



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
CICA (Civil) Appeal No 13 of 2022
(G 184 of 2019)**

BETWEEN:

MCGRATH TONNER (A FIRM)

Appellant

AND

KHATIDJA MCLEAN

Respondent

BEFORE:

**The Hon Sir Richard Field, Justice of Appeal
The Hon C Dennis Morrison, Justice of Appeal
The Hon Sir Michael Birt, Justice of Appeal**

Appearances:

**Mr Colin McKie KC instructed by Mr Everton Spence of
McGrath Tonner for the Appellant
Mr Alex Potts KC and Ms Rowana-Kay Campbell of
Conyers Dill and Pearman for the Respondent**

Heard:

25 April 2023

Judgment delivered:

4 May 2023

JUDGMENT

Birt JA:

1. This is an appeal by McGrath, Tonner (“ the Appellants”) against a decision of Walters J (Actg) dated 18 January 2022 whereby, for the reasons set out in a judgment dated 1 February 2022 (“ the Judgment”), he declined to set aside a default judgment which the Appellants had obtained against their former client, the Respondent, in the sum of CI\$32,348.50 in respect of *CICA (Civil) Appeal 13 of 2022 – McGrath Tonner v Khatidja McLean - Judgment*

their unpaid professional fees, but nevertheless ordered that their fees should be taxed on the indemnity basis. He also ordered that costs of the application to set aside the default judgment should be paid by the Respondent.

2. At the hearing of the appeal on 5 April 2023, this Court allowed the appeal, set aside the default judgment and remitted the Appellants' claim to the Grand Court for determination. What follows constitutes the reasons for that decision and is the judgment of the Court.

Background

3. In March 2018 the Respondent instructed the Appellants in connection with her divorce proceedings. As set out in the Judgment at [7] to [18], all did not go smoothly. The Respondent felt that she had not been well served by the Appellants as set out at [17] of the Judgment and that she had been overcharged. In the absence of the Respondent settling an outstanding balance of fees claimed, the Appellants indicated on 12 April 2019 that they could no longer act for the Respondent and she thereafter was left to represent herself in the divorce proceedings.
4. After correspondence about the outstanding fees, the Appellants issued a writ and statement of claim on 1 November 2019 and served the proceedings on the Respondent the same day. On 19 November the Respondent emailed the Appellants advising that she definitely planned to contest the claim, but stating that, as a result of an injury, she was unable to respond to the writ until the New Year. She did not file a notice of intention to defend within the required period.
5. On 22 November 2019, Appellants applied for default judgment on the basis that no notice of intention to defend had been filed and judgment in default in the sum of \$32,348.50 with costs to be taxed if not agreed was entered on 26 November 2019. The above sum was calculated by deducting from the total fees charged of \$40,948.50 the sum of \$8,600 which the Respondent had paid on account.
6. On 7 February 2020, the Respondent filed a summons seeking to set aside the default judgment. Her summons was supported by an affidavit which exhibited a draft defence and counterclaim based upon the complaints which she had raised previously about how her case had been handled. As described in the Judgment, there was considerable delay in the Respondent's summons coming before the Grand Court, but it eventually did so on 18 January 2022.

7. The judge concluded that there was no reasonable explanation for the failure by the Respondent to file a notice of intention to defend within the requisite period and also found that the Respondent had not disclosed an arguable defence. He therefore declined to set aside the default judgment but he substituted for “*costs to be taxed if not agreed*” the words “*fixed costs*”.
8. However, despite that decision, he concluded at [42] that “*The [Respondent’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 [Appellants]*”. He said that the Respondent “*should be given an opportunity to have the [Appellants’] fees taxed on an indemnity basis pursuant to GCR O.62 r. 13(3)*”.
9. He therefore purported to vary the default judgment by ordering as follows:

“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 in 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.”

The nature of the appeal

10. The Appellants filed a Notice of Appeal on the ground, inter alia, that the judge had ordered a procedure which the court was not empowered to do. Conversely, the Respondent filed a Respondent’s Notice to the effect that, apart from the reasons given by the judge, his decision to order a taxation of the Appellants’ fees could be upheld on the ground that, an attorney being an officer of the court, the court has an inherent jurisdiction at common law to direct the taxation of the fees charged by an attorney to his client.
11. In their skeleton argument, the Appellants submitted that the history of legislation in this jurisdiction showed that, even assuming the court had originally had an inherent jurisdiction

to order taxation of fees as between an attorney and his client, that inherent jurisdiction had been removed as a result of the legislation. The Respondent, on the other hand, submitted that the relevant legislation had not expressly removed the court's inherent jurisdiction to tax the fees of an attorney as an officer of the court and that accordingly that jurisdiction remained. The Judgement could therefore be upheld on the basis that the judge was entitled to order the fees charged to the Respondent to be taxed under the court's inherent jurisdiction even though the judge had made no mention of the court's inherent jurisdiction in the Judgment.

12. Apart from the submissions on the above issue of principle, the Appellants accepted that there is an implied term in the contract between an attorney and his client to the effect that, in the absence of an agreed fixed fee, the fees charged must be reasonable. Their skeleton argument therefore submitted that, even if the appeal were to be allowed, the Appellants' claim should be remitted to the Grand Court in order for it to consider the Respondent's defence as to the quantum (reasonableness) of the fees charged.
13. At the outset of the hearing, the Court put it to Mr McKie KC for the appellant that the inevitable consequence of his skeleton argument was that the judgment in default had to be set aside. One could not have an extant judgment stating that the Respondent owed the Appellants \$32,348.50 and at the same time allow her to defend the claim for that sum.
14. Mr McKie accepted that this was so and was content that the Court should allow the appeal by setting aside the default judgment and remitting the matter to the Grand Court for determination as to the reasonableness of the fees by reference to the contractual position. Mr Potts KC, on behalf of the Respondent, expressed concern that remitting the claim to the Grand Court on this basis would be a potentially expensive way of proceeding as it would involve all the usual procedural steps of contested civil proceedings; proceeding by way of taxation as ordered by the judge would be a much better way of resolving the dispute. However, he accepted that the main concern of his client was to be able to challenge the quantum of the fees claimed by the Appellants on the ground that some of them were unreasonable and that the course suggested by the Court would achieve this.
15. In our view the reasons given by the judge do not justify his decision. In particular:
 - (i) As expressed in the Judgment, the ground for taxation is to be found in O.62. However, O.62 is concerned only with taxation of an opposing party's costs following litigation. It is not concerned with and confers no jurisdiction upon the court to order the taxation of an attorney's fees at the behest of his own client. There was therefore no jurisdiction to order taxation in this case pursuant to O.62.

- (ii) As already stated, we do not consider that a judgment in default for a specified sum can be allowed to stand whilst at the same time permitting a defendant to challenge the amount which the court has, in its judgment, found to be due.
16. In the circumstances, we allowed the appeal and ordered as follows:
- (i) The Judgment below be set aside, including the adverse costs order made against the Respondent.
 - (ii) The judgment in default for \$32,348.50 is set aside.
 - (iii) The Respondent has leave to defend the Appellants' claim on a quantum meruit basis i.e. that some of the fees claimed are unreasonable and that there is accordingly a breach of the implied term of the contract that the fees charged would be reasonable.
 - (iv) There be no order as to costs of the appeal.
17. We note Mr Potts' concern that determination of the Appellants' claim should be conducted in a proportionate manner. We fully understand and share that concern. We would therefore urge the Grand Court, pursuant to the Overriding objective, to exercise its case management powers to try the case in a proportionate manner. How best to do so will of course be a matter entirely for the judge trying the case, but one possibility which springs to mind is of appointing a taxing officer as a form of assessor or adviser and directing that the taxing officer should assess the reasonableness of the items claimed by the Appellants and tender his advice to the judge. Whilst the decision following any such process would of course be for the judge, the parties as well as the judge may well be assisted by such a process. Mediation may of course also provide assistance.
18. As matters will be proceeding by way of consideration of the contractual position, it follows that this Court has specifically not decided the issue of whether the Grand Court has an inherent jurisdiction to order the taxation of an attorney's fees as between the attorney and his client by reason of the attorney being an officer of the court. It is not necessary to do so and we think it undesirable to do so when the issue was not alluded to in the Judgment. That issue accordingly remains open for consideration on a future occasion.
19. In summary, we allow the appeal with no order as to costs. We set aside the default judgment and order that the Appellants' claim is remitted for decision by the Grand Court as described above.

