IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G 184 of 2019

MCGRATH TONNER (A FIRM)

Plaintiff

AND

KHATIDJA MCLEAN

Defendant

IN CHAMBERS

CORAM:	**Walters J. (Actg.)**
Appearances:	**Mr. Jonathan Casey of McGrath Tonner for the Plaintiff** **Ms. Khatidja McLean, in person.**
Heard:	**18 January 2022**
Draft Reasons circulated:	**26 January 2022**
Reasons Delivered:	**1 February 2022**

HEADNOTE

Default judgment for unpaid attorney/client legal costs, application to set aside, factors to take into account when exercising discretion, failure to set aside, variation of judgment to provide for taxation of unpaid attorney/client legal costs on indemnity basis pursuant to GCR O62, stay of enforcement pending taxation

REASONS FOR DECISION

1. At the hearing on 18 January 2022, I gave judgment declining to set aside the default judgment against the Defendant and indicating that in the exercise of my discretion pursuant to GCR O13 r.9, I was going to vary the judgment to provide for indemnity taxation of the Plaintiff's unpaid professional fees which form the basis of the claim against the Defendant. At the request of the parties I set out below my reasons.

2. This matter involves an application by the Defendant to set aside a default judgment entered against her by the Plaintiff firm, her former attorneys, pursuant to Grand Court Rules ("GCR") Order 13 rule 9 in relation to CI$32,348.50 of professional fees charged by them whilst advising the Defendant in relation to her divorce.

3. O.13 r.9 provides that *"[t]he Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."*

4. The judgment was regular although not in the correct form in that it provided for costs to be taxed if not agreed. Pursuant to GCR O13 r.1 (1) where a writ is endorsed with a claim for liquidated damages then upon a failure of the defendant to give notice of intention to defend, the plaintiff may, after the prescribed period, enter judgment in default for the principal sum, interest and fixed costs.

5. Two affidavits have been filed, one sworn by the Defendant on 7 February 2020 and one sworn by Gillian Gordon on 12 October 2021 on behalf of the Plaintiff.

6. This appears to be the first time since the default judgment was entered that the matter has come before the court on an *inter partes* basis.

Summary of facts

7. In March 2018 the Defendant instructed the Plaintiff firm, McGrath Tonner in respect of her divorce proceedings and in particular in connection with a proposed application for maintenance pending suit and an order that the Defendant's now ex-husband contribute to her legal fees. Prior to that, the Defendant's application for legal aid had been denied. Although these is some disagreement about whether the Plaintiff's attorney-client agreement was signed by the Defendant, the Plaintiff's position is that it was sent to her 21 March 2018. She was requested to pay a retainer of Cl$3,000, which she paid on 29 March 2018.

8. The Defendant's position is that her divorce was acrimonious, she was desperate to get it concluded and avoid incurring excessive legal fees, having limited resources available. Although the Defendant is a qualified Cayman Islands attorney she apparently did not practice during the course of her marriage and although recently she started her own firm, she is now working as in house counsel for a financial services business in the Cayman Islands.

9. By 27 November 2018 the Defendant states that she started to get frustrated by what she perceived as a lack of responsiveness on the part of Ms Kirsty Leedam, the attorney at the Plaintiff firm with conduct of the case.

10. On 29 November 2018 Ms Leedham wrote to the Defendant enquiring about how the firm's legal costs would be paid by the Defendant.

11. On 6 December 2018 David McGrath, of the Plaintiff firm, wrote to the Defendant advising that his firm would not be able to continue to act, unless an outstanding balance of Cl$2,300 was paid, and advised the Defendant in relation to options for funding her litigation. The same day, the Defendant wrote to Ms Leedham and Mr McGrath complaining that various matters that they were supposed to be handling were not being progressed and proposing that, in the absence of progress by them, she would draft custody and financial agreements for their review.

12. On 7 December 2018 the Defendant responded to email of 6 December 2018 from Mr McGrath, advising that she can could pay Cl$5,000 toward she legal fees but could not afford to pay any more. The Defendant sent through the documents that she had drafted and whilst complaining about the service that she was receiving from the Plaintiff and indicated that her retired parents would fund her case if costs exceeded CI$10,000.

13. On 13 December 2018 the Defendant sent an email to Ms Leedham indicating that she wished to apply for an order that her ex-husband contribute to her legal costs. The same day Ms Leedham replied informing the Defendant what information she would need in order to make the application.

14. On 4 February 2019 an application was filed at court and was eventually listed for hearing on 17 April 2019.

15. Between 4 February 2019 and 12 April 2019 there were various discussions between the parties (the Defendant and her ex-husband) about borrowing against either a jointly owned piece land or the former matrimonial home in which the Defendants was residing in order to release come capital to help meet costs including both parties' legal fees. The Defendant insisted that the land should be used as security and was not willing to allow the former matrimonial home in which she was residing to be re-mortgaged.

16. In the absence of funding for legal fees, on 12 April 2019 McGrath Tonner indicated that they could no longer act for the Defendant and the Defendant was left to represent herself.

17. The Defendant maintains that she has multiple complaints about the level of service that she received from the Plaintiff including;

17.1 lack of attention to her case by Ms Leedham;

17.2 having to draft key document herself to progress matters;

17.3 having to repeat instructions on multiple occasions;

17.4 having to amend poorly prepared draft documents;

17.5 having to follow up with Ms Leedham in relation to getting the summons listed for hearing;

17.6 being told by the Plaintiff shortly before the hearing of the summons that the application for an order that her former husband pay her legal fees was likely to be unsuccessful leaving the Defendant at risk of an adverse costs order which she as unable to pay as well as being unable to pay her own; and,

17.7 a concern that the Plaintiff firm had disclosed confidential information to her former husband's legal advisers.

18. The Defendant feels that she has been overcharged by the Plaintiff.

19. Between April and 22 October 2019 there was various correspondence between the parties to this action about the fees owed to the Plaintiff and when the Defendant would settle what was owed.

20. On 22 October 2019 the Defendant raised her multiple complaints with Mr McGrath. Mr McGrath invited her to make those complaints to his partner, Mr Ben Tonner QC. During the course of this hearing I asked the Defendant whether she had done so. She indicated that she had not because having aired her concerns with Mr McGrath and received no useful response she did not see any point in taking the complaints to Mr Tonner.

21. On 25 October 2019 a letter before action was sent by the Plaintiff to the Defendant. No response was received. On 1 November 2019 the writ and statement of claim was issued and on 1 November 2019 the Defendant served personally. On 19 November 2019, after the time allowed for indicating an intention to defend the proceedings had expired, the Defendant emailed the Plaintiff advising that she definitely planned to contest that claim but that she had broken her foot and would be unable to respond to the writ until the New Year. The Defendant's position is that she was unable

to drive for some months and filed her summons and affidavit as soon as she was able. Other than to say that she has no real experience of litigation she has been unable to provide any reasonable explanation as to why she did not complete and return to the court the acknowledgment of service form indicating an intention to defend the claim within 14 days of the service of the writ on her. The Defendant was also unable to provide any reasonable explanation why she did not ask for an extension of time to do so.

22. On 22 November 2019 the Plaintiff applied for default judgment. That was entered on 26 November 2019 and served on the Defendant on 10 December 2019.

23. On 7 February 2020 the Defendant filed a summons seeking to set aside the default judgment and filed her affidavit. There was some confusion about whether the Defendant paid the filing fees but at the hearing she produced a copy of the receipt that she had received at the time. The Defendant's affidavit includes in the exhibits a draft defence and counterclaim. The defence repeats many, if not all, of the Defendant's complaints about the level of service that she received from the Plaintiff firm, alleges negligence and seeks the repayment of the legal fees that she had already paid. At the hearing in April 2019, the Defendant was successful in obtaining an order increasing the maintenance that was being paid to her. The defence includes a counterclaim for the amount by which the maintenance increased, multiplied by the number of months by which the Defendant says that the application was delayed by the Plaintiff.

24. Again, there appears to be some confusion as to why the Defendant's summons was not listed for hearing. Indeed, one of the complaints that the Defendant has about the Plaintiff firm is that it failed to ensure that the February 2019 summons was listed promptly, something that she herself failed to do with her own summons to set aside.

25. On 8 September 2021 the Plaintiff filed a notice of intention to proceed. That prompted the Defendant to follow up on 9 September 2021 with the listing officer in order to get her summons listed for hearing.

26. On 12 October 2021 the Plaintiff initiated enforcement proceedings and filed an application for the Examination of the Judgment Debtor.

27. On 30 November 2021 the Defendant's summons applying to set aside Judgment was listed for hearing on 18 January 2022.

28. When approaching an application to set aside a default judgment the court should consider two factors. Firstly, is there a reasonable explanation for delay and, secondly, even if there is, does the applicant's claim have reasonable prospects of success.

Reasonable explanation for delay

29. The Plaintiff has referred to a number of authorities in relation to the question of delay. In ***Pearce v M Seymour and C Seymour (trading as Merlin's Auto Sales)*** 1998 CILR N-3, it was held that the Court had discretion to refuse to set-aside a default judgment where there is a delay, even where there are procedural irregularities.

30. The case of ***Samara v MBI & Partners UK Limited*** [2014] EXHC 563 (QB) also confirms the Court's discretion in refusing to set-aside default judgments where there has been a delay in making that application even where the defendant may have a good defence. At paragraph 37 of ***Samara***, the Court references Lord Dyson's guidance in ***Mitchell v News Group*** [2013] EWCA Civ 1537 when he explained that:

> *"(a) [T]he new more robust approach [which] will mean that from now on relief from sanctions should be granted more sparingly than previously" ([46]);*
>
> *(b) This approach, which meant an end to the belief that the "culture of delay and non-compliance "would continue (ibid);*
>
> *(c) "[T]he starting point should be that the sanction has been properly imposed and complies with the overriding objective" [45];*
>
> *(d) Relief would be granted if the default is trivial "provided that an application is made promptly" (ibid [40]) or if there is a good reason for failure to comply (ibid [41]). Good reasons are likely to arise from; circumstances outside the control of the party in default (ibid [43]) and by contrast inefficiency or incompetence of a party's solicitors – for example, the fact that a deadlines is simply overlooked - is unlikely to prove a good reason (ibid [41]) (see Leggatt J in Summit Navigation Ltd and another v Generale Romania Asigurare Reasigurare SA and another*

[2014 EWHC 398 (Comm)[39]); and (e) Applications for relief must be made promptly (ibid [40] and [46])."

31. The Case of ***Standard Bank Plc v Arginvest International Inc*** [2010] EWCA Civ 1400 also provides further guidance: Moor-Bick LJ, Para 22: "*...promptness will always be a factor of considerable significance...and if there has been a marked failure to make the application promptly, the Court may well be justified in refusing relief, notwithstanding the possibility that the Defendant might succeed at trial*".

32. The Case of ***Gentry v Miller*** *2016 EWCA Civ 141* echoes the above: Para 40 …. "*even if the insurer could show a good reason for not attending court and a reasonable prospect of success (which it probably could), it could not satisfy the first condition which makes it clear that the application may* ***only*** *be granted if the applicant has acted promptly when it found out about the order.*"

33. The recent Grand Court case of ***Cedrus Investments Limited v Abidin and Tata Artha Group (Richards J)*** (2019 (1) CILR 39), at para 56 onwards, considers the guidance provided by the leading English authority of ***Denton* v. *T.H. White Ltd.***, [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.

34. ***Denton*** provides an approach to addressing applications for relief from sanctions:

a) The court should identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order;
b) The court should consider why the default occurred; and
c) The court should evaluate all of the circumstances of the case so as to deal with the case justly.

35. The Plaintiff argues that it has been prejudiced, as it has acted on the default judgment and incurred costs seeking to enforce the same (***Cedrus Investments Limited v Abidin and Tata Artha Group*** (2019), para 116 onwards).

Good Arguable Defence

36. In ***International Finance Corporation –v- Utexfrica*** [2001] 2 All ER (D) 101 – Moor-Bick H:

"A person who holds a regular Judgment, even a Default Judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice in favour of setting the Judgment aside."

37. In ***Evans –v- Bartlam*** [1937] A.C. 473 the court affirmed the following:

a. the primary consideration is whether the Defence *"has merits to which the Court should pay heed".*
b. *"...the Court will take into account the explanation as to how it came about that the Defendant found himself bound by a judgment regularly obtained to which he could have set up some serious Defence".*
c. *"A Defendant who is asking the Court to exercise its discretion in his favour should show that he has a Defence which has real prospects of success."*
d. *"The arguable Defence must carry some degree of conviction."*

38. The Plaintiff says that the Defendant fails on both limbs of the test. They say that there is no reasonable explanation for the Defendant's failure to acknowledge service of the writ indicating her intention to defend and no reasonable explanation for the subsequent delay in proceeding with her application to set aside. Further they say that:

38.1 the Defendant had an opportunity to obtain funding to assist her with her case but failed to pursue it;

38.2 it was the Plaintiff that was "*left in the lurch*", not the Defendant;

38.3 the Defendant's draft defence is unparticularised and no more than bare assertions made in an attempt to set aside the judgment and avoid the judgment debt.

39. Having had the benefit of considering all of the evidence before the court and hearing from the Defendant in person, I am of the view that there is no reasonable explanation for the failure by the Defendant to file an acknowledgement of service indicating her intention to defend these proceedings or request an extension of time in which to do so. This is a very important procedural deadline to have failed to comply with. That is, in my view, a serious failing. The Defendant is an officer of the court and even if not an experienced litigation attorney, she is nonetheless a qualified attorney and to ignore important court deadlines such as this is in, my view, unacceptable. At the hearing the Defendant was unable to clarify exactly when she broke her ankle and certainly she did

not suggest that it happened within the 14 day period provided for the filing of the acknowledgement of service form.

40. I also do not accept that there was a reasonable explanation for the delay thereafter. Especially when the Defendant criticizes the Plaintiff for failing to follow up with the court about the listing of the summons field on her behalf in the divorce proceedings summons. An attorney who is the subject of a default judgment should, in my view, act without any delay in seeking to have that judgment set aside.

41. During the course of the hearing, the Defendant acknowledged that she owes the Plaintiff something in respect of its legal fees but disputed that it was the full amount for all of the reasons that she has put forward. In relation to the question as to whether the Defendant has disclosed a defence that has real prospects of success or is arguable or carries some degree of conviction, I do not find that she has. By acknowledging that she owes the Plaintiff something it seems to me to be impossible to maintain a claim for the repayment of what the Defendant has already paid to the Plaintiff. Divorce litigation is stressful and frustrating and just because the other party to those proceedings is difficult and does not necessarily agree does not mean that attorneys are not doing their job properly. Based on the issues raised in the Defendant's draft defence and counterclaim and, for the reasons given above. I think that it would be unfair to the Plaintiff to set aside the default judgment and I will not grant that relief to the Defendant.

42. However, should the Defendant be left with no remedy in relation to the Plaintiff's fees notwithstanding that I am not going to set aside the default judgment? Pursuant to GCR O. 13 r.9, I have a discretion to set aside or vary a default judgment. The Defendant's complaints about the quality of the service that she received may well be legitimate and may well warrant a reduction of the amount claimed by the Plaintiff. I am conscious of the fact that the total fees billed by the Plaintiff are CI$40.948.50. The Defendant paid CI$8,600, leaving a balance of CI$32,348.50. Those are significant amounts of money. In my view the Defendant should be given an opportunity to have the Plaintiff fees taxed on an indemnity basis pursuant to GCR O.62 r.13 (3) which states:

> *"On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving*

party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly."

43. Although not setting aside the default judgment I am going to vary it as follows:

43.1 the reference to "taxed costs" should be substituted with "fixed costs"

43.2 enforcement of the default judgment is stayed for a period of 14 days to allow the Defendant to provide her objections to the Plaintiff's costs as set out in their statement of account dated 24 October 2019 (the "Statement of Account") which should be treated as the equivalent of Form 314 as referred to the GCR O.62, r.27. The Defendant shall state the extent to which she agrees with and accepts liability to pay the amounts claimed in the bill of costs. In addition to doing so, the Defendant may also within the same period of 14 days serve a written statement of objections.

43.3 In the absence of agreement between the parties within 14 days thereafter as to the amount to be paid by the Defendant to the Plaintiff, during which period the enforcement of the judgment shall continue to be stayed, the Plaintiff's costs as set out in the Statement of Account are to be taxed by the Court on the indemnity basis and a stay of the enforcement of the default judgment shall continue until that process is completed.

43.4 The Defendant will then be liable to pay to the Plaintiff the amount certified by the court taxing officer as being due to the Plaintiff.

44. If the Defendants fails to serve any objections within 14 days as provided for above then the default judgment as varied in relation to fixed costs shall become enforceable on the expiry of that period.

45. The costs of this application are to be paid by the Defendant to be taxed on the standard basis if not agreed.

Hon Justice Alistair Walters (Actg.)
Judge of the Grand Court