

CITATION: *Withnall Cavenagh and Co. Pty Ltd v Doherty* [2007] NTMC 056

PARTIES: WITHNALL CAVENAGH AND CO PTY LTD

v

PETER DOHERTY

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20631964

DELIVERED ON: 21st August 2007

DELIVERED AT: Darwin

HEARING DATE(s): 16th August 2007

JUDGMENT OF: Acting Magistrate Fong Lim

CATCHWORDS:

Practice and Procedure – Costs – Solicitor client – costs agreement – reference to Master for assessments

Legal Professions Act 2007 Division 8 & section 735

Legal Practitioners Act sections 118 - 130

REPRESENTATION:

Counsel:

Plaintiff: Ms Farmer
Defendant: Mr Doherty (by phone)

Solicitors:

Plaintiff: Withnalls
Defendant: Lloyd Lancaster

Judgment category classification: C
Judgment ID number: [2007] NTMC 056
Number of paragraphs: 36

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20631964

[2007] NTMC 056

BETWEEN:

**WITHNALL CAVENAGH AND CO PTY
LTD**

Plaintiff

AND:

PETER DOHERTY

Defendant

REASONS FOR DECISION

(Delivered 21 August 2007)

MS FONG LIM RSM:

1. The Plaintiff is a firm of solicitors who obtained a default judgement for their fees and disbursements against the Defendant who is also a legal practitioner.
2. The Defendant was contracted by the Plaintiff in April 2006 as a locum and during that time became personally involved in a dispute with another party over the purchase of a block of units. The fees and disbursements in dispute between the parties relate to the Plaintiff's representation of the Defendant in that matter.
3. After some negotiation the parties entered into a costs agreement on the 1st of September 2006 and the accounts subject of this dispute were issued pursuant to that cost agreement. It is conceded by the Defendant that none of those accounts were paid by him and further conceded that the Plaintiff is due some payment for those fees and disbursements. His dispute is the amount claimed which he submits is excessive. The Defendant was served

with the Statement of Claim on the 17th January 2007 failed to file a Defence and was subject of a default judgement on the 26th February 2007.

4. The application to set aside judgement was filed in the court on the 26th July 2007
5. The law is clear in relation to applications to set aside default judgments. If the judgment is entered irregularly then the judgement must be set aside but in the case of a regularly entered judgement the court has to be satisfied that the Defendant has a meritorious defence, that the Defendant had a satisfactory reason for not filing his defence in time, that the application to set aside has been made promptly and whether the Plaintiff would suffer prejudice which could not be adequately compensated by costs if the judgement is set aside see *Evans v Bartlam [1937] AC 473*.
6. The Defendant relied on his affidavit of the 16th of July 2007 and the Plaintiff on the affidavit of Vanessa Farmer of the 14th August 2007.
7. The Defendant argues that he has a “prima facie” defence because he alleges that the fees charged are excessive and pursuant to the provisions of the Legal Professions Act 2006 he is entitled to ask for the accounts to be referred to the Master for an assessment whether or not there is costs agreement. He submits that he doesn’t need to go into the merits of his defence because he only needs to convince the court of a prima facie case. The Defendant also argues that he has a counterclaim for fees owed to him as a locum and he should be entitled to have that matter dealt with as a part of this action.
8. The Defendant’s affidavit evidence is brief and lacking in substance. His submissions were misconceived and his understanding of the application of the law clearly lacking.
9. **“Arguable / Meritorious defence”**- the Defendant’s evidence of a meritorious defence to the Plaintiff’s action is a bald statement that he

believes that fees and counsel's fees charged are excessive. He has not even annexed a draft defence to his affidavit.

10. In paragraphs 17 to 22 of his affidavit the Defendant addresses the issue of counsels' fees and attempts to demonstrate that the fees are "grossly excessive" by comparing them to the fees of a NSW barrister who gave an initial advice on the matter. The Defendant particularly states in paragraph 22 as follows:

" It is my view that Counsel exceeded their instructions and overstated the time claimed as being required to address the issues."

11. The Defendant also states in his affidavit that he did not receive the accounts for counsels' fees until October 2006 after the matter had settled. The Defendant does not say in what way Counsel exceeded their instructions, he does even annex any of the counsels' accounts and make reference to where the over statement of time is evidenced. The Defendant does not produce any evidence for this court to assess whether he has is making a baseless claim or not.
12. Even though it has to be accepted that the Counsels' fees are substantial there is no evidence before this court what was done for those fees and therefore this Court cannot assess their excessiveness or reasonableness. The Defendant argues that it is not this Court's role to make that assessment but that is where the Defendant is wrong. To prove a meritorious defence to these fees he must produce to this court enough evidence to assess the merits of his defence and he simply has not. He does not have to show each and every item on the counsels' fees is excessive but he does have to show this court at least an example of where the counsel has allegedly overcharged. By just making the statement that he only paid his other barrister a lesser amount and that the litigation was on a simple point (which was not established) is not enough to prove to this court that he has a meritorious claim.

13. Against the evidence of the Defendant on this point the court has the Plaintiff's evidence that the Defendant had signed a costs agreement on the 1st of September 2006 together with an indemnity to pay the costs and disbursements (specific reference being made to counsel's fees) within 14 days of being rendered an account. The Defendant also signed a further undertaking on the 28th of September 2006 to pay counsels' fee relating to his matter which contained a specific undertaking relating to fees already rendered by counsel as follows:

“Further I undertake to place into trust with Messrs Withnalls Territory Lawyers a sum equal to and all the sums owing on accounts rendered to date by Mr MacDonald QC and Mr Clift within 14 days of the date below.”

14. Throughout her affidavit the Ms Farmer sets out that her office emailed and faxed all accounts to the Defendant on the dates that they were raised including counsels' fees. It is clear from that evidence that at the time the Defendant signed the above undertaking he was aware of the original counsel's fees of \$39504.36 which were sent to him on the 12th of September 2006 and then again on the 19th of September 2006 according to the records of the Plaintiff. These accounts have not been paid nor was there any evidence at that stage that the Defendant had a complaint about the amount of those accounts.
15. In relation to other accounts from counsel the Defendant did not indicate to the Plaintiff any difficulties with the amounts claimed until making this application.
16. In relation to the Plaintiff's own costs. It is acknowledged by the Defendant that Plaintiff were instructed as his solicitors in the Supreme Court and Federal Court matters and that they were required to take some steps on his behalf. He states in his affidavit that he conducted the proceedings on his own behalf until he was required by counsel and the courts to have a local solicitor. The Defendant is then scant on detail as to what services were

provided to him by the Plaintiff even though he says they have overcharged him. Again as with counsels' fees the Plaintiff has not put before the court any evidence to support his claim that the fees charged are excessive.

17. The Plaintiff's evidence is that the Defendant obligated the Plaintiff to pay his counsel's fees on his behalf without an agreement by the firm to act on his behalf and then after finally signing a cost agreement and undertaking to pay counsels fees he has not paid any of those accounts sent to him.
18. The Defendant also raised a technical defence to the Plaintiff's claim and that is pursuant to the Legal Profession Act 2006 he has 12 months from the issue of a tax invoice in which to request the matter be referred to the Master for an assessment. The Defendant could not refer me to the appropriate section however on my own research I presume he is referring to section 332 of that Act. The Defendant's argument is that because the 12 months had not yet expired then the judgment should be set aside to enable him to make that application.
19. This argument is fundamentally flawed. The contract for services between the Plaintiff and the Defendant was entered into at the latest on the 1st of September 2006 when the Defendant signed the costs agreement. The Legal Profession Act 2006 commenced on the 31st March 2007. Section 735(1) of the Legal Professions Act provides:

“The former costs provisions continue to apply to a matter if the client first instructed the law practice in the matter before the commencement date”

“former costs provisions” are defined as “means the provision of Party X of the repealed Act as in force immediately before the commencement date.”
20. It is clear that section 332 of Legal Professions Act and the other costs provisions under the Legal Professions Act do not apply to the agreement between the Plaintiff and the Defendant in this matter.

21. The Defendant has not proven to the court that he has an arguable meritorious defence and his application must fail on that basis.
22. **Reason for failure to file Defence** – the Defendant states that he had not filed a Defence to the action because he thought he could settle the Plaintiff's action by negotiation. It is clear that negotiation failed as evidenced in the Plaintiff's letter of the 8th of February 2007 to the Defendant and is equally clear in that letter that any further time to file a defence would not be agreed to by the Plaintiff. The Defendant, as a legal practitioner, ought to have known that without the consent of the Plaintiff to extra time in which to file a Defence then he should file his Defence forthwith otherwise he could be subject to a default judgement.
23. The Defendant's explanation for failing to file a Defence is not acceptable to this court and so his application must fail on that ground as well.
24. **Delay**- the default judgment was entered on the 26th February 2007 the Defendant's application was properly filed on the 26th of July 2007 and the Defendant's explanation for that delay is contained in paragraph 46 of his affidavit as follows:

“I have not been able to apply to have the default judgement set aside prior to the present because I have not been in a position to return to Darwin for Hearing or Notice of Motion associated with such an application from both a financial consideration and a practical consideration in respect of time away from my own legal practice in Sydney.”

25. This explanation is clearly unsatisfactory. The Defendant as a legal practitioner should know that any application to set aside a default judgement should be made promptly. His convenience is not a satisfactory excuse for the delay of 5 months nor is his suggestion that he would be required to travel to Darwin for the application. He appeared by phone for this application and should have been aware as an officer of this court that

rules of this court allowed that option to be available to him at any time by leave.

26. The Defendant's application must fail on this ground as well.
27. **Prejudice to Plaintiff** – this is the only area in which I am in favour of the Defendant in that any prejudice to the Plaintiff could be compensated for my costs. Ms Farmer herself claims the only prejudice is that they have not been paid the monies owed to them.
28. **Counterclaim** - The Defendant also submits that he has a “prima facie” counterclaim that should be adjudicated on at the same time as the Plaintiff's claim. The counterclaim arises out of the Defendant's time as a locum with the Plaintiff. The Defendant claims that on the 7th of September 2006 he rendered accounts in the sum of \$81776.08 and has only been paid \$11000.00. The Defendant does not annex the invoices rendered.
29. The Plaintiff does not deny that invoices had been issued by Lloyd Lancaster to the Plaintiff however claims that no amount is payable to them or Peter Doherty until such time that Peter Doherty fulfils his obligations under the terms of the locum agreement.
30. The Plaintiff claims that the Defendant is not entitled to be paid anything because he hasn't rendered any invoices on behalf of Withnalls to recover fees for the work he has performed. The Plaintiff did pay the sum of \$11000.00 to the Defendant on the 7th June 2006 in advance of fees to be invoiced (see Withnalls letter to the Defendant of the 7th of June 2006) however the Defendant has not yet issued those invoices. The Plaintiff argues that the agreement was that the Defendant be paid the fees received by Withnalls for the work done by the Defendant as invoiced by the Defendant to the clients, and after the fees had been collected. The contingency was that in the event of the locum ending (which it clearly has)

then the Plaintiff would issue invoices for the work and pay the Defendant when those fees are collected.

31. The Plaintiff doesn't really address the issue of whether they have received payments from clients for work done by the Defendant except to deny any monies are payable to the Defendant.
32. It may be possible that the Defendant does have a claim for some payment from the Plaintiff however he has not established an arguable case in that he hasn't provided the court with any evidence that he there are any invoices issued from the Plaintiff to clients which have been paid and included work done by himself as locum. In any event the Defendant's possible claim against the Plaintiff can be subject of a separate action the only commonality between that action and the present action is that the same parties are involved. This cannot be used as a tool to deprive the Plaintiff its judgement.
33. **Conclusion** – The Defendant has failed miserably in establishing any basis for the success of his application to set aside the default judgement. He has misstated the law submitting that he had to only prove prima facie case without going into the merits of his claim and that the provisions of the Legal Profession Act applied to this matter when it clearly does not. Further the Defendant has not been full and frank in his disclosure as to his dealings with the Plaintiff, he did not disclose in his affidavit any of the correspondence he had received from the Plaintiff or the invoices he has received from the Plaintiff. He did not acknowledge any conversations or email correspondence he had with Plaintiff about the fees and he has not until now made any complaint as to the level of the Plaintiff's and counsels' fees.
34. It is my view that the Defendant is merely avoiding paying the Plaintiff and counsel as he is required to do under his contract. The Defendant as a legal practitioner should be aware of his rights and obligations to request itemised

bills and a possible taxation. The Defendant as a practitioner in civil litigation should be aware of the possibility of a default judgement being entered against him and the requirements of the court should he need to make an application to set aside that judgment. In this application and in his dealings with the Plaintiff the Defendant has shown the Court that he is either ignorant of the most basic rules of civil procedure or that he knew of them yet chose to run the risk of a judgement by not complying with those rules. Either way the Defendant has not convinced this court that he has an arguable defence or counterclaim and that he does not have a reasonable excuse for the delay in making this application.

35. The Defendant's application to set aside the judgment is dismissed.
36. Costs reserved with liberty to apply.

Dated this 21st day of August 2007.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE