**IN THE COMMONWEALTH OF THE BAHAMAS**
**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2024/CLE/gen/487**

**B E T W E E N**

**ALPHA AVIATION LIMITED**

**Claimant**

**AND**

**RANDY LARRY BUTLER**

**First Defendant**

**AND**

**LARONA BUTLER**

**Second Defendant**

| | |
|---|---|
| **Before:** | Assistant Registrar Jonathan Deal |
| **Appearances:** | Michael Scott KC with Marnique Knowles for the Claimant |
| | Ashley Williams for the Defendants |
| **Hearing dates:** | 12 December 2024 |

**RULING**

## ASSISTANT REGISTRAR DEAL

[1.] This is an application made by the Defendants by Notice of Application filed on 28 August 2024 for an Order pursuant to **Part 26.3(1)(c)** of the **Supreme Court Civil Procedure Rules, 2022** ("**CPR**") that the "Statement of Claim" (Points of Claim) filed on behalf of the Claimant "be set aside and dismissed" as it is frivolous, vexatious, scandalous and an abuse of the process of the Court. The application is supported by the Affidavit of Adam Miller filed on 28 August 2024. A cross-application made by the Claimant for further information was withdrawn.

**Background**

[2.] The foundation of the Defendants' application is that the Claimant could and should have brought the claim it now advances in these proceedings in earlier litigation involving the parties and Mr. Kevin Peter Turnquest ("Mr. Turnquest"), namely, **Alpha Aviation Limited v Kevin Peter Turnquest and Randy Larry Butler and Larona Butler** 2021/CLE/gen/00354 (the "2021 Action").

[3.] On 7 January 2005, the Claimant, a company beneficially owned by one Mr. Kaiser, loaned the Defendants the sum of $279,000 to be repaid at a rate of interest of 4% per annum over 20 years (the "Initial Loan"). The Initial Loan was secured by a mortgage over Lot 5, Block 13 Winton Heights Estate subdivision (the "Mortgage).

[4.] On 28 March 2007, the Claimant loaned the Defendants an additional sum of $120,000.00 to be repaid at a rate of interest of 4% per annum over 20 years (the "Additional Loan"). The Additional Loan was secured by way of a charge over Lot 5, Block 13 Winton Heights Estate subdivision (the "Further Charge").

[5.] On 17 December 2008, the Defendants decided to sell Lot 5, Block 13 ("the Property") after a tragic accident involving their child and sought to convey the fee simple estate in the Property to certain third party purchasers (the "Purchasers"). The Mortgage and Further Charge were not recorded as satisfied as part of the transaction and it is disputed whether the Initial Loan and Additional Loan were repaid out of the sale proceeds.

[6.] On 15 March 2017, following a request generated on behalf of the Purchasers, a deed of release was executed for and on behalf of the Claimant (the "Deed of Release"). The Deed of Release had the effect of converting the Initial Loan and Additional Loan from secured loans into unsecured loans. Mr. Turnquest, who was at the time the Claimant's Manager and Director, acted for the Claimant in the transaction. No alternative security was obtained.

[7.] By a statement of claim filed in the 2021 Action dated 8 April 2021, the Claimant brought a claim against Mr. Turnquest and the Defendants to the effect that:

(i) Mr. Turnquest and the Defendants conspired to defraud the Claimant of the outstanding balance owed under the Mortgage by facilitating the sale of the Property to the Purchasers without first satisfying the Claimant; and

(ii) Mr. Turnquest breached his fiduciary duty owed to the Claimant as its Manager and Director by executing the Deed of Release without first securing payment of the money owed under the Mortgage.

[8.] The Claimant sought damages, a declaration that the Claimant held legal title to the Property, a declaration that the Defendants held the sum of $220,313.43 and/or all assets representing such sums on trust for the Claimant, compensation for breach of director's duties, interest, and costs.

[9.] By a judgment in the 2021 Action dated 15 April 2024 (the "April 2024 Judgment"), Card-Stubbs J held (as is summarised at [2] of the judgment) that:

(i) the Claimant had not proven a conspiracy to defraud it;

(ii) Mr. Turnquest was in breach of a fiduciary duty and a statutory duty to the Claimant to exercise care, diligence and skill; but

(iii) the Claimant suffered no measureable loss as result of the breach because it had lost its security but not its entitlement to the sums outstanding.

[10.] The Claimant now brings a debt claim against the Defendants alleging that, as at 30 May 2024, the state of accounts between the parties reflected a principal balance owing of $170,313.43 ("the Debt"). The Claimant alleges that interest has accrued on the Debt at the rate of 4% per annum since 27 May 2019. The Claimant claims the Debt, accrued interest, daily interest, further or other relief, and costs.

**The Defendants' case**

[11.] The Defendants argued that the Claimant's present claim is an abuse of process as the claim is barred by the rule in **Henderson v Henderson** (1843) 3 Hare 100. The Defendants raised the separate issue of cause of action estoppel in their written submissions but abandoned it early in the course of the hearing of their application.

[12.] Mr. Williams submitted on behalf of the Defendants that the case law on **Henderson v Henderson** abuse of process indicates that, if a claimant had an opportunity to bring a claim in earlier proceedings, the claimant should have done so rather than in a subsequent action because of the public policy of the finality of litigation. Mr. Williams argued that the instant claim was "fully capable" of being raised in the 2021 Action and should have been raised in the 2021 Action. Mr. Williams submitted that, in order for the rule in **Henderson v Henderson** to not apply, special circumstances must be demonstrated but the Claimant has not demonstrated any.

[13.] Counsel for the Defendants submitted that the rule in **Henderson v Henderson** is a principle that is broader than cause of action estoppel insofar as it includes related claims and issues not raised in earlier proceedings but which could have been. Mr. Williams accepted that there is some discretion in the application of the rule based on fairness and reasonableness. Mr.

Williams suggested that, in exercising that discretion, the Court must closely examine the nature of the claims in the earlier proceedings, the opportunity to raise the issues earlier and the conduct of the claimant.

[14.] Mr. Williams submitted that the Claimant had the capability of recovering the Debt in the 2021 Action but deliberately confined its pleadings to conspiracy as part of its litigation strategy. Counsel referred to [52], [55], [62], [64] and [70] of the April 2024 Judgment in an effort to demonstrate that the Mortgage was "canvassed extensively" in the 2021 Action notwithstanding that the Claimant's claim related to conspiracy and breach of fiduciary and statutory duty. Mr. Williams suggested that "the entirety of the conversation and debate" in the 2021 Action related to the Mortgage and what was due and owing under it.

[15.] Mr. Williams submitted that there is in law a duty upon a claimant to raise all pleadings necessary to bring finality to a matter, by amendment or by filing a subsequent action and applying for consolidation, if necessary, and that such duty has been breached by the Claimant. Mr. Williams relied on **Barrow v Bankside Members Agency Ltd** [1996] 1 All ER 981, where Sir Thomas Bingham MR stated at page 269:

> "In his closing submissions, Mr Simon suggested that if the new action were allowed to proceed, then the court would be replacing the rule in Henderson v Henderson with a new rule, namely that parties are entitled to wait and see the outcome of one claim before deciding whether or not to pursue another. This is not the case. The rule remains that where a matter could and should have been litigated first time round, then in the absence of special circumstances a party will not be allowed to start subsequent proceedings raising that matter, because that would be an abuse of the process of the court. As I have tried to explain, in the circumstances of the present case the matter now raised could not and should not have been litigated first time round."

[16.] Mr. Williams further submitted that the Claimant failed to adhere to what are known as the "**Aldi Stores** Guidelines", as at no point did the Claimant indicate to the Court prior to judgment in the 2021 Action that it intended to bring the instant claim. Mr. Williams submitted that it is impermissible to await the outcome of a particular action to determine whether or not you will proceed with another action. Mr. Williams relied on [38.5] and [38.6] of **Mansing Moorjani and others v Durban Estates Limited and another** [2019] EWHC 1229 (TCC). At [38.5] of **Moorjani**, Pepperall J stated:

> "35 I reject Mr Rosenthal's argument that the guidance at paragraphs 30-31 of Thomas LJ's judgment in Aldi Stores Ltd v. WSP Group plc [2008] 1 W.L.R. 748 is directly engaged in this case. Mr Moorjani's County Court claim was not complex commercial multi-party litigation. That said, it will always be easier to defend a Henderson v. Henderson abuse argument if the claimant expressly raises his intention to bring a second claim before judgment is given in the first: see Stuart v. Goldberg Linde [2008] EWCA Civ 2; [2008] 1 W.L.R. 823 and Clutterbuck & Paton v. Cleghorn [2017] EWCA Civ 137. Here, no such indication was given."

[17.] Counsel for the Defendants highlighted the well-known speech of Lord Bingham in **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 and, in particular, that part where Lord Bingham quoted from **Barrow** as follows:

> "The rule in Henderson v Henderson 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

[18.] Mr. Williams submitted that, in pursuing the instant claim, the Claimant is seeking a "second bite of the cherry" and there would be a re-litigation of issues for which the Defendants are not at fault. Mr. Williams argued that a significant amount of time and effort was already devoted in the 2021 Action to exploring what amounts were due and owing under the Mortgage. Mr. Williams also suggested that, if the action is allowed to proceed, Mr. Turnquest would have to be convened again, as there was a lack of clarity in the 2021 Action as to where the proceeds from the sale of the Property went. Mr. Williams flagged that the Defendants may have a claim if there was "overage" retained.

[19.] Mr. Williams submitted that to allow this further claim by the Claimant against the Defendants to proceed would be to permit the unjust harassment of the Defendants. Mr. Williams questioned rhetorically why the Defendants should be "punished" by having to litigate an issue that could have been raised in the 2021 Action when the Claimant chose at that time to bring a claim based on conspiracy to defraud because it felt it could recover more in damages than what was due and owing under the Mortgage. Mr. Williams identified this particular element as the harassment and abuse in this case.

**The Claimant's case**

[20.] The Claimant argued that the Defendants have the onus of making out their application beyond a balance of probabilities and they have not done so.

[21.] Mr. Scott KC submitted that the fact that the Claimant did not bring this claim in the 2021 Action does not amount to an abuse of process. Mr. Scott submitted that the mere fact that a claim or an issue could have been raised before, but was not raised, does not, in and of itself, amount to **Henderson v Henderson** abuse. It is a matter of fact in each case. The Court must conduct a balancing exercise and must not restrict access to justice lightly. The Court will rarely find abuse save where proceedings amount to unjust harassment.

[22.] Counsel for the Claimant relied on [17.4] of **Mansing Moorjani and others v Durban Estates Limited and another** [2019] EWHC 1229 (TCC), where Pepperall J summarised the law relating to the rule in **Henderson v Henderson**. Counsel submitted that **Moorjani** – a case in which **Henderson v Henderson** abuse was found – is distinguishable on its facts because that case concerned duplicative claims for alleged breaches of repairing obligations where the second claim merely relied on additional particulars of breach.

[23.] Mr. Scott relied on **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1 as the leading authority on whether to strike out a claim for abuse of process on the ground that it should have been included in a previous action, noting that the case was relied on by the Court of Appeal in **Lucretia Rolle v The Airport Authority** SCCivApp. No. 119 of 2021 (25 July 2022) (a case also included by the Defendants). Counsel referred also to **Dexter Ltd v Vlieland-Boddy** [2003] EWCA Civ 14.

[24.] Counsel for the Claimant submitted that, in accordance with the guidance in **Johnson v Gore Wood & Co**, the Court must undertake a broad merits-based assessment in which it takes account of all of the public and private interests involved, all of the facts of the case, and focuses attention on whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise an issue which could have been raised before.

[25.] Counsel for the Claimant submitted that the instant claim does not meet the "high threshold for abuse". Counsel made seven main points:

(i) the focus of the 2021 Action was the conduct of the Defendants and Mr. Turnquest. Mr. Turnquest was found to have breached the duties he owed to the Claimant, however, as per [136] to [138] of the April 2024 Judgment, the reason that Card-Stubbs J did not award damages against Mr. Turnquest was that the Defendants' indebtedness to the Claimant subsisted and the Claimant could bring further proceedings to enforce it.

(ii) there is no substantive prejudice to the Defendants caused by this action. On the other hand, if the Claimant was prevented from bringing its claim, which Card-Stubbs J held could be brought, that would be a "clear and obvious injustice" to the Claimant.

(iii) in **Orji v Nagra** [2023] EWCA Civ 1289, Nugee LJ observed that abuse lies in attempting to reopen something that has been decided. That is not the case here.

(iv) the position of the Defendants is not one that engages the public policy imperatives referred to in **Barrow** and does not rise to the point of harassment as required by **Johnson** and **Moorjani**. The Claimant's debt claim is simple. There is only one issue. The Defendants can admit the claim and submit to judgment if they accept the sum claimed is due or they can dispute it. If the claim is disputed, the claim should not take longer than a day to determine.

(v) where a court has made clear that a liability exists and can be pursued, irrespective of whether or not the same amounts to a declaratory judgment, it would be nonsensical to suggest that it extinguishes the cause of action. It does the opposite. In **Zavarco Plc v Nasir** [2020] EWHC 629 (Ch), Birrs J found on the facts of that case that no reasonable person in the defendant's position could have thought that the court's declaratory order was the end of the matter as far as the obligation to pay was concerned. That reasoning

applies *a fortiori* here. Card-Stubbs J effectively provided an invitation in the April 2024 Judgment to take whatever steps were necessary to enforce recovery of the Debt.

(vi) the Claimant loaned money to the Defendants in good faith and took security over the Property. The debt has not been fully repaid and, due to Mr. Turnquest's breach of fiduciary duty, the Claimant lost its security for the debt. The only reason that the breach by Mr. Turnquest did not give rise to an award of damages is that the underlying debt subsists. The Defendants have filed no evidence of prejudice and have not explained why the Claimant's claim should be considered abusive.

(vii) at trial, the Defendants were held to be vague and, in the case of the First Defendant, "evasive, deflective and deliberately vague". The Defendants have now refused to pay the balance of the loan and raise the present arguments as a mechanism purely to frustrate recovery sums to which Card-Stubbs J made clear the Claimant was, and is, entitled.

**Discussion and Analysis**

[26.] **Part 26.3(1)(c)** of the **CPR** empowers the Court to strike out a statement of case or part of a statement of case if the statement of case or the part to be struck out is an abuse of the process of the Court. An allegation of **Henderson v Henderson** abuse of process is capable of being dealt with under **Part 26.3(1)(c)**. **Nelson McFall and another v ScotiaBank (Bahamas) Limited and others** 2022/CLE/gen/01767; (12 April 2024) supplies an example.

[27.] In **Henderson v Henderson** (1843) 3 Hare 100, Vigram VC articulated the **Henderson** rule in its earliest form in the following way at page 115:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will (except under special circumstances) not permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as 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 points 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."'

[28.] In **Johnson v Gore Wood (a firm)** [2002] 2 AC 1, Lord Bingham authoritatively set out the modern approach towards **Henderson v Henderson** abuse of process at pages 30 to 31:

> "... Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as

a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue' which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. ..."

[29.] In **Dexter Ltd v Vlieland-Boddy** [2003] EWCA Civ 14, Clarke LJ, in a concurring judgment, at [49], summarised the principles to be derived from the authorities thusly:

"i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

iii) The burden of establishing abuse of process is on B or C or as the case may be.

iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.

vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

[30.] On the authorities cited, the Defendants, as the parties asserting it, bear the burden of establishing abuse of process. Given the consequences of a finding of abuse, the abuse of process must be clearly established. Simply because a claim could have been brought in earlier proceedings does not mean that it is necessarily an abuse of process. The question is whether, applying a broad merits-based approach that takes into account the private and public interests, and all of the facts of the case, the Claimant's conduct in seeking to pursue its claim is in all the circumstances a

misuse or abuse of the process of the Court. There will rarely be a finding of abuse in the absence of oppression or unjust harassment.

[31.] I accept the Defendants' submission that the instant claim could have been raised in the 2021 Action. While it is undoubtedly correct, as Mr. Scott KC submitted, that the focus of the 2021 Action was on the conduct of the Defendants and Mr. Turnquest, it does not appear that anything prevented the Claimant from asserting the instant claim in the 2021 Action. The Claimant itself acknowledged in its written submissions that the instant claim could have been pleaded as an alternative claim in the 2021 Action or raised at the trial of the pleaded claim with a view to having the judge determine it. What, then, of the Claimant's explanation for the failure to raise the claim in the 2021 Action?

[32.] The Claimant has not provided a compelling reason why the instant claim was not raised in the 2021 Action. The Claimant filed no evidence in response to the Defendants' application. The explanation from the bar table was that the Claimant wished to pursue causes of action in conspiracy and breach of fiduciary and statutory duty because of the possibility of greater recovery than under a simple debt claim due to the different remedies available. Supposing that that explanation can be taken into account, it is plainly not a good one. It does not explain why the instant claim was not pursued at all. It also suggests a tactical decision, which is a factor which weighs in favour of a finding of abuse.

[33.] In the circumstances of the present case, I have derived assistance from the decision of Birrs J (as he then was) in **Zavarco Plc v Nasir** [2020] EWHC 629 (Ch). It stands as persuasive authority for the proposition that, even if a claim could have been included in a prior action, and no convincing reason is advanced for why it was not, it does not necessarily follow that the subsequent pursuit of the claim is an abuse of process. A more nuanced assessment is required.

[34.] The facts of the case were that Zavarco claimed a debt of €36 million from Nasir which arose because Nasir had been allotted ordinary shares in Zavarco upon its incorporation but had not paid for those shares. In an earlier action, Nasir unsuccessfully resisted liability to pay for the shares in proceedings wherein the English High Court granted declaratory relief to Zavarco subject to a direction that it could not take any steps to forfeit Nasir's shares or enforce payment of the debt pending the outcome of any application for permission to appeal. Responding to Zavarco's debt claim, Nasir argued (so far as the case is relevant) that Zavarco's debt claim was an abuse on **Henderson** grounds.

[35.] In evaluating Nasir's application to have the debt claim struck or stayed, Birrs J did not accept that the debt claim was an abuse of process simply because no cogent explanation had been given as to why no debt claim had been advanced in the earlier proceedings between the parties. Birrs J accepted that Zavarco could have included the debt claim in the earlier action but declined to find that Zavarco's second action was an abuse of process. Birrs J came to this conclusion because it had been clear that enforcement of the obligation to pay for the shares would follow. Birrs J stated at [39] to [41]:

"39.Plainly Zavarco could have included the debt claim in the first action and no convincing reason why not has been provided. However I would have more sympathy with Mr Nasir if it had not been obvious that the company and the judge seemed to think that enforcement of the obligation to pay cash for the shares would follow the decision. Otherwise the passage in paragraph 9 underlined above makes no sense. No reasonable person in Mr Nasir's position when that order was made could have thought that the order was the end of the matter as far as an obligation to pay was concerned.

...

41.Zavarco or its advisers took a grave risk in proceeding this way. The point clearly could have been raised and I believe it ought to have been mentioned more clearly, at least to make crystal clear how it was that Zavarco envisaged the matter would proceed (see e.g. ***Aldi Stores*** [2007] EWCA Civ 1260). However there is nothing to which my attention has been drawn to suggest that Mr Nasir could have had a reason to think Zavarco was giving up its right to require him to pay cash for the shares by bringing their claim to establish that they were entitled to forfeit them. It was made clear in the order (para 9) that enforcement of the payment obligation was likely to follow afterwards once any appeal was over, and Mr Nasir cannot have thought otherwise. In my judgment looking at the case as a whole and in all the circumstances, Zavarco's conduct is not an abuse of the court's process."

[36.] Looking at the present case in the round, I am not satisfied that the claim is an abuse of process. I accept the Claimant's submission that the Defendants have not discharged the burden of establishing abuse.

[37.] The Deed of Release expressly preserved the Claimant's right to sue the Defendants for their indebtedness and, subsequent to the execution of the Deed of Release, the Defendants continued to repay the Claimant for a period. The Defendants stopped making payments to the Claimant because of the deterioration of the relationship with the Claimant's beneficial owner and because they determined that they had no money to make payments ([80] of the April 2024 Judgment). The Defendants then faced proceedings in which the Claimant did not advance a debt claim but other causes of action focused on the extinction of its security. The Claimant succeeded on one of those causes of action but was awarded no damages because it was found that there was no measure of loss to be assessed since the Claimant could recover any sums outstanding from the Defendants using other mechanisms, including the process of the Court.

[38.] In view of this history, I accept the Claimant's submission that no reasonable person in the position of the Defendants with the background that the Defendants had could have thought the April 2024 Judgment was the end of the matter so far as the Defendants' obligation to repay the Claimant was concerned. For this reason, and for the reasons which follow also, I consider that there is no unjust harassment or oppression of the Defendants by the present action.

[39.] I attach no significant weight to the Claimant's seemingly undisputed failure to follow the "**Aldi Stores** Guidelines" derived from **Aldi Stores Ltd v WSP Group plc** [2008] 1 WLR 748. It is not clear that the 2021 Action was "complex commercial multi-party litigation" directly bringing into play the **Aldi Stores** Guidelines (compare **Moorjani** at [38.5]). Even if it was, and it is correct to say that the **Aldi Stores** Guidelines should have been followed by the Claimant, it was foreseeable that a debt claim against the Defendants would follow if the Claimant did not succeed in the 2021 Action.

[40.] Efficiency, the needs of other court users, the public interest in finality and the public interest in preventing a party from being vexed twice must be taken into account. However, the Defendants devoted relatively little effort towards demonstrating the extent to which previously canvassed issues will have to be rehashed or the extent to which these proceedings will be repetitious. Based on the submissions that were made and what is recorded in the April 2024 Judgment, it appears that the Defendants put their submissions on this issue too highly.

[41.] The account between the Claimant and Defendants as mortgagee and mortgagors has not been settled. There was no judicial determination of the precise amount due and owing by the Defendants to the Claimant in the 2021 Action and it is the precise amount due and owing by the Defendants to the Claimant, if any, that is the critical issue in the present claim. Even if the Defendants are correct that there will be some repetition of evidence or argument, the claim that the Defendants now face is a simple debt claim and it is unlikely to be complex or protracted.

[42.] Card-Stubbs J held at [136] of the April 2024 Judgment that, as the Defendants' debt was not extinguished by the Deed of Release, "there is nothing to prevent the Plaintiff from recovering the full sums outstanding once proven, using other mechanisms, including the process of the court" and that is why damages were not awarded to the Claimant for Mr. Turnquest's proven breach of duty. It would be somewhat incongruous to now hold that the Claimant has abused the process of the Court by initiating a debt claim against the Defendants to recover sums which it alleges are outstanding.

[43.] Finally, considering the private interests, if the Claimant is prevented from advancing its claim, that would cause significant prejudice as the Claimant would be precluded from advancing a genuine claim to recover approximately $170,000 in money alleged to have been lent but not repaid, plus interest and costs. The Defendants, for their part, adduced no evidence of prejudice and rely only on what prejudice can be deduced from having to engage in further litigation with the Claimant when the claim could have been brought earlier.

**Conclusion**

[44.] For the reasons stated above, the Defendants' application is dismissed. Applying the general rule in **Part 72.26(2)** of the **CPR** that the unsuccessful party must pay the costs of the successful party, I order that the Defendants pay the Claimant's costs of the application to be assessed if not agreed. If the costs are not agreed by 5:00 pm on 27 January 2025, the Claimant is to lodge a brief statement of costs by 5:00 pm on 3 February 2025 and the parties are to submit brief written submissions as to what would be a fair and reasonable sum to allow by 5:00 pm on 10 February 2025 to facilitate a summary assessment of the amount of costs on the papers.

Dated this 15th day of January, 2025

Jonathan Deal
Assistant Registrar