In The Supreme Court of Bermuda

CIVIL JURISDICTION
2010: No. 213

BETWEEN:

PAUL ANDREW HARSHAW

Plaintiff

-and-

MAXINE YOLANDA REID

Defendant

Mr.. Paul Harshaw in person

Miss Maxine Reid in person

DECISION

1. This case concerns an action for fees in the sum of $43, 829.46 based on contract. The plaintiff is a Barrister and Attorney admitted to practice law before the courts in Bermuda. The Plaintiff styles his practice Harshaw & Co.

2. The Defendant is a lay person, a nurse by training, who in January of 2009 sought the legal services of the Plaintiff in respect to a matter concerning her son, a minor. The defendant disputes the Plaintiff's bill for a number of reasons which are set out in her defence or otherwise discerned from her defence and the evidence.

3. It is common ground that the parties entered into a retainer agreement contained in a letter dated the 25th January 2009 wherein the Plaintiff would represent the Defendant in connection with an application that had been made in the Supreme Court by a Mr.. Collingwood Robinson pursuant to sections 12 and 22 of the Minors Act 1950. The contents of that letter are reproduced in full as follows:

> "This will confirm that you have retained the law firm of Harshaw & Co. on your behalf in connection with an application made to the Supreme Court of Bermuda under the provisions of sections 12 and 22 of the Minors Act 1950 by Mr.. Collingwood Robinson against you and in relation to Brazil Collingwood Robinson. The cause bears the Supreme Court number 2009 : No. 15.
>
> The sum of $500 has been paid to Harshaw & Co. by you in order to confirm this retainer. The sum paid by way of retainer will be held in Harshaw & Co's trust account and will not be used to discharge fees unless such fees are due and owing for more than 30 days.
>
> As I mentioned to you on the telephone yesterday, I expect the final costs of the hearing presently scheduled for Thursday 29 January 2009 to be in the region of $5,000 to $10,000.
>
> This retainer gives Harshaw & Co. discretion to review, research, investigate, provide legal advice on and generally to act on your behalf in Bermuda with respect to the above-mentioned matter.
>
> Our current attorney rates range from $400 per hour up to $550 per hour for senior attorneys. We will notify you of any changes to our rates.
>
> Payment of each invoice, whether for both fees and disbursements or for fees or disbursements separately, is due when each invoice is rendered. Where the balance of any account remains unpaid 30 days after date of the invoice, interest in the amount of 1.5% per month of the then outstanding balance will be charged on the account for each month or part thereof that such balance remains unpaid.
>
> Please sign and return the letter to me to confirm that you agree with the terms of this retainer.
>
> If there is anything I can clarify for you, please do not hesitate to let me know."

4. It is the Plaintiff's case that the subject matter of the retainer expanded to include proceeding initiated by the Defendant which resulted in the additional fees being incurred. It is the Defendant's case that she terminated the Plaintiff's services but did not receive any of the bills in relation to the additional fees, (not withstanding attending the offices to enquire) until after such termination.

BACKGROUND

5. Mr. Robinson through his attorney Mr.s. Marshall had applied by way of an ex parte application to the Supreme Court essentially for the return of the minor to the jurisdiction, the Defendant having (temporarily, as it turned out) removed the child to her place of origin, Jamaica.

6. In his supporting affidavit Mr. Robinson stated that he was the father of the child, and had been supporting the child financially and other wise, and had enjoyed access to the child. Consequent upon his application and submissions the court granted Mr. Robinson sole custody of the minor; the Defendant was ordered to make arrangements to have the child returned to Bermuda within 7 days; that in default the Defendant would be remanded in custody until the minor's return.

7. The order went on to provide that the Defendant would be escorted by the police to her residence to hand over her travel documents; the Defendant was prohibited from leaving the island; that the Defendant was prohibited from sending the child out of Bermuda after his return without the leave of the court; and the matter was set for mention on the 29th January 2009.

8. These were extremely stringent conditions, and the Defendant was understandably concerned that she should have legal representation in court on the return date. The Plaintiff and the Defendant had an initial consultation during which the Defendant's instructions included informing the Plaintiff that Mr. Robinson was the father of the minor, and that prior to Mr. Robinson making the application to the court, she had informed Mr. Robinson of the confirmed plans she had made for the child to be returned to Bermuda. As events turned out she was able to show the court that such plans had in fact been made.

9. Nonetheless, the Defendant was also of the view that as she had sole custody of the child, she was not Bermudian but employed on a work permit, and the child was born in the Unites States of America, the court had no jurisdiction under the Minor's Act to order the child back to Bermuda. Additionally she was of the view that the Minor's Act did not in any event confer jurisdiction on the Supreme Court to order the return of the minor to the jurisdiction.

10. The Plaintiff advised the Defendant, adopted a strategy for the hearing, reproduced the Defendant's instructions in an affidavit and they appeared before the Judge on the return day.

THE PLAINTIFF'S CASE

11. The Plaintiff's case essentially is that he provided the services required by the Defendant, and in so doing used the skill and competence of the standard expected of an attorney licenced to practice law in the courts of Bermuda. The Plaintiff relies on the written agreement between himself and the Defendant and asserts that his representation of the Defendant fell within the express terms of that contract. He argues that he is to be permitted interest at the rate of 18% per annum as set out in that agreement.

12. The Plaintiff's case is that to the extent that the Defendant is not happy with the outcome of any court proceedings it was because the judge hearing the parties preferred the position taken by the other side, rather than his failing to properly represent her. The Plaintiff's case is that he issued invoices regularly to the Defendant and it is for the Defendant to show why she received his correspondence but not his invoices. The Plaintiff position is that the Defendant has failed to show any reason for this.

THE DEFENDANT'S CASE

13. The Defendant disputes the outstanding sum for several reasons. She argues that she did not receive proper representation by the Plaintiff. The Defendant also argues that the Plaintiff never advised her that his fees had increased to the sum now sought. Her position is that the Defendant never sent her any invoices between the 2nd March 2009 and April 2010 which dates fall beyond those relevant to the matter concerning the return of her son to Bermuda.

14. It is also the Defendant's case that in charging her the Plaintiff did not take into consideration the financial hardship she was experiencing and never discussed waiving or settling any portion of his fees prior to taking out an action against her. It is also her case that the fees charged were not proportionate to the results of the litigation.

LACK OF PROPER REPRESENTATION

15. The Defendant cites several matters for which she complains the Plaintiff did not provide her proper representation. She lists among these: the hearing on the 29th January; failure to vary access; failure to resolve the issues of access and maintenance and generally permitting the matter to become protracted without resolution.

THE JANUARY HEARING

16. The Defendant made it clear from the outset of the trial that she is not trained in the law and as a consequence had to be assisted by the court in making clear some of the questions she put to the Plaintiff. The case that she made in her defence was clarified in some of the questions that she put in cross-examination to the Plaintiff more so than in her evidence in chief.

17. It became apparent that the Defendant and the Plaintiff were not ad idem either on the strategy the Plaintiff planned for the first appearance on the 29th January 2009, the return date of Mr.. Robinson's summons She was displeased with the effort he put into arguing on her behalf, and she questions his knowledge of and adequate research or knowledge of the law.

18. It was clear to the Plaintiff from his instructions that he had to inform the court that plans were already in motion to return the child to the jurisdiction. However, the Plaintiff was also cognizant of the Defendant's insistence that he challenge the court's authority under the Minor's Act to order the return of the child; its authority to imprison her, and its authority to seize her passport. The Plaintiff sought to argue the court's authority under the Minor's Act in circumstances where it would have been clear to the court that the mother intended that the child be returned.

19. The Plaintiff states in his evidence that he had to couch his submission on the lack of legal jurisdiction as a technical point. This is clear from the record of those proceedings which were read into evidence. The Plaintiff sought to persuade the judge that she had wrongly exercised her power in a way not intended by the Minor's Act. The judge rejected the Plaintiff's submission. The question arises therefore, whether the Plaintiff did all that would have been required of him consequent upon his instructions, to prevent the ordered return of the child and to prevent his client from being held in contempt of the court order.

20. In her affidavit filed in the above referred hearing the Defendant admitted that Mr.. Robinson was the father of the minor. Further she indicated that plans were afoot so that the minor would be returned to the jurisdiction. The Plaintiff's evidence is that, having had his technical point rejected he could do no more. The Plaintiff states in his evidence that he discussed the possibility of an appeal with the Defendant after the hearing. That possibility was ruled out on the basis that it would take too long and would require leave of the judge (not to mention stay of the order) which he informed the Defendant in all probability would be refused.

21. For reasons stated more fully below, it would appear to me that the court had specific jurisdiction under the Children Act 1998 (the "Children Act") Section 36B and in particular sections 36F and 36L to grant custody of the minor to the father; and consequent upon that to have the child returned to the jurisdiction. However Mr. Robinson's application was not made pursuant to the Children Act.

22. If the Plaintiff can be criticized for the conduct of the 29th January 2009 hearing it would be that it did not seem to have occurred to him to argue on the basis of a comparison of the court's power under the Children Act versus its power under the Minor's Act. It is difficult to say what would have resulted in the circumstances. The net result may have

been the same in that the court may ultimately have ordered the return of the minor pursuant to the Children Act.

23. I do not think it fair of the Defendant to criticize the Plaintiff for the lack of force or cogency of his submissions at the hearing on the 29th January 2009. Neither can the Plaintiff be faulted where the Judge made an order on the basis of her interpretation of the Minor's Act. I do find however that the Plaintiff should be taken to have known the full extent of the law, the provisions of which include the Children Act. The Defendant might have taken less umbrage over an order made if the Plaintiff could show her definitively that the Children Act applied.

24. The Plaintiff's first invoice to the Defendant suggests he only researched the Minor's Act. No mention is made of the Children Act. In giving evidence in this matter the Plaintiff erroneously stated that the Children Act did not apply to Supreme Court matters. Having been invited by the court to review that act, he subsequently corrected himself. I am of the view that the Plaintiff failed to advise the Defendant on the relevance of the Children Act to the facts, thereby misleading the Defendant.

REQUEST TO VARY ACCESS

25. Once the minor returned to Bermuda issues arose over the Defendant pursuing maintenance for the minor and defined access arrangements with Mr.. Robinson. An interim order was made regarding access. The Defendant makes general and specific complaints that the Plaintiff failed to progress the issue of both access to the minor and his maintenance. It would appear that in respect to first of these issues the Defendant complained about Mr. Robinson's conduct over 2 matters: non adherence to the maintenance order and abusive behavior toward her. It is the Defendant's case that she brought these matters to the Plaintiff's attention on many occasions, sometimes actually in tears in his presence, but he failed to address them.

26. The Plaintiff acknowledges that the Defendant was in tears on occasions in his office. He admits that she sent him emails complaining of Mr.. Robinson's casual manner in treating access. The Plaintiff evidence is that the Defendant did not understand or accept his explanation that Mr.. Robinson could not be forced to see the child on occasions when he failed to turn up for access. The Plaintiff also advised that as the court had tied access and maintenance together, unless the issue of maintenance was also ready to be dealt with, he would or could not seek a variation of access either because the judge would not allow it or Robinson's counsel would strenuously fight it.

27. The Plaintiff denies however that the Defendant made him aware that she was suffering stress as a result of Mr. Robinson's behavior over the interim access arrangements that had been made. The Plaintiff's evidence is that no complaints were made to him about serious abuse until September 2009.

28. The Plaintiff's evidence essentially is that the Defendant's only complaint before September 20th 2009 was about Mr. Robinson's failure to adhere to the letter of the interim access arrangements. In cross examination however, the Plaintiff admitted that he has a file note indicating that hostilities occurred between the Defendant and Mr. Robinson's mother and sisters on the minor's return to Bermuda or the 6th February. That as a result he sent them letters under section 19(d) of the Summary Offences Act warning them not to trespass on the Defendant's property.

29. The Plaintiff also admits that he was aware that Peter Farge was representing the Defendant in a Domestic Violence (Protection Order) Act application (DVO) before the Magistrates' Court concerning the Defendant's allegations about Mr. Robinson's abuse of her. The Plaintiff states that he had little to do with the DVO matter, never received a copy of the order, and was unaware if an order had in fact been made.

30. Parenthetically, the Plaintiff's bill to the Defendant for the 26th January indicates telephone communication between him and Mr. Farge over the subject DVO matter. The Plaintiff's evidence is that he only communicated with Mr.. Farge to ensure that the Defendant's evidence in the application for the DVO was consistent with that in her application in the Supreme Court. However it is also evident from email exchanges between Mr.. Farge and the Plaintiff on the 19th and 20th February 2009 that Mr. Farge informed the Plaintiff that the Defendant referred to herself as broke and completely stressed.

31. It was suggested by Mr. Farge that the Plaintiff take over the DVO application hearing scheduled for 23rd February 2009 however the Plaintiff declined to, which was of course his choice. In my view however the Plaintiff should have kept himself apprised of the progress or results of the DVO application. The evidence in those proceedings and or the fact of a continuing DVO would have been relevant to the Defendant's position on access whether during the interim or ultimately.

32. In all these circumstances it seems somewhat disingenuous for the Plaintiff to say that he was unaware that the Defendant found these early matters to be stressful. If she had not said it to him directly he was none the less made aware of what she had been experiencing and how she felt. In the final analysis given the circumstances, the Plaintiff should have been aware of the stressful nature of the proceedings for his client.

33. It appears from the evidence that the Defendant had genuine concerns about Mr. Robinson and conduct that she thought was abusive. Subsequent to the instructions she had given to the Plaintiff and after the January 29th appearance, the Defendant complained to the Plaintiff that she had recordings of abusive and threatening telephone calls made by Mr. Robinson to her telephone. The Plaintiff admits that his advice to the

Defendant was that she would have no way of proving to a court that it was Mr. Robinson's voice and so it was of no use to her in the access proceedings.

34. The Plaintiff admitted that the Defendant complained to him about an incident in September 2010 when Mr. Robinson telephoned her at work demanding, (in very unpleasant terms) that she come home to receive the minor (during his access period). Once home the Defendant phoned Mr. Robinson to inform him that she was at home. Over the telephone Mr. Robinson again used very disparaging names and insults to the Defendant and threatened to kill her. The minor was then put on the phone leading the Defendant to believe that the name calling and death threat were uttered within the hearing of the minor.

35. When put to the Plaintiff, he admitted that the Defendant had informed him of the preceding conduct and of the following account on the 21st September 2009, the day after it occurred. When Mr. Robinson was returning the child to the Defendant's home Mr. Robinson had become enraged over something and when venting his rage he punched a window in his car, broke the glass and the minor, who was present in the car, was showered with the broken glass. The minor was visibly terrified by the event, and was in the car screaming for his mother, the Defendant. The police were summoned. The Defendant was later informed that the minor had been taken to the hospital and left there without a parent. The Defendant had to rush there to be with the minor.

36. It is against this back ground that the Defendant complains that the Plaintiff did not adequately represent her or advance her instructions in relation to a variation of the access arrangements. The Defendant wanted to pursue an emergency ex parte application. The Defendant wished to obtain a variation of interim access so that Mr. Robinson did not have to come to her home in relation to the minor as directed in the access arrangements, or otherwise to be directly in contact with her.

37. The Plaintiff's evidence is that in relation to the above referred incident involving the minor having been put in jeopardy, he thought it best to write to the police to obtain a report complied as a result of the complaint filed by the Defendant. What is more the Plaintiff justified this because he wanted corroboration of the Defendant's instructions. This was necessary in his view because the proceedings had been drawn out, cross allegations had been made, there was an acrimonious history between the parties and he did not believe the court would accept the Defendant's bare assertions. He states that in any event a hearing was coming up in approximately 3 weeks time.

38. The Plaintiff states that he did not consider pursuing or advising on an action in the Magistrates' court for a DVO or variation of the DVO to protect the Defendant or the minor. He gave two reasons; firstly that another application for a DVO could be seen as

an abuse of process, and that as Mr. Robinson and the Defendant did not live together the DVO legislation did not apply in any event.

39. I believe the Plaintiff had no basis for assuming in law or on the facts that a third or subsequent application for a DVO could be considered to be an abuse of the court's process. The very nature of the ills that domestic violence legislation is aimed at requires it to be available whenever a resident seeks protection from domestic violence. Indeed Bermuda's positive obligations under its Constitution, human rights conventions, and international law holds the Government of Bermuda responsible to respect promote and ensure adequate protection for a victim of domestic abuse at the hands of private actors. A resident has a fundamental right to protection of his or her personal integrity.

40. The Plaintiff had no legal basis for stating that because Mr.. Robinson and the Defendant did not live together a DVO was not available to her. Section 2 of the Domestic Violence (Protection Orders) Act 1997 defines a partner in relation to a person in a domestic relationship as including a person with whom he/she has a biological child in common. Residence in the same household is not required where the parties are the parents of a child. Again this is a matter of law that one would expect counsel to know.

41. Having considered this evidence and in particular the incident of the 20th September about the minor having been put in peril by the behavior of Mr. Robinson, I am of the view that the Plaintiff fell short of adequately advancing the Defendant's case which required diligence in doing all that he could to efficiently and effectively seek protection for the Defendant and the minor.

42. The manner in which the Plaintiff approached the Defendant's concerns placed far too little reliance, if any, on the court's responsibility to give sufficient weight to allegations of domestic violence, and to place the interest of the minor as its first and paramount consideration.

43. It is convenient to mention here that in email correspondence passing between the Plaintiff and Mr. Farge in February 2009, the Plaintiff informed Mr. Farge that "if Maxine Reid is required to seek protection through an order in the Supreme Court it will have to be under the common law and she will be deprived of the benefit that the [DVO] Act 1997 was intended to confer on every person in Bermuda". In my opinion the Plaintiff was quite wrong about this, and failed to appreciate the comprehensive provisions of the Children Act 1998.

44. Section 36.1I of the Children Act provides the court with power to restrain harassment of one party to proceedings by the other. This is an acknowledgement that the court has a responsibility where relevant, to identify and deal expeditiously with issues of domestic violence, whether toward a partner or a child. The application can be brought in the Supreme Court. It is clear that having earlier misdirected himself on the law, the Plaintiff

failed to appreciate the benefit of the Children Act in relation to the September 20th incident.

45. Where counsel informs the court of abusive allegations including verbal abuse, threats of or actual violence, it is for the court to decide as a matter of principle if such conduct can affect access. The Plaintiff therefore had an obligation to at least advise the Defendant of the appropriate legal provisions, and that in her interest he could and should bring these matters to the court's attention at the earliest possible stage.

46. It does the Plaintiff no good to say that he exercised his professional judgment in not taking immediate action on the Defendant's complaints and concerns. The Plaintiff's professional judgment must be viewed in the light of applicable law and what other counsel would do or be reasonably expected to do in the circumstances. In my judgment the risk to the minor and the Defendant in the circumstances far outweighed the matters to which the Plaintiff had regard.

47. I can take judicial notice of the fact that in family matters, practitioners have successfully made emergency applications on less cogent evidence given on oath in the absence of an affidavit. In such cases counsel give an undertaking to file proof at the earliest opportunity. The Plaintiff admits in evidence that had he applied for an ex parte order immediately following the September 20th incident he would almost certainly have obtained the variation. This I take as an acknowledgement of his having failed his client in this particular. If I am wrong in this assumption, then I rely on the following.

48. Had the Plaintiff used section 36.1I in making an application following the September 20th matter, the message to Mr. Robinson would have been loud and clear; the court had power to both fine and imprison him. The Plaintiff's advice to the Defendant however was to let the matter go to sleep for a while because the longer that the matter went unanswered the harder it would be for Mr. Robinson to deny the incident.

49. The Plaintiff could have assisted the court in the fact finding process for an emergency application. While the Plaintiff would have wanted some evidence to be placed before the court, he had an unreasonable expectation that a letter to the police for a report would have produced results at all or within a short period of time. To the date of the hearing he had received no answer to that letter. He did not enquire of the attending officers whether or what type of complaint had been made by the Defendant. That enquiry would only have required a phone call.

50. This was not a civil case where counsel might have the luxury of time in which to obtain items of proof. Detailed evidence gathering could have been left for the later substantive hearing after the social inquiry report was at hand.

51. The Plaintiff was able to obtained copies of his client's and one other witness's police witness statements. The Plaintiff however discounted the Defendant's witness statement as being just a repetition of her instructions to him. The Plaintiff failed to appreciate that a police witness statement contains a statement signed by the witness attesting to its truth, and acknowledging the penalty of prosecution for a false statement tendered in evidence. The value of this would not have been lost on a judge.

52. The Plaintiff did not ask the Defendant to obtain an admission and discharge summary from the hospital in proof of the minor's attendance there. This could readily have been done by the Defendant who worked at the hospital and may have been available for an emergency application.

53. In my view the Plaintiff mistakenly conflated the requirements for a substantive hearing on access with that of an emergency application for a variation of access. The former may have required more substantial evidence; the latter which related directly to the Defendant's immediate concerns did not. The court in all probability would have taken immediate and protective measures for the Defendant and the minor and either suspended access or made the adjustment to avoid the parties face to face contact; the variation the Defendant was crying out for; she was not trying to deprive Mr. Robinson of contact with his child.

54. It boggles the mind that the Plaintiff would have been more concerned about how counsel for Mr. Robinson would have reacted to a variation application or to an emergency application. Mr. Robinson's counsel represented him at the earlier scheduled DVO application hearing. She would not have been caught by surprise. Any denials by her client were a matter for the court's judgment.

55. Time is often of essence in family matters. Contrary to the position the Plaintiff advised, where the welfare of a minor is concerned, the delay in pursuing a complaint of abuse can often have tragic if not adverse consequences. One of the consequences in this case was that the Defendant lost any advantage that she may have had in obtaining relief from the stresses of an unworkable access order. I have no doubt that she also lost faith in her lawyer.

56. It is clear from the evidence that the Defendant became frustrated by the conduct of Mr. Robinson. The Plaintiff admitted telling the Defendant that it was clear to him that Mr. Robinson appeared to be playing games either to punish her or to drive up her costs. It is no answer for the Plaintiff to say that his file note reveals that the Defendant agreed to his strategy to let the matter go to sleep in circumstances where she was ill advised.

MAINTENANCE

57. The Defendant argues that the Plaintiff did not assist her in reaching any agreement or arrangement concerning maintenance. She complains as well that the Plaintiff entered into a consent order with counsel for Mr.. Robinson without her knowledge and consent in terms that she would never have agreed to.

58. The order signed by Ground, CJ provided for Robinson to make voluntary contributions into the Collecting Office of the Magistrates' Court toward the maintenance of the child. There is no stated payment amount. The order does not provide for a start date for the payments, nor does it provide for a review date. The order is dated the 14th April 2010. The Plaintiff's evidence is that no payment has ever been made under this order.

59. I find it difficult to accept that the Defendant who had sought the Plaintiff's help in securing maintenance, agreed to an order for a non specific amount of maintenance, to be paid at the father's pleasure. The order in effect is unenforceable. The Defendant had by then been pursuing maintenance for a period in excess of 1 year. The Plaintiff is unable to show by a file note that the Defendant was informed prior to entering into the order of its terms or that she agreed to its terms.

60. The Plaintiff reiterates throughout his evidence that Mr. Robinson's counsel Mr.s Marshall is a very experienced family law counsel. He states that he did not go into a hearing with her without coming to some agreement with her. This must be one of those agreements. It was clearly to Mr. Robinson's advantage. The consent order does not accord with the Defendant's instructions or her aim in having the Plaintiff represent her. The Defendant in the circumstances should be given the benefit of the doubt on this complaint.

61. The Defendant also complains that the Plaintiff disregarded her instructions to him regarding certain other aspects of maintenance. For example, the Defendant's position was that she did not want the minor attending private school. Mr. Robinson had indicated that he wanted the minor in private school and was prepared to pay for it. The court social worker recommended the minor attend the private school.

62. The Plaintiff's advice to the Defendant in an email dated the 11th May 2010 was that given Mr. Robinson's indication that he would pay, and the recommendation in the social inquiry report, her concern that she could not afford private school did not "come into play". The Plaintiff stated that it would be difficult for the Defendant to mount a credible argument against private school.

63. It must have been very disconcerting to the Defendant to be so advised by the Plaintiff. She knew Mr. Robinson and she had no faith that he would keep up with the private school payments. At no point in the email, or in his evidence did the Plaintiff indicate that

he advised the Defendant that under the Education Act 1996 (the "Education Act") a parent's duty is to have his/her child receive suitable education as prescribed by the Education Act. That pursuant to section 52 of the Education Act the child's statutory right is to free education.

64. Inability of a parent to pay for private fee paid education therefore is always relevant to a court. Equally, a parent's view of the ability of the other parent to pay for private education is also relevant and must be taken into consideration with other direct and indirect expenses of the child that that parent may have to pay.

65. The Defendant was offended by the fact that the Plaintiff was not prepared to advocate for her on this issue. The minor was at the time in pre- school. I believe that the Defendant was justifiably concerned especially as Mr. Robinson had resisted paying maintenance up to that time. Had the child been placed in private school and the father failed to pay and the mother was unable to pay, the child's future in the school would have been uncertain. That must have been relevant. While not much may turn on this, it no doubt contributed to the Defendant's belief that the Plaintiff was conceding too much to the other side and not advocating for her.

PROTRACTING THE MATTER

ACCESS

66. The Defendant argues that if the Plaintiff had properly advanced her application for a variation in access the matter would not have dragged on from the 23rd of April 2009 until the 12th May 2009 without result. Her termination of representation email specifically refers to this complaint.

67. The Plaintiff's evidence was that Wade Miller J. would not have allowed the matter of access to be heard apart from the matter of maintenance. Such an approach is provided for in the Children Act. However, this general position should be understood to be subject to circumstances where an emergency application for a variation of access is required.

68. It is of course difficult to know if a variation would have made a difference to the length of time that the Plaintiff took on the matters of access and maintenance but I think it is more probable than not that the sooner decisions went in the Defendant's favour, the sooner the real issues would have been resolved.

69. I believe that once proved, the allegation of abuse may have had a substantial sobering effect on Mr. Robinson. His counsel is very experienced in family law matters and she would no doubt have advised her client that the change in access (as the Defendant envisioned it) would have been in the interest of the child and to Mr. Robinson's benefit as well. The proposed change would have avoided the need for direct contact between the

parents. Such orders, sadly I must add, are made all the time where access has proven difficult for one parent or the other.

70. The real test of the missed opportunity to have access changed as requested by the Defendant is best captured by Cervantes' expression "the proof of the pudding is in the eating". The evidence in this case that demonstrates the truth of the matter is the fact that access continued to be a contentious issue, and was never resolved by the Plaintiff.

71. In point of fact, the Defendant informed the Plaintiff in an email prior to terminating his services that Mr. Robinson was using the access arrangements as an opportunity to be in direct contact with her and would never agree to change the arrangements. The access arrangements had not been resolved by the Plaintiff on behalf of the Defendant prior to the 12th of May 2010 when she informed him that she would no longer require his services.

DECLARATION OF PARENTAGE

72. Several other events leading up to the parting of the ways of the parties herein require some scrutiny. The Plaintiff's evidence is that at a hearing on the 12th February (the minor having been returned to Bermuda by then) Wade Miller J. learned that the Defendant had made an application in the Magistrates' Court for a declaration of paternity and for maintenance in respect to the minor against Mr. Robinson.

73. In the course of the hearing the Plaintiff gave an undertaking that he would discontinue proceedings in the Magistrates' Court and file a fresh summons seeking similar relief in the Supreme Court. This was reflected in the order made on the 12th February along with consequential orders made by the judge effectively consolidating Mr. Robinson's existing Minor's Act application and the Defendant's declaration of paternity and maintenance applications.

74. The Defendant indicates that she was dissatisfied with the consolidation. She thought that the Family Court was better suited to deal with that matter where she could represent herself and not incur legal fees. The Plaintiff's answer to that was that he had no choice in the matter because the judge determined that it should be consolidated. I see no reason for complaint if indeed the judge was determined to handle the matter in that way, whatever her reasons.

75. The Defendant is dissatisfied with the manner in which the consolidated matters dragged on. Her evidence is that the Plaintiff did not have to take a year to manage her case particularly as he did not achieve any result for her.

76. The Plaintiff admits that he did not discontinue the proceedings in the Magistrates Court. His evidence is that he does not recall attempting to review the Magistrates' Court file,

stating that as a matter of practice counsel are not permitted to review Magistrates' Court files. He states that he does not recall asking for it or going to see it. He does not believe that the file itself was ever brought up to the Supreme Court for inspection.

77. The Plaintiff's evidence is that he had nothing to do with the Family Court proceedings, had not acted in respect to them, so had no authority to do anything in regard to those proceedings. He subsequently learned that the proceedings in the Magistrates' Court were still active. This was a rather dry technical point made by the Plaintiff. It was his duty pursuant to the undertaking that he had given to discontinue the proceedings. However, no injury was caused to the Defendant by his failure to perform his undertaking.

78. The Plaintiff's evidence is that Mr.s Marshall, counsel for Mr. Robinson, told him that paternity would not be disputed or seriously disputed therefore he waited for Mr.s Marshall to file the application for the declaration of paternity. He states that when she failed to do so, he then filed an Originating Summons in order to facilitate the Defendant's application for a declaration of paternity and for maintenance. When the Plaintiff eventually filed the summons and affidavit on 6th April the matter was set down for a first hearing date several weeks in the future by the Registrar.

79. I do not understand the Plaintiff's evidence on this point. This application was, and was always intended to be the application of the Defendant; the first clause of the order of the 12th February makes that clear. I cannot understand in the circumstances why the Plaintiff would have been waiting for Mr. Robinson's counsel to file it. I believe that this provides substance to the Defendant's assertion that the Plaintiff was conceding too much of the case including its forward motion to Mr. Robinson's counsel.

80. I believe that there is a fundamental point that the Plaintiff missed or has not relied on in connection with Justice Wade Miller's ordered of the 12th April 2009. This point was not relied on by the Defendant directly in her defence; however, it arises on the law and dovetails into her complaint under the instant heading. I made it clear to the Plaintiff in the hearing that as the Defendant was a lay person I would permit her to enlarge her defence because in the circumstances, to not do so would put her at a serious disadvantage.

81. While the Plaintiff complained that he was caught by surprise by some of the Defendant's cross examination and evidence he had the opportunity to bring into court any and all of his files in the matter as he needed to refresh his memory. The Plaintiff did not take advantage of the many adjournments in this case to bring those files to court to assist him. He did however, have available to him scanned copies of much of the documentation relied on in trial.

82. I am of the view that when Wade Miller J. ordered that the Defendant's application for a declaration of paternity (parentage) be heard together with the Minor's Act application in

her order of the 12th February 2009, she intended that the provisions of the Children Act 1998 would apply. The application that the Defendant had taken out in the Family Court was a Children Act application. I am confirmed in this view because there is no matching scheme for establishing parentage under the Minor's Act.

83. Had the Plaintiff bothered to look into the Family Court application or been aware of the relevance of the Children Act to Family Court applications he would have been aware that the provisions of section 18E applied and formed the basis for the Defendant's application in the Family Court.

84. The relevance of the act is that the Plaintiff could then have prayed in aid the provision in section 18H of the Children Act. Section 18 H provides:

> "A written acknowledgement of parentage that is admitted in evidence in any civil proceeding against the interest of the person making the acknowledgment is *prima facie* proof of the fact."

85. The Minor's Act application was a civil proceeding and the Plaintiff could have relied on the sworn affidavit of Mr. Robinson filed there in as prima facie proof that he was the father. There would have been no need to delay the application. The formal application could have been filed with the draft order when it was sent up for signing. There would have been no room for Mr. Robinson or his counsel to resile from the position stated in his document.

86. Alternatively the declaration could have been made on this basis at the next available chambers hearing date. The Defendant would not have had to wait until July for the declaration application to be made. Indeed the originating summons could have been requested to be set down as soon as possible or at latest on the 23rd of April, the review date in the order or the 12th February. For that matter a consent order filed in advance may have not just been possible, but probable if the Plaintiff had the Defendant's best interest in mind.

87. As an aside, any of the above would have alleviated the Defendant's concern about having the minor registered as a Bermudian, another source of concern for the Defendant that the Plaintiff was aware of. A court order declaring parentage is sufficient under the Immigration and Protection Act for the non Bermudian mother to make an application on behalf of a minor. The Defendant had repeatedly complained to the Plaintiff that she had trouble with the Immigration officials upon returning to Bermuda with the child for want of registration.

88. The court would have been in a position to consider an application for interim maintenance at an early time in the proceedings. Again, Mr. Robinson's counsel would have been in a difficult position denying his assertion in his affidavit that he had been

supporting the minor. I am of the view that the Plaintiff failed to appreciate that in spite of the directions given in the order of the 12th February for affidavits of means to be filed, an interim maintenance order could have met with some success.

89. Section 36.1D of the Children Act provides for an interim order to be made. By virtue of section 36.1F it is clear that the court may make an order before financial statements have been filed. That same affidavit asserted the Mr. Robinson had financially supported the minor.

90. The Plaintiff states that whenever he broached the topic of interim maintenance Mr. Robinson's counsel countered with an argument that the child spent the majority of his time with the father. The order of the 12th shows that the father had the child for approximately 3 hours each week day after nursery and every other week end. I do not see how this amount of time could have affected the housing expenses alone that the Defendant underwrote for the child.

91. The Plaintiff gives no specifics of the argument that counsel for Mr. Robinson presented. Mr. Robinson was clearly avoiding a monetary order being made against him. However it is clear that the Plaintiff could have asserted a case pursuant to the above referred section. He should be aware that direct and indirect expenses are always to be considered. Having the child part of the time may affect one (eg. baby sitter fees) but not the primary care giver's other expenses (eg. rent).

EXPIRED ORDER

92. Another incident that the Defendant relies on in her defence is an occasion when the Defendant resorted to calling the police related to access. In the course of the police reading the court order of the 12th February 2009 the police discovered that the access order had in fact expired on the 23rd of April.

93. The Defendant complains that the Plaintiff failed to advise her that the access order had expired. She was very upset to learn of the expiry and the manner in which it came to her attention. The Defendant's position is that when the court made the order it intended that the parties would return on the 23rd of April because the order expressly provided that the access arrangements made in the order expired and on the following day access would be reviewed.

94. The Defendant's position is that she learned that the Plaintiff and Mr. Robinson's counsel agreed to delist the mention for the 23rd April without the Plaintiff first obtaining her consent or advising her that he intended to take that course. Her position is that had she been aware of the course of action she would have objected to the adjournment because she had informed the Plaintiff that the access arrangements were not working for her. She relies on this as an incident of the Plaintiff not looking out for her interest.

95. The Plaintiff's position is that the 23rd of April was only intended to be a mention and that the court would not have heard them on access on that occasion. He had no specific recollection of informing the Defendant of his intention to delist the 23rd April matter but his evidence was that it was his usual practice.

96. I reject the Plaintiff's assertion that the review date was a mention only. I have accepted the Defendant's evidence that she informed the Plaintiff that she required access to be amended to prevent face to face handovers of the minor between her and Mr. Robinson. The Defendant was not attempting to reduce Mr. Robinson's access provisions. The review date was intended by the judge to maintain control over that aspect of the proceedings. It indicates that the judge was aware that the access order was made in circumstances that either presented or may have presented challenges for the parties.

97. In the circumstances I find it incredible that the Plaintiff was not awake to the expressed concern of his client. The order was clear in its terms and implications; the access arrangements were only made on an interim basis. The access was not working for his client. Other orders could have been made, or a simple variation could have been made to alleviate the Defendant's concerns.

98. It was unreasonable for the Plaintiff to assume the court would not have heard the matter. He would at the least have advanced his client's concerns. He appreciated that a final order was not being sought. In such circumstances a social inquiry report would not have been needed for the variation, hence there was no need to wait for it in the circumstances.

99. This missed opportunity resulted in a substantial delay in having the issue of access finally determined. One can understand why the Defendant later referred to Mr. Robinson's conduct as "making her life a living hell". After the expiry of 18 months the Defendant when representing herself had the issue resolved post haste, in the terms that she had earlier sought to have the Plaintiff vary. It does the Defendant no good to say that the Defendant obtained relief because Mr. Robinson's counsel was being gentle with her.

100. The Plaintiff's later statement to the Defendant that the court would have assumed that the order remained in force and effect notwithstanding its expiry did not allay her concerns. This statement although technically correct totally missed the Defendant's point; the Defendant was suffering at the hands of Mr. Robinson, and she deserved to be heard by the judge. The judge did not make a vacuous order; she made it because counsel requested and or because the circumstances required scrutiny by the judge. I have no doubt that this also contributed to the breakdown in the parties' relationship.

THE PLAINTIFF'S CHARGES AND BILLING

101. The Defendant has three basic complaints under this head. Her first position is that she did not receive any of the Plaintiff's bills for the matters that arose after the September

2009 matter. Secondly that she resolved the issues that she had hired the Plaintiff to represent her on. The Plaintiff did not accomplish anything for her, therefore has been over charged. And thirdly, if which she denies, the Plaintiff is entitled to the fees he charged, he ought to have given her an opportunity to discuss settlement of the charges before the Plaintiff sued her for the outstanding amount.

102. The Plaintiff's position is that he himself invoiced the Defendant electronically for each invoice and then on a monthly basis sent hard copies of all the invoices in an envelope to the Defendant. The Defendant paid approximately $15,000 that had been invoiced down to the end of April 2009.

103. The Plaintiff's case is that he acquired an accounts department which then commenced invoicing the Defendant from May or June 2009. The Plaintiff was not able to provide any proof that his accounts department electronically billed the Defendant or billed her monthly, despite having time over several adjournments to find such proof. He indicated variously that he had no access to the accounts department accounts, or that his former or current assistants were unavailable or unable to assist him, that she could not find any 'send' receipts. He indicated that the "accounts girl" did not come into the office on the previous Friday or was locked out of the office.

104. The Defendant asserts that she paid the Plaintiff $9,000 on account from the beginning on the basis of the estimate given by the Plaintiff and then paid some further invoice of approximately $4,000, and then as she was low on funds then paid additional billed amounts as and when she had cash. I am satisfied that the Defendant paid the amount that the Plaintiff indicates she paid. The Defendant asserts however that the first that she became aware of owing the Plaintiff $35,000 was toward the end of his representation of her.

105. I am not satisfied that the Plaintiff's office billed the Defendant as he asserts. He has not proven that, despite his assertion that if she got all of his other emails she should have gotten the billings. The defendant was not sending the Defendant electronic bills. If someone was they did not come to court to give that evidence. Despite his assertion that the Defendant should prove why she did not get the bills, the Plaintiff has failed to prove that she did receive them.

106. If the Plaintiff had been able to establish on the balance of probability that he had invoiced the Defendant on an ongoing basis, his form of billing seems unusual. It seems that only the very last billing dated 27th April provides a running balance of account and is referred to as a statement. The previous invoices all seem to only bill for the current month's work. This is very deceptive and no doubt confusing for a recipient.

107. The Plaintiff did not make it clear in his evidence if his office sent out monthly statements. I am inclined to believe that he did not send out statements. That may explain

why in 2009 the Defendant found it necessary to go into the Plaintiff's office to find out what her total billing was at that time. It may also explain why by email of the 30th April the Defendant expressed surprise that her bill totaled $37,000. The Plaintiff in reply went onto refer only to invoices.

108. The Plaintiff is also relying on the terms of his retainer agreement to charge interest at the rate stated therein of 1.5% per month. My first observation of this term is that it is written in a deceptive way. Only the savvy client would appreciate that the annual interest rate is 18%. My second observation is that if a client is not given a monthly statement showing the running balance, the client may have difficulty appreciating the accumulative effect of the interest charges applicable. Not even the Plaintiff's statement makes reference to the interest charge.

109. The above observations have been made because in this case the Plaintiff had to be aware that the Defendant was not a deep pocketed client. She was a mother concerned to obtain a reasonable maintenance order. Legal costs would have been relevant to her. In a case where interest is stated to attach to unpaid balances, a concomitant implied term is that outstanding balances and the accrued interest will be included each month's billing. I have no doubt that had the Defendant been aware of the cumulative effect of the Plaintiff's charges she would have been in a better position to address the issue of fees with the Plaintiff prior to them escalating beyond her reach.

110. There is no evidence to suggest that the Plaintiff addressed the overdue account with the Defendant at any time prior to his sending a statement. Billing by the hour did not justify the Plaintiff in sitting back and driving up costs or letting the opponent drive up costs. Indeed a client should not be expected to wait until the representation is finished to understand what certain options may have cost. Further, since the retainer agreement contemplated one matter, it should be implied from the agreement that should a change occur that goes beyond the estimate an updated estimate will be given.

111. Even if (which I do not believe) my assessment of the implied terms of the agreement is not a correct one, in any event my general assessment is that in light of the finding that I have made above the Defendant did not receive value for the money she has been charged by the Plaintiff.

112. That is, the Plaintiff did not adequately advise the Defendant on the law, in particular on the applicability of the Children Act; he mistakenly conflated the requirements for a substantive hearing on access with that of an emergency application for a variation of access in circumstances where the Defendant and the child were put at risk; he failed to seek to vary access or obtain a reasonable maintenance order within a reasonable time or at all; failed to adequately advise the Defendant or carry out her instructions and generally protracted the matter to the detriment of the Defendant.

113. These failings brought the retainer agreement to an end quite early in the Plaintiff's representation of the Defendant during the initial matter for which the Plaintiff appeared on January 29. In the circumstances the Defendant did not breach the retainer agreement of 25th January 2009 as claimed or at all. Accordingly, the Plaintiff's claim for $43,829.46 is hereby dismissed. In so far as the Plaintiff's work did assist the Defendant, I am of the view that the amount already paid by the Defendant is sufficient to compensate the Plaintiff.

114. The Defendant shall have her costs, (to the extent that any are claimable) taxed if not agreed.

Dated this day of 2012

_____

Charles-Etta Simmons

Puisne Judge