IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 01767 of 2022

B E T W E E N:

NELSON MCFALL

First Plaintiff

and

MARTHA MCFALL

Second Plaintiff

AND

SCOTIABANK (BAHAMAS) LIMITED

First Defendant

and

GATEWAY FINANCIAL LTD.

Second Defendant

and

GATEWAY ASCENDANCY LTD.

Third Defendant

BEFORE: The Honourable Madam Justice C.V. Hope Strachan

APPEARANCES: Yvette Rahming and Gabrielle Rahming for the First and Second Plaintiffs

Leif Farquharson K.C and Gabriel Brown for the First Defendant – 6 June, 2023; 20 June, 2023.

Michela Sumner-Budhi and Gabriel Brown for the First Defendant- 24 October, 2023; 11 March, 2024

Ms. Akera Martin for the Second and Third Defendant

HEARING DATES: 6 June, 2023; 20 June, 2023; 24 October, 2023; 11 March, 2024

RULING

Application to strike out Writ of Summons- Sanctions- Civil Procedure Rules 26.3 - whether writ of summons and statement of claim disclose no reasonable cause of action-whether writ of summons and statement of claim is frivolous vexatious and abuse of process of the court – waiver by conduct and election – estoppel- substitution and or removal of party from suit- consolidation of actions – costs.

PRELIMINARY COMMENTARY:

[1.] For the purposes of clarity I have designate the parties as follows:

a) The McFall's are the Claimants ('the Claimants")
b) The First Defendant is Scotiabank ("Scotiabank")
c) The Second Defendant is Gateway Financial ("Financial")
d) The Third Defendant is Gateway Ascendency ("Ascendancy")
e) All the Defendants are collectively referred to as ("the Applicants").

Introduction

[2.] This is an application by the Applicants to strike out the Claimants writ of summons and statement of claim in this action in which the Claimants claim damages for several common law and statutory breaches against the Defendants. The arguments advanced in the subject application made by the Defendants to strike out the writ of summons and statement of claim herein, involves an action filed some seven (7) years prior to the current writ, i.e. CLE/gen/01960 ("the first Action") filed on 15th December, 2015 while this present action CLE/gen/01767 was filed 19th December, 2022. ("the second action"). In this regard the decision will of necessity include the disposition of the 2015 action.

[3.] The application to strike out came by way of the following:

a. Notice filed by Scotiabank on 20th July, 2023with supporting Affidavit of Gabriel Brown filed even date.
b. Summons filed by Financial on 26th April, 2023 and 19th July, 2023 with Affidavit of Tavares Laroda filed 19th July, 2023 and Affidavit of Tavares Laroda filed 11th September, 2023
c. Summons filed by Ascendancy on 21st February, 2023, Affidavit of Allan Butler filed 31st May, 2023, Notice of Application filed 19th July, 2023 and Affidavit of Allan Butler filed 11th September, 2023.

HELD: The application by Financial and Ascendancy to strike out the writ of summons and statement of claim of the Claimants, on the basis that it does not contain reasonable grounds and/or is frivolous, vexatious/or and an abuse of the process of the court is denied. The summons is dismissed with costs to the Claimants to be fixed by this court. Scotiabank succeeds on their application that the writ of summons and statement of claim disclose no reasonable grounds for

bringing the claim. Scotiabank is removed as the first defendant to this action, with costs to Scotiabank to be paid by the Claimants and fixed by this court. The reasons for the decision are set out herein below.

FACTUAL BACKGROUND

[4.] This action is precipitated by certain activities which flowed from a mortgage dated 23rd March 2006 ("the mortgage") between the Claimants as ("the Mortgagors") and Scotiabank as ("Mortgagee"). The mortgage fell into arrears. This resulted in a series of events by Scotiabank commencing with a 2015 court action for possession of the mortgaged property. After this action was commenced, several other events occurred ending ultimately with a transfer of the mortgage to Ascendancy. The Claimants contend in their writ of summons and statement of claim that the Applicants are liable in damages to them for various breaches which occurred upon the said transfer. The Applicants have denied the claim and consequently have applied to strike out the writ of summons and statement of claim pursuant to Part 26.3 of the Civil Procedure Rules (CPR) in the case of the three (3) applicants and additionally under the inherent jurisdiction of the Court in the case of Scotiabank. The Applicants also seek a costs order pursuant to Part 71 CPR.

[5.] The relevant events are in chronological order, and it is important to have particular regard to certain communications and the timelines of the communications and/or the timelines when the Claimants received these communications. This is pivotal to the allegations in the statement of claim. They are as follows:

i. The Mortgage, the claimants to Scotiabank Bahamas Ltd – 23/03/2006
ii. The filing of the First Court Action by Scotiabank 15/12/2015
iii. The Transfer Deed – 26/02/2018 – Scotiabank to Ascendancy
iv. The Court Order – 01/07/2020 – Scotiabank/the claimants.
v. The Commitment Letter – 11/11/2021 – the claimants - Ascendancy
vi. The Email Diandra Gibson at Ascendancy from Yvette Rahming – 02/12/2021(Attorney for the claimants).
vii. Writ of Summons filed by the claimants against Scotiabank, Financial and Ascendancy.

THE FIRST COURT ACTION

[6.] The first action was commenced by Scotiabank for Vacant Possession and payment of outstanding mortgage payments from the Claimants over property described as,

> **"ALL THAT piece and parcel or lot of land lying within the subdivision known as Garden Hills Number two (2) in the Southern District of the Island of New Providence**

and being known as Lot Number Three Hundred and Nine (309) in the said Subdivision which said piece of land is with its position shape marks boundaries and dimensions as are shown on the Plan attached to an Indenture of Conveyance dated the 12th day of November, A.D., 1973 and made between Garden Hills Estates Limited of the one part and Maxwell Bowe of the other part and being delineated pink on the said plan.

[7.] The action commenced as a result of the delinquency of the claimants in the payment of their mortgage installments. Scotiabank by virtue of the mortgage deed were empowered to obtain possession of the subject property and payment of the arrears due and owing as at that date.

[8.] The evidential disclosures filed thus far in the present proceedings suggest that nothing significant occurred after the action for possession was filed in 2015 other than a forbearance agreement executed by Scotiabank and the Claimants on 7th January, 2016. The entire document is not discussed here, as nothing turns on it, however suffice it to say that the agreement varied the previous terms agreed by the claimants in 2006 in connection with the payment and servicing of their mortgage. These terms had been set out and agreed to by the claimants' executing a Promissory note to Scotiabank dated 27th March, 2006. Suffice it to say that according to the payment structure the mortgage was set to mature on 27th March, 2009. The forbearance agreement included details in connection with inter alia the balance agreed between the parties as owed as at that date, the interest then due, add on charges due, interest on add on charges, late fees, the per diem interest rate and the arrears due and owing as at that date. This document is not of particular relevance to the present application except to say that it exemplified the approach taken by the mortgagee which appeared to have been sustained throughout the history of the mortgage.

[9.] Pursuant to a Transfer Deed dated 26th February, 2018, the details of which will be explored further along, Ascendancy was substituted as plaintiffs in this 2015 action. They obtained an order to that effect on 1st July, 2020 from Deputy Registrar of the Supreme Court Mr. Renaldo Toote ("Registrar Toote"). Given that the 2015 action remains extant and the filing of the current action, the Applicants are alleging that this current action has resulted in two actions running concurrently, which involve the same subject matter and the same parties. Their interpretation of this has led them to allege that the current action is an abuse of the process of the court and that it is offensive to the rule in **Henderson v Henderson (1843) 3 Hare 100. Per Wigram V-C:**

> " ***In trying this question I believe the rule of Court correctly when I say that where, a matter becomes the subject of litigation in, and by adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to point upon which the Court was actually required***

by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Simply put, the applicants are against what they see as an attempt by the Claimants to relitigate in this case matters which should have been brought in the 2015 proceedings. .

[10.] THE CURRENT COURT ACTION

The Claimants commenced this second action and particularized in their writ of summons and statement of claim a multiplicity of breaches and allegations of wrongdoing on the part of the applicants, in their various respective dealings with them. They claim damages in negligence for inter alia negligent mis-statement, false representations, inaccurate and/or misleading information given them by the applicants in carrying out their duties when the mortgage was transferred to Ascendancy. They also claim that one or more of the applicants breached their fiduciary and statutory duty to them. These allegations are set out alphabetically in the writ and statement of claim from a) to k) which I have lifted verbatim as follows;

a) Informing the Plaintiffs that the Mortgage was assigned by the First Defendant to the Second Defendant when they knew or ought to have known that the Mortgage had not yet been transferred;

b) Failed to timeously advise the Plaintiffs that their Mortgage had been transferred;

c) Failed to accurately advise the Plaintiffs of the entity to whom they should have made mortgage payments following the purported transfer of the mortgage;

d) Failed to provide the Plaintiffs with the proper entity to whom they should have made mortgage payments following the purported transfer of the mortgage;

e) Failed to properly account for monies paid according to arrangements made between the First and Second Plaintiffs and the First Defendant;

f) Failed to comply with the terms of the mortgage;

g) Allowed the Plaintiffs to begin making payments to institutions that did not yet have the mortgage;

h) Failed to provide statement of accounts concerning the mortgage and other information and/or documentation as requested by the Plaintiffs;

i) Made certain inaccurate, false and/or misleading misstatements and/or misrepresentations to the Plaintiffs on which the Plaintiffs relied;

j) Failed to act in good faith;

k) In all the circumstances, failed to act with reasonable skill and care and/or in the best interest of the Plaintiffs

[11.] As against Scotiabank and Ascendancy the Claimants allege in their writ of summons and statement of claim that they breached their Statutory Duty. The detailed allegations are set out a) to d) under the same named rubric which I have also lifted verbatim as follows:

a) ***The First Defendant failed to, not less than thirty days before the effective date of transfer, assignment or sale, or at all, provide to the Plaintiffs notice of transfer, assignment or sale of the mortgage which took place by way of Deed;***
b) ***Failed to account for monies paid according to arrangements made between the First and Second Plaintiffs and the First Defendant;***
c) ***Failing to provide statement of Accounts concerning the Mortgage and other information and/or documentation as requested by the Plaintiffs; and***
d) ***The Second Defendant offered the Plaintiffs new payment terms that place the Plaintiffs in a worse position that they would have been had the mortgage debt not been sold.***

[12.] As against Financial and/or Ascendancy the Claimants allege negligence and/or breach of Fiduciary Duty and have particularized the breaches a. to g. under that rubric in the statement of claim **lifted verbatim** as follows:

a) ***Failed to advise the Plaintiffs that Gateway Financial and/or Gateway Ascendancy had not yet acquired the mortgage of the Plaintiffs from the First Defendant notwithstanding Gateway Ascendancy and/or Gateway Financial had been collecting payments made by the Plaintiffs;***
b) ***Failed to properly apply payments made by the Plaintiffs to the mortgage or to advise the Plaintiffs that such amount being paid by them was being applied by Gateway ascendancy incorrectly to accounts held by Gateway Ascendancy notwithstanding Gateway Ascendancy had no right to receive mortgage payments, Gateway Ascendancy not being the transferee of the mortgage from the 1st Defendant;***
c) ***Began accepting payments from the Plaintiffs notwithstanding neither Gateway Ascendancy nor Gateway Financial had yet been transferred the Mortgage;***
d) ***Provided the Gateway Financial Notice notwithstanding Gateway Financial had not been transferred the Mortgage;***
e) ***Continuing to accept funds from the Plaintiffs notwithstanding that the mortgage had not been acquired yet;***
f) ***Failing to provide statement of accounts concerning the mortgage and other information and/or documentation as requested by the Plaintiffs; and***
g) ***In all the circumstances, failed to act with reasonable skill and care and/or in the best interests of the Plaintiffs.***

[13.] The Claimants further set out the particulars of their loss and damage i.e. special damages being sums paid to Ascendancy and/or Financial in the sum of $24,196.50 and sums paid to Ascendancy subsequent to the signing of a commitment letter at $5,709.33. The total of these special damages being $29,905.83.

The reliefs sought by the Claimants in the prayer of the statement of claim are as follows:

i. ***Immediate repayment of the sums which was received and/or held by the Defendants following the erroneous Scotia Notice of Assignment, alternatively equitable compensation;***
j. ***Damages for breach of contract against the First and Third Defendants in an amount to be determined and assessed at trial;***
k. ***Damages for negligent misstatement and/or negligent misrepresentation against the Defendants in an amount to be determined and assessed at trial;***
l. ***Damages for breach of Statutory duty against the Defendants in an amount to be determined and assessed at trial;***
m. ***Breach of fiduciary duty against the First Defendant and Second Defendant in an amount to be determined ad assessed at trial;***
n. ***A Declaration that the Defendants are jointly and severally liable to the Plaintiffs for those damages;***
o. ***A Declaration that due to negligent, innocent and/or fraudulent misrepresentation and/or misstatement of the First, Second and/or Third Defendant the transfer of the mortgage and all subsequent agreements are null and void;***
p. ***Interest pursuant to the Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court considers appropriate;***
q. ***Costs; and***
r. ***Such Further or other relief as this Honourable Court may deem just.***

THE STRIKE OUT APPLICATIONS OF SCOTIABANK, FINANCIAL AND ASCENDANCY

[14.] *SCOTIABANK'S strike out application*

Is made pursuant to Part 26.3 (1) (b) and (c) of the Supreme Court Civil Procedure Rules, 2022 ("CPR") and/or the Inherent jurisdiction of the Court. They seek relief from continuing to be a party to the current action pursuant to Part 19.2 (4) of the CPR and costs pursuant to Part 71.6 CPR. Their resistance to continuing as a party to the action is borne out of the fact that the claimant's mortgage was transferred to Ascendancy since several years ago. Further that Ascendancy substituted for Scotiabank in the 2015 court action against the claimants by court order of Registrar Toote on 1st July, 2020. As a result they are not proper parties to the writ of summons and statement of claim and should be removed therefrom. They submit that in those circumstances the Claimant's writ and statement of claim fail to show any reasonable grounds for commencing the subject action. There is also a commitment letter ("the commitment letter") executed by the Claimants in December 2021 which contained a clause that the contents of that letter superseded any previous negotiations in relation to the mortgage. The letter was provided to them by Ascendancy. Scotiabank says also that the letter having been executed 6 years after the first action, as such the Respondents are estopped from seeking damages based on the transfer of

the mortgage to Ascendency. Additionally, they say the Claimants have failed to specify any statutory breach committed by Scotiabank in their writ of summons and statement of claim.

[15.] Scotiabank further submits that with the 2015 action still extant, the Claimants can raise any legal issues to do with the mortgage in this action. In those circumstances they allege the current action is frivolous vexatious and an abuse of the process of the court and should be struck out.

[16.] Relying on the overriding objective of the CPR they are of the view that the court is mandated to deal with cases justly and at proportionate costs. The concern is that to allow this action while the 2015 action is extant will result in a disproportionate share of the court's resources.

[17.] **FINANCIAL'S strike out application**

Like Scotiabank, Financial's application is based on Part 26.3 (1) (b) and (c) CPR, and Part 71CPR. The same premise applies, that the writ of summons and statement of claim does not disclose a reasonable cause of action and that it is frivolous, vexatious and an abuse of the Process of the Court. They deny the Claimants allegations that they failed to comply with the Homeowner's Protection Act, 2017 ("HPA") in relation to a S. 18 obligation to notify the claimants of the specific details of the transfer of their mortgage, in the manner and time specified by the HPA. Having done so the claimants action is frivolous vexatious and an abuse of the process of the court. They also submit that any issue which the claimants may want to address with Gateway may be done in the 2015 action thus there is no reasonable ground to defend the claim.

ASCENDENCY'S strike out application

[18.] Ascendency's application likewise is predicated upon Part 26.3 (1) (b) and (c). They too assert that the claimants waived their right to bring any claim against Ascendency by their conduct and election in signing the commitment letter on 8th December, 2021. Consequently, that the claim is frivolous, vexatious and an abuse of the process of the court. They further contend that the issue raised in the claimant's application could be ventilated in the 2015 action as it is a simple matter of calculation and accounting of the payments made under the mortgage.

[19.] **General Commentary on the Applications**

In each case the applicants are relying on extrinsic evidence separate and apart from the actual writ of summons and statement of claim as a foundation for their applications. In the case of Scotiabank, the crucial documents are a Transfer Deed dated 26th October, 2018 wherein Scotiabank transferred a mortgage between themselves as mortgagees and the Claimants as mortgagors to Ascendancy and also a Court Order dated 1st July, 2020 granted by Deputy Registrar Toote substituting Ascendancy for Scotiabank in a 2015 court action taken against the claimants by

Scotiabank. In connection with the said transfer document Financial and Ascendancy are relying on the mentioned commitment letter purported to contain a waiver clause. The waiver clause is touted by the Applicants as estopping the Claimants from bringing the current action. It is also material to the deliberations and the final decision that Scotiabank invoked the inherent jurisdiction of the court in deciding the application.

[20.] **THE LAW – The relevant legislation relied on by the applicants is set out hereunder as follows:**

The **Civil Procedure Rules (CPR) Part 26 Rule 26.3** provides the Court with the power to strike **out actions. The aforementioned rule provides:**

In addition to any other power 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 that —

- ***a. there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;***
- ***b. the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;***
- ***c. the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or***
- ***d. the statement of case or the part to***

[21.] ***CPR Part 71.3***

The court may make an order requiring a party to pay the costs of another party arising out of, or related to all, or any part of any proceedings.

[22.] ***CPR Part 19.2***

(1)The court may add, substitute or remove a party –

(a) on application by a party; or

(b) without an application

[23.] ***CPR 19.2 (5)***

The court may, by order remove any party if it considers that it is not desirable for that person to be a party to the proceedings.

[24.] At this juncture I drawer attention to the fact that given the existence of the 2015 action concurrent to the present action the court is empowered to consolidate actions where it is practical and just to do so pursuant to the overriding objectives of the CPR. Notwithstanding that the Applicants have not sought a consolidation of the two (2) cases in their respective applications I could not overlook the fact that in the Claimants submissions they entertained that possibility despite ultimately rejecting it as an avenue of resolution as to the continued existence of the two mentioned actions. Notwithstanding their position on this issue I am of the view that the provisions should be part of the discourse herein and may ultimately influence the final decision. So I have set out the specific provisions for consolidation under the CPR as follows:

[25.] ***CPR 26.1 (2) (b);***

Except where these rules provide otherwise, the Court may;

(a)

(b) consolidate proceedings;

[26.] ***CPR 2- Overriding Objectives of the CPR;***

(1) "The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.
(2) dealing justly with a case includes, so far as practicable;
(a) ensuring that the parties are on equal footing.
(b) saving expense;
(c) dealing with the case in ways which are proportionate to
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the courts resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with the rules, practice directions and order.

THE ISSUES BETWEEN THE PARTIES RELATIVE TO THE STRIKE OUT APPLICATION

[27.] The Issues for this court's determination can be crystalized as follows:

(i) Does the Court have power at this stage of the proceedings to strike out the writ of summons and statement of claim?

(ii) If so does the facts and the existing circumstances warrant such a strike out?

(iii) Does the Writ of Summons and Statement of Claim fail to disclose reasonable grounds for bringing the claim (Part 26.3 (1) (b). and;

(iv) Is the Writ of Summons and Statement of Claim frivolous vexatious and an abuse of the process of the court?

(v) Should Scotiabank be removed from this action?

(vi) Should the 2015 action be consolidated with this action herein?

(vii) Should the Court exercise its powers pursuant to Part 71 of the Supreme Court Civil (Amendment) Rules 2022?

Documents prayed in aid of the Applicants strike out application

[28.] **The Mortgage Deed –**

This document is specifically relevant to the Scotiabank contention that they should be removed from the current action. The mortgage, despite significant changes during its lifetime with the three entities who are the applicants herein, still subsists.

[29.] There was nothing unusual in the terms and conditions in the Mortgage agreement between the Claimants and Scotiabank. The Claimants do not dispute any of the actions of Scotiabank in relation to the possession proceedings against them in the 2015 action, after they became delinquent in their mortgage. However, for deciding the issues in this matter Clause 22 of the Mortgage is material;

> ***"This indenture constitutes the entire understanding between the parties and none of its terms conditions or provisions may be amended varied altered or otherwise modified unless such amendment variation or alteration or modification is in writing and duly signed by all parties."***

[30.] It appears that at every stage where the bank decided to alter or amend the structure of the mortgage, they put their amendments, variations or alterations in writing and required the Claimants to execute such writing before the same could take effect.

The Deed of Transfer –

[31.] This document is critical to all of the parties, including the Claimants as much of the alleged irregularities which caused the current action to be filed materialized from this document and the surrounding communications. It is particularly vital to Scotiabank in its quest to be removed from the current action.

[32.] By Deed of Transfer dated 26th February 2018, the Claimants mortgage was transferred to Ascendency. The Deed has been provided as an exhibit in the Affidavit of One Allan Butler, Manager of Scotiabank's Centralized Retail Collection Unit. The Deed is material to the application to strike out, as the effective date of transfer of the Claimants mortgage is called into question.

[33.] This document was made between Scotiabank Bahamas Limited (Transferor) and Gateway Ascendancy Ltd. (Transferee). It is recorded in the Registry of Records in volume 13024 at pages 250 to 269. The Claimants mortgage was included among numerous others that were purportedly transferred to Ascendancy by this document. Included among several of the vesting clauses was Clause #4:

> ***" The Transferee hereby assumes and accepts all obligations and liabilities of the Transferor contained in the Scheduled Instruments and all of the duties and responsibilities related thereto after the date hereof and shall discharge, perform and fulfill all of the said obligations arising in connection with or pursuant to the Scheduled Instruments and shall indemnify and hold the Transferor harmless against all claims arising out of or by reason of the said obligations and liabilities contained in the Scheduled Instruments."***

[34.] This transfer having been made in 2018 it is subject to The Homeowner's Protection Act 2017 which provides clear rules for the dissemination of information from a mortgagee to a mortgagor upon a transfer. In answer to allegations made against them by the Claimants, Financial denies any breach of the Homeowners Protection Act. They contend that they notified the Claimants about the transfer of their mortgage in accordance with ***S.18*** of the said Act which provides;

[35.] Mortgage transfer, assignment or sale at option of mortgagee.

> ***(1) If a mortgagee transfers, assigns or sells a mortgage debt, the mortgagee shall provide to the mortgagor a notice of transfer, assignment or sale not less than thirty days before the effective date of the transfer, assignment or sale.***
> ***(2) The notice of transfer, assignment or sale must be served upon the mortgagor either personally or by registered post.***
> ***(3) The notice of transfer, assignment or sale must include –***
> ***(a) The effective date of the mortgage debt transfer, assignment or sale;***

(b) The name address and contact number for both the current mortgagee and the transferee, assignee or purchaser mortgagee; and

(c) A statement that the transfer of the mortgage debt does not adversely affect any term or condition of the mortgage agreement."

[36.] *S.18 (4) Where a mortgagee transfers, assigns or sells a mortgage debt – the transferee, assignee or purchaser of the mortgage debt shall not –*

(a)

(b)

(c) offer the mortgagor new payment terms that place the mortgagor in a worse position than he would have been had his mortgage debt not been sold.

[37.] In contemplating these provisions I noted that in the writ of summons and statement of claim filed by the claimants they indicated that they were told by Ascendancy that none of the payments they made to Financial after receiving the Scotiabank notification in 2017 was applied to the actual mortgage but rather to charges related to their insurance of the home. Notwithstanding that a determination will have to be made relative to this issue the question of liability is not for the courts adjudication at this point in time. Rather the main question is whether these allegations are sufficient to meet the criteria of a reasonable ground pursuant to Part 26.3 (1) (b) or whether this pleading is determined to be frivolous, vexatious and/or an abuse of the process of the court, Part 26.3(1)(2) a finding to be revealed at the conclusion of this ruling and after consideration of all of the other issues canvassed herein.

THE COMMITMENT LETTER

[38.] Determining the question as to the efficacy of the commitment letter centers around whether or not its terms created an estoppel barring the Claimants from bringing the current action.

[39.] An examination of the principles surrounding the law on the operation of waivers estoppel is helpful;

Halsbury Laws of England, Volume 47 (2021) para 251. explains that Waivers may be express or implied from conduct, but in either case it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance on the concession.

It is submitted that the distinction between variation and waiver must be considered according to the context of the dispute. Thus in the context of contracts of guarantee, the distinction

turns upon whether the alteration is a major or a minor one.; but in the case of other contracts this distinction is irrelevant, for what matters is whether the modification is binding as being supported by consideration or in the form of a deed. In practice, this distinction may be difficult to draw: if it is so supported, any concession, however minor (as with a forbearance to sue.) is a variation; whereas, if that forbearance is not intended to amount to consideration, there is only a waiver.

Standard form contracts frequently include provisions to the effect that no waiver or forbearance in enforcing any of the rights of the proferens under a contract shall prejudice the right of the proferens to do so in the future. Such provisions rely for their efficacy on preventing any such acquiescence amounting to an unequivocal waiver.

[40.] The Applicants contend that not only did the Claimants execute the commitment letter with the waiver clause but they conducted themselves thereafter in accordance with the terms. They did so by paying the mortgage in the same manner and in the same amounts as stipulated in the letter. Moreover they paid the mortgage installments to Ascendancy from whom they had received the letter.

[41.]. In the Affidavit of Allan Butler of Gateway Ascendancy filed 31st May, 2023 he states that they were in contact with the Claimants in attempts to restructure their account and that the Claimants were in frequent communications with a Ms. Gibson of Gateway (he fails to state whether Financial or Ascendancy) regarding the same restructuring of their account. The restructuring attempts did not succeed until 8th December, 2021, when the claimants executed the letter from Ascendancy containing the waiver clause. This is exhibited in the same Affidavit of Allan Butler.

[42.]. The relevant waiver clauses are set out herein as follows:

"This offer does not constitute a waiver of the terms of the Mortgage and no failure or delay by GAL to exercise any right, power or remedy shall operate as a waiver of it nor will any partial exercise preclude any further exercise of the same, or of some other right, power or remedy.

All covenants and agreements entered into by you under the said mortgage remain. GAL reserves any and all rights that we have under the said mortgage. This includes but is not limited to the right to sue or exercise the power of sale upon default. We wish to emphasize that the total amount payable by you will remain as in the said mortgage and we may discontinue this concession at any time by Fourteen (14) days' notice, to you in which event you shall meet your remaining obligations in full as originally agreed in the said mortgage. All of your original deed shall remain with GAL, as your mortgagee.

This offer may not be amended, waived, modified or in any way altered without expressed written consent from Gateway Ascendancy Ltd.

All terms pertaining to this Solution Product are conditional to your performance of all obligations under the same and the Mortgage documents; consequently, if any breach of the same were to arise, GAL will seek adequate remedy available under the law towards obtaining full payment of the amounts owed inclusive of all interest and associated expenses, fees and/or any outstanding balance under the above captioned mortgage deed.

This letter supersedes any other verbal or written negotiations regarding settlement of the mortgage debt made prior to the date hereof. Failure to comply with the terms stated herein shall result in the automatic cancellation of the agreement unilaterally without prior written notice by GAL."

If you wish to take advantage of this restructure, please indicate your acceptance by signing the enclosed copy of this letter and returning it to the attention of the undersigned. If not accepted within thirty (30) days of the date of this letter, the offer will lapse.

[43.] The Applicants contend that by executing the commitment letter and then adhering to the terms specified in the letter, the claimants have waived their right to bring the present proceedings, in other words their **conduct** amounted to waiver and it is clear that they **elected** to do so.

Waiver by Conduct

[44.] ***The guiding principles to determine waiver by conduct can be found per Davis J in Msas Global Logistics Limited v Power Packaging Inc. [2008] EWHC 1393 (Ch), [2003] ALL ER (D) 211 (Jun) at [50]-[53]when he stated:***

- ***(a) Whether it is referred to as waiver or forbearance is not important. What is required is a promise or representation which is unequivocal.***
- ***(b) The test is objective and what was in the mind of the promisor, representor is not determinative, the focus is on the likely effect (objectively speaking) of the words or conduct in question.***
- ***(c) There is no authority to support the proposition that, when one party has led another to believe that he may continue in a certain course without any risk of the contract being cancelled, the first mentioned party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract (Viscount reading CJ Panoutsos v Raymond Hadley Corporation of New York [1917] 2 KB 473, [1916-17] ALL ER Rep 448, at p 479***
- ***(d) Whether it is called waiver or forbearance ...or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal rights. That promise was intended to be acted on and was in fact acted on. He cannot afterwards go back on it. (Denning LJ in Charles Rickards Ltd. V Oppenheim [1950] 1 KB 616, [1950] 1 All ER 420 at p 623.***
- ***(e) Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those***

legal rights; if in such circumstances the other party acts or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representation, thereafter to enforce his legal rights inconsistent with the representation, he will to that extent be precluded from doing so (lord Goff of Chievely in the Kanchenjunga [1990] 1 Lloyd Rep 391 at p 399.

Waiver by Election

[45.] The applicants also contend that the Claimants elected to waive their rights. The guiding principles are provided in the case of ***Delta Petroleum (Caribbean) Ltd. v British Islands Electricity (British Virgin Islands) [2020] UKPC23*** which has been commended to the court by the Applicants:

Per ***Lord Legatt;***

"There is no dispute about the legal principle. As stated by Lord Diplock in Kammins Ballrooms Co. Ltd. v Zenith Investments (Torquay) Ltd. [1971] AC 850, 883, waiver by election arises; in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was aware that this would be the legal consequence of what he did."

[46.] Further ***Lord Goff of Chively*** explained in ***Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn. of India (The Kanchenjunga) [1990] 1 Lloyd's Rep 391,398*** that an election "***can be communicated to the other party by word or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right he will only be held to have done so if he has so communicated his election to the other party in clear unequivocal terms... Once an election is made, however, it is final and binding."***

[47.] If its determined that the Claimants waived their right by election it would be final, preventing the subject claim from proceeding. The finality of an election was confirmed further in **Kosmar Villa Holidays v Trustees of Syndicate 1243 [2008] EWCA Civ. 147; [2008] Bus LR 931, para 38, Rix LJ** also commended to this court by the Applicants;

Election "***generally requires knowledge of the facts giving rise to the choice on the part of the party electing, and knowledge of the choice having been made on the part of the other party. Those are the conditions which make the doctrine mutually fair. It typically arises where the parties to a contract have to know where they stand. Thus the choice has either to be communicated unequivocally by the party electing to the other party or else the objective circumstances have to be such that an effluxion of time by itself constitutes that communication. Since the election is the choice of the party electing, it is his conduct which is decisive. Once made the election is final and irrevocable."***

[48.] Knowledge that they were signing away their right to pursue claims against the applicant is essential for the waiver to operate. In ***Halsbury's Laws of England Equitable Jurisdiction (Volume 47 (2021) explains it as follows:***

> **"For *a release or waiver to be effectual it is essential that the person granting it should be fully informed as to his rights. This does not, however, prevent a person from deliberately, at any rate in a compromise agreement for valuable consideration, agreeing to release claims of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, but to have this effect appropriate language must be used to make plain that that is the intention."***

[49.] The Claimants knowledge cannot be presumed ***per Lord Atkin: Evans v Bartlam [1937] 2 All ER 646 stated the principle as follows;***

> ***"It is a simple answer to say that, to infer election, it must be shown that the person concerned had full knowledge of the various rights amongst which he elects. There is here no evidence that the defendant, at the time he asked for and received time, had any knowledge of his right to apply to set the judgment aside I cannot think that there is any presumption that he knew of this remedy, either sufficiently for the purposes of the doctrine as to election, or at all."***

[50.] Moreover the Claimants must have intended the waiver to operate in the manner proposed by the applicants: ***per The Earl of Darnley Appellant; and The Proprietors, & c. Of the London, Chatham, and Dover Railway Respondents. (1867) l.r. 2 H.L. 43; A waiver must be an intentional act with knowledge;***

[51.] If the Claimants conducted themselves in such a manner and/or elected to waive their rights an estoppel would be created as the Applicants contend. Waiver by Conduct or election also creates an estoppel as defined in ***Halsbury's Laws of England Estoppel (Volume 47 (2021)) - Reliance-Based Estoppel.***

> ***Generally; "Parties to litigation who have continued the proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up; and on a somewhat different principle, such a party cannot take advantage of an error to which he has himself contributed.***

[52.] ***Stevens & Cutting Ltd v Anderson [1990] 1 EGLR 95 – further describes the operation of an election and how estoppel***

> ***"Although not in the forefront of his argument, Mr. Cole submitted that the respondent had waived the irregularity in the application by electing not to rely upon it. A party may be deprived of the right to pursue a certain course of conduct if, when faced with two alternative and inconsistent courses of action, he chooses one rather than the other and his election is communicated to the other party. It is, however, now established that before he***

can be said to have elected, the party electing must know not only of the facts giving rise to the right but that he has the right. In Peyman v Lanjani [1985] Ch. 457 at p 487F, Stephenson LJ said:

> ***"Knowledge of the facts which give rise to the right to rescind is not enough to prevent the plaintiff from exercising that right, but he must also know that the law gives him that right to choose with that knowledge not to exercise it."***

Estoppel

[53.] ***Additionally, which favours the Claimants, for any estoppel to operate against them, three things must be established*** a representation of fact; reliance upon the representation by the person to whom it is made; and detriment resulting from such reliance. ***Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 and Bristol Cars Ltd v RKH (Hotels) Ltd (in liquidation) (1979) 38 P&CR 411.*** With the ambiguities attendant upon the alleged waiver clause it is impossible to conclude that the first threshold in this rule has been met, there was no clear representation of fact. One has to be not partially but fully aware or fully cognizant of the true circumstance. The quality of the Claimants knowledge, even as it relates to the legal situation, before executing that letter with the waiver clause is critical to the process:

Per Atkin's Court Forms - *Release or waiver.*

> ***"Waiver presupposes that the person to be bound is fully cognizant of his rights and, being so, neglects to enforce them. A waiver without full knowledge of the true circumstances affecting the legal situation, cannot be relied upon. That said there is authority that knowledge of the facts of the situation found a presumption that the rights arising from those facts are known as well. Furthermore, constructive knowledge may apply to impute knowledge to the claimant, where a claimant is put on notice and deliberately decides not to make inquiries. In Holder v Holder, the Court of Appeal affirmed Wilberforce J's approach was the correct one to apply in examining the quality of knowledge required for waiver and acquiescence."***

[54.] Objectively, considering the condition of the commitment letter I am not convinced that the claimants made an unequivocal promise or representation which by their words or conduct they intended to affect their legal rights to such an extent that they are estopped from bringing a claim against the applicants.

[55.]. A striking observation in the terms of the letter is the obvious imbalance between the burden and benefits specified for the Bank as opposed to the Claimants. All of the references to waiver, favour Ascendancy. It was clearly stated that the bank was reserving (not waiving) their right to take further action against the Claimants should they fail to adhere to the terms in the letter. In fact, they reserved the right to sue for the entire balance owed under the mortgage should that happen. The supersession clause provides further protection for the bank should the Claimants

decide to look back into the mortgage relationship and decide that they have some actionable claim against the bank. The Claimants were specifically given a choice whether to sign or not. It was indicated that if Thirty (30) days passed without them signing the letter the offer would lapse. The Claimants executed the letter on 8th December 2021 notwithstanding that the terms of the commitment letter makes it distinctly clear that the bank was not waiving their right to bring certain proceedings against the claimants should they default on the restructured terms.

[56.]. On the other hand, the terms in the commitment letter which favours the Claimants is not so clear, It does not specifically spell out that the claimants were waiving their right to anything. Frankly the language used is ambiguous and wide open to interpretation. The waiver clause in the letter can be easily misconstrued; "***This letter supersedes any other verbal or written negotiations regarding settlement of the mortgage debt made prior to the date hereof.***" One of the major questions which comes to mind is which entity or entities are being included in this clause. None are named and assuming that any other entity is included beyond the issuer of the letter would be pure speculation. In Comparison, the clause favoring Ascendancy i.e. ***"This offer does not constitute a waiver of the terms of the Mortgage and no failure or delay by GAL to exercise any right, power or remedy shall operate as a waiver of it, nor will any partial exercise preclude any further exercise of the same, or of some other right, power or remedy,"*** is well-defined. In its literal interpretation saying that a letter supersedes other negotiations as opposed to specifically stating that the Claimants were waiving their rights to bring further proceedings and against specified entities Scotiabank and Financial creates ambiguity. The contra proferentum rule applies that such ambiguous terms should be construed against the proferens:

> ***Ailsa Craig Fishing Co. Ltd. V Malvern Fishing Co. Ltd [1983] 1 All ER 101, [1983] WLR 964 per Lord Wilberforce:***
>
> ***"Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguous expressed, and, in such a contract as this, must be construed contra proferentum I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification; one must not strive to create ambiguities by strained construction, as I think the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion; this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also to the opportunity of the other party to insure."***

[57.]. While it might well be said that the Ailsa Craig exhortation was made in relation to contracts of insurance I view the principle as applicable in this instance of a mortgage contract and the commitment letter. As such, the clause seems totally inadequate to cause the Claimants to abandon their rights under the mortgage.

[58.] Aside from signing the commitment letter the Claimants performed the terms specified in the letter by paying the mortgage installments as prescribed and there is no dispute between the parties that the mortgage is current.

[59.] It is clear from all of the authorities quoted above that the party granting the waiver must know completely what rights they are waiving and moreover they must have communicated their intentions unequivocally. I find again that the ambiguity of the waiver letter did not provide sufficient clarity so that the claimants were not clothed with all of the knowledge of facts which gave rise in law to alternative rights as ***Lord Diplock in Kammins Ballrooms*** supra. It is also clear from the Claimants pleadings that they did in fact make inquiries of the Applicants to obtain full knowledge of the status of the mortgage before executing the letter. But while it is clear based on the Rahming email that there were enquiries being made about the application of instalment payments under the commitment letter, there is no indication from the evidence given by the Applicants as to the substance of, or the completeness of the answers given in response to the enquiries. Of particular note is the lack of any communications between the applicants and the claimants as to the rights they were intended to be abandoning through the commitment letter and waiver clause.

[60.] It is obvious that the disposition of this Commitment Letter goes to the heart of the Applicants case, however aside from the issues that has already been identified with the letter the fact of the execution of the Commitment letter is not the only consideration for this court. In fact the provisions under which the application is brought, well established authorities demonstrate that there are several other pivotal considerations in determining the success of a strike out application pursuant to CPR 26.3.

THE ORDER OF REGISTRAR TOOTE DATED 1st JULY, 2020 – This document is critical to the Scotiabank application to be removed from the current action. It is to be considered in concert with the Transfer Deed and the waiver letter.

[61.] Following through on the transfer arrangement with Ascendancy, Scotiabank applied for and obtained a court order from Registrar Toote on 1st July, 2020 in the 2015 action. Through this order Ascendancy substituted as Plaintiff for Scotiabank in the 2015 action. The Claimants were aware of this order having taken part in the proceedings before the Registrar. There is no doubt that those proceedings resulted in Ascendancy replacing Scotiabank. The effect of the order was that any further action in those proceedings either by them or against them in connection with the subject mortgage should name Ascendancy as Plaintiff and The Claimants herein as Defendants. This position remains the same to date since 1st July 2020 given that the Claimants herein have not had the order set aside or appealed. The 2015 action subsists as between Ascendancy and the Claimants as mortgagor qua mortgagee established extending back to 23rd March, 2006, the date the mortgage deed was executed.

[62.] The Claimants have taken the position that this was not a hearing on the merits of the case. That it was not a substantive hearing, which required the expenditure of judicial time and resources to such an extent that it should influence any decision against them in the present application. They opine that the present writ of summons and statement of claim is not a relitigation of the 2015 action that would in any way make the claim frivolous, vexatious or an abuse of the process of the court; a discussion which will be expanded further in this ruling.

SUBMISSIONS of the APPLICANTS / RESPONSES by the CLAIMANTS;

[63.] The applicants in support of their strike out application sought to convince the court that every one of the grounds pleaded by the Claimants amounted to an absence of any grounds or was in fact frivolous, vexatious and an abuse of the process of the court. The Claimants defended each submission in turn. Those responses relate to the allegations of misrepresentation and/or negligent misstatement, breach of statutory duty, breaches of the Home Owners Protection Act, 2017, breach of fiduciary duty, no reasonable grounds and frivolous, vexatious and an abuse of the process of the court. The responses are set out hereunder.

[64.] When in their submissions the Applicants contend that the claimant's writ is subject to strike out due to the fact that in claiming breach of Statutory duty they failed to identify the specific statutory provisions, so their claim is not actionable, the claimants answered that an application for strike out should not involve evidence regarding the claims advanced in the statement of case.". ***Allshop v Banner Jones Ltd. (trading as Banner Jones Solicitors) and another [2021] 3 WLR 1317.***

[65.] Another argument posed by the Claimants in defence of the strike out application is that alleged breaches of the Homeowners Protection Act 2017 (HPA) would cause a developing area of the law or at the very least an area uncertain in its application to be adjudicated. They contend that these fairly new provisions deserve ventilation in a full trial and it would not be appropriate to deprive the claimants of a trial by striking out at this stage. "***Wragg and another v Partco Group Limited and another [2002] EWCA Civ 594 where the UK Court of Appeal in dealing with U.K CPR 3.4 (2) (a)*** characterized the considerations as to whether the statements of case (i) "raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides" or (ii) a claim or defence which is not a valid claim or defence as a matter of law." (i) refers to a case which is unwinnable on the merits, whereas (ii) refers to the failure of a claim which is misconceived or, which upon the facts or matters pleaded is bound to fail as a matter of law.

[66.] So in a situation such as Wragg it was found not to be appropriate ***to strike out a claim in an area of developing jurisprudence, in which a decision as to a novel point of law should be based on actual findings of fact, and a statement of case would not be suitable for striking out***

if it raised a serious live issue of fact which could only be properly determined by hearing oral evidence.

[67.] The Applicants deny the allegations made by the Claimants that they made negligent misstatements in their communication about the transfer of mortgage and further that they owed a Fiduciary Duty to the claimants. The Claimants admit that while the general rule as expounded by ***Winder J in First Caribbean International Bank (Bahamas) Limited v Gerald Deveaux*** that "the fiduciary duty and the duty of care for negligent misstatement do not co-exist and that the law only imposes a duty of care where there is no contractual or fiduciary duty in place" applies generally, but it does not apply in every case. In some cases banks may provide fiduciary services or may be deemed to have acted as fiduciaries. For instance in the case of ***Henderson v Merrett Syndicates [1994] 3 All ER 506 it was held:***

> ***"where a person assumed responsibility to perform professional or quasi-professional services for another who relied on those services the relationship between the parties was itself sufficient, without more, to give rise to a duty on the part of the person providing the services to exercise reasonable skill and care in doing so. The fact that the agency and sub-agency agreements gave the agent absolute discretion in respect of underwriting business conducted on behalf of the name did not have the effect of excluding a duty of care, contractual or otherwise."***

[68.] The Claimants state that reasonable grounds can also be found in their pleadings that Scotiabank is liable to them for misrepresentation and/or negligent mis-statement. The particulars of their claim are set out in the statement of claim and they are of the view that they are likely to succeed as it relates to this claim. Relying on the case of ***Finance Corporation of Bahamas Limited v Johnson and Burrows and RBC Royal Bank (Bahamas) Limited v Lawson H Hall and Rhonda Hall CLE/gen/000236/2020*** they say that in both cases where the banks as mortgagees failed to give proper notice under the Homeowners Protection Act and had attempted to commence proceedings pursuant to the act. They were precluded from doing so and the actions were struck out.

[69.] A final submission of the Claimants is that the case should not be struck out as frivolous, vexatious and an abuse of the process of the court, if one were to consider the overriding objective on the CPR as it relates to saving judicial resources. The Applicants answer to this submission is to be found in the case of Harrington Scott Ltd. v Coupe Bradbury Ltd. **[2022] EWHC 2275** (Ch) per Judge Hodge KC;

> ***"I accept that the Court has an inherent jurisdiction to strike out proceedings where the claimants conduct past and reasonably apprehended put the fairness of the trial in jeopardy; where it is such that any judgment in favour of the claimant would have to be regarded as unsafe; or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory, abuse of the process of the court from doing injustice to the defendant. If it were necessary to identify a source for this jurisdiction in the Civil Procedure***

Rules (which it is not, because the court has an inherent jurisdiction to act so as to preserve the integrity of the trial process), it is to be found in the duty imposed on the parties, by CPR 1.3, to help the court to further the overriding objective of enabling the court to deal with the case justly, thereby engaging (in addition to the inherent jurisdiction) the jurisdiction to strike out under CPR 3.4 (2) (c) for noncompliance with CPR 1.3. I note that at the end of his concurring judgment in Arrow Nominees at [77], Ward LJ explained that he had added his observations to the judgment of Chadwick LJ..." simply to underline that the principles to apply are those in the new procedural code. They are encapsulated by the need to do justice, case by case. In this case it is no more than justice in that broad sense that the petitioners should be denied the relief which they sought to obtain by persistent cheating."

[70.] There are various schools of legal authority on striking out applications that the Claimants have commended to the Court in addition to the foregoing, to defend against the strike out application: Pursuant to their contentions they submit that the court is bound to consider several established rules and principles applicable to deciding applications under Rule 26.3 (1) (b) and 26.3 (1) (c).

[71.] ***Cable v Liverpool Victoria Insurance Co. Ltd. [2020] EWCA Civ 1015 at para [45] the Claimants*** *provides that striking* out is a "**draconian measure**", a remedy which should only be employed as a last resort where there are no alternative remedies." Consequently I have determined that any decision should be based solely upon what is apparent on the face of the Writ. Further that the issues pleaded are too complex for a decision to be made to strike out the writ summarily.

[72.] **"Mini-Trials"** should be avoided at all costs. The Claimants acknowledge that the temptation may be to venture far beyond that which is necessary to decide the application. They contend that the issues in this case are too complicated for summary judgment and the temptation to venture into a minitrial must be avoided. Such an admonition can be found by ***Laddie J in Barrett v Universal-Island Records Ltd [2003] All ER (D) 427 (Mar)***. Citing ***Lord Hope of Craighead in "Three Rivers DC v Bank of England (No. 3) who said***

> "***It may be clear beyond question that the statements of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is called summary judgment. But more complex cases are unlikely to be resolved in that way without conducting a mini trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in Swain's case [2001] 1 All ER 91at 95, that is not the object of [CPR rule 24.2]. (the UK equivalent to our Rule 26.3). It is designed to deal with cases that are not fit for trial or at all."***

The principle is difficult to adhere to in a situation such as this where the substance of the application surrounds extraneous document(s) but it is fairly easy to appreciate that the principle speaks to what the writ and statement of claim discloses as opposed to the evidence.

[73.] The defendants has an obligation to make it clear that all claims in the writ of summons and statement of **"claim are fanciful"** and to this must be made clear without the need for conducting a mini trial. ***Per Laddie J. in Barrett***. They contend that in this case, at this point similar to Barrett there are 3 different applicants, each with their own set of evidence and reply evidence as well as extensive submissions. The multiple issues raised in the writ of summons and statement of claim also supports the contention that this is not an appropriate circumstance to accede to an application to strike out the writ of summons and statement of claim.

GENERAL DISCUSSION AND ANALYSIS REGARDING THE LAW ON STRIKE OUT APPLICATIONS

[74.] The applicants have confined there applications to Rule 26.3 (1) (b) that the Statement of Claim fails to disclose any reasonable ground for bringing or defending the claim and; Rule 26.3 (1) (c) whether the statement of Claim is frivolous, vexatious or an abuse of the process of the court.

[75.] The Court in exercising this discretion must consider all factors arising out of the application and also ensure that a litigant is not unfairly driven from the judgement seat while having regard to the overriding objectives of the CPR, which ensures that all parties are dealt with fairly and applications of this nature are not abused.

[76.] It has always been the principle in strike out applications as enunciated *in* ***Sandy Port Home Owners Association v. R Nathaniel Bain SCCIN 289 of 2014*** that a pleading must only be struck out in obvious cases.

In Walsh v Misseldine [2000] CPLR 201, CA, Brooke LJ stated:

> **"...when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."**

STRIKE OUT CONSIDERATIONS

[77.] NO REASONABLE GROUNDS: Part 26.3 (1)(b)

The burden rests with the Applicants to convince the court that the writ of summons and statement of claim contains no reasonable grounds for bringing the claim. In ***Bellize Telemedia Ltd. v***

***Magistrate Usher (2008) 75 WIR 138 Conteh CJ* expounded on the operation of** Part 26.3 CPR, **the same provision relied upon by the applicants.** He said;

> ***"Rule 26.3 (1) (b) which enabled the court to strike out a claim because it discloses no reasonable grounds for bringing or defending the claim is undoubtedly a salutary weapon in the court's armory, particularly at the case management stage. It is intended to save the time and resources of both the court itself and the parties: why devote the panoply of the court's time and resources on a claim such as to go through case management, pre-trial review and scheduling a trial with all the time and expense that this might entail, only to discover at the end of the line that there was no reasonable ground for bringing or defending a claim that should not have been brought or resisted in the first place? This provision in the rules addresses two situations:***
> ***(2008) 75 WIR 138 at 144(i) When the content of a statement of case is defective in that even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or***
> ***(ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.***
> ***(See Civil Court Practice (2008) (the Green Book), CPR 3.4[4] at p 76 and Civil Procedure (2005) (the White Book) at paras 3.4.1 and 3.4.2.)***
> ***[20] It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?***
> ***[21] These are always important factors that perforce must attend any consideration in exercising the discretion to strike out or not to strike out a claim."***

[78.] **In answer to the arguments advanced by the Applicants for 26.3 (1) (b) the Claimants have commended to the court the case of *Allshop v Banner Jones Ltd. (trading as Banner Jones Solicitors) and another [2021] 3 WLR 1317*** which posits that an application for strike out should not involve evidence regarding the claims advanced in the statement of case. Moreover, that the threshold which must be met to show reasonable grounds is a low threshold of what Mr. Justice Marcus Smith calls "reasonable arguability."

[79.] The duty of the court in determining this application is prescribed in Harlsbury Laws as follows: The outcome of the Strike out application hinges on specific established rules and guiding authorities. **Volume 36 of the Fourth Ed. of Halsbury's Laws of England states:–**

> ***"The practice is not to consider the evidence until the question whether or not on the face of the pleadings some reasonable cause of action... is disclosed had been determined. In judging the sufficiency of the pleading for this purpose the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim, then shows on the face of it that the action is not maintainable or that an absolute defence exists, the court will strike it out..."***

FRIVOLOUS VEXATIOUS AND AN ABUSE OF THE PROCESS OF THE COURT – 26.3 (1)(c)

[80.] **Halsbury's Laws of England - Consumer Protection (Volume 21 (2022)) - *758. Vexatious litigants.***

> ***"In considering whether any proceedings are vexatious, the court must look at the whole history of the matter; and proceedings may be held to be vexatious, notwithstanding that in each individual case taken singly the pleading discloses a cause of action: Re Vernazza [1959] 2 All ER 200, Lord Parker CJ, Donovan and Salmon jj:***
>
> ***In 1935 V sued a company for £158,982 for breach of contract and/or wrongful dismissal. The action was dismissed in 1937. In 1938 V brought an action in the Chancery Division claiming that the judgment in the earlier action should be set aside; in this action the statement of claim was struck out as vexatious. In 1938, 1939, 1940, 1952, 1953, 1957, 1958 and 1959 he took further proceedings or steps in proceedings before the courts arising out of the same claim as had been the subject of the action; all these were dismissed or refused. On a motion for an order under s 51(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should be instituted by V without the leave of the High Court or a judge thereof, it was contended on V's behalf that as the process issued disclosed a cause of action, except in the second action where the statement of claim was struck out, the proceedings were not vexatious.***
>
> **Held**– ***In determining whether proceedings were vexatious the court must look at the whole history of the matter, not solely at the question whether the pleadings had throughout disclosed a cause of action, and in the present case, so regarded, the order should be granted."***

[81.] What can be gleaned from the Halsbury Law description and ***"Vernazza"*** is that the history of this case and the particular circumstances are material to the ultimate decision. Also that a failure to prove a Part 26.3(1)(b) strike out does not militate against a positive finding under Part 26.3(1)(c).

[82.] In this current situation the claim brought by the Claimants is taking place after a major event involving their mortgage with one financial institution engaging in activities relative to their mortgage with another financial institution at first unbeknownst to them. Communications to them about the activities between these institutions were replete with irregularities. Notwithstanding those irregularities they were seemingly compelled to sign a new financial arrangement with that institution. This differed from their previous arrangements with the initial mortgagee in circumstances where they were not clothed with all of the relevant information. To top it off money they paid at the direction of one of those institutions seems not to have been applied to their account. This is unlike that described in ***Vernazza***. A claim that can be described as frivolous and/or vexatious is not obvious in this circumstance at all.

[83.] It has been said in ***Re L & N D Development and Design Ltd. Dixon v Myers and another (as administrators of L & D Development and Design Ltd. [2021] 2 BCLC 110*** Per Millet J "

The expressions frivolous and vexatious or no reasonable prospect of success were synonymous with the test for summary judgment under CPR Pt. 24. If the applicant could not show that the claim had a real prospect of success, he or she could not say that unfair harm had been suffered." [Emphasis mine]

[84.] Re L & N would place the onus on the claimants to prove that the writ of summons and statement of claim has a real prospect of success. Unless they could do so the claim could be deemed frivolous and vexatious. I find that a real prospect of success is adducible from the ambiguity of the commitment letter. I therefore repeat similar findings that the claim is not frivolous or vexatious.

[85.] The Applicants also seek strike out of the writ of summons and statement of claim on the basis that it is an abuse of the process of the court.

ABUSE OF THE PROCESS OF THE COURT

[86.] If the writ and statement of claim in the current case is deemed to be an abuse of the process of the court it is liable to be struck out and the Applicants prevail on their application. ***Financial conduct Authority v Papadimitrakopoulos and others [2023] (Comm) 804*** per Smith J: In commenting on CPR 3.4(2) CPR U K. provisions which bears close resemblance to R.26.3(1)(b) Bahamas provisions ..

> "It ***is common ground that CPR 3.4 (2) provides that the court may strike out a statement of case if it appears to the court that the Statement of case "is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."***
>
> ***"Before the court can strike a claim for abuse of process, it must first determine whether the conduct complained of is properly characterized as an abuse. The categories of abuse are many and are not closed. ..... recognized aspects of abuse of process include Henderson v Handerson abuse, bringing the administration of justice into disrepute and proceedings which are manifestly unfair to the other party. (see JSC VTB Bank v Skurikhin [2020] EWCA Civ. 1337, [2021 WLR 434, [2020] All ER (D) 39 (Nov), at [51] per Phillips LJ). The court should consider whether as a matter of fact, a party has used the courts procedures for a purpose or in any way significantly different from its ordinary and proper use."***
>
> ***"Where the court determines that conduct amounts to an abuse of process it must then consider whether to exercise the courts discretion to strike out the claim. A finding of abuse will not inexorably lead to a strike out, any decision to strike our must involve a balancing exercise – the court's decision must be consistent with the overriding objective and must be proportionate to the abusive conduct (see Walsham Chalet Park Ltd. (trading as The Dream Lodge Group) v Tallington Lakes Ltd. [2014] EWCA Civ 1607, [2015] 1 Costs LO 157 at ([44]).***

[87.] Suffice it to say that I see no situation here where the Claimants have brought the administration of justice into disrepute (Henderson) or that these proceedings will be manifestly unfair to the other party ***(JSCV VTB Bank)*** nor do I detect that the courts are being used for any purpose from what is normally intended.

[88.] It has been held that there is no set list of what acts would qualify as an abuse of the process of the court. The categories are extensive. ***In Financial Conduct Authority v Papadimitrakopoulos and other [2023] 1 All ER (Comm) 804*** , Smith J opined "***Proceedings can be struck out as an abuse of process "where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct..."***

[89.] There is no allegation made by the applicants that the Claimants have engaged in unlawful conduct. They have not alleged even a breach of procedural rules. Had they envisaged that they could achieve success on a breach of procedural rules Part 26.3 (a) would've provided suitable grounds for such an application but the applicants were intentional in their avoidance of that provision. As for an attack on the collateral previous decision I note that the applicants argue that the claimant's writ and statement of claim is an attempt to impugn the decision of Registrar Toote when he ordered the substitution of Ascendancy for Scotiabank in the 2015 action. I do not agree with that characterization at all, given that the application was restricted to regularizing the Plaintiff in the action after the transfer between those institutions was completed, rather than a substantive hearing of any issues in the 2015 action. Moreover the grounds of the current action were not raised in the 2015 action as most of the allegations concerning the irregularities in the notices, which are the cause of the current action took place well after the 2015 action.

[90.] Likewise I find no dishonesty or reprehensible conduct to be present in the allegations made in the writ of summons and statement of claim. In fact taking a broad merits based approach, as ***Phillips LJ in JSC VTB Bank***, deemed critical to deciding the issue in ***Papadimitrakopoulos*** I find that the Claimants by the writ of summons and statement of claim are not ***"misusing or abusing the process of the court."***

[91.] However, notwithstanding that the court may determine that there has been abuse of the process, the court still has a discretion whether to strike out the claim.

> Phillips J continued that a finding of abuse will not inexorably lead to a strike out. ***Any decision to strike out involves a balancing exercise- the court's decision must be consistent with the overriding objective and must be proportionate to the abusive conduct."***

[92.] ***Phillips J also quoting Lord Neuberger's observations*** in ***Prince Abdulaziz Bin Abdulaziz Al Saud v Apex Global Management Ltd. 2014*** that "***the striking of a Statement of Case is one of the most powerful weapons in the court's case management armory and should not be deployed unless its consequences can be justified")***

[93.] One of the central submissions made by the Applicants on this Rule 26.3 (1) (c) particular application, is that the 2015 action is still a live action and that any issues which arise post the 2021 Waiver letter can be dealt with in that action. It should be noted that the submission relates only to issues post the waiver letter. They suggest an alternative however that if the court determines that there is merit to the claims in the writ of summons and statement of claim they can also be raised in the 2015 action.

[94.] The Applicants relied on several Bahamian cases where situations similar to this case occurred, and the decision arrived at by the court in those circumstances was to allow Ascendancy to substitute in ongoing court actions for Scotiabank:

(i) Gateway Ascendancy Ltd. v The Estate of the Late Percy Burrows: After an order was made, substituting Ascendancy for Scotiabank where Scotiabank initiated action against the Defendant for vacant possession and moneys owed

(ii) The same methodology applied in Gateway Ascendancy Ltd. v Timothy Clarke Supreme Court Action No. 2014/CLE/gen/01872 dated 26th April 2023 and in Robert Ian Mitchell v Gateway Ltd. Supreme Court Action No. 2019/CLE/gen/01332 dated 2nd May, 2023.

[95.] The Claimants distinguish the forgoing authorities on the basis that those decisions were made after substantive hearings, where the applicants were seeking to relitigate matters which should have been raised during the substantive hearing. In this instance there has been no hearing on the substantive issues in this case and the 2015 case involved only a claim for possession. No such claim exists presently.

[96.] In support of this contention the Complainants have commended the case of ***Henly v Bloom [2010]1 WLR 1770*** where the court held that ***" however desirable it might be for a party to bring all his claims forward at one time, a claim was not barred on the ground of abuse of process simply because the party had failed to raise the claim when he could have done so; that rather the facts of the case had to show that the second action amounted to an abuse of the process before it could be struck out; that moreover, it was more difficult to argue that an action was an abuse where it was brought by the defendant to an earlier action involving the same parties than where the same person was claimant in both actions."***

[97.] Further reliance to this point is provided in ***Johnson v Gore Wood & Co. [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72 (14th December 2000*** where the Henderson principle in connection with the abuse of process is further clarified.

Per Lord Millet:

> ***"It is one thing to refuse to allow a party to relitigate a question which has already been decided. It is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law…"***
>
> ***"it may in a particular case be sensible to advance claims separately. Insofar as the so called rule in Henderson v Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action…."and because a matter could have been raised in earlier proceedings does not necessarily make it an abuse of the process."***

[98.] ***The case of Bradford and Bingley Building Society v Seddon (Hancock and others, t/a Hancock's (a firm), third parties [1999] All ER 217 held "mere relitigation, in circumstances falling short of cause of action or issue estoppel did not necessarily give rise to abuse of process. Similarly, the maintenance of a second claim which could have been part of an earlier one, or which conflicted with an earlier one, should not in itself be regarded as an abuse of process. In such cases the Claimant was not required to establish special circumstances to justify relitigation. Rather the onus was on the party alleging abuse of process to establish the existence of some element additional to mere relitigation."***

FINAL ANALYSIS AND CONCLUSION

[99.] FINANCIAL AND ASCENDANCY'S CLAIM

It would be premature of this court at this stage of the proceedings to rule on the veracity of the Claimants allegations against the Applicants that they breached their statutory duty to them. That is a matter for a full trial of the issues. No evidence is adducible or conclusive of the matter at this stage (See All shop).

[100.] I am satisfied that on a full trial of the matter it could well be determined that this is a developing area of jurisprudence which the court may well explore given that the HPA is relatively new legislation. I am not satisfied that the claim under this head is misconceived or that it is bound to fail. Even the applicants acknowledge there are issues with calculations on the mortgage account. (See Wragg supra).

[101.] The issue of whether a breach of fiduciary duty occurred in the relationship between the applicants or any one or more of them and the claimants can only be determined after trial and findings of fact. Such determination may also lead to a determination on the allegations of negligence included in the writ of summons and statement of claim. (See ***Henderson v Merrett Syndicate, supra***).

[102.] It would also be premature and particularly so without the benefit of evidence being adduced at trial for this court to rule on the claims in negligence brought by the claimants against the Applicants.

[103.] Notwithstanding the voluminous submissions of the Applicants and the Claimants iterated above, it is clear that the crux of the Applicants case lies in the commitment letter and its possible effects on the subject proceedings. Therefore, notwithstanding what is apparent on the face of the writ they are inviting the court to look beyond the face of the writ to consider the implications of the waiver clause in the commitment letter. They bolster their case asserting that the strike out is also in the interest of the overriding objectives of the CPR.

The Commitment Letter

[104.] I am satisfied that the commitment letter does not succeed in effectuating a waiver of the Claimants rights to bring the current action.

[105.] While it is apparent that the Applicants were at all times clothed with the requisite information about the Claimant's account and utilized that information, it is not so clear that the Claimants were similarly clothed. Knowing all that had transpired between Scotiabank, Financial and Ascendancy, Ascendancy had the advantage over the claimants and were motivated to pursue the execution of the letter, intending that the claimants would have no ability to look back at anything that had transpired with the other financial institutions in the past. In fact, it initially appears that the claimants did not know all they needed to know at the date of executing the commitment letter, and they alleged so in their writ of summons. There were a series of irregularities in the Notices of Transfer given by the Applicants. As I pointed out previously, it was these irregularities which spurred the present action by the Claimants. Examining these several irregularities, looking particularly at the timelines involved may be determinable of this issue.

[106.] Evidence which speaks to the Claimant's knowledge prior to them executing the 8th December 2021 letter can be found in the Affidavit of Christopher Rahming in paragraphs 10 – 22. Mr. Rahming's is the only Affidavit sworn on behalf of the Claimants, which when summarized attests to the following:

i. The Claimants signed the forbearance letter on 8th January 2016. Scotiabank receiving payments.

ii. In February 2017 Claimants received a letter dated 19th December 2016 Notification of Assignment that their Scotiabank mortgage had been assigned to Financial effective 16th December, 2016. This was Eleven months after the forbearance agreement.

iii. Once letter received payments being made to Financial who accepts.

iv. 5th January, 2018 (a year later) the Claimants receive another Notification this time from Financial stating that the mortgage with Financial was being transferred just about a month later on 9th February, 2018.

v. 26th February, 2018 was discovered as the true date of the transfer which apparently took place from Scotiabank directly to Ascendancy.

vi. 1st July 2020 Date of Registrar Toote's order substituting Ascendancy for Scotiabank.

vii. 8th December 2021, the Claimants execute the commitment letter.

viii. 5th January, 2018 a statutory notice pursuant to section 18 of the Homeowners' Protection Act, 2017 from Gateway Financial which purportedly, notifies the complainants that their mortgage with Gateway Financial Ltd. (Financial) will be transferred to Gateway Ascendancy (Ascendancy). The effective transfer date was stated to be 9th February, 2018.

ix. Email of Counsel Gabrielle Rahming to Ascendancy dated December 2, 2021 and Ascendancy's response later the same day.

[107.] Based on the various contradictory timelines stated in the notification, the Claimants must have been totally confused as to the correct details of the disposition of their mortgage. If at the very least it is accepted that all of the various notices were received prior to the 8th December execution of the commitment letter, that knowledge is called into question based on the nebulous wording of the waiver/supersession phrase. The email communication between Gabrielle Rahming of Counsel for the Claimants and one Diandra Gibson at Gateway Ascendancy ("the Rahming Email") suggests a lack of clarity about the mortgage installments:

> ***"Dear Mrs., Gibson, Apologies for the back and forth but to clarify, upon signing and subject to any changes which may be brought on by any claims made against the policy and other surrounding factors, as set out in the policy, the current premium is $1,223.64 (with zero rated VAT).***

This equates to $101.97 per month and therefore the remaining $519.03 of the monthly installments stated in the Commitment Latter will be going towards repayment of the Mortgage?

[108.] The Email bore Gabrielle Rahming's legal counsel's name and the details of her firm. But at the bottom of the email was the penned signature of the Claimants each individually.

[109.] On 8th December, 2021 six (6) days after this communication between the Claimants Counsel and Ascendancy, the Claimants executed the commitment Letter. What is conveyed to me through this very brief email communication is that there had been a number of communications between Ms. Rahming and Ms. Gibson and/or officers of Ascendancy, ostensibly about the terms of the commitment letter. The further information that was provided in the letter sufficiently satisfied Ms. Rahming so that her clients, the claimants, executed the commitment letter on 8th December.

[110.] This lines up for the most part with the contents of the Sworn Statement of Allan Butler, the sole affiant for the Applicants. I summarize and note the following;

i. The Order substituting Ascendancy for Scotiabank was made by Registrar Toote on 1st July, 2020.

ii. Gateway has made no attempts to pursue the 2015 action since the substitution.

iii. Out of several solution products offered to the Claimants they agreed to a 3rd July 2021 offer.

iv. Frequent communications occurred thereafter with the Collections officer Ms. Gibson at the applicants regarding a restructuring of the account.

v. Quoting directly from Mr. Butler's Affidavit; *" by letter date 1st November 2021, Counsel for the Claimants wrote to Gateway acknowledging the transfer of the 23rd March Mortgage and requested an explanation on the breakdown of the 3rd July 2012 offer offered to the Claimants by Gateway."*

   He continued, "*the only discrepancy with the Claimants account was that it was 3000 days past due however, that discrepancy had to have been clarified by Gateway or ultimately accepted by the Claimants."*

vi. 2nd December 2021 the Rahming Email was sent to Ascendancy.

[111.] For me the difficulty lies in the interpretation of the Commitment letter. Who are the parties to the agreement? It is hard to see how Scotiabank and Financial could be covered by the contents. I have already voiced my misgivings about the effectiveness of the supersession clause to estop or

bar the Claimants from the current claim. The clause itself creates uncertainty by the wording and the use of "supersedes all previous negotiations". Is it clear enough to the person entitled to the alternative rights and has knowledge of the facts, (see ***Deltec Petroleum, supra***) that they are giving up their legal rights by executing that letter? Without full knowledge of the details of the agreement intended by executing the commitment letter the claimants cannot be said to have waived their rights by conduct or by election. The uncertainty of the clause means that the knowledge of the fact giving rise to the choice on the part of the party electing and knowledge of choice having been made on the part of the other party is absent to all intents and purposes. (See ***Kosmar Villa Holidays supra***). The succession clause must be unequivocal (see ***Charles Rickards v Oppenheim supra)*** and an estoppel would've been created as it is clear that the Applicants intend the Claimants in reliance upon the clause to act upon the representation (conduct estoppel ***re Rickards supra***). I am also that it is not possible at this stage to say that the Claimants have an unwinnable case. (see ***Wragg v Partco supra)***.

[112.] Keeping in mind that striking out a writ and statement of claim is the most powerful weapon in the courts case management armory (see ***Prince Abdullaziz supra***) and that striking out is considered a draconian measure and should only be used as a last resort (see ***Cable v Liverpool supra***) the commitment letter is pivotal. However, not convinced that the waiver letter operates to cause the claimants to waive their right to bring the current action, I turn now to the face of the writ of summons and statement of claim. If no extrinsic evidence is considered the threshold to meet the reasonable ground test is "low" ***(see"the Allshop" supra)***. Assuming all allegations are true the statement of claim is maintainable as provided in (see ***Halsbury supra***). The writ clearly sets out claims in negligence, breach of contract, breach of statutory duty and breach of fiduciary duty. Notwithstanding that the applicants aver that there are certain issues and/or irregularities with the pleadings on these issues, those arguments are not for my adjudication at this time. The evidence in support of these allegations can only be supplied at a full trial of this action. Looking strictly at the face of the writ and the statement of claim and guarding against conducting a mini trial and making a premature judgment (see ***Barrett v Universal supra)*** I am satisfied that the Applicants have failed to show that the Writ of Summons and statement of claim fails to disclose a reasonable cause of action.

[113.] The failure of the waiver in the commitment letter amounts to an acknowledgement that what is contended by the Applicants has not been achieved. The writ of summons and statement of claim does disclose a reasonable cause of action and on the face of it and even in consideration of the extrinsic evidence and the law, it is neither frivolous nor vexatious.

[114.] Abusive conduct may come in many forms, there is no settled list. There was no breach of the procedural rules or unlawful conduct by the claimants (see ***Papadimmitrakopolous supra***). The claimant's choice to file a new action rather than plead in the 2015 action, was not a collateral attack on a previous decision or an act of dishonesty or other reprehensible conduct. I rather see it as a genuine belief that the claim could best be adjudicated through a writ of summons procedure and that the originating summons taken in 2015 was now itself if not obsolete, inactive.

[115.] I am also satisfied that the current action grounded in the several tortious acts and statutory breaches is significantly different from the 2015 action. It is not a relitigation of that matter and thus rendering it res judicata (see ***Henderson (supra)***) and ***Johnson v Gore Wood (supra)***.

> ***The plea of res judicata applies, except in special cases, not only to point upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."***

[116.] Finally, taking into account all of the Legal authorities and principles, discussed herein and based on the numerous irregularities particularized in the writ of summons and statement of claim, the ambiguity of the waiver clause and balancing the interest of the applicants on the one hand and the complainants on the other hand, and determining the sufficiency's of the pleading I find that the Claimants claim is not fanciful, it is in the best interest of both parties, for a full trial of the issues to take place. The overriding objectives of the CPR is not compromised by the decision to take this current action to full trial. It is certain that to decide to strike out the action at this stage may ultimately save costs, but this does not outweigh the factors of fairness and the intrinsic justice of the case which is also mandated by the CPR. I note that the Scotiabank transfer included scores of mortgages from Scotiabank to Ascendancy. It is not inconceivable to suppose that this form letter will be used many times over and possibly end up in other actions between Ascendancy and other mortgagors, (note the several reference matters above supra). A full investigation at a trial of this matter may ultimately decide on the veracity of the wording of the commitment letter. This may well result in saving resources of the parties and the court if a final determination can be made on what seems to be a standard form letter being issued to customers in similar circumstances. I am satisfied that this is a broad merits-based approach (***Phillips LJ in JSC VTB Bank*** **(supra)**) for the use of the most powerful weapon in the courts armory on case management. (***Prince Abdulaziz supra***)

[117.] SCOTIABANKS CLAIM

Having considered the Rule 26.3 (1) (b) and (1) (c) and the authorities discussed herein Scotiabank's claim is treated differently based on the transfer deed and the court order of Registrar Toote. I am satisfied that in consideration of the overriding objectives of the CPR, to save time and judicial resources, the court was mandated to look beyond the writ of summons and statement of claim to the transfer deed and court order. The principal established in ***Allshop*** had to be set aside in favour of the overriding objectives of the CPR. Moreover Scotiabank sought for the operation of the Court's inherent jurisdiction in their prayer for relief, entitling the court to look beyond the face of the writ and statement of claim.

[118.] I am satisfied that notwithstanding that the writ of summons and statement of claim has withstood the challenges posed by the applicants to strike it out in the case of Financial and Ascendancy, the same does not apply when it comes to Scotiabank. I am of the view that the writ of summons and statement of claim will fail in law given the operation of the deed of transfer and Registrar Toote's court order pursuant to the second foundational premise in (***Belize Telemedia supra)*** supra. The Claimants have no reasonable grounds for bringing a claim and/or have no real prospect of success at trial against Scotiabank given that they now lack privity of contract; (***Walsh v Messeldine supra)***. The Applicants have demonstrated in this instance, that the Claimants have an unwinnable case against Scotiabank ***Wragg***.

[119.] To maintain Scotiabank as a defendant in this current action would seek to impugn Registrar Toote's order as suggested by counsel for Scotiabank. I therefore deny the Application to Strike out the Writ of summons and statement of claim as against Financial and Ascendancy I hereby order that Scotiabank be removed from being a proper party to the proceedings in accordance with CPR 19.2.

[120.] I order that the 2015 action and the current action be consolidated and moving forward that the pleadings be subject to the CPR 2022. That the Parties are given leave to amend their pleadings and or to file any other, as necessary to advance the matter to complete the case management.

[121.] Due to Financial's and Ascendancy's failure in the strike out application the claimants are awarded their costs in defending the subject application against Financial and Ascendancy to be fixed by this court and noted hereunder.

[122.] Due to the Claimant's failure on the application to maintain Scotiabank as a defendant to this current action, Scotiabank shall have its costs against the Complainants to be fixed by this court and noted hereunder.

[123.] Having considered Counsels respective submissions on costs and CPR Part 72.2(6) I hereby award costs to Scotiabank from the Claimants in the sum of **$25,056.00** which is comprised of legal professional fees and disbursements and to the Claimants from Financial and Ascendancy in the sum of **$36,984.50** which is comprised of legal professional fees and disbursements to be split on a 50/50 basis between Financial and Ascendency. All costs are payable at the end of trial.

Dated the 12th day of April A.D., 2024

The Honourable C.V. Hope Strachan. J