THE COURT OF APPEAL

CIVIL

Neutral Citation: [2022] IECA 157

Appeal Number: 2021/213

Haughton J.
Binchy J.
Allen J.

BETWEEN

ROSEMARY CROWLEY

PLAINTIFF/APPELLANT

AND

KAPSTONE LIMITED (IN RECEIVERSHIP)

DEFENDANT/RESPONDENT

AND

KEN FENNELL

NOTICE PARTY/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 11th day of July, 2022

Introduction

1. This is an appeal against the judgment and order of the High Court (Keane J.) refusing to deem good what was relied on by the plaintiff as service of the plenary summons; refusing

to renew the summons; dismissing the action; and ordering the plaintiff to pay to Mr. Ken Fennell his costs of a motion to join him as a defendant to the proceedings.

2. The judgment of the High Court on the substantive applications was delivered on 2nd June, 2021 [2021] IEHC 384 and a separate written judgment in relation to costs was delivered on 30th July, 2021 [2021] IEHC 557.

Background

3. By two agreements in writing dated 10th July, 2017 the plaintiff agreed to purchase the properties comprised in Folios 6124F and 41530F, County Galway for €300,000 and €90,000 respectively. The vendor in each case was described as *"Kapstone Limited (In receivership) acting by and at the direction of Ken Fennell"*. The contracts provided for the payment of a deposit of 10% of the purchase price and for completion in fourteen days.

4. The contracts were in the Law Society of Ireland printed form (2017 edition) subject to 42 special conditions which greatly diluted the rights of a purchaser on foot of the general conditions of sale.

5. The documents schedule listed in one case eighteen and in the other nineteen documents under four headings.

6. The title in each case was to be the folio. The folios showed the registration of Kapstone Limited *("Kapstone")* as the owner of the lands; the registration at the same time of a charge for present and future advances in favour of Allied Irish Banks plc *("AIB")*; and the later transfer of that charge to Promontoria (Arrow) Limited.

7. Miscellaneous documents were provided in relation to building energy rating and roads and services: without any warranty as to the contents of those documents.

8. A number of planning documents were provided in respect of each of the properties: without any warranty as to development or use.

9. In each case, under the heading *"Security documents"* the documents schedule listed:-

1. The counterpart original mortgage and charge between Kapstone and AIB;
2. Copy redacted deed of transfer from National Asset Loan Management Limited and Promontoria (Arrow) Limited;
3. Copy deed of appointment of receiver;
4. Copy deed of novation of receiver.

10. The special conditions, in each case, stipulated that Mr. Ken Fennell had been appointed as receiver over Kapstone Limited (In receivership) pursuant to the deed of appointment listed in the documents schedule and that the purchaser should accept the appointment as valid and subsisting and make no objection nor raise any requisition in relation to same. It was agreed that the contract would *"... be executed by the vendor acting by the receivers (sic.) as the duly appointed agent of the borrower"* and that no objection, requisition or enquiry would be made or raised by the purchaser in that regard.

11. It was agreed in each case that, on the closing date, the purchaser would accept an assurance of the property executed by Promontoria (Arrow) Limited, in which event the purchaser would conclusively acknowledge and accept that Promontoria (Arrow) Limited had a power of sale as mortgagee as more particularly set out in the mortgage and charge.

12. Each of the contracts provided that completion of the sale to the purchaser was conditional on completion of the other.

13. The sale and purchase was not completed as provided and completion notices were served by the vendor's solicitors on 11th August, 2017. The completion notices referred to the vendor as *"Kapstone Limited (In receivership) acting by and at the direction of Ken*

Fennell". The purchases were not completed within the time stipulated and on 13th September, 2017 the plaintiff was told that her deposits had been forfeited.

14. After the completion notices were served, it came to the plaintiff's attention that boulders had been placed at the entrance to one of the properties and a security fence removed from the perimeter. The plaintiff, by her solicitors, relied on this as having invalidated the completion notices. The vendor's solicitors insisted that the completion notices had been validly served and the contracts validly rescinded. There followed a protracted if desultory correspondence as to what might be done to get the sales completed. The vendor's position was that terms might be agreed on which the contracts might be reinstated. The purchaser's position was that she was insisting that the vendor take such steps as were necessary to allow completion in accordance with the terms of the contracts. However, the rights or wrongs of the parties' respective positions are immaterial for present purposes.

15. When, by letter dated 7th September, 2017 the purchaser's solicitors first raised the issue of the boulders and fence, they identified the vendor as *"Kapstone Limited (In receivership) acting by and at the direction of Ken Fennell, receiver, of Deloitte, Earlsfort Terrace, Dublin 2"*. In their letter of 27th October, 2017, and thereafter in the correspondence, the vendor's solicitors identified their client as *"Ken Fennell, receiver appointed over certain assets of Kapstone Limited"*. From 8th March, 2018 (which appears to have been the letter next following the vendor's solicitors' letter of 27th October, 2017) the purchaser's solicitors identified the vendor's solicitors' client variously as *"Ken Fennell Receiver, Kapstone Limited"* and *"Ken Fennell Receiver"*.

16. Under cover of their letter of 8th March, 2018 – which identified the vendor's solicitors' client as *"Ken Fennell Receiver, Kapstone Limited"* – the purchaser's solicitors served completion notices (or purported completion notices) addressed to *"Kapstone Limited*

(In receivership) acting by and at the direction of Ken Fennell" and the correspondence resumed more or less from where it had stopped the previous October.

17. On 26th April, 2018 the plaintiff issued a plenary summons claiming orders for specific performance of the two contracts made on 10th July, 2017 said to have been made between the plaintiff of the one part and the defendant acting through its agent Ken Fennell of the other part for the sale and purchase of the two properties. The action was registered as a *lis pendens* against both properties on 9th May, 2018 and the *lis pendens* was registered as a burden on each of the Folios on 17th May, 2018.

18. Between April, 2018 and July, 2018 there was an exchange of correspondence as to the terms upon which the contracts might be reinstated or the sales completed. Agreement in principle appears to have been reached that the boulders would be removed and a boundary fence erected, if a definitive time for completion could be agreed and if agreement could be reached as to the amount – whether the €5,000 asked, or €1,500 offered or somewhere in between – of a contribution to the purchaser's costs of issuing the proceedings. As far as the evidence goes, the last word appears to have been a letter from the vendor's solicitors of 2nd July, 2018 by which the purchaser was offered a contribution of €1,500 to her costs. While in the course of the hearing of the appeal it was suggested that the purchaser would have been content with the terms then proposed, it was acknowledged that the purchaser had then not conveyed her acceptance of those terms or – as she had been invited to do – confirmed when she expected to be in funds to complete.

19. Again, the rights and wrongs of the positions taken by the parties are not material but in the correspondence the vendor's solicitors at all times identified their client as *"Ken Fennell, receiver appointed over certain assets of Kapstone Limited"* and the purchaser's solicitors referred to the vendor's solicitors' client as *"Ken Fennell Receiver"*.

20. As far as the evidence goes, there was no further communication in relation to the matter until October, 2019, by which time a new firm of solicitors had been appointed to represent the vendor. Through the vendor's previous solicitors, the purchaser's solicitors identified the vendor's new solicitors and wrote to them to complain that the property had been advertised for sale and a for sale sign had been erected. The purchaser's solicitors asserted that this was in breach of an undertaking previously given and threatened an application for an injunction. Again, as will become apparent, the merits of the position taken by the purchaser are immaterial but the letter relied on in support of the alleged undertaking was a without prejudice letter dated 23rd March, 2018, the exhibited copy of which was wholly redacted.

21. By October, 2019, the plenary summons which – it will be recalled was issued on 26th April, 2018 – had expired. The purchaser's position was that the summons had not been served because the vendor's previous solicitors had asked the purchaser's solicitors not to serve it – which would account only for the fact that it was not served as long as the negotiations were ongoing – but again it does not matter.

22. On 14th October, 2019 Ms. Crowley applied to the High Court *ex parte* for an order pursuant to O. 8, r. 1 of the Rules of the Superior Courts renewing the plenary summons and an order pursuant to O. 49, r. 7 remitting the action to the Circuit Court, Western Circuit, County Galway. An order was made by Meenan J. renewing the summons for three months for the stated special circumstances that Ms. Crowley intended to remit the action to the Circuit Court. By the way, it does not appear that any step was taken to remit the action to the Circuit Court but for present purposes nothing turns on that.

23. On 18th October, 2019 the purchaser's solicitors wrote to the vendor's new solicitors. They identified their client as Rosemary Crowley and the matter as Rosemary Crowley v.

Kapstone Limited (In receivership), High Court Record No. 2018/3713P. Their letter did not identify the vendor but asked the vendor's new solicitors to:-

> *"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."*

24. The material part of the reply – upon which the application to the High Court was, and the appeal is, founded – was:-

> *"**Re: High Court Record No. 2018/3713P***
>
> ***Our client: Ken Fennell (as receiver) and Promontoria (Arrow) Limited***
>
> ***Your client: Rosemary Crowley***
>
> *Dear Sirs,*
>
> *We refer to the above matter and to your letter of the 18th.*
>
> *Please note that we have authority to accept service of proceedings in this matter on behalf of the above named clients.*
>
> *We note that your letter of the 18th refers to Kapstone Limited (In Receivership).*
>
> *Please note that as far as this firm is aware Kapstone Limited is not in receivership and instead a fixed charge receiver has been appointed over certain assets of Kapstone Limited. … "*

25. The original plenary summons and a certified copy of the order of 14th October, 2019 were sent to the new solicitors under cover of a letter dated 22nd October, 2019 which noted that they had authority to accept service and invited them to endorse acceptance of service and return it at their earliest convenience. It appears that a further letter was sent on 24th October which is not in evidence but nothing could turn on it.

26. The new solicitors replied by letter dated 30th October, 2019:-

> *"**Re: High Court Record No. 2018/3713P***

Our client: Ken Fennell (as receiver) and Promontoria (Arrow) Limited

Your client: Rosemary Crowley

Dear Sirs,

We refer to the above matter and to your letters of the 22nd and 24th October.

We would respectfully suggest that you complete a search against the defendant named in your proceedings issued under record 2018 / 3713 P. You have identified an incorrect defendant, where Kapstone is not 'In Receivership'. This office does not act for Kapstone.

We will take instructions from our client and revert to you shortly, but it would appear obvious that the defendant as named in your proceedings is incorrect.

We await hearing from you."

27. There, it appears, the matter was allowed to rest until 20th July, 2020 when Mr. Fennell's and Promontoria's solicitors wrote to the purchaser's solicitors to say that the receiver was engaged in the sale of the properties and calling on the purchaser to have the *lis pendens* removed, failing which proceedings would be brought to have it vacated.

28. On 26th August, 2020 the purchaser's solicitors replied. They asserted that the receiver's solicitors had indicated that they had authority to accept service of the summons; that the original summons had been sent by certified post; and that receipt had been acknowledged. They charged the receiver's solicitors that they had wrongfully retained the original summons since October, 2019, which, it was said, had prevented the purchaser from progressing the litigation by seeking judgment in default of appearance. They asserted that they had made repeated and persistent requests for the return of the summons which the receiver's solicitors had failed, refused and otherwise neglected to do. They said that they had instructed counsel to draft an application to deem service sufficient, which application

would be made *ex parte*. They threatened fresh High Court proceedings against the receiver's solicitors, in which they would name each and every one of its partners.

29. In the meantime, it appears, a form of statement of claim had been engrossed on 27th July, 2020 on which the purchaser's solicitors had endorsed a certificate of no appearance. What, if anything, was done with this document is not apparent.

30. The original summons was returned to the plaintiff's solicitors under cover of a letter of 1st September, 2020. The receiver's solicitors apologised for the delay in doing so but noted that no request had been made until quite recently. They challenged the purchaser's solicitors to provide any correspondence in which they indicated that they acted for Kapstone or that they would be entering an appearance for Kapstone. They said that they were instructed by Mr. Fennell to enter an appearance on his behalf but could not do so as he had not been named as a defendant.

31. By letter dated 29th October, 2020 the purchaser's solicitors wrote that it had come to the purchaser's attention that a *"sold"* sign had been erected on the properties. They asked for confirmation whether the receiver had entered a contract or contracts for sale of the properties; if so, to identify the buyer or buyers and the proposed closing date; and threatened an immediate injunction application in the absence of a reply by close of business on the following day.

32. By letter dated 1st November, 2020 the receiver's solicitors confirmed that the sale of both properties had been completed and that any proceedings or injunction application would be strenuously opposed.

The application to the High Court

33. On 3rd November, 2020 application was made by the plaintiff to the High Court (Reynolds J.) for short service of a notice of motion for an order joining Mr. Fennell and to restrain Kapstone and Mr. Fennell from agreeing to sell or completing and transfer of the properties. An order was made for short service and a motion issued on 4th November, 2020 returnable for 16th November, 2020. The notice of motion was addressed to Kapstone as *"the defendant in the proceedings herein"* and to Mr. Fennell as *"the proposed second defendant in the proceedings herein."*

34. The plaintiff's application to restrain the sale of the properties did not engage with the fact, or the assertion, in the vendor's solicitors' letter of 1st November, 2020, that the properties had already been sold to someone else and the sales had been completed. Nor did it engage with the difficulty, previously identified in the plaintiff's solicitors' letter of 26th August, 2020, that the summons had not been served.

35. Following an exchange of affidavits, the plaintiff's motion came before the High Court (Keane J.) on 3rd February, 2021. There was then no evidence that the summons had been served on Kapstone and the motion was put back to allow the plaintiff to address that issue.

36. On the following day, 4th February, 2021 the Plaintiff applied for, and was granted, an order permitting short service of a notice of motion seeking to deem good the service of the summons. On 11th February, 2021, a notice of motion was issued by the plaintiff returnable for 19th February, 2021, again addressed to Kapstone and Mr. Fennell. The motion sought, in the alternative and as necessary, an order renewing the plenary summons. As appears from the judgment of the High Court, when the second motion came before the court on 19th February, 2021 it had been served on Mr. Fennell but not on Kapstone and, on the application of the plaintiff, the two motions were further adjourned to 4th March, 2021.

37. When the two motions came back into the list before Keane J. on 4th March, 2021 there was no appearance by or on behalf of Kapstone. The judge dealt first with the application to deem good the service said to have been effected of the plenary summons. It appears then to have been acknowledged that that was the correct approach for if the summons had not been served it was no longer in force. Certainly no complaint is made on the appeal as to the order in which the judge dealt with the motions.

38. Keane J. summarised and set out what he said were the material parts of the correspondence after October, 2019 before going on to examine the judgment of the High Court (Costello P.) in *Fox v. Taher* (Unreported, High Court, 24th January, 1996) which was the foundation of the plaintiff's argument. He identified one similarity between *Fox* and the instant case – which was that the summons had been sent to a firm of solicitors which refused to accept service – and six differences:-

(a) Kapstone, by contrast with Mr. Taher was not an international businessman who was coming and going but an Irish registered company simply and readily amenable to service under s. 51 of the Companies Act, 2018;

(b) There was no large web of companies such as might have rendered service complex;

(c) The solicitors to whom the summons was delivered in this case had never had instructions to accept service for Kapstone;

(d) There was no evidence of any contact between the receiver's solicitors and Kapstone;

(e) There was no evidence that there had ever been a solicitor-client relationship between the receiver's solicitors and Kapstone;

(f) There was nothing to suggest that the delivery of the summons to the receiver's solicitors would have achieved the purpose and object of service,

which was to bring to the attention of Kapstone the matters sought to be litigated against it. The judge referred to *Lancefort Limited v. An Bord Pleanála* [1997] IEHC 83.

39. As he went through the correspondence, Keane J. said that he could not understand how the receiver's solicitors' letter of 21st October, 2019 – which stated that they had authority to accept service on behalf of the *"above-named clients"* Promontoria (Arrow) Limited and Mr. Fennell – could have justified a belief that they had authority to accept service on behalf of Kapstone; and that he could not see how the statement in the receiver's solicitors letter of 30th October, 2019 that they would take instructions from their client and revert might have qualified the unambiguous statement that the office did not act for Kapstone. And, he went on to say, even if the letter of 30th October, 2019 could be read in the manner contended for by the plaintiff, there was no suggestion that the receiver's solicitors ever had received instructions from Kapstone.

40. The High Court judge concluded that as the plenary summons had not been served and was no longer in force, the appropriate order was to strike out the motion to deem service good and the action. That being so, the judge concluded, the plaintiff's motion to join Mr. Fennell and to injunct him and Kapstone from completing the sale could not succeed and must be struck out also.

41. It will be recalled that one of the reliefs sought by the plaintiff's second motion was an order renewing the summons. As the judgment of the High Court shows, that part of the application was not pressed.

The arguments on the appeal

42. On 13th August, 2021 the plaintiff filed a notice of appeal against the judgment and order of the High Court, including against the refusal to order the renewal of the summons, which the judge had not been asked to do. Peculiarly, the notice of appeal was addressed only to Kapstone and was served only on Kapstone. Peculiarly, the precise form of orders that would be sought from the Court of Appeal if the appeal were to be successful was *"Vary/substitute: X"*. That said, as I will come to, one of the grounds of appeal was that the judge erred in making an award of costs in favour of Mr. Fennell and it was later confirmed in correspondence with Mr. Fennell's solicitors that the appeal included the award of costs. At the directions hearing on 26th November, 2021 this court (Costello J.) made an order joining Mr. Fennell as a respondent to the appeal.

43. Broadly, the grounds of appeal were that the High Court judge:-

(i) Erred in law or in fact in distinguishing *Fox v. Taher*;

(ii) Erred in law and in fact in concluding that Mr. Fennell was not the agent of Kapstone *"for the specific purpose of the sale of both properties, and all title or litigation issues arising"*;

(iii) Erred in law or fact in disregarding the explicit authorisation of Mr. Fennell as agent of Kapstone;

(iv) Erred in law or fact in *"ignoring the authority to accept service of proceedings expressly professed by Ken Fennell's solicitors on 21 October, 2019 and service accordingly on 22nd October, 2019"*;

(v) Erred in law or fact in ignoring the fact that Mr. Fennell's solicitors wrongly retained and withheld the return of the summons.

44. The arguments made on the appeal were broadly similar to those shown by the judgment of Keane J. to have been made in the High Court.

45. Counsel for the appellant laid heavy emphasis on the description of the vendor in the contracts as *"Kapstone Limited (In receivership) acting by and at the direction of Ken Fennell"* as showing that the defendant to the proceedings had been correctly named as Kapstone but this, it seems to me, misses the point. What, if any, involvement Kapstone might have been thought to have in contracts signed by a receiver which were to have been completed by an assurance by the mortgagee, may be a matter for debate but the issue on the application to deem service of the summons good was not whether the plaintiff had named the correct defendant but whether the solicitors acting in connection with the sales were acting for the company, as opposed to the receiver and the mortgagee.

46. For present purposes, it seems to me that all that had gone before the renewal of the summons on 14th October, 2019 is not really relevant. If the preponderance of correspondence between 2017 and 2019 – on both sides – identified the vendor's solicitors' client as Mr. Fennell, the issue from October, 2019 onwards was whether the vendor's new solicitors had authority to accept service of proceedings on behalf of Kapstone.

47. Whether, having regard to the terms of the contracts, it might reasonably have been expected that the solicitors acting in the sale might have been thought to be acting at the same time for the company, the demonstrable fact of the matter is that the plaintiff's solicitors did not assume that they were, but asked whether the new solicitors, who had identified themselves as having been instructed in connection with the conveyancing transactions, had authority to accept service of proceedings. That the plaintiff's solicitors might have thought or assumed that the vendor's solicitors were instructed by the company is not altogether easy to reconcile with the plaintiff's solicitors' letter 18th October, 2019 – in which it was said that if they did not, arrangements would be made to serve *"him"* directly. Like the High Court judge, I find it impossible to understand how the Mr. Fennell's solicitors' letter of 21st October, 2019 – which stated that they had authority to accept service on behalf of Mr.

Fennell and Promontoria (Arrow) Limited – might have given rise to a belief that they had authority to accept service on behalf of Kapstone. But even if it did, any such belief cannot have survived the unequivocal statement in their letter of 30th October, 2019 that *"This office does not act on behalf of Kapstone Limited"*.

48. I am satisfied that the judge correctly distinguished *Fox v. Taher*. The points of difference that Kapstone was simply and readily amenable to service by leaving the summons at its registered office or sending it by post are not insignificant but the most important difference is that the solicitors to whom the summons was sent never had instructions to act on behalf of Kapstone. The purpose and object of achieving proper service – as was identified by the judge applying *Lancefort Limited v. An Bord Pleanála* [1997] IEHC 83 – to ensure that the party concerned has been adequately informed of the matters sought to be litigated against it, could not possibly have been achieved by sending the summons to the receiver's solicitors. Apart from the fact that there was no evidence that the solicitors had ever been in contact with the company, it seems to me that it would have been unlikely, to the point of impossibility, that the solicitors could have acted at the same time for the mortgagor and the receiver who had been appointed to realise the security.

49. It is common case that in the circumstances which have been set out, the original plenary summons was sent to the receiver's solicitors on 22nd October, 2019 and was not returned until 3rd September, 2020.

50. The written submissions filed on behalf of the appellant are, I think it is fair to say, rather loaded. According to the introduction, the appellant seeks to set aside the refusal of the High Court to deem the retention of the summons for fully ten months and more good service. I do not believe that that accurately summarised the case made on behalf of the plaintiff in the High Court. The foundation of the argument in the High Court was not that

the vendor's new solicitors had deliberately kept the original summons but that they had indicated that they had authority to accept service of the summons on behalf of the company.

51. That said, part of the case made in the High Court and on the appeal was that Mr. Fennell's solicitors had failed to enter an appearance and, despite repeated demands, had failed to return the original summons which, it was said stymied the plaintiff from progressing the action. At first glance, it appeared that there might be a conflict of evidence between the parties respective solicitors. Mr. Swaine, solicitor for the plaintiff, deposed, generally, that despite his repeated requests, the receiver's solicitors refused to return the summons but what he said, specifically, was that he had asked for the return of the original summons by e-mail of 14th August, 2020 and – following a number of telephone calls in the meantime – by letter of 25th August, 2020, and that it was returned under cover of a letter of 1st September, 2020. This, it seems to me, tallies with the evidence of Mr. Murphy, solicitor for the receiver, that there was no request for the return of the summons until August, 2020 – by when, of course, it had long since expired. It is worth emphasising that between 30th October, 2019 when the receiver's solicitors wrote to the plaintiff's solicitors that they would seek their clients' instructions and 14th January, 2020 when the renewed summons expired, no request was made for the return of the summons.

52. In their letter of 1st September, 2020 returning the original summons, the receiver's solicitors apologised for the delay in doing so, explaining that the solicitor dealing with the file had been working remotely for a number of weeks. On the hearing of the appeal, it was common case that the summons ought to have been returned in October, 2019 when it became apparent to the receiver's solicitors that the only defendant was Kapstone. However, it was accepted that as far as the return of the summons was concerned, the primary duty was on the plaintiff's solicitors to have asked for it, rather than on the receiver's solicitors to have seen that hat they had been sent was the original and to have returned it. Mr. Murphy,

solicitor, deposed that in his experience it was highly unusual that an original summons might be sent without clear evidence of the recipient firm's authority to accept service and an undertaking to accept service, and he was not contradicted. In any event, even if there was fault on both sides, it is difficult to see how the consequences of any confusion on either or both sides might have properly been visited on Kapstone by deeming good the service of proceedings of which there was no evidence that Kapstone knew anything.

53. One of the grounds of appeal, as I have said, was that the judge erred in holding that Mr. Fennell was not Kapstone's agent *"for the specific purpose of the sale of both properties, and all title and litigation issues arising"*. In effect, the argument was that the description of the vendor in the contracts and the stipulation in the special conditions that the contract was *"executed by the vendor acting by the receivers (sic.) as the duly appointed agent of the borrower"* constituted Mr. Fennell the agent of Kapstone for the purposes of defending, and, I suppose, for that purpose, accepting service of proceedings. I am satisfied that that is misconceived. If, for the sake of argument, Mr. Fennell might have agreed to act as agent for Kapstone in the defence of any proceedings that might arise out of the contracts, he could not possibly have thereby appointed any solicitors he might instruct as solicitors for Kapstone or forced either the solicitor or Kapstone into a relationship of solicitor and client, which, for good measure, would almost certainly have given rise to a conflict of interest.

54. A good deal of the argument made on behalf of the plaintiff and, indeed a good deal of the evidence tendered on her behalf in the High Court was directed to what the plaintiff asserted were the rights on her side and the wrongs on the vendor's side of the circumstances in which the contracts had not been completed. It was contended that the High Court judge had failed to take sufficient account or to make a sufficient connection between the receiver's solicitors and the assets. I disagree. Whatever about the receiver, the mortgagee, the mortgagor and the purchaser, the solicitors had no connection with the properties, only with

their clients. Unquestionably the protagonists in the dispute were the plaintiff on the one side, and the receiver and/or the mortgagee on the other. The receiver having been appointed over the properties and having taken possession of the properties, it might very well have been – as was said – that the company would have nothing to contribute to the resolution of the dispute. But if that were so, it is difficult to understand why Kapstone was named as a defendant, *a fortiori* as the only defendant.

55. I mention for completeness that there was some discussion in argument as to why, when it was realised that the summons had not been served, the plaintiff did not simply issue new proceedings and as to whether the fact that the plaintiff's solicitors did not have the original summons in their possession was any impediment to the service of the summons – or a copy of the summons – on Kapstone by ordinary pre-paid post. Both of those issues, however, are by the way. The fact that the plaintiff might have elected to issue new proceedings or – with or without a special order in the absence of the original – to have served the summons is not relevant to the validity and effectiveness of the purported service relied upon.

Summary

56. I have set out in some detail the evidence tendered on behalf of the appellant in support of the motions in the High Court. This was necessary to an understanding of the arguments made on behalf of the appellant which, for the reasons I have outlined, must be rejected.

57. The case, in the beginning and in the end, is very simple. The general rule is that proceedings must be served on the opposing party in accordance with the Rules of the Superior Courts, In certain circumstances, service otherwise than strictly in accordance with

the rules may be deemed good. The summons in this case was sent to a firm of solicitors who did not act for the defendant; who the plaintiff's solicitors had no good reason to believe acted for the defendant; and who plainly and unequivocally said that they did not act for the defendant. The judgment of the High Court was properly reasoned, founded on principle, and in my firm view, unquestionably correct.

Costs

58. Besides the grounds on which the judge was alleged to have erred in dealing with the substance of the motions, the appellant contended that he erred in fact or in law in awarding Mr. Fennell his costs of the motion to join him as a defendant in circumstances in which he had not entered an appearance and so was not a party to the proceedings.

59. In his judgment on the substantive motions, the judge expressed the provisional view that Mr. Fennell was entitled to the costs of the motion to join him and to restrain the sale and allowed the parties the opportunity to make short written submissions on that issue.

60. In an admirably concise written submission, the plaintiff pointed to O. 99 rr. 1 and 3 of the Rules of the Superior Courts, a short passage from *Delaney and McGrath on Civil Procedure* (4th Edition), and to two cases. The general rule, it is said, is that an award of costs will not be made in favour of a non-party. So, for example, in *Goode v. Philips (Electrical) Ireland Ltd.* [2002] 2 IR. 212 in which, it is said, the Supreme Court reversed an award of costs in favour of a non-party which had opposed an application to restore a company to the register. It was acknowledged that in certain circumstances such an award may be made. So, for example in *Tuohy v. North Tipperary County Council* [2008] IEHC 410, a proposed third party was allowed its costs of a motion to set aside an expired third party notice.

61. In this case, it was said, the second motion – to deem service good – on which Mr. Fennell had no entitlement to be heard, was dealt with first and any costs which Mr. Fennell incurred were incurred by reason of his own strategic decision to attend at an application which he had no right to participate in.

62. The submission on behalf of the plaintiff in the High Court was focussed on the second motion. The notice of appeal fails to recognise that Mr. Fennell was awarded his costs of the first motion – that is to say the motion to join and enjoin him – only. The High Court effectively acceded to the plaintiff's application that there should be no order as to the costs of the motion to deem service good. The argument below did not address the question of the plaintiff's liability for Mr. Fennell's costs of the first motion. On the appeal, it was tentatively suggested that Mr. Fennell had materialised in the High Court like a Cheshire cat but that suggestion as quickly disappeared when it was pointed out that he had been served with the motion.

63. In his separate written judgment on the costs issue, the High Court judge referred to O. 99, rr. 1, 2 and 3 of the Rules of the Superior Courts, ss. 168 and 169 of the Legal Services Regulation Act, 2015, and the judgment of this court in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183. The judge rather doubted the existence of a general rule that an award of costs will not be made in favour of a non-party; carefully explained that the Supreme Court in *Goode v. Philips (Electrical) Ireland Ltd.* had in fact upheld so much of the order of the High Court as had awarded the non-party its costs in relation to the restoration; and distinguished *Tuohy v. North Tipperary County Council*. He found that each of the authorities to which reference had been made confirmed the jurisdiction of the High Court to make an award of costs in appropriate circumstances. The judge awarded Mr. Fennell his costs of the first motion, only.

64. On the appeal, counsel relied on the written submissions filed in the High Court but did not identify any error in the judgment. I find no such error.

Conclusion

65. For these reasons, I find that the appeal fails on all grounds.

66. Provisionally, it seems to me that Mr. Fennell has been entirely successful on the appeal and is entitled to his costs of the appeal but I would give the appellant ten days from the electronic delivery of this judgment within which to notify Mr. Fennell's solicitors and the Court of Appeal office of any desire to argue otherwise, in which case a brief hearing will be arranged.

67. I am authorised by Haughton and Binchy JJ. to say that they agree with this judgment and the orders proposed.