

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 36 of 2020

BETWEEN:

[1] ROBERTHA MAGNUS USHER  
(doing business as Robertha Magnus  
Usher & Associates)

Claimant/Ancillary Defendant

and

[1] HERMITA CAWICH

Defendant/Ancillary Claimant

Appearances:

Rt. Hon. Dean O. Barrow, SC for the claimant/ancillary defendant

Mr. Allister Jenkins for the defendant/ancillary claimant

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2023: July 21  
November 3  
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**DECISION**

[1] **FARNESE, J.:** Ms. Cawich hired Mrs. Magnus Usher as her attorney in divorce proceedings. Mrs. Magnus Usher brought this claim to recover payment of \$42,492.50 plus court fees, interest and costs for her services. Ms. Cawich disputes the bill for those services on the basis that they do not reflect the Fee Agreement she signed. In particular, Ms. Cawich contends that she should not have

been charged an hourly rate for work done to file an injunction. She also asserts that some of the fees charged were for work done after she instructed Mrs. Magnus Usher to discontinue the claim, and that she paid for an application for maintenance to be filed that was not. Relying on subsection 33(6) of the Legal Profession Act,<sup>1</sup> Ms. Cawich has filed an ancillary claim to set the Fee Agreement aside on the grounds that it is unfair and unconscionable in the circumstances. Alternately, she argues that the amount she was charged under the Fee Agreement is unfair and unconscionable given the total of what she has already paid to Mrs. Magnus Usher surrounding the end of her marriage.

[2] For the reasons outlined below, I find that Ms. Cawich owes \$31,867.50 under a Fee Agreement she entered into with Mrs. Magnus Usher to pursue a matrimonial property claim. When an objective test is applied to the ordinary meaning of the words in the Fee Agreement, and after considering the overall purpose of the Fee Agreement and the factual and regulatory context, I find that the injunction application was to be charged on a contingency basis. I further find that Ms. Cawich agreed to pay the amount owing even though she aborts or settles the matrimonial property claim.

## **Issues**

- [3] Three issues must be resolved in this dispute:
- a) Was Ms. Cawich billed according to what the parties agreed?
  - b) If yes, is the agreement unfair and unconscionable?
  - c) What, if any, amount is owed to Mrs. Magnus Usher under the Fee Agreement?

## **Analysis**

*Was Ms. Cawich billed according to what the parties agreed?*

[4] To resolve this dispute, I must look at the Fee Agreement to decide what the parties agreed would be the method of payment for Mrs. Magnus Usher's services. This process engages well

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<sup>1</sup> Cap. 320, The Substantive Laws of Belize, Rev. Ed. 2020 [the Act].

established principles of contract interpretation. These principles have been summarized by Hoffman J. as follows:<sup>2</sup>

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [\[1997\] A.C. 749](#).

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [\[1985\] A.C. 191](#), 201:

“if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

[5] Because the Legal Profession Act subjects the fees Mrs. Magnus Usher can charge for her services to some regulation, it informs the court’s interpretation of the Fee Agreement. There is no statutory

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<sup>2</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [1998] 1 WLR 896 at 912-3.

requirement that a lawyer enter into a fee agreement with their clients, but if they do, that agreement must be in writing.<sup>3</sup> The Act respects the parties' rights to freely negotiate the fees to be paid for services. The court will only interfere in circumstances where the agreement is unfair and unconscionable,<sup>4</sup> or where remuneration is paid on terms not specified in the agreement.<sup>5</sup> If the parties do not have a fee agreement, disputes over bills can be taxed.<sup>6</sup> Bills issued pursuant to a fee agreement, however, cannot be taxed.<sup>7</sup> It is important to understand that these two processes are different. The Act empowers the taxing officer to "make the order as he deems fit with regard to the costs of reference."<sup>8</sup> The taxing officer has much more discretion than I do in the present application to adjust the amount owing.

[6] Ms. Cawich has the burden to prove that Mrs. Magnus Usher's bill for services was either contrary to their fee agreement or unfair and unconscionable. Provided the bill was properly drafted and served on the client, Mrs. Magnus Usher is not required to justify the contents of the bill in the "first instance" provided the invoice is in the correct form.<sup>9</sup> I interpret this subsection of the Legal Profession Act as a rebuttable presumption that the work invoiced was in fact completed. The court does not require evidence that the work invoiced was completed as Ms. Cawich does not dispute that Ms. Magnus Usher completed the injunction application on her behalf.

[7] Ms. Cawich's main objection to her bill is that she was charged an hourly rate for work completed towards an injunction application to prevent her ex-spouse from dealing with assets subject to her matrimonial property claim. She believes that the Fee Agreement specifies that Ms. Magnus Usher would do this work on a contingency basis.

[8] When an objective test is applied to the ordinary meaning of the words in the Fee Agreement and after considering the overall purpose of the Fee Agreement and the factual and regulatory context, I find that the injunction application was to be charged on a contingency basis.

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<sup>3</sup> Subsection 33(5).

<sup>4</sup> Subsection 33(6).

<sup>5</sup> Subsection 33(3).

<sup>6</sup> Subsection 35(1).

<sup>7</sup> Subsection 33(7).

<sup>8</sup> Subsection 35(6).

<sup>9</sup> Section 36.

- [9] Clauses 2 and 3 of the Fee Agreement outline the parties' agreement as to payment:
2. In consideration of the services to be performed by the Firm the Client has agreed to pay to the Firm the following amounts:
    - a. Retainer of \$5000 for Division of Property and 15% of the value of property/ assets obtained.
  3. Should the Supreme Court Proceedings become protracted, Firm may request a further retainer or submit invoices periodically.
- [10] Because the Fee Agreement contains no express provision to the contrary, I find that a reasonable person would believe that the injunction application was subject to the Fee Agreement. Clause 1 of the Fee Agreement outlined that the Agreement was for "pursuing the division of matrimonial property." The injunction was made in the matrimonial property claim to protect assets Ms. Cawich asserted were family property before the court could decide their fair division. The injunction clearly was made in pursuit of the division of matrimonial property. As such, subsection 33(3) of the Legal Profession Act provides that once a fee agreement is signed, an attorney is not "entitled to any further remuneration for the matters to which it relates other than those therein stipulated in the agreement."
- [11] If the fee for the injunction was not going to be invoiced on a contingency basis, it is reasonable to expect that either the Fee Agreement would have expressly provided for the different method of invoicing, or a separate fee agreement would have been signed. Ms. Cawich signed separate fee agreements for the dissolution of marriage and alimony proceedings, which provided for different methods of payment.
- [12] When the ordinary meaning of the words in Clause 3 are considered with the Fee Agreement's overall purpose, it is clear that Clause 3 contemplates the possibility of other arrangements being made if the matter became lengthy or more complex than usual. Subsection 33(5) of the Act, however, requires that these arrangements be in writing to be enforceable because those side discussions modify the Fee Agreement. The parties cannot contract out of a mandatory statutory provision even if I were to find that the parties discussed that the injunction would be invoiced on an hourly basis.

[13] I also do not find the circumstances support the conclusion that payment on an hourly basis is a term that can be implied to reflect the intention of the parties at the time the contract was made. Clause 2(a) specifies the method of payment. Clause 3 adds that additional retainers may be sought, and invoices issued if the matter becomes protracted. Clause 3 does not vary the method of payment. That Ms. Cawich paid the additional retainer and the invoice issued for the injunction do not alter this conclusion. Ms. Cawich is entitled to have the \$13,125 she paid towards the invoice set off against the \$42,492.50 she owes Mrs. Magnus Usher. The additional retainer amount of \$5625 (inc. tax) will not be deducted, however, because Ms. Cawich expressly agreed to pay additional retainers if the matter became protracted.

*Is the agreement unfair and unconscionable?*

[14] Ms. Cawich argued in the alternative that if the Fee Agreement allowed for the injunction to be invoiced on an hourly basis, it was unconscionable and unfair. Although it is no longer necessary for me to consider this issue to resolve this claim, I feel it is important to do so. Unconscionability is a serious charge. As an attorney, Mrs. Magnus Usher is an officer of the court and such an allegation, even if unfounded, can have lasting repercussions for her reputation that can affect her ability to earn a living.

[15] After reviewing the Fee Agreement and the circumstances surrounding its use, I find nothing to suggest that the Fee Agreement is unfair and unconscionable. Mrs. Magnus Usher did not take advantage of Ms. Cawich by asking for additional payments for the injunction. By Ms. Cawich's own admission during her testimony, the possibility of an injunction was discussed before the Fee Agreement was signed. The Fee Agreement expressly contemplates that additional payments may be required if the matter became protracted. If Ms. Cawich did not want to agree to that term, she could have chosen not to retain Mrs. Magnus Usher's services.

[16] I also find no evidence that Mrs. Magnus Usher misled Ms. Cawich. In fact, I find it is more likely than not that Mrs. Magnus Usher discussed with Ms. Cawich that the invoice for the injunction would be on an hourly basis. This discussion explains why Ms. Cawich paid the invoice when it was received without questioning its contents. By not reducing that understanding to writing, however, Mrs. Magnus Usher did not ensure that Ms. Cawich understood that this amount was not

a pre-payment of the ultimate contingency fee collected. I find this was an oversight, not malfeasance.

[17] I also find that the amounts Ms. Cawich paid under separate fee agreements for the dissolution of marriage and alimony claim irrelevant to this dispute. The amounts charged reflect what was agreed between the parties and are not amounts that raise any suspicion of unconscionability.

*What, if any, amount is owed to Mrs. Magnus Usher under the Fee Agreement?*

[18] Ms. Cawich asserts that she owes nothing further to Mrs. Magnus Usher because she terminated her retainer before settlement and has yet to recover any matrimonial property. She also disputes how Mrs. Magnus Usher calculated the value of the assets recovered. Mrs. Magnus Usher used the value of one property from a professional valuation undertaken by Ms. Cawich's ex-husband, which Ms. Cawich disputed as too high during the matrimonial property claim.<sup>10</sup> Ms. Cawich also claims that costs she was awarded and that have been paid to Mrs. Magnus Usher have not been deducted from the total owing.

[19] Mrs. Magnus Usher relies on Clause 7 of the Fee Agreement to claim payment is outstanding. Clause 7 outlines that:

Should the matter be aborted by Clients, litigated or settled, all fees as stated herein are due and payable by Clients, unless otherwise varied in writing by the Firm.

Moreover, Mrs. Magnus Usher alleges that Ms. Cawich has attempted to circumvent her obligation to pay by pretending that she is abandoning her matrimonial claim after she obtained a settlement offer on Ms. Cawich's behalf. Instead of finalizing the settlement, Ms. Cawich reached a side agreement with her ex-husband. Mrs. Magnus Usher also contends that there was nothing improper in her use of the professional valuation. She also indicates that she discounted the injunction's invoice by the \$2500 in response to payment of the costs order.

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<sup>10</sup> Ms. Cawich also disputed interest being charged on the outstanding invoice and the failure to consider \$2500 awarded to her in a related proceeding. During her submissions, Mrs. Magnus Usher conceded that the \$2500 in costs ought to be deducted and that she erred in charging interest.

[20] I do not find Ms. Cawich's assertions that she abandoned her claim because the process was too stressful and that she was not satisfied with the services she received from Mrs. Magnus Usher credible. The attorney representing her ex-husband at the time wrote to Mrs. Magnus Usher indicating that she received instructions from her client that her client and Ms. Cawich had settled the matter among themselves. The attorney did not communicate that her client informed her that Ms. Cawich was abandoning her matrimonial claim. Ms. Cawich also did not bring the other party to that agreement, namely her ex-husband, to refute his lawyer's report of a settlement. I, therefore, find on a balance of probabilities that a settlement agreement exists. The fact that no property has been transferred to Ms. Cawich is likely the result of this litigation.

[21] Ms. Cawich is equally bound by the ordinary meaning of the terms of the Fee Agreement. Clause 7 plainly states that should the matter be "aborted" or "settled" all fees are due. It flouts business common sense to suggest that the contingency payment does not apply in circumstances when a claim is settled or aborted to avoid paying fees.

[22] As previously explained, section 36 of the Legal Professions Act creates a rebuttable presumption that the invoice accurately reflects the amount owing. Ms. Cawich has not presented evidence to contest that the settlement offer Mrs. Magnus Usher obtained was unreasonable or unfair. While she disputes the use of professional valuation of one property because she personally values it at a lesser amount, Ms. Cawich has not provided any other information to explain why her personal valuation is more accurate than the professional valuation. I find Ms. Cawich's personal view of the property's worth is insufficient to overcome the presumption in section 36.

[23] Ms. Cawich has also not satisfied this court that the costs order is an outstanding amount owed to her. The notations on the injunction invoice shows that the hourly rate charged for the injunction was discounted by \$2500. Mrs. Magnus Usher testified that the discount was done to reflect the costs paid. Ms. Cawich provided no other explanation for why the injunction's invoice was discounted by the exact amount of the costs order.

[24] Mrs. Magnus Usher is entitled to any amount owing to her for her services after the amount Ms. Cawich paid for the injunction is deducted (subject to the correct amount of interest being charged).

## **Disposition**

[25] It is hereby ordered that:

- a) Ms. Cawich pay to Mrs. Magnus Usher the sum of \$31,867.50 being the amount owed under the Fee Agreement dated 12<sup>th</sup> December 2018 after the \$13,125 paid by Ms. Cawich for the injunction application are deducted from the outstanding balance of \$42,492.50.
- b) The counterclaim is dismissed.
- c) Ms. Cawich will pay to Mrs. Magnus Usher fixed costs of \$3000 and court fees of \$125.
- d) Ms. Cawich pay interest on the judgment to Mrs. Magnus Usher at the rate of 6% per annum until full payment pursuant to section 167 of the Supreme Court of Judicature Act.

**Patricia Farnese  
High Court Judge**