

**THE HIGH COURT
CHANCERY**

[2021] IEHC 557
[2018 No. 3713P]

BETWEEN

ROSEMARY CROWLEY

PLAINTIFF

AND

KAPSTONE LIMITED

DEFENDANT

RULING of Mr. Justice David Keane delivered on the 30th July 2021

Introduction

1. On 2 June 2021, I gave judgment refusing the application of the plaintiff, Rosemary Crowley, for an order deeming service of the plenary summons in these proceedings on the defendant Kapstone Limited ('Kapstone') good or one granting leave to renew that summons.
2. This ruling should be read in conjunction with that judgment, which can be found under the neutral citation [2021] IEHC 384.
3. In accordance with the joint statement made by the Chief Justice and the Presidents of each court jurisdiction on 24 March 2020 on the delivery of judgments during the Covid-19 pandemic, I invited the parties to seek agreement on any outstanding issues, including the costs of the application, failing which they were to electronically file concise written submissions, which would then be ruled upon remotely unless a further oral hearing was required in the interests of justice.
4. Ms Crowley filed submissions as an attachment to an email, dated 16 June 2021, from her solicitors to the registrar. I did not receive any submissions on behalf of Mr Fennell.

The procedural posture of the costs issue

5. The proceedings sought specific performance of agreements for the sale to Ms Crowley of two adjacent properties owned by Kapstone but mortgaged to Promontoria (Arrow) Limited ('Promontoria'), which had appointed Ken Fennell receiver of both.
6. A problem with service of the proceedings only became apparent after Ms Crowley brought a motion to join Mr Fennell as a defendant and to injunct both Kapstone and Mr Fennell from taking any step to sell either property to anyone else, pending trial.
7. At the conclusion of my judgment refusing the application to deem service of the plenary summons good or renew the summons, I identified the appropriate order as one striking out both that application and, as a logical consequence, the proceedings in which it was brought. I went on to indicate that, as a further logical consequence, Ms Crowley's application to join Mr Fennell as a defendant and to injunct Kapstone and Mr Fennell from selling the properties pending trial must also be refused. Finally, I expressed the provisional view that Mr Fennell is entitled to his costs of the latter application against Ms Crowley.

The costs of the application

i. applicable rules and principles

8. Order 99, rule 2(1) of the Rules of the Superior Courts ('RSC'), as inserted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019), confirms that, subject to the provisions of statute, the costs of and incidental to every proceeding in the Superior Courts shall be at the discretion of the court concerned.

9. Order 99, rule 2(3) provides in material part that, upon determining any interlocutory application, the High Court shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the application.

10. Order 99, rule 3(1) of the RSC provides in material part:

'The High Court, in considering the awarding of the costs of any action or step in any proceedings ... in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the [Legal Services Regulation Act 2015], where applicable.'

11. Section 168 of the Legal Services Regulation Act 2015 ('the 2015 Act') states in material part:

'(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings ...

(2) Without prejudice to *subsection* (1), the order may include an order that a party shall pay –

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before judgment.'

12. Section 169(1) of the 2015 Act states:

'A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
- (c) the manner in which the parties conducted all or any part of their cases,
- (d) whether a successful party exaggerated his or her claim,
- (e) whether a party made a payment into court and the date of that payment,
- (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
- (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.'

13. In *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183, (Unreported, Court of Appeal, 8 July 2020) ('*Chubb*') (at para. 19), Murray J distilled from those provisions the following principles on the costs of concluded proceedings:

- '(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O. 99, r.2(1)).
- (b) In considering the awarding of costs of any action, the Court should '*have regard to*' the provisions of s.169(1) (O. 99, r.3(1)).
- (c) In a case where the party seeking costs has been '*entirely successful in those proceedings*', the party so succeeding '*is entitled*' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).
- (d) In determining whether to '*order otherwise*' the court should have regard to the '*nature and circumstances of the case*' and '*the conduct of the proceedings by the parties*' (s.169(1)).
- (e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).
- (f) The Court, in the exercise of its discretion may also make an order that where a party is '*partially successful*' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).
- (g) Even where a party has not been '*entirely successful*' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O. 99, r.3(1)).
- (h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).'

ii. *submissions on costs*

14. Ms Crowley makes the audacious argument that, as her application to join Mr Fennell as a defendant to the proceedings (and for an injunction against him) failed because she had failed to properly serve the underlying proceedings on the original defendant Kapstone, Mr Fennell cannot have his costs of that application because of what she describes as 'the general rule' that an award of costs will not be made in favour of a non-party.
15. While I do not doubt that, as is stated in Biehler, McGrath and McGrath, *Delany and McGrath on civil Procedure* (4th edn.) (Round Hall, Dublin, 2018) (at para. 24-228), in the normal course of events an award of costs will not be made in favour of a non-party, I do not think that amounts to a general rule.
16. The authority those authors cite for the more limited proposition they advance is the decision of the Supreme court in *Goode v Phillips Electrical (Ireland) Ltd* [2002] 2 IR 613. That case concerned an appeal against an order for costs in a company restoration petition. The order awarded a non-party both its costs of the petition and its costs to date of a separate legal action that the company had taken against it, in which it had recently obtained a strike out order based on the company's dissolution, which order was subject to a stay in the event of the company's prompt restoration to the register. The Supreme Court (*per* Murphy J; Hardiman and Fennelly JJ concurring) found that it was within the jurisdiction of the court hearing the restoration petition to treat the non-party as a notice party *and to award the non-party its costs of the petition* but it was not open to that court to award the non-party its costs of the separate legal action (to which it was actually a party), since that was a jurisdiction that could only be exercised in the context of that action and not as a sanction in the restoration petition.
17. Thus, if the case is authority for any general rule, it is that the jurisdiction to award costs in a company restoration petition does not extend to an order, as a sanction, that the petitioning company pay the costs to date of another party in a separate action. Nothing of that sort arises here.
18. As Ms Crowley frankly acknowledges in the costs submission electronically filed on her behalf, *Tuohy v North Tipperary County Council* [2008] IEHC 63, (Unreported, High Court (Peart J), 10 March 2008) provides a much closer analogy with the present case. However, it is – in my judgment – a no less unhelpful one. In *Tuohy*, Peart J refused an application brought by a proposed third party to set aside a third party notice that had never been properly served upon her (so that she remained strictly a non-party), but awarded that proposed third party the costs of that unsuccessful application against the defendant on the basis that the application had served to concentrate the defendant's mind on the procedural difficulties that it needed to address.
19. In short, each of the two authorities that Ms Crowley cites confirms the existence of a jurisdiction to award costs in favour of a non-party in appropriate circumstances.
20. Moreover, Mr Fennell was plainly a notice-party to Ms Crowley's application to join him as a co-defendant in her proceedings against Kapstone and for an interlocutory injunction

against him in that capacity. That was an application he was entitled to defend. And, as events turned out, it was an application that could not succeed.

21. As there is nothing to suggest that it is not possible to justly adjudicate upon liability for the costs of that application; as Ms Crowley was entirely unsuccessful in pursuing it; as Mr Fennell was entirely successful in resisting it; and as there is nothing in the particular nature and circumstances of the case, or the conduct of the proceedings by the parties, that would warrant any other order, Mr Fennell is entitled to his costs of that application against Ms Crowley.
22. For the avoidance of doubt, Mr Fennell did not seek to be heard on Ms Crowley's application for either an order deeming service of the plenary summons upon Kapstone good or one granting leave to renew that summons, so he cannot have – indeed, I believe he does not claim – an entitlement to an award of costs against Ms Crowley on that application.

A stay pending appeal

23. Ms Crowley seeks a stay pending appeal on the order that I propose dismissing her proceedings and each of the two interlocutory applications that she has brought.
24. The test on an application for a stay is that confirmed by the Supreme Court in *C.C. v. Minister for Justice* [2016] 2 IR 680, applying the principles earlier identified by that court in *Okunade v Minister for Justice* [2012] 3 IR 152. In simple terms, I must first determine whether Ms Crowley has established an arguable appeal and, if so, must then consider whether the least risk of injustice lies in granting, or refusing, a stay.
25. Unfortunately, Ms Crowley does not identify the ground or grounds of appeal that she wishes to raise, preventing any assessment of the arguability of any such ground. Instead, the submission filed on her behalf merely references the existence of two contracts of sale, dated 10 July 2017, between Mr Fennell in his capacity as receiver of Kapstone, as vendor, and Ms Crowley, as purchaser, before going on to address the balance of justice.
26. In that context, it is superfluous to point out that the nub of the underlying dispute between the parties, as disclosed in the affidavits exchanged on the two motions before me, is not whether those contracts for sale ever existed but rather whether they were lawfully rescinded by the vendor for the purchaser's failure to comply with the vendor's completion notice in each case.
27. The more fundamental difficulty is that I have not purported to determine the merits of that underlying dispute. Rather, I have concluded that Ms Crowley has failed to establish that the proceedings in which she seeks to raise it were properly served within time. Accordingly, in order to meet the relevant limb of the test for the grant or refusal of a stay, Ms Crowley needs to establish that she has an arguable appeal against that finding, rather than that she has an arguable case on the underlying dispute.

28. Because of her failure to do so, as Clarke J pointed out in *Okunade*, her application for a stay must be refused on that basis alone.
29. Even if that were not so, I do not think I could be persuaded that the balance of justice lies in favour of the grant of stay. I accept that, as a result of the dismissal of Ms Crowley's proceedings, she will lose the benefit of the *lis pendens* that she has registered against each of the properties but, as the uncontroverted averments of the receiver suggest and as Ms Crowley appears to acknowledge in the costs submission electronically filed on her behalf, the receiver has already sold both properties. Further, in the course of argument before me, counsel for Ms Crowley acknowledged that she is still within time to launch fresh proceedings. Finally, it appears to be common case that, when Meenan J granted leave to renew the plenary summons on 14 October 2019, the special circumstance that Ms Crowley relied upon to obtain that order was her intention to apply to remit the proceedings to the Circuit Court forthwith. Against that background, I can see little justice in the grant of a stay on a decision made over a year and a half later in this court to dismiss those proceedings for failure to effect proper service of that summons.

Conclusion

30. In summary, I will make the following orders:

- (1) An order refusing Ms Crowley's application for either an order declaring the service of the plenary summons effected on Kapstone sufficient or an order granting leave to renew that summons.
- (2) An order refusing Ms Crowley's application for an order joining Ken Fennell as a defendant in the proceedings.
- (3) An order refusing Ms Crowley's application for an interlocutory injunction restraining Kapstone or Mr Fennell, or both, from selling either or both of the properties to any person other than Ms Crowley.
- (4) An order directing Ms Crowley to pay Mr Fennell his reasonable costs of the applications described at paragraphs (2) and (3), to include the costs of submissions (if any), which costs are to be adjudicated upon in default of agreement.
- (5) An order dismissing the proceedings.
- (6) An order refusing a stay on the dismissal of the proceedings pending appeal.

Order accordingly.