

THE HIGH COURT

Record Number: 2004 17054P

BETWEEN

JOANNE TUOHY

PLAINTIFF

AND

NORTH TIPPERARY COUNTY COUNCIL

DEFENDANT

AND

ELIZABETH CLEARY

PROPOSED THIRD PARTY

Judgment of Mr Justice Michael Peart delivered on the 25th day of November 2008

1. This judgment relates to the question of costs arising following the determination of a motion issued by the proposed third party ("the third party") herein as appears from my judgment dated 10th March 2008.
2. This matter originally came before the Court by way of a Notice of Motion issued by the third party seeking to set aside the order of Mr Justice Charleton on the 16th July 2007.
3. However, since the defendant agreed that a second order granting leave to issue and serve a third party notice should be vacated on the basis that in the circumstances of this case the proposed third party ought to have been put on notice of that application, that order was made by consent.
4. It has been accepted by both the defendant and the third party that the more appropriate step to have been taken was for the defendant to seek an extension of time for issuing and serving a Third Party Notice on foot of the said order of Charleton J. dated 16th July 2007.
5. It followed that where the court decided that no order should be made on the third party's motion to set aside that order, the Court was required to consider an application by the defendant to extend time for issuing and serving a Third Party Notice. That application was granted for reasons appearing in my judgment delivered on the 10th March 2008. Subsequently the Court heard submissions in relation to costs.
6. To the extent that the third party's application to set aside the third party notice was unsuccessful, the normal rule is that the costs of that unsuccessful application should follow the event, and that the defendant should be entitled to the costs of that motion, unless there is some special reason to be stated, as to why that should not happen.
7. Having considered the matter carefully, I am satisfied that the normal rule should not apply.
8. The third party, having been served with an unissued Third Party Notice would have been entitled to sit back and wait for the defendant to serve a Notice of Motion seeking an extension of time to issue and serve the Third Party Notice pursuant to the order of Charleton J. dated 16th July 2007. However, instead, it chose to move to set aside the said order. That move certainly served to concentrate the mind of the defendants on the procedural difficulties which presented themselves, and led to the vacating of the second order, and to the situation whereby an extension of time was sought by the defendant for the issue and service of the third party notice herein on foot of the said order. That application did not result from any Notice of Motion issued by the defendant seeking the extension of time. But the Court proceeded with the third party's motion on the agreed basis that if the Court was satisfied that the order of Charleton J. ought not to be set aside because of the defendant's delay in seeking leave to issue the third party notice, the Court would, as happened, have to consider the merits of an application by the defendant for an extension of time for issuing the Third Party Notice under that order.
9. In all the circumstances of this case thus far, I see no reason why the third party should be penalised in costs in respect of the motion which was issued by her to set aside the order of Charleton J., given the delay by the defendant, for whatever reason, first of all in seeking leave to issue the Third Party Notice, and secondly by the failure thereafter to issue same prior to service.
10. In so far as the defendant was required in any event to seek an extension of time for the issue of the Third party Notice, whatever the cause of the failure to, or delay in, doing so, and that much of the factual evidence adduced on the third party's motion would necessarily have to have been adduced by the third party and the defendant if the motion issued had been one by the defendant seeking an extension of time for issue and service of the Third Party Notice, it is reasonable and fair, and therefore just as between these parties to treat the application simply as one by the defendant for an extension of time. The third party would have to be entitled to the costs of such an application one way or the other, and in these circumstances I will in the exercise of the Court's discretion under Order 99 RSC order that the defendant pay the costs of the motion to the third party, such costs to be taxed in default of agreement on the basis of a single motion.