

**IN THE SUPREME COURT OF BELIZE A.D., 2020**

**CLAIM NO. 370 OF 2020**

**BETWEEN**

**LINDA BOWMAN**

**CLAIMANT**

**AND**

**PRISCILLA HERRERA (as Executrix of the  
Estate of William Henry Bowman et al)**

**DEFENDANT**

**BEFORE the Honourable Madam Justice Sonya Young**

**Decision**

6<sup>th</sup> July, 2021

**Appearances:**

Ms. Priscilla Banner, Counsel for the Claimant.

Ms. Lisette Staine, Counsel for the Defendant.

**KEYWORDS: Civil Procedure - Strike Out - Claim Form - No Cause of Action Pleading - Limitation - No Defence filed - Delay - Amended Claim Form Filed Prior to Determination of Application**

**DECISION**

1. This is a short decision on an Application to strike out the Second Amended Claim Form. There is no dispute that the Court has jurisdiction to strike out in

certain circumstances. The Defendants rest their Application on **Rule 26.3(1) (b)** and **(c)** - abuse of process and disclosing no reasonable grounds for bringing the claim.

2. Briefly, the Claim concerns the enforcement of a settlement agreement (the Agreement) made on divorce. The terms of payment of maintenance were stated therein to be for the Claimant/Wife's) lifetime. The husband has since died and the Claimant brings the Claim for arrears against the Administrators of his estate as well as two (2) companies (Third and Fourth Defendants) which were named in the Agreement.
3. The parts of the Agreement which are of greatest concern here are:

*“3.3 the monthly maintenance shall be secured for the duration of the life of Linda Bowman by the establishment of a trust by virtue of which:*

- (a) the monthly maintenance shall be paid from proceeds of citrus deliveries by H.T.A. Bowman Limited or W.B. Incorporated.*
- (b) in default of such proceeds being forthcoming from citrus products, the monthly maintenance may be raised from property pledged as such security of sufficient and adequate value and validly charged to ensure the payment or collection of the monthly maintenance and any arrears in respect thereof and future payments.*

*3.4 The parties here identify the following property intended to be pledged and charged as security for the monthly payments in pursuance of Clause 3.3 above:*

*Property of H.T.A. Bowman Ltd comprised in Transfer Certificate of Title dated the 7<sup>th</sup> of June 1955 recorded at the Land Titles Unit Belmopan in the Land Titles register Volume 1 Folio 82 being approximately 50 acres and known as Section 6”*

### **The Issues:**

1. Has a cause of action been pleaded against the fourth and fifth Defendants?
2. Are the alleged breaches which occurred more than six years prior to the filing of the Claim statute barred?
3. Is the delay in bringing the Claim an abuse of process?

**Has a cause of action been pleaded against the third and fourth Defendants:**

4. The Third and Fourth Defendants state that they are not proper parties to the Claim. There is no cause of action made out against them particularly since they were never parties to the Settlement Agreement. The Claimant, in her affidavits, say that the deceased was the sole shareholder and a director of the Third and Fourth Defendants. She says further that they have since ratified the Agreement by not only paying her the monthly maintenance sum but by executing a deed in April of 2005, which refers to the Agreement and which seeks to ensure that the terms of the Agreement as it relates to security was carried out.
5. She also exhibits correspondence from a named Administrator of the deceased's estate who is also a director of the third Defendant where she states "*H.T.A. Bowman Ltd is currently going through a major financial crisis and due to this the company and I are financially unable to continue your monthly stipend in full.*" In the next paragraph she states, "*... I only request a temporary reduction until the new crop year, which seems to be promising, and all back dated amounts will be paid to you accordingly.*"
6. Counsel for the Claimant in her submissions state that Clause 3.3 (stated above) has the following effects:
  - a. William Bowman created a trust in favor of the Claimant, with the Third and Fourth Defendants as trustees;*
  - b. William Bowman created an obligation for the Third and Fourth Defendants to secure the Claimant's monthly maintenance payments.*
7. She continues that the cause of action resounds in breach of contract, trust obligations with issues of agency also arising. However, none of this was pleaded.

8. The Court must agree with the Second and Third Defendants that no cause of action whatsoever had been pleaded against them. None of what is set out in the affidavits of the Claimant is even alluded to in the Claim. All that is stated is that *“(t)he Third and Fourth Defendant hold property pledged and charged as security for the payments which are to be made pursuant to the Deed.”* (Paragraph 5 of the Claim Form). With relief stated as *“an order that the Defendants pay to the Claimant all sums which have fallen due under the Deed of Settlement and remain unpaid”* and *“further, an Order for specific performance of the Deed, particularly clauses 3.3 and 3.4, which provide for the sale of the Property, and for the proceeds of sale, after payment of charges and expenses incurred in connection with the sale, to be sued to satisfy outstanding and future payments which shall become due in accordance with the Deed”*.
9. Throughout the Statement of Claim, however, all allegations (how so ever made) of nonpayment of maintenance are made against the First and Second Defendants only. There is only repeated the allegation stated above at paragraph 5 (also at paragraph 5 off the Statement of Claim) and the same reliefs sought.
10. The Court is only allowed to look at the pleadings. Holding property is certainly not a cause of action. However, before this Application was heard and a decision rendered, the Claimant filed a third amended Claim Form which sought to plead breach of contract, trust and ratification in relation to the Third and Fourth Defendants.
11. Those causes of action may or may not be sustainable. The Defendant has reserved the right to make another Application to strike out. The Court will, therefore, refrain from any comment on the amendments until such time. Suffice it to say that the Third and Fourth Defendants would have seen success on this ground had there not been an amendment. In any event, the mere fact

that the amendment was made is indicative of the shortcomings of the pleaded case.

**Are the alleged breaches which occurred more than six years prior to the filing of the Claim statute barred:**

12. The Statute of Limitation is to be taken as a Defence. It is not a bar to litigation unless pleaded *Richards v McKeon and Anor [2017] EWCA Civ 2374*. The Defendant has not yet filed a Defence so the Court ought not to consider the statute under those circumstances. Where a Defence is filed, the Court may then deal with the limitation issue in a preliminary hearing or at trial. This ground fails at this time.

**Is the delay in bringing the Claim an abuse of process:**

13. This issue deserves most of the Court's attention. It is felt that all the Defendants accept this by virtue of the position taken in their submissions in reply.
14. Delay of itself is not an abuse of process. There must be something additional which takes it to this level. The Defendants say this delay has been inordinate and inexcusable. They rely on *Icebird Ltd v Alicia P Winegardner [2009] UKPC 24*, paragraph 7:
15. The first breach pleaded by the Claimant occurred since 2003 and was ongoing each year since then. At paragraph 13 of the third amended Statement of Claim it states "*In December of 2019 the Claimant discovered that the annual increase of 3.75% did not commence on the 1st of December, 2003, but actually commenced in December of 2004. This resulted in shortages for each monthly payment going forward. The shortages continue to date....*"

16. The Defendants say that it has been over 18 years since the first breach is alleged to have occurred. Since then, the Claimant has accepted all payments made although she had signed the Agreement and ought to have known its contents. The Claim was never brought or the issue raised while the deceased was alive.
17. Further, the First and Second Defendants would be gravely prejudiced because the person with direct knowledge of the payments can no longer speak to the alleged breach. The fact that the Claimant did not originally offer any explanation as to why her Claim was not filed earlier and in particular before William Bowman died ought to be viewed with suspicion. They ask that she be barred from bringing any Claim for breaches which precedes the death of William Bowman or at the very least six (6) or more years before the filing of the Claim.
18. The Claimant also relied on *Icebird (ibid)* and insisted that only in exceptional circumstances would the Court strike a Claim on the basis of delay occasioning an abuse of process.
19. This Court is aware that there are no hard and fast rules which would indicate in what circumstances delay would warrant a strike out. The Court must consider all of the circumstances in light of the overriding objective and ensure that justice is done. Striking out is draconian and must be sparingly used and even then in plain and obvious cases only. Certainly, there ought to be exceptional circumstances where proceeding would amount to a real risk of injustice.

20. This matter turns mainly on the interpretation of a document which is still available. It also depends heavily on mathematical calculations. While I agree with the Defendants that the death of William Bowman means that his direct testimony is no longer available, I can find no reason to see this as causing such prejudice that there could no longer be a fair trial.
21. In fact, it seems that the very same evidence which would allow the Court to determine what, if anything, was owed up to six (6) years prior to the initiation of the Claim is the same evidence which will indicate what was owed 18 years ago.
22. The delay is undoubtedly significant but the third amended Claim Form offers an excuse for it. The Claimant never became aware of the breach until 2019 and the Claim was filed in 2020. It seems that there was a short period of negotiations and attempts to settle. There was no inordinate delay in bringing the matter after the Claimant said she became aware of the breach.
23. The Defendant's position that the Claimant ought to have discovered the breach earlier as she was always in possession of the Agreement is worthy of consideration. But it does not alter the existence or the believability of human error.
24. This Court can not find that the delay would deprive the Defendants of a fair trial amounting to an abuse of the Court's process. This ground of the Application is also dismissed.

25. The Applicant has indeed seen some level of success in that the Application has forced the Claimant to amend its Claim. The Applicant is to have some cost which the Court assesses at \$2,000.00.

**Disposition:**

1. The Application is dismissed with costs to the Applicant in the sum of \$2,000.00.
2. Leave is granted to the Defendants to file a Defence within two (2) weeks of today's date.
3. The matter is listed for case management on the 3<sup>rd</sup> August, 2021 at 8:30 am.

**SONYA YOUNG**  
**SUPREME COURT JUDGE**