IN THE SUPREME COURT OF BELIZE, A. D. 2016

ACTION NO. 245 OF 2016

	(WIZARD TRUST LTD. (A company duly	**CLAIMANT**
	(incorporated under the laws of St. Kitts and Nevis)	
	(	
BETWEEN	**(AND**	
	(	
	(COVE LTD.	
	((A limited liability company)	
	((CLENT WHITEHEAD	**DEFENDANTS**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Ms. Pricilla Banner of Courtenay, Coye & Co. LLP for the Defendants/Applicants

Mrs. Deshawn Arzu-Torres of McKoy Torres LLP for the Claimant/Respondent

-----

R U L I N G

1) This is an Application to Strike out a Claim for damages for breach of contract. On May 5th, 2016, this Claim was filed in the Supreme Court of Belize seeking damages for breach of a contract between the parties. The Claimant, Wizard

Trust Ltd. alleged that the Defendants, Cove Ltd and Clent Whitehead, had an agreement with it for the purchase and sale of property in Placencia. The Claimant says that it paid a deposit of $100,000 US to the Defendants, and a balance of $95,000US was to be paid on the completion date. Cove Ltd. had also agreed to get a survey and plan of the property carried out at their own expense. The Claimant Company alleges that it had agreed with the Defendants that it would receive "*not less than 172.5 feet of beach frontage"*. Upon completion of the survey, only 166.23 feet of beach frontage was available. The Claimants allege, *inter alia*, that the Defendants sought to convey this 166.23 feet of beach frontage to the Claimants, and as this was less than the 172.5 feet referred to in the agreement, the Defendants had breached the agreement.

2) The Defendants filed an application to strike out this claim on October 14th, 2016 and the written submissions were filed by the Defendants/ Applicants on June 22nd, 2017 and by the Claimant/Respondent on November 11th, 2017. The Defendants/Applicants filed Submissions in Reply on March 3rd, 2018. The Court reserved its decision which it now delivers.

Defendants/Applicants Submissions in support of Strike out Application

3) Ms. Pricilla Banner submits on behalf of the Defendants/Applicants that this Claim should be struck out for the following reasons:

    a) The Claim is an abuse of the process of the Court;

    b) The matters sought to be tried in this Claim are *res judicata;*

    c) The Claim is statute barred in any event having not been commenced within 6 years of the alleged breach of contract, which the Defendants wholly deny,

    d) The present Claim is frivolous and vexatious and discloses no reasonable grounds for bringing the Claim and is abusive of the process of the Court.

Ms. Banner submits that on July 29th, 2004, Cove Ltd. commenced Action No. 373 of 2004 against Wizard Trust Ltd. concerning the same subject matter of the present claim. Both the claim and the counterclaim in Action No. 373 of 2004 Cove Ltd and Clent Whitehead v. Wizard Trust Ltd. concerned the interpretation and enforcement of an Agreement for Sale of property which was fully litigated and the Supreme Court Judge Legall J. made orders dismissing the claim and ordering Cove Ltd to pay Wizard Trust Ltd. US $158,000 as damages for breach of contract as well $100,000 as return of

the deposit paid by Wizard Trust Ltd. for the sale of the property. The Counterclaim of Wizard Trust Ltd. was also dismissed. An injunction was granted against Wizard Trust Ltd. restraining it from dealing with the property and the building thereon. Cove Ltd. was also ordered to pay interest of 6% per annum on the judgment debt from September 1st, 2008 until fully paid. Costs were to be paid by Cove Ltd. to Wizard Trust Ltd.

4) On appeal by Cove Ltd. and by Wizard Trust Ltd., the Court of Appeal ordered that:

   i. The Appeal and Cross Appeal be allowed;

   ii. The Orders of the Court below be set aside;

   iii. A new trial is ordered before another Judge of the Supreme Court;

   iv. No order as to costs on the Appeal and the Cross Appeal.

5) The re-trial was heard before Mr. Justice Courtney Abel on March 3rd, 2015. At that trial the witnesses for the parties did not appear. Having heard submissions by the parties, the Court struck out both the claim and the counterclaim. Neither Wizard Trust Ltd. nor Cove Ltd. appealed the decision of Abel J. Ms. Banner submits that that decision is therefore final. More than

two years later, Wizard Trust Ltd. filed these proceedings seeking to re-litigate the dispute concerning the 1997 Agreement on May 5th, 2016.

6) In these proceedings in Claim No. 245 of 2016, Wizard Trust Ltd. seeks the following relief against Cove Ltd. with respect to the same 1997 Agreement litigated in Action No. 373 of 2004.

   i. Damages for Breach of Contract;

   ii. Special damages in the sum of US $550,000;

   iii. Interest at such rate and for such period as this Honourable Court deems just;

   iv. Costs and Attorneys costs;

   v. Such further or other relief as this Honourable Court deems just.

7) Ms. Banner contends that Wizard Trust Ltd. has been struck off the register of companies in St. Kitts since 31st July, 2009 almost 8 years ago. The company is therefore not in good standing and consequently has no legal status to bring this claim, its corporate personality acquired upon its registration under the Companies Act 1996 of St. Kitts and Nevis having been extinguished or suspended. She further argues that the Court should suspend these proceedings pending proof from Wizard Trust Ltd. that it has

the relevant authority to commence the claim. The affidavit of Clent Whitehead is evidence that not only has the claim been filed by an inactive company, it has also not been authorized by any director of the company, and should therefore be struck out.

8) Ms. Banner further submits that this Claim is issued after the expiry of the limitation period and should be struck out for want of prosecution under section 4 of the Limitation Act CAP 170 of the Laws of Belize:

> *"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued*
>
> *(a) Actions founded on simple contract or tort"*

The cause of action relied upon by Wizard Trust Ltd. as breaches of the 1997 Agreement occurred at the latest in the first half of 2004. No claim could therefore be validly filed after 2010 since the time period would have exceeded 6 years since the alleged breach.

9) Ms. Banner further argues that the facts of this case demonstrate that the Court should strike out this claim for abuse of process on the ground that the claim amounts to re-litigation of and/or a collateral attack on the final decision of the Court in Action No. 373 of 2004 where the Claimant's

collateral attack was struck out and no appeal was lodged. She cites Halsbury's Laws of England as follows:

> *"The law discourages re-litigation of the same issue except by means of an appeal. It is not in the interests of justice that there should be a re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions , or that there should be collateral challenges to judicial decisions. There is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. The principles of res judicata, issue estoppel and abuse of process have been used to address this problem."*

10) Ms. Banner submits that in the case at bar, there is no doubt that Wizard Trust Ltd. put forth the case which it has now filed in Action No. 373 of 2004. Notwithstanding that the claim in Action No. 373 of 2004 was struck out and Wizard Trust Ltd. did not appeal that decision, Wizard Trust Ltd. has once again proceeded with the present Claim for breach of contract on the very same facts. She relies on ***Tyrell v John*** Claim No. 97 of 2004 of St. Vincent and the Grenadines, where the OECS High Court struck out a claim for abuse of

process in circumstances whereby the Claimant commenced a claim similar to a counterclaim she had filed in a previous matter that had been struck out.

Learned Counsel says that the present Claim is replete with pleadings which appear to have been merely extracted from the Counterclaim filed in Action No. 373 of 2004. This is a clear case of abuse of process wherein the Claimant is attempting to not only re-litigate a matter which was struck out in previous proceedings, but is also attempting to launch a collateral attack on a final strike out decision with respect to Action No. 373 of 2004, which has not been appealed.

11) On the question of res judicata estoppel, Ms. Banner cites the elements of the principle as stated in ***Butterworths Common Law Series (Spencer Bower and Handley)*** 2009 as follows:

a. The decision whether domestic or foreign was judicial in the relevant sense;

b. It was in fact pronounced;

c. The tribunal had jurisdiction over the parties and the subject matter;

d. The decision was i) final; ii) on the merits

e. It determined a question raised in the later litigation; and

f. The parties are the same parties, or the earlier decision was in rem.

Ms. Banner cites Lord Denning MR in ***Fidelitas Shipping v VV/O Exportchleb*** [1965] 2 ALL ER 4 as follows:

> *"The law as I understand it is this; if a party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same issue. Transit in res judicatum.*
>
> *But within one cause of action there may be several issues raised which are necessary for the determination of the whole case, the rule is that once an issue has been raised and distinctly determined* between *the parties, then as a general rule neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them in the same or subsequent proceedings."*

For these reasons, Ms. Banner submits that this Claim should be struck out, with costs to Cove Ltd.

Submissions on behalf of the Claimant/Respondent on the Strike Out Application

12) Mrs. Deshawn Arzu Torres on behalf of the Claimant/Respondent argues that although the claim was refiled in accordance with the order of the Court of Appeal, it has never been re-heard on its merits. Abel J. struck out the Claim for want of prosecution on account of the parties not having appeared at court for trial of the claim. No evidence was tendered before the Courts. On May 5th, 2016, Wizard Trust Ltd. re-filed this Claim No. 245 of 2016 *Wizard Trust Ltd. v. Cove Ltd.* so that the case can be determined on its merits. On or about October 14th, 2016, Cove Ltd. filed an application to strike out the claim.

Mrs. Torres submits that the power to strike out is draconian and should be used sparingly. A judge should therefore only use this jurisdiction in the clear obvious case when it can be seen on the face of it that a claim is obviously unsustainable, cannot succeed or in some way is an abuse of the process of the court and should not be the first and primary response of the court. She says that the court retains an inherent jurisdiction as well as jurisdiction under the Supreme Court (Civil Procedure) Rules ("CPR") to strike out a claim as being an abuse of process. After citing Part 26.3(1)(b) of the CPR, Learned

Counsel says that what can be gleaned from the substantive case law illustrating abuse of process is that there are no hard and fast rules as to what amounts to abuse of process. Each matter must be determined on its own facts. She argues that the Court must keep in mind the overriding objective under Part 1 of the Belize Supreme Court CPR to deal with cases justly whenever making a determination of this application.

13) On the issue raised by the Defendants that this is an unauthorized Claim, Mrs. Torres says that authorities are clear in saying that a company not being in good standing does not preclude it from commencing any action in the courts. She further submits that at the time of the commencement of this Action the company was said to be in good standing and she relies on ***Progresso Heights Ltd. v Wilfred Elrington et. al.*** Claim No. 712 of 2010.

14) In response to the question of whether this claim is statute barred, Mrs. Torres argues that the Claim was instituted within six years of the cause of action having accrued and with it instituted in the Courts of Belize in the year 2004 by the Defendants themselves. The Court of Appeal on 16th June, 2011 so directed that the matter be re-tried and with the parties moving to have the matter re-heard before another judge. The Limitation Act was therefore

not renewable as it was the subject of a Court Order. No specific time limit was stated in which the matter was to be retried. If the Court finds that time is to run afresh, the Claimant submits that it was still within the Limitation period and from the date that the Court of Appeal ordered a retrial of the matter. Mrs. Torres relies on ***Abayomi Babtunde v. Pan Atlantic Shipping and Transport Agencies Ltd.*** (S.C. 154/2002) where the Court stated inter alia:

> *"….That a trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to relitigate the same matter, or rather, in a more general sense, the parties are at liberty, once more to reframe their case and restructure it as each may deem it appropriate."*

15) Considering the question of abuse of process or res judicata, Mrs. Torres states that these are two separate principles which have much in common with each other. She submits that the present claim is not a collateral attack on the Defendants as there were no findings of fact against it by Abel J. When a party brings a second action on similar facts as a previous claim that has been struck out, the claim is different. A defendant/applicant must establish, on the balance of probabilities that the new claim is not an "*abuse of*

process" and thereby liable for strike out. Of critical importance is that there has been no formal judgment or determination of the issues at trial of the claim. Learned Counsel argues that the instant claim is distinguishable from the counterclaim it filed in the earlier proceedings. In the counterclaim filed in the previous action, Wizard Trust Ltd, sought a declaration that the Agreement entered into between the parties is valid and subsisting; (b) specific performance of the agreement; (c) an Order that the Plaintiff do transfer all of its rights, titles and interest in the property free of incumbrances upon payment by the Defendant to the Plaintiffs of the balance of the purchase price; (d) an injunction; and (e) in the alternative, damages. The Claimant in the present claim now seeks damages for breach of contract and special damages only.

16) Mrs. Torres argues that the Court on the 11th day of May, 2015 struck out both the claim and the counterclaim without a trial of the issues as both the Claimant and the Defendant could not attend at a hearing in Belize owing to medical issues. The Court did not hear any evidence on the claim whatsoever nor were there submissions presented to the Court by Counsel on record. The Court on its own motion determined that it would strike out both claims

as a result of the absence of the parties. Learned Counsel relies on ***Securum Finance Ltd. v. Ashton*** [2001] Ch. 291 where the Court of Appeal said:

> *"The court … must consider whether the claimant's wish to have a 'second bite of the cherry' outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the Arbuthnot Latham case. (per Chadwick J.)"*

Mrs. Torres also cites ***Ferguson v. Ferguson*** Claim No. SLUHCV 2012/0387 where the court re-iterated the principles governing the issue of *res judicata*. The Court in that case found that there was no res judicata as there had been no determination of the claim on its merits. After analyzing the principle of res judicata in the case of Henderson v. Henderson and then discussing the doctrine in light of a strike out application on the basis of abuse of process, the Court went on to state the following, citing Lord Bingham of Cornhill in ***Johnson v. Gore Wood***:

> *"There is [an] underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the*

raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or the raising of a defence in later proceedings should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Mrs. Torres submits on behalf of the Claimant/Respondent that the public interest that there should be finality in litigation, and that a party should not be vexed twice with the same matter, was not infringed here. None of the Defendants has been vexed twice as they have not had an opportunity to have the matter litigated as so ordered. The Claimant/Respondent contends that there has been no harassment of any Defendant, nor any collateral attack on the correctness of any decision made by the Court of Appeal. There has been no abuse of process in this case as the Claimant/Respondent has not had the opportunity to litigate its matter as directed by the Court of Appeal. The Court should therefore refuse the Defendant/Applicant's application to strike out this claim.

Defendants/Applicants' Submissions in Reply

17) Ms. Banner filed written submissions in Reply to the Claimant/Respondent's submissions reiterating the Applicants/Defendants' position that this Claim should be struck out. She states that the first basis for striking out this claim is that the Claimant has most likely been dissolved and the Claimant has provided no evidence to rebut this contention. If the Claimant is dissolved as contended, then it is incapable of authorizing the commencement of the present suit and legal counsel to conduct the present claim.

In relation to the Limitation issue, the Defendants again state that this claim is statute barred. Ms. Banner submits that the Claimant's application of the factual matrix is misconceived. The Claimant has not filed any affidavit in this application providing its version of events and is therefore taken to have accepted the Defendants' evidence. On June 16th, 2011 (almost 7 years ago) the Court of Appeal (in Civil Appeal 24 of 2010) ordered a new trial of Claim No. 373 of 2004 ***Cove Ltd, Clent Whitehead v Wizard Trust Ltd*** (Claim No. 373 of 2004) before another Judge of the Supreme Court. Pursuant to the Court's order a new trial of the matter was set down before Mr. Justice Abel. The Order of the Court of Appeal was therefore complied with.

18) At the trial of Claim No. 373 of 2004 neither party had appeared for trial nor had their witnesses. Mr. Justice Abel therefore exercised his power pursuant to Rule 39.4 which provides that *"Where the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules – (a) if neither party appears at the trial, the judge may strike out the claim".* The Judge proceeded to strike out the Claim as well as the Counterclaim filed by the Claimant herein. The filing of the present new claim(Claim No. 245 of 2016) one year after Claim No. 373 of 2004 was struck out at the retrial has resulted in proceedings wholly divorced from the claim

which the Court of Appeal ordered to be retried. It is submitted that Wizard Trust Ltd., the Claimant herein was cognizant of the fact that by the time of the retrial in 2015, some 11 years had lapsed since the filing of the claim (almost double the limitation period). It was therefore in the Claimant's interest that its representatives and witnesses be present at the retrial of the matter before Mr. Justice Abel so as to ensure that its live claim could be retried. This new Claim No. 245 of 2016 filed some 14 years after the Claimant's cause of action arose is statute barred. The submission is that this court therefore has no jurisdiction to hear the present claim. Relying on the decision ***Abayomi Babtunde v. Pan Atlantic Shipping and Transport Agencies Ltd.***, the Claimant contends that (i) no specific timeline was stated by the Court of Appeal in which the matter was to be retried; (ii) the limitation was not *"renewable"* or applicable because the retrial is subject to a court order; and (iii) the limitation period was renewed and started to run from the time the Court of Appeal ordered the retrial of the matter.

19) In response to these contentions raised by the Claimant, Ms. Banner states that it does not matter that the Court of Appeal did not state a timeline as that Court's order must be adhered to from the moment it is pronounced. Pursuant to that Court's order a retrial of the claim was scheduled, albeit

almost 4 years after the order was made. A limitation point was not taken at that retrial. Ms. Banner further argues that the *Abayomi* case is no support for the Claimant's contentions, as that case concerns the application of a particular Nigerian civil procedure rule regarding discontinuance which does not apply to Belize. She submits that if the Claimant wanted to keep Claim No. 373 of 2004 alive, it should have appealed the decision of Mr. Justice Abel to strike out the claim for non-appearance of their witness or a representative of the Claimant at the retrial. It is noteworthy that the Claimant has not appealed the decision of Mr. Justice Abel.

20) In relation to the issues of abuse of process and res judicata, Ms. Banner submits that the Claimant has conflated the two issues which are argued separately. She contends that it is abusive of the Court's process for a Claimant to file a new claim for the purpose of avoiding the consequences of a claim: (i) which has been struck out; (ii) which the Claimant has failed to appeal; and (iii) which is statute barred. The limitation period for the filing of a new claim based on the same cause of action has expired. The Defendants therefore say that this claim should be struck out.

21) On the issue of res judicata, the Defendants say that if this Court will determine this issue, notwithstanding the limitation point, then the Defendants rely on their previous written submissions and say that the striking out at trial for failure of the parties and witnesses to attend is a final determination of the claim once no appeal is lodged within the relevant 21 day period. Citing Morrison JA on the modern day approach to res judicata, Ms. Banner cites the following passage from ***Belize Port Authority v. Eurocaribe Shipping Services Ltd.*** Civil Appeal No. 13 of 2011 dated 23rd November, 2012 at Para 43:

> *"On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which where applicable, is an absolute bar to re-litigation between the same parties or their privies; (ii) issue estoppel, which where applicable, also prevented the reopening of particular points which have been raised and specifically determined between the parties, but is subject to an exception in special*

circumstances; and (iii) Henderson v Henderson abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, 'a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Ms. Banner submits on behalf of the Defendants that the present claim falls within (i) cause of action estoppel; and (ii) Henderson abuse of process. The Court should therefore strike out this Claim and order prescribed costs in favour of the Defendants.

Ruling

22) I am grateful to both counsel for their submissions on this application to strike out claim. After much deliberation and consideration of the arguments raised for and against this application, I must state that I find that the arguments of the Defendants must prevail. While it is true, as Mrs. Arzu Torres so ably argued, that the merits of the case have not been considered on a re-trial of the substantive issues as ordered by the Court of Appeal, I do agree with Ms. Banner's point that the Claimant had every opportunity to

have the matter fully re-litigated before Abel J. in Claim No. 373 of 2004 and failed to do so. The order of the Court of Appeal was complied with when the matter was set down for hearing before Abel J. That decision by Justice Abel to strike out the Claim was never appealed to the Court of Appeal. Mrs. Torres submits that the power to strike out is draconian and should be used sparingly. A judge should therefore only use this jurisdiction in the clear obvious case when it can be seen on the face of it that a claim is obviously unsustainable, cannot succeed or in some way is an abuse of the process of the court and should not be the first and primary response of the court. She says that the court retains an inherent jurisdiction as well as jurisdiction under the Supreme Court (Civil Procedure) Rules ("CPR") to strike out a claim as being an abuse of process. I must say with the greatest of respect that these are arguments which should have been raised at the Court of Appeal if the Claimant had brought an appeal against the decision of Abel J. to strike out Claim No. 373 of 2004. This Court therefore has no jurisdiction to revisit and review a matter already decided by a judge of concurrent jurisdiction. I also agree that the issues sought to be litigated by the Claimant in this claim are the same issues that were raised in Claim No. 373 of 2004 involving the same parties on identical facts. The Application to strike out therefore

succeeds on the basis of abuse of process of the court and *res judicata* under ***Henderson v Henderson***. Prescribed Costs awarded to the Defendants to be paid by the Claimant.

Dated this Thursday, 31st day of January, 2019.

_____
Michelle Arana
Supreme Court Judge