

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV153 of 2023

BETWEEN:

**[1] CLAUDIA ESMERALDA MEMBRANO
(Previously “Claudia Esmeralda Swasey)**

Claimant

and

[1] DAREN DALE SWASEY

Defendant

Appearances:

Mrs. Robertha Magnus Usher SC for the Claimant

Ms. Darlene Vernon for the Defendant

2023: July 05;
September 12;
2024 February 05.

DECISION

[1] **ALEXANDER, J.:** The defendant (“Mr. Swasey”) applies to strike out the claim on the basis that it discloses no discernible cause of action so amounts to an abuse of process and that there are no reasonable grounds for bringing or defending the claim. He filed the application on 17th May 2023 supported by an affidavit stating that he does not know what the claim is about. Mr. Swasey claims that the claimant (“Ms. Membrano”) brought an imprecise and unclear claim, which he is unable to answer or properly defend. It should be struck out.

[2] Ms. Membrano is the ex-wife of Mr. Swasey. After obtaining a divorce from him, Ms. Membrano approached the court by fixed date claim filed on 13th March 2023, seeking declarations and alteration orders for properties/assets allegedly obtained during the parties’

marriage. She claims that she is beneficially entitled to a share in the properties listed in the schedule in the claim since Mr. Swasey holds title in trust for her. She, therefore, seeks orders for transfer of title in the properties, transfer of proceeds of rent, delivery of possession of listed items or, alternatively, that a parcel of land be sold and proceeds be divided between the parties.

[3] Ms. Membrano states that her claim is sufficiently clear for a defence to be made to it. Mr. Swasey's application should not be entertained by the court.

[4] I rule in favour of the application before me.

[5] Ms. Membrano's claim is essentially for a division of matrimonial property after a divorce was made final. However, she did not describe it as a claim for division of matrimonial property because she was required to seek property settlement at the time of the divorce proceedings. Having not done so, she comes by way of a civil claim to get her beneficial share in the property. She claims she is entitled to bring the claim more than a year after the divorce was finalized, as Mr. Swasey holds title in the properties and assets "in trust" for her. Her pleadings show that her cause of action is in trust, so there is no need to specify the type or nature of the trust.

[6] Ms. Membrano may hold a beneficial share in the matrimonial property, but she was required to seek property settlement within the timelines set by the law. At this stage, she cannot rely on the Senior Courts Act to get the reliefs being sought, as her claim is time barred. She also ought to have given brief details of her claim in trust in her pleadings to fairly allow for an answer to it.

[7] Having not dealt with the property settlement at the right stage, and with an ill-defined claim in trust, the claim is an abuse of process and discloses no reasonable grounds for bringing or defending it. I, therefore, strike out her claim and grant Mr. Swasey his application.

Background

The Claim in Context

- [8] Mr. Swasey's application requires that I give a short history to understand why these divorced parties are back before the court. He claims that he is unable to respond to the claim by way of a defence, as there is no discernible cause of action.
- [9] The parties' divorce was made absolute on **27th October 2021**. At the time of the divorce proceedings, Ms. Membrano did not apply for a division of matrimonial property and/or assets. Subsequent to the dissolution of the marriage, and in the absence of a claim over the matrimonial assets, the Senior Courts Act No. 27 of 2022 came into force in November 2022 ("SCA"). The SCA provided a longer period within which an application for property settlement can be made after a divorce is made absolute. The law in Belize is now that as codified in the SCA.
- [10] Having not sought a division of property during the course of the divorce, Ms. Membrano now claims in equity for her share of the matrimonial property and assets. This claim is brought as an action in trust. The nature or type of trust is not spelt out in the pleadings. She seeks inter alia a declaration of property rights and a division of property or assets held in trust for her. Mrs. Usher, counsel for Ms. Membrano, says the cause of action is obvious and Mr. Swasey can answer the claim.
- [11] It is convenient, therefore, to look at Ms. Membrano's claim as advanced. She seeks:
1. A declaration that the Claimant is beneficially entitled to property listed in the Schedule hereto or such share therein as the Court thinks just and that the Defendant holds title thereto in trust for and on behalf of the Claimant.
 2. Possession of all those properties described in the Schedule hereto, being Parcels 5088, Block 20, Belmopan, Registration Section, Belize and all furniture including
 3. An order of Injunction, restraining the Defendant by himself, his agents and or servants howsoever from selling or agreeing to sell, possessing, transferring, leasing, charging encumbering, entering on or in any way dealing with any of the real properties aforementioned until the determination of the Action herein or further order.

4. An Order directing the Defendant to transfer his title in the property listed in the Schedule hereto to the Claimant and to transfer proceeds of rent (if any) collected since the parties' separation to the Claimant.
5. In the alternative that the said parcels of land be sold and proceeds shared in such proportion as the Court deems just.
6. An Order that the Respondent transfer and deliver possession of all the items mentioned in paragraph two (2) hereof to the Applicant.
7. Such further or other order or relief the Court deems just.
8. Costs.

[12] In the affidavit in support, Ms. Membrano laid out in paragraphs 4-23 the history of the relationship between the parties including when they met, got married, and the responsibilities of each party during the marriage. She detailed her financial and other contributions to the marriage and properties in dispute. She claimed that at some point during the marriage, Mr. Swasey had stopped contributing to the family and household expenses. After the marriage ended, Mr. Swasey continued to live at the matrimonial home. It was unclear if any attempt was made to get him to vacate the matrimonial home but given that there was no division of matrimonial property, I assumed that the parties continued with their same living arrangements after the divorce.

[13] Ms. Membrano stated that whilst she was away for work in January 2022 for four months, she was locked out of her home by Mr. Swasey. Since then, she has been deprived of her home, furniture and personal items. She is forced to take up rental accommodation at her parents' home with her son.

Issues

- [14] The sole issue is whether Mr. Swasey has satisfied the test to get the claim struck out on the pleadings. This requires a determination of the following:
- a. Is the claim an abuse of process?
 - b. Does the claim disclose no reasonable ground for bringing or defending it?

The Law

[15] Rule 26.3 (1) (a) to (d) of the Civil Proceedings Rules empowers the court to strike out a claim in specified circumstances. It reads:

[26.3] (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

- (a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;
- (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
- (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
- (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

[16] CPR 8.7(1) and (2) outline a claimant's duty to set out its claim by giving a statement of all the facts being relied upon in the matter. The statement must be as short as possible. The purpose of this rule is to put a defendant in a position to answer the claim against him.

Analysis

Issue: Whether Mr. Swasey has satisfied the test to get the claim struck out?

[17] Mr. Swasey brings his application under CPR 26.3, which has four sub-rules. In submissions, Ms. Vernon, counsel for Mr. Swasey, states that the claim is to be struck out for failing to disclose a cause of action. It is an abuse of process and discloses no reasonable ground for bringing it: see CPR 26.3 (1) (b) and (c). I will look first at the abuse of process claim.

Abuse of Process

[18] Generally, it is an abuse of process to bring a claim without a clear cause of action against a defendant. It is defective in law. If the claim has a clear and valid cause of action then it is not an abuse of process to have brought the claim. It should not be struck out.

Brief details of claim

[19] The fixed date claim form at paragraph 10 above identifies the claim as one where property and assets are held “in trust” for Ms. Membrano. There is no dispute that the claim refers to property and assets acquired or improved during the marriage (together “matrimonial properties”). There is also no dispute that the time for bringing a claim for property settlement in matrimonial proceedings, under the previous legal regime, has expired. The question then is whether these two words “in trust” are sufficient to put Mr. Swasey in a position to answer the claim.

[20] In her affidavit in support of the claim filed on 13th March 2023, Ms. Membrano states at paragraph 23, “The Defendant well knew he held the property in trust for myself and that as I had to assume responsibility for paying arrears on his default as well as to pay towards the mortgage that I am fully entitled to the said property.” Her affidavit gives an account of her contribution in acquiring the matrimonial properties.

[21] After the strike out claim was served on her, she filed two affidavits in response.

[22] In her response affidavit filed on 2nd June 2023, she briefly identifies and sets out for the first time the elements of a resulting trust and express trust. She states that she invested in the acquisition, upgrade and maintenance of the properties (both real and personal), including Parcel 5088, Block 20, Belmopan Registration Section (“Parcel 5088”), with the encouragement and acknowledgement of Mr. Swasey. The home at No. 27 Cadena Mountain was agreed by parties to be own jointly. She continues to be obligated as a borrower of a mortgage loan for the said Parcel 5088 although title was registered in Mr. Swasey’s name only. Her evidence was that she acted to her detriment in the acquisition,

furnishing and upgrade of the home due to the unconscionable acts of Mr. Swasey in telling her that they owned the property jointly. The common intentions of the parties to hold the matrimonial properties equally and share expenses during the marriage were shown.

[23] In another affidavit filed on 22nd June 2023, Ms. Membrano states that her claim is not only for a resulting trust and an express trust but has elements of a constructive trust. She maintains that Mr. Swasey holds the matrimonial assets in her favour.

[24] Ms. Vernon maintains that the pleadings are deficient and could not be cured by affidavits in response to a strike out application. The claim form contains a mere allegation that properties are held on trust for Ms. Membrano, without defining the elements of such trust. This is not sufficient to invoke the jurisdiction of the court and amounts to an abuse of process. Using response affidavits, after an application to strike was filed, to set out the types and elements of trust was inappropriate.

[25] In response, Mrs. Usher argues that the entire premise of the strike application is wrong. To claim that there is no clear cause of action or that the court's jurisdiction is not invoked is "inaccurate and misconstrues" the claim and the law. The claim is based on the law and principles applicable in Trust and Equity. In fact, Ms. Vernon is fully aware that the claim is grounded in trust since she has taken issue only with the alleged failure to identify the type(s) and elements of the trust. These pleadings were provided in the response affidavits.

[26] Mrs. Usher states further that under the CPR, there is no need for extensive pleadings or particulars so what was provided suffices to enable Mr. Swasey to answer the claim. Having been informed that the claim is "in trust", he was given the general nature of Ms. Membrano's case in the supporting affidavit. Mrs. Usher submitted that, "Lack of particulars or elements (unknown) does not prevent an action from continuing." Mrs. Usher relies on the case of **DMV Ltd v Tom L. Vidrine**¹ where the Belize Court of Appeal discussed pleadings, in a claim for specific performance of a sale agreement and damages for breach of contract.

¹ Civil Appeal No. 1 of 2010, Belize para 55.

- [27] In **DMV Ltd**, the Court of Appeal relied on the learning on pleadings in the *locus classicus* case of **McPhilemy v Times Newspapers Ltd. and others**² as well as the adoption/application of those principles by Barrow JA in **East Caribbean Flour Mills Limited v Ormiston Boyea** and **East Caribbean Flour Mills Limited v Hudson Williams**.³ Mrs. Usher's case seems to be that extensive pleadings are not needed, since a pleader can use its witness statements (or affidavits) to give details or particulars of a pleader's case.
- [28] I agree that it is now trite that there is no longer a need for extensive pleadings and/or excessive particulars. It does not mean that pleadings are now superfluous or unnecessary.⁴ The line of cases on the details to be given in pleadings requires a balance to be struck between brief pleadings that give fair notice as against excessive details in pleadings. It does not absolve the pleader from giving adequate particulars of the case or its elements to let a defendant know the case he has to answer. The purpose of brief pleadings is to prevent the defendant from being taken by surprise at the trial and not to leave him in the dark as to the case he has to meet. Pleadings can be short but must be adequate enough to mark out the general parameters of a claimant's case. So whilst pleadings with an extensive or excessive amount of particulars are discouraged, brief and adequate particulars of the case are not.
- [29] Further, witness statements (or affidavits) can be used to supply details or particulars of allegations already made in the pleadings. Such a use cuts down the need for extensive pleadings, and builds or expands on particulars of allegations already made. The case of **Lysandra Berbey v Jason Marin**⁵ confirms this position. In **Berbey**, Justice Young commented that issues between the parties could be found outside the pleadings such as in witness statements. However, pleadings are necessary to set the parameters of the party's case. A party is, therefore, bound by his pleadings and it is to the pleadings (i.e. the statement of claim) that the court looks to understand the parameters of a party's case. Affidavits in support and witness statements can be used to give more particulars of the types of trust.
- [30] In my view, pleading that the claim is in trust without setting out the type(s) or elements (i.e. resulting, express or constructive or otherwise) does disadvantage Ms. Swasey in filing his

² [1999] 3 All ER 775.

³ Civil Appeal No. 12 of 2006, Eastern Caribbean Court of Appeal, St. Vincent and the Grenadines.

⁴ DMV Ltd. paragraph 55 quoting *McPhilemy v Times Newspapers Ltd.* et al pages 792-793.

⁵ Claim No. 127 of 2020 paras. 16, 18 & 19.

answer to it. The affidavit in support of the claim hinted at but did not spell out clearly the type(s) of trust. The only information on the types/elements of trust was supplied in the affidavits in response to his strike out notice.

[31] I have considered the response affidavits of Ms. Membrano and agree with Ms. Vernon that affidavits are for evidence not pleadings. Affidavits cannot replace or be a substitute for short, proper pleadings. However, they could be used for providing more particulars of an issue that was already properly pleaded. The jurisprudence is clear that evidentiary documents (i.e. witness statements or affidavits) can be used for expanding on the brief particulars/allegations already given in a claim. I do not agree with Mrs. Usher that using response affidavits in a strike out application to provide pleadings for three types of trust would suffice. In fact, Mrs Usher through the affidavits in response kept shifting the goal posts in identifying the types of trust involved in the present case. Initially, she pointed to the resulting and/or express trust then argued that there were elements of constructive trust in the affidavits. Despite this, I accept that the court can use the witness statements/affidavits to determine the types of trust but there must be some foundation set in the pleadings.

[32] Ms. Membrano's evidence is that there was a resulting trust, as she contributed to the purchase price giving rise to an equitable interest. A constructive trust arises by operation of law⁶ so I understand Mrs. Usher's argument that the affidavits point to the unconscionable actions of Mr. Swasey in allegedly holding on to property paid for, in part, by Ms. Membrano. Ms. Vernon submits, however, that there was no pleading of a common intention to which a party acted to her detriment. If Ms. Membrano wanted to rely on any of the trusts, she ought to have properly identified and pleaded it to allow Mr. Swasey a fair opportunity to respond. Ms. Membrano's "pleadings cannot be 'fixed' by laying same out in affidavits in response to a strike out application."⁷ I am minded to agree with Ms. Vernon. Ms. Membrano's pleadings require as a minimum a short detail of her claim. She did not do this.

[33] The lack of clarity with the pleaded case was also seen when Ms. Membrano in one of her response affidavits stated that she was lawfully entitled either in trust or for a division of matrimonial property. Regarding her rights to claim for property settlement, this is discussed

⁶ Alastair Hudson, in *Equity and Trusts* 4th Edition page 39.

⁷ Submissions of the defendant/applicant filed on 5th July 2023, para. 23.

below. As to her claim in trust, it lacks the short details required to be pleaded. Having failed to briefly set out in her pleadings brief details of the trusts or their elements, her claim should be struck out.

[34] For completeness, I turn now to the issue of whether her pleaded case discloses any reasonable grounds for bringing or defending the claim.

No reasonable grounds for bringing or defending a claim

[35] The court in **Citco Global NV v Y2K Finance Inc.**⁸ describes a claim that shows “no reasonable grounds” for bringing it if, ‘the claim sets out no facts indicating what the claim is about or it is incoherent and makes no sense or if the facts it states, even if true, do not disclose a legally recognizable claim”. It is appropriate in such circumstances to use the power to strike out such a case and so bring an immediate halt to the litigation. I will examine the present case in the context of it relating to matrimonial property settlement, as admitted by Ms. Membrano and confirmed in her counsel’s submissions.

Division of Matrimonial Property

[36] Ms. Membrano by her affidavit filed on 2nd June 2023 in response to the strike out application also raises the issue of the SCA, which recently amended the law by extending the time for applications for a division of matrimonial property. She states that her claim is not statute barred. Her time to apply for a property settlement order expires in November 2023. She has both a claim in Trust and for division of matrimonial property. She states that there is no material difference since both claims arise in equity.

[37] There are two questions that arise here:

- a. Was Ms. Membrano bound to make her application for property settlement during the course of the divorce?
- b. Can Ms. Membrano bring her application under the SCA which has amended the law?

⁸ BVI HCV AP 2008/022.

[38] Regarding the first question, the current dispute is over matrimonial property. The claim in trust does not change this fact nor does the failure to describe it as a claim for settlement of matrimonial property. In submissions, Mrs. Usher argues that a claim for property settlement is still available to Ms. Membrano. I disagree. I turn now to the law on property settlement.

[39] The governing legislative framework for matrimonial property settlement, at the time of the parties divorce, was the Supreme Court of Judicature Act (Amendment Act No. 8 of 2001). I will set out only the relevant section for present purposes.

S. 148A (1) Notwithstanding anything contained in this Part or in any other law, a husband or wife may, **during divorce proceedings** make application to the court for a declaration of his or her title or rights in respect of property acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage.

[40] In the case of **Vidrine v Vidrine**⁹, Barrow JA clarified some aspects of the law on the High Court's jurisdiction in matrimonial property settlement applications. Applications under section 148A (1) may only be made once divorce proceedings have begun. This was not done in the present case. Barrow JA was clear that the legislative intent for the High Court's jurisdiction to declare or alter property rights during divorce was limited for a specified purpose. It was interfering with a constitutional right. I find it convenient to set out his explanation at paragraph 37 in full here as it provides a full answer to Mrs. Usher's argument:

Ownership of private property is protected as a fundamental right in section 17 of the **Belize Constitution** and the distinct purpose of the amendment to the Act was to erode that right, even though only in the sphere of matrimonial (and quasi-matrimonial) relationships. **It is hardly surprising, therefore, that the power to alter rights in property – basically to take property from the ownership of one person and give it to another – should not have been given to the Supreme Court as a matter of open discretion but was given subject to specific limits.** In addition to the limitation and condition already mentioned, section 148A (4) provides that the power to alter property rights should not be exercised unless the court is first satisfied that in all the circumstances it is just and equitable to make such an order... [Original emphasis]

⁹ Civil Appeal No. 2 of 2010 paras. 32-37.

[41] I will address the second question next. It seeks to determine simply whether Ms. Membrano has the benefit of the amendment that came by way of the SCA. For convenience, I will set out the relevant section in full.

[42] Section 150 of the SCA states:

S. 150. –(1) Notwithstanding anything contained in this Part or in any other interests in law, a husband or wife may, **during divorce proceedings or at any time within two years of the date of dissolution of the marriage, make application to the court for a declaration of his or her title or rights in respect of property** acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage.

(2) In any proceedings under sub-section (1), the court may declare the title or rights, if any, that the husband or wife has in respect of the property.

(3) In addition to making a declaration under sub-section (2), the court may also in such proceedings make such order as it thinks fit altering the interests and rights of either the husband or the wife in the property, including_

- (a) an order for a settlement of some other property in substitution for any interest or right in the property; and
- (b) an order requiring either the husband or wife or both of them to make, for the benefit of one of them, such settlement or transfer of property as the court determines.

(4) The Court shall not make an order under sub-section (3), unless it is satisfied that, in all the circumstances, it is just and equitable to make the order. [My emphasis]

[43] The SCA came into force in November 2022.¹⁰ It extended the time by two years after the absolute to file for property settlement. Ms. Membrano’s decree absolute was issued on 27th October 2021. The SCA was not enacted at the time the divorce was made final, and Ms. Membrano was outside the limitation period set under the previous legal regime for making an application for division of matrimonial properties.

[44] Mrs. Usher submits that section 150 of the SCA allows a claim for property settlement to be filed within two years of the dissolution of the marriage. It is not an issue of retroactivity. She

¹⁰ Senior Courts Act No. 27 of 2022 was Gazetted on 15th November 2022.

asserts that although the divorce was finalized prior to the enactment of the SCA, a property settlement order is still possible. She points to section 245(3) of the SCA and submitted that it may have prospective effect. I reproduce it hereunder:

245(3) Every proceeding commenced under the Supreme Court of Judicature Act and the Court of Appeal Act **shall be continued and completed** as if the proceeding had been commenced under this Act. [My emphasis]

[45] A clear reading of this section shows that it does not refer to proceedings that have already been completed. It allows for matters that have started under the previous legislative framework to be “continued and completed”. Its purpose is not to breathe new life into matters completed before the SCA was enacted.

[46] Mrs. Usher also raises the issue of conversion, arguing that the court has the power to convert “the Action to an Originating Summons.” She relies on two cases¹¹ where conversion orders were granted, in circumstances that are clearly distinguishable from the present case. She submits that in the absence of a conversion order, the present case can continue under the law of trust, which is the foundation for applications for division of matrimonial property. To bolster her arguments, Mrs. Usher relies on two cases that I will address below.

[47] In the case of **Faber v Faber**¹², the court found the existence of a trust, utilizing the statutory provisions of section 148A of the Supreme Court of Judicature Act. Of note is that **Faber** was an application under section 16 of the Married Women’s Property Act, Chapter 176 of the Laws of Belize, R.E. 2000 and section 148A of the Supreme Court of Judicature Act (Amendment Act No. 8 of 2001). In **Vidrine**, the distinction between the two regimes was detailed and I see no reason to add anything further.

[48] In **Reyes v Reyes**¹³, Justice Farnese used a purposive approach in interpreting section 245 SCA to allow a petitioner to amend his petition. The distinction between **Reyes** and the present case is obvious. There was no final dissolution of the marriage in **Reyes**.

¹¹ Mohammed Shameem v Ajay Kumar Civil Action No. 109 of 2017 from the High Court in Fiji and Manfas Hay v Clover Thompson et al (2018) JMSC Civ. 26 from Jamaica.

¹² Action No. 23 of 2011.

¹³ Action No. 305 of 2022.

[49] I could find no reasonable basis for bringing or defending this claim. I agree with Ms. Vernon that the law of trust is used as a mere “back door” attempt to get a division of property order. At this stage, though unfortunate, Ms. Membrano is not entitled to her claim as made or to a property settlement order. If, as she claims, she is still lawfully within her rights to make an application for matrimonial property settlement, it is unclear why this was not done but rather she filed a claim in trust. Her present claim is a bid to defeat the legislative intent for property division claims.

Conclusion

[50] Generally, the jurisdiction to strike out deprives a party of its right to a fair trial so should be used sparingly and in the clearest of cases. For these reasons they are called applications of last resort and are determined solely on a party’s pleaded case.¹⁴ To dispose of such an application there will be no mini-trial but the facts pleaded are assumed to be true. However, the court will bear in mind that a case can be strengthened by disclosure, further investigation or through cross-examination of witnesses.¹⁵

[51] In my judgment, this is an ideal case for early disposal of the claim by striking out.

Costs

[52] Costs should follow the event. The parties have not addressed me on costs and given the circumstances of this case, I am minded to order parties to bear their own costs.

Disposition

[53] It is ordered that the application to strike out dated 17th May 2023 is granted with each party to bear his or her own costs.

Martha Lynette Alexander
High Court Judge

¹⁴ Dr. Martin G.G. Didier et al v Royal Caribbean Cruise Ltd et al SLUHCVP2014/0024.

¹⁵ Ibid.