COMMONWEALTH OF THE BAHAMAS **2022/CLE/gen/1000**

IN THE SUPREME COURT

BETWEEN

RBC ROYAL BANK (BAHAMAS) LIMITED

Claimant

AND

DEALS BUS SERVICE LIMITED

1st Defendant

AND

ARTHUR W. DEAL

2nd Defendant

Before:	The Honorable Madam Carla Card-Stubbs
Appearances:	Audley Hanna for the Claimant
	Alton McKenzie holding for C.A. Martin for the Defendants
Hearing Date:	12 May 2023

Civil – Mortgage – Mortgage secured by Guarantee - Defendants defaulting on payment under the Mortgage – Claimant awarded judgment for sums due under the Mortgage and under the Guarantee in previous action against Defendants - Res judicata - Estoppel - Cause of action estoppel – Whether mortgagee is estopped from seeking further relief - Striking Out – Whether the Claimant's claim discloses no reasonable cause of action – Vexatious – Abuse of the Court's Process – Order 18, Rule 19 of the Rules of the Supreme Court.

Introduction

1. This is the Defendants' application to strike out the Claimant's Suit for relief in an action on its mortgage.

Background

2. On June 29, 2022 the Claimant filed an Originating Summons ('the 2022 action') asking for relief concerning an Indenture of Mortgage made the January 5,1996 between the Claimant and the First Defendant. The Second Defendant is said to be a Guarantor of the first Defendant's obligations pursuant to a written Guarantee made August 7, 2009. The Second Defendant was also described as being in possession of the mortgaged property and assets of the First Defendant.

3. By the Originating Summons, the Claimant seeks the following relief: -
    a) A Declaration that the Claimant is entitled to possession of the Mortgaged Property; and
    b) A Declaration that the Claimant is entitled to exercise the power of sale with respect to the Mortgaged property;
    c) An Order directing the First Defendant to deliver possession of the Mortgaged Property to the Claimant within twenty-eight (28) days of the Order;
    d) Judgment for the sums outstanding under the said Mortgage;
    e) An Order that a Receiver or Receiver-Manager be appointed in accordance with the Mortgage and/or for the purpose of receiving the revenue, whether rents, profits or otherwise, of the Mortgaged Property;
    f) An Order directing that upon the appointment of a Receiver, that the aforesaid Receiver:
        a. be added as a signatory to each of the bank accounts maintained by the First Defendant, until such time as he is able to open and maintain bank accounts in his name as Receiver of the First Defendant;
        b. may be at liberty to receive revenue, whether rents, profits and/or otherwise, of the mortgaged property;
        c. may be at liberty to and/or be directed to sell lots of land or any part thereof comprising the Mortgaged Property and/or which form assets of Deal's Bus Services Limited;
        d. may be at liberty to now and in the future compromise all claims, demands and liabilities whatsoever and to settle each and every right and claim, matter or action and actions, cause and causes of action, suit debts, dues, sums of money, accounts, reckoning costs, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, demands now and that may arise any time hereafter in law or equity in respect of the property comprising the Mortgaged Property and/or

which form assets of Deal's Bus Services Limited; and to give effectual receipts, and discharges pursuant to Section 26 (3) of the Conveyancing and Law of Property Act and

e. may be at liberty to execute sales agreements, conveyances or other instructions relating to the sale of the lots of land or any part thereof comprising the Mortgaged Property and/or which form assets of Deal's Bus Services Limited.

g) An Order for delivery up by the Second Defendant to the Receiver possession of the Mortgaged Property and/or assets of First Defendant.

h) An Order that any actions performed in good faith and prior to the date of this Order, by the Receiver relating to the sale of any lot(s) of land or any part thereof comprising the Mortgaged Property and/or which form assets of First Defendant, be ratified and/or confirmed.

i) An Order directing that upon the appointment of the Receiver or upon the recognition of the appointment of the Receiver, the receivership in relation to the Mortgaged Property be continued thereafter under the direction and/or supervision of the court with liberty to apply thereafter.

j) That the Court order further or other relief as deemed expedient.

k) An Order that the Costs of and occasioned by this application be paid by the Defendants to the Claimant

4. An Affidavit in support of the Originating Summons was sworn by Roneika Rolle and filed on 6 September 2022.

5. The Defendants entered a Memorandum of Appearance and filed a Notice of Appearance on August 16, 2022.

6. On January 16, 2023, and again on January 17, 2023 the Defendants filed a Summons to, inter alia, strike out the action. The documents appear to be identical.

7. On 18 January 2022 the Defendants filed an Amended Summons seeking, inter alia:

a) An Order striking out this action pursuant to Order 18 Rule 19 (1) of the Rules of the Supreme Court, as showing no cause of action and as being frivolous, vexatious, an abuse of the process and that it shows no reasonable cause of action, the mortgage referred to in the Originating Summons being non-existent, having merged into the judgment granted to the Claimant in Action CLE/GEN/346/2011 ("the 2011 Action") (between the same parties and in their same capacities) and that in any event the Claimant's right to bring action on the said mortgage and Judgment is

statute barred under the Limitation Act, and in particular, Section 5 (3) of such Act

b) Without prejudice to No.1 above, granting the parties hereto and adjournment to negotiate a settlement of the matters in this action and the 2011 action.

8. The Defendant's Summons is supported by the Affidavit of Arthur Deal filed on February 2, 2023.

9. Previously, on March 15, 2011, the Claimant instituted suit against the Defendants by way of a specially endorsed Writ of Summons (Suit No. 2011/CLE/GEN/00346). This suit ('the 2011 action') was never disclosed in any of the pleadings or affidavits filed by the Claimant in the 2022 action. However, its existence was not contested and the evidence of the suit as exhibited in the Defendants' affidavit was relied on by the Claimant in its submissions.

10. In the Statement of Claim of the 2011 action is pleaded the loan with the First Defendant and the Guarantee of the Second Defendant. The Claimant pleaded breach of the loan and claimed

> "As regards the First Defendant under the Loan
>
> 1) The said sum of $592,000.60;
> 2) Interest on the outstanding principal sum of $543,013.32 at Nassau Banks' Prime Interest Rate in effect from time to time plus 3 per centum per annum (currently 8.5 per centum per annum) from the 23rd day of February A.D. 2011 to the date of payment on judgment;
> 3) Late charges;
> 4) Alternatively, damages;
>
> As regards the Second Defendant under the Guarantee:
>
> 5) The said sum of $584,400.72;
> 6) Interest on the outstanding principal sum of $543,013.32 at Nassau Banks' Prime Interest Rate in effect from time to time plus 3 per centum per annum (currently 8.5 per centum per annum) from the 23rd day of February A.D. 2011 to the date of payment on judgment;
> 7) Alternatively, damages
>
> ….."

11. In the 2011 action, the Claimant applied for, and obtained, judgment in default of appearance and Defence.

12. On November 7, 2011 Judgment in Default was entered in the 2011 action, in the following terms:

> "IT IS ADJUDGED that the First Defendant, Arthur W. Deal, and the Second Defendant, Deal's Bus Service Limited, do pay to the Claimant as follows:
>
> As regards the First Defendant under the loan:
>
> 1) The sum of $609,931.72;
>
> 2) Interest continuing on the said sum of $609,931.72 from the 7th day of July A.D., 2011 until payment in full at the statutory rate of 6.75 per centum per annum.
>
> As regards the Second Defendant under the Guarantee
>
> 3) The sum of $598,023.59;
>
> 4) Interest continuing on the said sum of $598,023.59 from the 7th day of July A.D., 2011 until payment in full at the statutory rate of 6.75 per centum per annum.
>
> And
>
> 5) The costs of this action to be the Claimant's to be taxed if not agreed."

13. On June 2022, the Claimant commenced the present action seeking the relief noted above.

14. **Issues**

The issues before the court are:

1. Whether the Claimant is estopped from bringing this action on the doctrines of merger and res judicata?
2. Whether the Claimant's action is statute-barred?
3. Whether the present action is an abuse of process?
4. Whether the court should exercise its discretion to strike out the present action?

15. The Defendants assert that as the present Action concerns the same subject matter as the 2011 action, the principle of res judicata applies and the Claimant is estopped from pursuing the claim any further. The Defendants also submit that the Claimant is statute-barred from bringing an action on the judgment in a previous suit.

16. The Claimant submits that while the root of both actions arises from the various agreements, it is not correct to say that the actions have the same subject matter.

The Claimant avers that the instant action, the 2022 action, seeks, materially, vacant possession and the appointment of a receiver.

17. Before proceeding, the Court notes that the written skeleton arguments of the Defendants appear to be at odds with their overall submissions. Further, Counsel who appeared for the Defendants at the hearing seemed unprepared to reconcile the submissions and the application before the Court. This Court will make a determination on the issues based on the principles of law raised.

Merger

18. Defendant's Submissions

19. The essence of the Defendants' oral submission is that the current cause of action has been extinguished by the doctrine of merger. The skeleton arguments appear to raise the doctrine of merger as a reason why the current action should not succeed. That is the way it was argued. Inexplicably, the skeleton arguments also argue (at paragraph 16) that the judgment in the first action was not final and that therefore the doctrine of merger does not apply.

20. The Defendants relied on the definition of merger from the case of *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.* (2013) UKSC 46. In that case, Lord Sumpton explained the doctrine of merger at paragraph 17 as

> "Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment….it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action."

21. The Defendants also cited Halsbury's Laws of England, 3rd Edition, Volume 22, pp. 781-782, para 1661:

> "1661. Merger of cause of action in judgment.
> When judgment has been given in an action, the cause of action, in respect of which the judgment is given, is merged in the judgment, transit in rem judicatam, and its place is taken by the rights created by the judgment; but merger is not effected by an order which is not a judgment, nor by a judgment which is interlocutory and not final, or which is void.
>
> ……

> A judgment obtained by a mortgagee in an action on the personal covenant in the mortgage merely operates as an additional security for the due payment of the debt, and, if the debt is extinguished, the judgment is extinguished."

22. The Defendants cited the case of *Aman v Southern Railway Co.* [1926] 1 KB 59 as a case on an action on the personal covenant in the mortgage, without more. Having reviewed that case, it is unhelpful to the Defendants on the general principle of merger as that case turns on the specific facts of the debenture holder therein and on the construction of a reference to "claims" in that context.

23. Claimant's Submissions

24. The Claimant does not disagree with the Defendant's articulation of the principles of law regarding merger. The Claimant argues that merger is inapplicable because the cause of action in the 2011 action was a money lending action "derived from Order 73" whereas the 2022 action "derives from Order 77" and included (at least) two reliefs not sought in the 2011 action. The Claimant submitted that the 2011 Action "sought relief solely for damages due and owing under a loan granted to the First Defendant which was guaranteed by the Second Defendant." The submission is that the 2022 action is distinct from the 2011 Action because in the 2022 action the Claimant "seeks to: (i) exercise remedies available to it under its mortgage which are independent to its rights to judgment (such as vacant possession and the appointment of a receiver); and (ii) recover sums which, by payments made during the period January, 2011, through August 2022, the Defendants have acknowledged are due and owing. "

25. The Claimant submitted that whether or not the reliefs could have been sought in the 2011 action, there is no bar to the mortgagee seeking them separately. The Claimant relied on the text, Commonwealth Caribbean Property Law, 2nd edition, by Gilbert Kodilinye, as authority for this proposition on the rights of a mortgagee.

> " *There are five of these, viz:*
> *(a) right to sue on the personal covenant;*
> *(b) right to enter into possession of the mortgaged property;*
> *(c) right to appoint a receiver.*
> *(d) right to sell the mortgaged property; and*
> *(e) right to foreclose the mortgage.*
> *These remedies are both concurrent and cumulative: the mortgagee can pursue all or any simultaneously as soon as the mortgagor is in*

default, and, if one remedy proves insufficient to satisfy what is owing to him, he may pursue another remedy in order to recover the balance. The only exception is foreclosure, which, once made absolute, extinguishes the other remedies."

26. The Claimant submitted that since no remedy of foreclosure was sought in the 2011 Action, the Claimant could bring another action for any of the remedies, including a foreclosure. Counsel for the Claimant did concede that although no foreclosure action was brought in the current proceedings, that because the Mortgagee has asked for vacant possession and wishes to exercise the power of sale, then if such power were to be exercised that would extinguish the mortgage and hence any remedy of foreclosure.

27. It is also the Claimant's submission that the Defendants have made payments since the 2011 Judgment and that those payments were "payments on the mortgage debt thereby acknowledging the debt." The Claimant argues that for this reason, they are entitled to sue for the sums owing based on the Limitation Act because "payments on a debt effectively renew the period of limitation". The Claimants submit that their right to sue on the debt accrued from the date of the last payment made to it by the Defendants, the last such payment being made in August 2022. The Claimant also submits that the payments made since 2011 were tendered on mortgage and not the judgment.

28. Law and Analysis

29. The parties are *ad idem* as to the principles of law they it relate to merger. However, they disagree on the application of same in the present case.

30. I accept that the principle of law is as extracted from *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd*. (2013) UK SC 46, at paragraph 17 above and in Halsbury's Laws of England, 3rd Edition, Volume 22 at paragraph 1661. The doctrine of merger "treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right [is] a right upon the judgment."

31. The doctrine provides that where judgment has been given in an action, the cause of action merges in that judgment so that the judgment stands in its place. Having moved on the cause of action for relief and having received a judgment in relation to that relief, the cause of action is said to be merged in the judgment. I believe that the effect of the principle is that the party with the judgment must now have

recourse to the judgment. The cause of action has been adjudicated upon and the party's rights then flow from the judgment.

32. A consequence of the doctrine of merger is that a party having received judgment on a cause of action in one suit, cannot revisit the same cause of action in a subsequent suit to get another judgment for the same loss. This is sometimes referred to as cause of action estoppel.

33. I also accept the principles as set out in Commonwealth Caribbean Property Law 2nd edition. A mortgage is, to my mind, a specialty contract. A mortgagee may claim one of several reliefs under the contract on breach of the contract. A mortgagee may sue for any or all of the reliefs in one suit or in subsequent suits. It is to be noted that, of course, if the mortgagee forecloses, then that extinguishes the other remedies. That principle is not at odds with the doctrine of merger. It seems to me that a mortgagee can go after his contractual reliefs in separate suits. However, once the mortgagee has obtained judgment for a certain relief, then the mortgagor is not entitled to go after that same relief in a subsequent suit.

34. In this case, the Claimant has been at pains to indicate that the reliefs sought in the 2022 action include vacant possession and a declaration of the right to exercise the power of sale. I find that the Claimant is not estopped from pursuing these reliefs. These reliefs were not sought in the 2011 action nor pronounced upon. The Claimant is entitled to pursue these reliefs in the 2022 action.

35. The Claimant is estopped, as a result of the doctrine of merger, from pursuing any action for monetary damages. That cause of action was litigated upon, and that relief granted, in the earlier proceedings. The Claimant cannot by way of this 2022 action re-assert that same claim in these subsequent proceedings**.** Any action to recover such damages must be by way of enforcing the 2011 judgment which the Claimant already holds.

36. I also find that any payment made by the Defendants subsequent to the 2011 judgment are payments that must be applied to that judgment and accounted for as such. On the entering of judgment, the Claimant substituted its rights to collect money on the mortgage with the right to collect under the judgment. Any payment made subsequent to the entry of judgment must apply to extinguishing that judgment.

37. It is also the Claimant's submission that the Defendants' payments made since 2011 were tendered on mortgage, thereby acknowledging the debt, and not the

judgment. They argue that for this reason, they are entitled to sue for the sums owing as payments on the debt.

38. This seems to me an unsupportable distinction in these circumstances. Even if one were to accept the Claimant's argument, the debt being acknowledged in this case is the mortgage. There is no cause of action independent of the mortgage. The Claimant's cause of action is on the mortgage – breach of contract – not in respect of any independent debt. This is clear from the Claimant's pleadings.

39. What the Claimant holds as a result of the 2011 action is a judgment for the sums outstanding on the mortgage. If one were to accept the Claimant's argument, then the Defendants could very well pay off the balance of the mortgage by continuing their regular payments to the Claimant and subsequently be met with enforcement of the judgment for the payment of the entirety of arrears at the 2011 date. By the Claimant's logic, a mortgagee can choose to sue for the entire balance in a first suit as due and owing on that date, and the mortgagee could receive judgment for sums outstanding together with contractual interest on the mortgage arrears and statutory interest on the judgment debt and the mortgagee could enforce the judgment while continuing to accept payments on the mortgage. What is more, the mortgagee would be able to bring a second suit and obtain a second judgment purportedly for the balance owing on the said mortgage at the date of the second suit while holding a judgment for the amount owed on the said mortgage in a first suit, all the while collecting payments on the mortgage that were not being applied to extinguish the judgment debt in the previous suit. If one were to accept the Claimant's proposition, this state of affairs could carry on *ad infinitum*. This is untenable and inequitable. The mortgagee is entitled to receipt of the sums owing but not twice or thrice.

40. I think that the principle of merger addresses this very instance and is designed to prevent the conundrum and inequities that could arise in these circumstances.

41. The Claimant, as mortgagee, holds a judgment in respect of the sums owing on the mortgage. I find that once the mortgagee entered judgment on the loan, then the right of action to sue for payment on the sums lent was merged in the judgment. The judgment in the 2011 matter was for sums owing and provided for interest until payment of the entirety of the judgment figure. In the current matter, the 2022 action, one of the reliefs sought is payment of the sums due under the mortgage. The relief as sought in the Originating Summons is worded as "Judgment for the sums outstanding under the Mortgage". By way of the exhibit of the First Defendant's Transaction History, exhibited as RR7 in the Roneika Rolle affidavit

filed on behalf of the Claimant, it is clear that the Claimant is seeking through the current action to recover the sums due and owing by way of the mortgage. This is no different from the relief sought by way of the Statement of Claim in the 2011 matter, exhibited in the Defendants' Affidavit of Arthur Deal as shown at Exhibit 2.

42. If a party receives judgment for a figure, then that figure represents its entitlement under the breach of the contractual terms. That figure is a quantification of its damages. Once that quantification is made and judgment entered, then unless that judgment is set aside, a party cannot have "a second go at damages" and file another action to go back for another judgment for the exact same remedy for the exact same loss on the exact same breach. He is estopped from doing so.

43. In this case, the Claimant is estopped from pursuing, by separate proceedings, further action for any sum said to be due under the mortgage. The law is clear. In the 2022 matter, the Claimant seeks damages representing the amount outstanding. There is only one thing that could be outstanding i.e. the consideration that passed by way of money under the loan i.e. the mortgage as secured by the guarantee.

44. The Defendant raised, but did not pursue, the question of finality of judgment. I will only note that the judgment in default that was entered in the 2011 action has not been set aside or appealed or been otherwise vacated.

45. Res Judicata and Abuse of Process

46. Defendants' Submissions

47. In relation to the issue of res judicata, the Defendants' written submissions are as follows:

> 24. The definition of res judicata is or is inclusive of a judgment by a judicial tribunal which having jurisdiction over both the cause and the parties, and which brings to an end the matter or matters or issue or issues decided by the tribunal, thereby making it impossible to be re-litigated between the parties or their privies, except by appeal by any of the original parties. It is regularly stated that the public policy aim is to bring finality to determination of issues and to prevent wasting judicial resources.

The Defendants relied on the judgment of Lord Sumption of the UK Supreme Court in *Virgin Atlantic Ltd. v. Zodiac Seats UK Limited* (2013) UKSC 46.

48. In oral submissions, counsel for the Defendants contended that the Claimant had already sued the Defendants for damages in the first action and should have sued for all remedies then. The submission is that this suit amounts to 'excessive litigation' and is an abuse of process. The skeleton arguments also posit (at paragraph 26) that the judgment in the first action was not final and therefore the doctrine of "res judicata has no application to the judgment obtained in the first action."

49. In summary, the Defendants contend that the Claimant cannot bring another action upon or on the said mortgage. They argue that the instant action would essentially deal with issues or matters that are *res judicata*.

50. Claimant's submissions

51. In answer to the Res Judicata and Abuse of Process submissions, the Claimant replied that the Claimant was entitled to pursue its remedies concurrently or cumulatively, and therefore the concurrent suit could not amount to an abuse of process.

52. The Claimant asserts that the Claimant is not seeking to either enforce the judgment it obtained in 2011 or to commence fresh proceedings on that judgment. Rather, the Claimant is seeking to: (i) exercise remedies available to it under its mortgage which are independent to its rights to judgment; and (ii) recover sums which, by payment, the Defendants have acknowledged are due and owing.

53. The Claimant relied on the principle as stated in Halsbury's Laws of England/Mortgage (Volume 77 (2016))/9:

> "*It may be an abuse of process for a party in subsequent proceedings to raise a ground of claim or defence which could have been but was not raised in earlier proceedings.* ***Therefore, a mortgagee who obtains judgment for possession and for the sums expressed to be due under the mortgage cannot bring a subsequent claim for sums due under a guarantee which were also secured by the mortgage****. A mortgagee is not, however, necessarily required to enforce all his rights in one action: if he brings a claim for possession or payment alone, or if he obtains an unopposed order for possession alone in proceedings for possession and payment, he is not estopped from claiming the other remedy in a subsequent proceeding.*" [My emphasis]

54. The Claimant also relied on the case of *UCB Bank plc v Chandler* All England Official Transcripts (1997-2008) .

55. Law and Analysis

56. The definition and purpose of 'res judicata' has been carefully expounded on by Lord Sumption's *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd. (*cited above), at paragraph 17:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.
>
> The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.
>
> Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336.
>
> Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34.

> Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198.
>
> Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.
>
> Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

57. One finds the rationale for the doctrine in Halsbury's Laws of England Civil Procedure - Finality of Judgments and of Litigation (2) Res Judicata (i) The Doctrine of Res Judicata at para. 1568:.

> "The purpose of the principle of res judicata is to support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation, and its twin principles are often expressed as being the public interest that the courts should not be clogged by re-determinations of the same disputes; and the private interest that it is unjust for a man to be vexed twice with litigation on the same subject matter. A distinction is often made between the doctrine of res judicata and the wider rule (alternatively seen as an extension of res judicata) that precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised, in the earlier ones for the purpose of establishing or negativing the existence of a cause of action ('abuse of process'), although the policy underlying both principles is essentially the same."

58. *Res judicata* is Latin for 'the matter has been decided'. Once the Court has made a decision in relation to a specific matter, that matter cannot be re-litigated save

on appeal. In the absence of an appeal, the parties are bound by the decision. The institution of another suit for the same cause of action in respect of the same relief is an abuse of process because it would subject a party to non-ending litigation concerning the same subject matter, cause of action and relief. There has to be some finality in litigation and a party ought not be able to subject another party to matters already adjudicated upon as between them.

59. The law is that a party is also usually estopped from proceeding with further litigation to claim relief that he could have claimed in a previous matter concerning the same cause of action. However, in mortgage actions, the nature of a mortgage is that a mortgagee has several independent reliefs and he may pursue those together or separately. I accept that the correct principle of law is that he can purse them concurrently or consecutively. I do not find that the entirety of the 2022 action amounts to matters res judicata.

60. For the reasons given above as it relates to the doctrine of merger, I find that the Claimant in this action, the 2022 action, may pursue reliefs not sought in the 2011 action. It is not an abuse of process for the mortgagee, in this instance, to pursue the current suit although the mortgagee is estopped from pursuing a claim for damages on the mortgage arrears. That part of the current suit was already been determined in the 2011 action.

61. Limitation Period

62. Defendants' submissions

63. It is also the Defendants' contention that the Claimant's claim is statute-barred because the current claim amounts to an action on the judgment obtained in the 2011 action.

64. The Defendants contend that

> "20. The sums, therefore, outstanding under the mortgage, is the sums under the judgment debt, except as above stated. This puts the present action as an action on the judgment which has been commenced after the 6 year period referred to under s. 5 (3) of the Limitation Act. It is submitted that this action must therefore be struck out insofar as the Judgment debt is concerned.
>
> 21. The deadline for the bringing of an action on this Judgment was 7th. November, 2017.

22. The Claimant cannot bring another action upon or on the said mortgage amounts which constituted the amounts of the mortgage debts for which judgment was given in the first action, as it would be, and in fact is, a contravention of Section 5 (3) of the Limitation Act. In essence, the Limitation Act has a bearing on the said judgment and the moneys under it."

65. Claimant's Submissions

66. The Claimant submits that the 2022 proceedings are distinct from that of the 2011 Action and that Section 5 (3) of the Limitation Act is not applicable in the 2022 action as that action seeks different remedies. The Claimant submits that the limitation period that would apply to this instant action is the 12-year period provided at Section 32(1) of the Limitation Act for action on a mortgage. They also rely on Section 38 as a provision for "payments on a debt [renewing] the limitation period. They cited *Securum Finance Ltd. v. Ashton* [2000] 3 WLR 1400 for that point. The Claimant submitted that, "Therefore, the limitation period has not expired giving RBC sufficient time to bring proceedings for the sums owed under the said Mortgage along with interest."

67. Law and Analysis

68. The relevant sections of the Limitation Act are section 5 (3) section 32(1) and section 38(1) of the Limitation Act, 1995.

69. Section 5 (3) provides:-

"(3) An action shall not be brought upon any judgment after the expiry of six years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiry of six years from the date on which the interest became due."

70. Section 32(1) provides:-

"No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover the proceeds of the sale of land, after the expiry of twelve years from the date when the right to receive the money accrued

71. Section 38(1) provides:-

"38. (1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and —
(a) the person in possession of the land or personal property, acknowledges the title of the person to whom the right of action has accrued; or
(b) in the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or any person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest,
the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment."

72. The parties are at variance as to the nature of this current suit, the 2022 action. This Court has determined that the 2022 action is a suit on the mortgage debt. It is not pleaded as a suit on the judgment debt nor as an enforcement of the 2011 judgment. For this reason, and given the finding of this court that the Claimant is estopped from proceeding in the 2022 action to sue for the sums outstanding on the mortgage, it is unnecessary to address the applicability of the Limitation Act in this circumstance.

73. Unconditional Appearance

74. The Claimant has taken issue with the Defendant's ability to bring a strike out application at this stage. The Claimant argued that the Defendants entered an unconditional appearance and therefore submitted to the cause of action. The Claimant also submitted that while the Defendants could raise the issues as a Defence to the substantive action, a strike out application is inappropriate.

75. The Claimant cited no authority for this proposition.

76. This Court fines no merit in this argument. The Defendants are not bound to enter an unconditional appearance in order to make an application to strike out under Order 18, Rule 19 or for the court to make an order under Oder 31A.

77. The Defendants are not alleging irregularity in the issue of the writ or the service of the writ nor are they contesting the jurisdiction of the court - these being examples of when a conditional appearance was, hitherto, appropriate.

78. The essence of the Claimant's submission is that a Defendant who has entered an unconditional appearance may take such a point at trial but not before. I do not think that that is correct in law. It would be peculiar for a Defendant to incur costs

and waste time going to trial to make a point on the pleadings and to subject himself to same when the very trial may be preempted. The rules provide for the very scenario raised in the instant case.

79. **Court's power to strike out**

80. The Application to strike out is made pursuant to Order 18 Rule 19(1) of the Rules of the Supreme Court ("RSC"). Order 18, Rule 19 (1) provides:

> *"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court."*

81. Order 31A Rule 20(1) provides further grounds for striking out a pleading or part of a pleading. It states:

> *20. (1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court —*
> *(b) that the pleading 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 pleading or the part to be struck out discloses no reasonable grounds for bringing or defending a claim or*
> *(d) that the pleading or the part to be struck out is prolix or does not comply with the requirements of any rule.*

82. Under these rules the Court has the power to strike out a party's case in whole or in part on the application of a party. The rules do not displace the Court's inherent jurisdiction to strike out pleadings which are an abuse of the process of the court. Striking out is often described as a draconian step, as it brings a party's case (in whole or in part) at an end without adjudication on its merits. Essentially, the unsuccessful party to the application would be driven from the judgment seat as it regards the whole or a part of his matter. Therefore, it is said that striking out should be allowed only in exceptional cases.

83. The Claimant made submissions on striking out as it relates to a reasonable cause of action, relying on *West Island Properties Ltd. V Sabre Investment Limited and others* [2012] 3 BHS J No 57 which cited *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094. In *West Island Properties Ltd. V Sabre Investment Limited and others,* Justice Allen, P, said at p. 15:

> " I think "reasonable cause of action" means a cause of action with some prospect of success, when…only the allegations in the pleadings are considered."

84. This Court finds that the Claimant has a cause of action in relation to the mortgage with some prospect of success. The mortgagor-mortgagee relationship has been alleged (and is not denied) and the mortgagee wishes relief under the terms of the agreement pleaded. However, the claim for judgment on the outstanding sums is not a claim that ought to be allowed in the current action. That part of the 2022 action, for the reasons outlined above, cannot succeed. Nevertheless, that claim for damages for the sums outstanding is not exhaustive of the remedies claimed for by the Mortgagee in this action and, therefore, the Court will not accede to striking out the entirety of the Claimant's action.

85. **Conclusion**

86. I find that the Claimant is estopped, as a result of the doctrine of merger, from proceeding with its claim on outstanding sums due under the mortgage. The Claimant has a judgment in relation to same and its recourse must be to that judgment.

87. I decline to make a finding as to whether the Claimant's action is statute-barred since the Court's finding is that the Claimant's pleadings do not found a claim on the judgment in the 2011 action as asserted by the Defendant.

88. I hold that to allow the Claimant to continue with a claim for damages against the Defendants in respect of moneys owing under the mortgage would be an abuse of the process of this Court.

89. I find that the Claimant is not barred from proceeding in this action (the 2022 action) to secure relief not previously sought or granted in the 2011 action. The Court will exercise its power to strike out that part of the pleading that is an abuse of the process of this court.

90. **Costs**

91. The Court invites the parties to make written submissions on the incidence of costs for this application. The Court will determine same on the papers.

ORDER

92. The order and directions of this Court are as follows.

1. The Claimant is estopped, as a result of the doctrine of merger, from pursuing any further action for monetary damages.
2. Paragraph 3 of the Claimant's Originating Summons, viz, "Judgment for the sums outstanding under the said Mortgage" is struck out.
3. For avoidance of doubt, this action is now governed by The Supreme Court, Civil Procedure Rules 2022, as amended.

Dated this 16th day of November, 2023

Carla D. Card-Stubbs, J