

25. Mr Fennell's solicitors replied by letter of 1 September, stating in material part:

**'Our client: Ken Fennell (as receiver)**

**Re: Plaintiff: Rosemary Crowley**

**Defendant: Kapstone Limited …**

**The High Court, Record No. 2018/3713P**

Please find enclosed as requested the original plenary summons in this matter as issued to us by your office some time ago. We do apologise for the delay in returning same to you, but this writer has been working remotely for the last number of weeks. We note that no request for the return of same was issued to by your office until quite recently.

In terms of your letter, you advise that we act for Kapstone Limited. Can you please provide by return copy correspondence where we indicated to you that we were instructed by Kapstone Limited or that we would be entering an appearance in the matter for Kapstone Limited.

Please note that we do not act for Kapstone Limited, and we have not entered an appearance on behalf of Kapstone Limited in these proceedings....

Please note that Ken Fennell is appointed by the secured creditor as receiver over certain assets of Kapstone Limited, which assets include the property (sic) which are the subject of the above proceedings. We are instructed to enter an appearance on behalf of Ken Fennell but where the receiver is not named as a defendant to the proceedings, we cannot enter an appearance.'

26. There is a stark conflict on affidavit between Mr Swaine and Mr Murphy concerning whether the office of the former made any request to that of the latter for the return of the original plenary summons between 22 October 2019, when it was sent by registered post, and 14 August 2020, when an email was sent seeking its return. Mr Swaine avers that he made repeated requests for its return. Mr Murphy avers that he is not aware, and has no record on file, of any such request, and that the original plenary summons was returned under cover of a letter dated 1 September, less than one week after receipt of Mr Swaine's letter of 26 August. Of course, I cannot resolve that conflict of fact.

27. Ms Crowley's solicitors wrote in response to Mr Fennell's solicitors on 18 September, stating in material part:

> 'In the event that an appearance is not entered by your client within the next 7 days we shall infer that he wishes to be joined in the proceedings. In that event, we shall also seek to have him made liable for the costs.'

28. Ms Crowley's solicitors wrote again on 29 October, noting that they had received no response to their earlier letter of 18 September and threatening injunction proceedings in respect of the apprehended sale of the properties.

29. Mr Fennell's solicitors wrote in reply on 1 November, stating in relevant part:

> 'Please be advised that the sale of [the properties] has been completed.
>
> ...
>
> We do not appear to have a copy of your letter of [18 September] to hand, but you have been advised at all times that this office does not act on behalf of the defendant [named in the proceedings], and accordingly we did not enter any appearance on behalf of [that defendant]. It is noted that, despite the proceedings issuing on [26 April 2018], there appears to have been no substantive action taken in the intervening period.'

30. The events that followed have already been described.

*ii. argument and analysis*

31. Ms Crowley argues that the service actually effected, that is to say the delivery of the plenary summons by registered post to the solicitors for Mr Fennell and Promontoria in the circumstances already described should be deemed sufficient service of the proceedings upon Kapstone.

32. In doing so, Ms Crowley relies on the *ex tempore* decision of Costello P in *Fox v Taher* (Unreported, High Court, 24 January 1996). That was an application to set aside an order deeming service of proceedings good, after the plaintiff had gone on to obtain judgment in those proceedings in default of appearance. The plaintiff was a solicitor suing the defendant, a former client, for disputed fees. The defendant's new solicitors had

previously written to the plaintiff stating that they had authority to accept service of any proceedings the plaintiff might see fit to issue against the defendant arising from that dispute. However, that authority had been withdrawn on the day before, and again on the day that, proceedings issued. When an attempt was made to serve those proceedings on that day, the defendant's new solicitors refused to accept service of the summons and refused to undertake to enter an appearance. Very shortly afterwards, the plaintiff successfully applied *ex parte* to Kinlen J for an order deeming service of the summons good on the basis that a copy of the summons had been delivered to the defendant's new solicitors.

33. Referring to the application to set aside the order of Kinlen J, Costello P stated (at para. 9):

> 'I refuse to make such an order because I cannot do so until the judgment has been set aside. But my main reason for refusing to grant such an order is this: even if the judgment is set aside, I can see no reason why the court should set aside Kinlen J's order.'

34. Later in the same paragraph, Costello P went on to explain:

> 'I am quite satisfied that Kinlen J had jurisdiction to make the order sought by the plaintiff and that he properly exercised his jurisdiction. The whole object of the power of the court to deem service good is to deal with a situation such as arose in this case. [The defendant] is an international businessman who comes and goes out of the jurisdiction and effecting service on him would be very difficult. He also has a large web of companies which he uses for different purpose and this may well involve difficulty in effecting service. The object of effecting service is to bring home to defendants the nature of the proceedings and the documents relating to the claim being made against them. In this case it is absolutely clear that [the defendant's new solicitors] were in daily if not hourly contact with [the defendant] and his English solicitors and that notice of and copies of the proceedings would have been made available almost immediately to [the defendant]. In my view there is no ground for setting aside the order of Kinlen J.'

35. Ms Crowley argues that she stands in the same position towards Kapstone as the plaintiff did towards the defendant in *Fox v Taher* so that she is entitled to the same order deeming the service effected sufficient as that made by Kinlen J in that case. Although in each instance, the plenary summons was served upon a firm of solicitors which refused to accept service and refused to enter an appearance, so that the O. 9, r. 1 exception from the requirement to effect service could not apply, in my judgment the numerous differences between the two cases are more significant than that single point of similarity.

36. As I perceive them, the principal differences are these:

    (a) The defendant Kapstone is not an international businessman who comes and goes from the jurisdiction, rendering service upon him difficult, but an Irish registered

company, simply and readily amenable to service under s. 51 of the Companies Act 2014 at all material times by leaving the plenary summons at, or sending it by post to, Kapstone's registered office.

(b) There is no large web of companies associated with the defendant Kapstone, such as might render service complex.

(c) The solicitors to whom the summons was delivered in this case have never had instructions to act on behalf of Kapstone. They have only ever had instructions to act on behalf of Promontoria, as the present holder of the mortgage security over the company's property, and Mr Fennell, as the receiver appointed over that property by Promontoria. While, as a matter of law, a receiver is the agent of the owner of the property over which he is appointed, and not of the mortgagee who appointed him, that does not make him the agent of the property owner for all purposes. As Denham J noted in *Bula Ltd v Crowley (No. 3)* [2003] 1 IR 396 (at 423), the receiver is in a unique and exceptional position, unlike that of the ordinary agent in commercial transactions, in that his or her agency is primarily a device to protect the mortgage or debenture holder, so that it is far removed from the ordinary principal and agent situation as far as the mortgagor and the receiver are concerned. Nor do the rules or the Companies Act 2014 provide for the service of proceedings on an agent of a defendant, rather than on a defendant directly.

(d) There is no evidence of any, much less daily or hourly, contact between the solicitors upon whom Ms Crowley's proceedings were served and Kapstone.

(e) This is not an instance of a proposed defendant's eleventh-hour withdrawal of a standing instruction to a firm of solicitors to accept service of proceedings. There is no evidence that there has ever been a solicitor-client relationship between Mr Fennell's solicitors and Kapstone.

(f) Thus, there is nothing to suggest that Mr Fennell's solicitors would have made the plenary summons available almost immediately available to Kapstone (or available to it at all).

37. In *Lancefort Limited v An Bord Pleanála* [1997] IEHC 83, (Unreported, High Court, 13 May 1997) (at para. 36), Morris J identified the purpose and object of achieving proper service in court proceedings as being to ensure that the party concerned is adequately informed of the matters to be litigated so as to suffer no prejudice. For the reasons I have given, I cannot be satisfied that Kapstone has been adequately (or at all) informed of the matters sought to be litigated against it, such that it would suffer no prejudice if I were to deem the service of the plenary summons actually effected on Mr Fennell's solicitors as sufficient service of the proceedings upon Kapstone.

38. Hence, I must refuse that application.

**Should leave be granted to renew the plenary summons?**

39. Having regard to the view expressed in Delaney and McGrath on Civil Procedure (4th edn, Round Hall, 2018) (at para. 2-30) that an application for leave to renew a plenary summons may be made on notice to the defendant, when the matter came before me on 19 February Ms Crowley sought, and was granted, an adjournment to enable the papers in the second motion to be served on Kapstone. When the motion came back before me on 4 March, I was satisfied that service of those papers had been effected in accordance with the terms of s. 51 of the Companies Act 2014. Nonetheless, there was no appearance at the hearing on Kapstone's behalf.

40. In moving the application on behalf of Ms Crowley, Mr Molloy S.C. acknowledged that, in reality, all her eggs were in the 'having service deemed good' basket, since recent authority militates against the renewal of her plenary summons. I take that to be a reference to the Court of Appeal's analysis of the proper construction and application of O. 8, r. 1, as substituted by the Rules of the Superior Courts (Renewal of Summons) 2018 (S.I. No. 482 of 2018), in *Murphy v Health Service Executive* [2021] IECA 3, (Unreported, Haughton, Whelan and Noonan JJ, 15 January 2021) and, in particular, to the dictum of Haughton J (at para. 77) concerning the unlikelihood that inadvertence could ever amount to a special circumstance warranting the renewal of a plenary summons. In any event, Mr Molloy indicated that he was not pressing Ms Crowley's application for that relief.

41. In those circumstances, I must refuse that application also.

**Conclusion**

42. As the plenary summons in these proceedings has not been served and is no longer in force, it seems to me that the appropriate order to make is one striking out both the second motion and the proceedings.

43. That being so, Ms Crowley's first motion, which seeks both an order joining Mr Fennell as a defendant to the proceedings and one injuncting Kapstone and Mr Fennell from selling the properties pending trial, cannot succeed and must also be struck out. It appears to follow that Mr Fennell is entitled to his costs of that motion against Ms Crowley.

**Final matters**

44. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

> 'The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of deliver subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt

with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

45. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be electronically filed with the appropriate registrar within 14 days, to enable the court to adjudicate upon it.