

APPROVED

[2023] IEHC 247



THE HIGH COURT
CIRCUIT APPEAL

2020 No. 35 CA

BETWEEN

KENNETH PRICE

PLAINTIFF

AND

ANN DOUGLAS

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 May 2023

INTRODUCTION

1. This judgment is delivered in respect of an *ex parte* application to deem the service of proceedings good, or, in the alternative, to permit substituted service. The application arises in circumstances where the original defendant to the proceedings is deceased (“*the deceased defendant*”) and, by order of the High Court dated 24 March 2022, her personal representative has been substituted as defendant (“*the substituted defendant*”).
2. The plaintiff has sought to effect service on a solicitor who he contends has been retained by, and is in communication with, the substituted defendant. That

NO REDACTION REQUIRED

solicitor is not, however, on record in the proceedings. The deceased defendant had been represented by a different firm of solicitors. It seems that that firm were allowed to come off record informally, without their having provided details of an address at which further documents in the proceedings might be served.

3. At all events, the current position is that there is no solicitor on record for the substituted defendant. It appears, however, from the various affidavits filed on behalf of the plaintiff by his solicitor that the substituted defendant had engaged the services of a solicitor in respect of these proceedings. In particular, the solicitor was involved in settlement discussions during the period January to March 2022. The solicitor has since indicated, however, in correspondence that her firm is not involved in these appeal proceedings, asserting that “*your appeal has nothing to do with our office and/or our client*”. The solicitor has also suggested that the appeal has no merit. It seems that the solicitor has, from time to time, instructed counsel to maintain a watching brief on applications in these proceedings. The same solicitor also acted for the substituted defendant in taking out the letters of administration in respect of the deceased defendant’s estate.
4. In the absence of a solicitor having either entered an appearance on behalf of the substituted defendant or given an undertaking to do so, the general position would be that the proceedings should be served upon the substituted defendant personally. The plaintiff’s solicitor has explained on affidavit, however, that it has not been possible to effect personal service in the following circumstances: inquiries have indicated that the substituted defendant is not residing at the address stated on the grant of letters of administration; the plaintiff does not have a date of birth for the substituted defendant; and the substituted defendant does

not appear to have a presence on social media such as Facebook or LinkedIn. The plaintiff's solicitor considers that it is reasonable that the service which has already been effected on the solicitor, who has previously been engaged in the proceedings on behalf of the substituted defendant, should be deemed good.

DISCUSSION AND DECISION

5. The judgment of the High Court in *Danske Bank v. Meagher* [2013] IEHC 496 is authority for the proposition that an order allowing for substituted service on a solicitor may be justified, notwithstanding that that solicitor is not formally on record in the proceedings, where the court is satisfied that the party to be served is a client of that solicitor and that the solicitor has a means of contacting their client and thus ensuring that the documents are brought to his attention.
6. (The Supreme Court did not need to address this issue in its judgment in the same case: *Danske Bank v. Meagher* [2014] IESC 38).
7. It is important to emphasise the distinction between the obligation of a solicitor, as an officer of the court, to furnish proceedings to their client when ordered to do so, and the separate obligation to act for that client in the proceedings. The fact that substituted service may have been effected upon a solicitor does not make that solicitor the solicitor on record in the proceedings. The obligation extends merely to making a reasonable effort to furnish the papers to their client.
8. It is apparent from the affidavits in the present case that a full set of papers has previously been served on the substituted defendant's solicitor and that she has acknowledged receipt of same, albeit saying that she is not involved in the proceedings. It appears that the solicitor must have been in communication with the substituted defendant relatively recently. It is also apparent that the plaintiff

faces practical difficulties in effecting personal service on the substituted defendant.

9. Accordingly, I propose to make an order deeming the service of the proceedings previously effected on Lisa McKenna, Solicitor, as good service on the substituted defendant, Ann Douglas. This order is subject to the following proviso. Ms. McKenna is at liberty to apply to have this order set aside if she so wishes. Ms. McKenna may, for example, wish to say that she is no longer in contact with the substituted defendant. Alternatively, Ms. McKenna may wish to raise some principled objection to the notion of proceedings being served on a solicitor who is not on record in the matter. If Ms. McKenna wishes to make any such application, she has liberty to issue a notice of motion returnable before me on Monday 12 June 2023 at 10:30 am.
10. If no such motion is issued, the court will assume that the substituted defendant has received a full set of papers in the proceedings and the appeal will be listed on 12 June 2021 for the purpose of fixing a hearing date. Subject always to any application the parties may wish to make, the court's intention is that the appeal will be heard before the end of the legal term on 31 July 2023.

CONCLUSION AND PROPOSED ORDER

11. An order is made deeming the service of the within proceedings which has previously been effected on Lisa McKenna, Solicitor, to be good service on the substituted defendant, Ann Douglas. This order is subject to the following proviso. Ms. McKenna is at liberty to apply to have this order set aside if she so wishes. If Ms. McKenna wishes to make any such application, she has liberty

to issue a notice of motion returnable before me on Monday 12 June 2023 at 10:30 am.

12. This order, together with the *ex parte* docket, grounding affidavit of 3 May 2023 and a copy of this judgment, should be served either by hand delivery or registered post to Ms. McKenna's business address at 115 Baggot Street Lower, Dublin 2.
13. The costs of the *ex parte* application are reserved.
14. The proceedings will be listed before me, physically, on Monday 12 June 2023 at 10:30 am. On that date, I will hear any motion brought by Ms. McKenna. If no motion has been brought, I will fix a date for the hearing of the appeal.

Approved
Gemma S. Mans