COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2023/CLE/gen/00781

IN THE MATTER of the Indenture of Mortgage made on the 4th day of October, A. D., 2000 between R & R Holdings Limited as Mortgagors and Scotiabank (Bahamas) Limited as Mortgagee and now of record in the Registry of Records in the City of Nassau in the Island of New Providence in Volume 8705 at pages 432 to 444

AND IN THE MATTER of the Conveyancing and Law of Property Act, Chapter 138 of the Revised Statute Laws of the Commonwealth of The Bahamas

AND IN THE MATTER of a Mortgage Action pursuant to Part 62 of the Civil Procedure Rules

GATEWAY ASCENDANCY LIMITED

Claimant

AND

R & R HOLDINGS LTD.

Defendant

RULING

Before: The Honorable Mr. Acting Justice Raynard S Rigby KC

Appearances: Mr. Damian Gomez KC for the Defendant/Applicant
Mrs. Sharlyn Smith along with Ms. Angelique Dennis for the Claimant/Respondent

Hearing Dates: Heard on the papers

Submissions: 29 May 2026 and 16 June 2026

Mortgage action – Order for Delivery up of Possession and Judgment - Foreclosure Order Absolute – Whether Court can strike out Action or reopen Foreclosure Order

Absolute when perfected – Limitation Act – Right to seek foreclosure under Limitation Act – Merger of Mortgage – Right to strike out action or Claim Form – Judicial discretion – functus officio

Rigby J. (Actg.)

Introduction

1. The saga between the parties appears to have a colourful history. This is not the first action commenced to enforce the mortgage debt owed by the Defendant under the mortgage deed dated 4 October 2020. There seems to be a series of actions relating to recovery under the mortgage as well as steps taken by the mortgagee to remove an unauthorised lessee from the property. The history date back to 2016 and continues to develop for some ten years to the date of the current action and the application before the Court.

2. The application for my consideration was filed by the Defendant by Notice of Application on 17 September 2025 ("**NOA**") seeking the following Orders: (i) that the Foreclosure Oder Nisi dated 18 July 2024 and the Foreclosure Order Absolute dated 17 April 2025 (collectively referred to as the "**Foreclosure Orders**") be struck out and/or set aside and (ii) a declaration that the Foreclosure Orders are null, void and of no effect as they breached the Supreme Court Civil Procedure Rules 2022. The NOA relies on the following grounds to aid the application:

> **1. Jurisdictional Defect:**
>
> o The foreclosure proceedings rest on a judgement dated 25th January 2016. Any claim to enforce or rely on that judgment is statute-barred under the **Limitation Act** and amounts to an abuse of process.
>
> **2. Non-Compliance with CPR 2022**
>
> o Under **CPR Part 26 (Case Management Powers)** and Part 31 **(Striking Out)**, the Court may strike out an order or proceeding where it discloses no reasonable grounds, is an abuse of process, or fails to comply with the Rules.
>
> **3. Defective Foreclosure Nisi:**
>
> o The Order Nisi demanded payment of **rent and real property taxes** in addition to the mortgage debt, without quantifying the sum due.
>
> o These conditions are extraneous, uncertain and contrary to foreclosure principles.

4. Defective Foreclosure Absolute:

- The Order Absolute was made without a valid foundation (no valid nisi) and without specifying the mortgage sum, thereby unlawfully purporting to extinguish the Applicant's equity of redemption.

5. Waiver and Acquiescence:

- The Respondent and its attorneys, with full knowledge of the tenancy of **Mr. Ian Jupp**, corresponded with him directly from 2021 through 2023 without objection.

- By such conduct, the Respondent waived or acquiesced in the tenancy and is estopped from alleging breach of covenant at this stage.

6. Equity of Redemption Survives:

- In law and equity, the mortgagor's **equity of redemption can only be extinguished by a valid foreclosure absolute**. Defective orders cannot achieve that result.

3. The NOA is supported by the Supplemental Affidavit of Derek Ryan filed on 17 September 2025 and the Affidavits of Derek Ryan filed on 18 August 2025 and 26 May 2026. The Affidavit of Ian Jupp filed on 18 August 2025 also aids the application.

4. The Claimant opposes the application and relies on the Affidavit of Brittany Newbold filed on 28 August 2025 as well as the Affidavits of Rico Glinton filed on 28 August 2025 and 22 May 2026.

Procedural background

5. The substantive claim was commenced by way of an Amended Claim Form filed on 31 January 2024 wherein the Claimant sought "**enforcement of the mortgage by Foreclosure**". The Amended Claim Form declares that the relief is "**as a result of [the Defendant's] continued breach of the Indenture of Mortgage made on 4 October 2000...**" and that an earlier Order for delivery up of possession was made on 25 January 2016 in Action No. 2014/CLE/gen/01030. It further alleges that the Defendant breached the Mortgage by allowing "**a third party to occupy the building**" necessitating the filing of Action No. 2023/CLE/gen/00506 procuring an Injunction.

6. On 18 August 2025 an Ex parte Injunction was obtained by the Defendant to restrain the Claimant from damaging, demolishing and removing the furniture,

fixtures and equipment from the property. I note that the Injunction was discharged or refused to be extended by Ellis J. on 3 September 2025. Prior to the Injunction application, I highlight that the Foreclosure Order Absolute was granted on 17 April 2025 by Senior Justice Fraser (as she then was). I say curiously with some degree of caution that an appeal was filed to the Court of Appeal on 5 September 2025 by the Defendant seeking to attack the refusal by Ellis J to not extend the Ex parte Injunction. Interesting for the purposes of this application, the Notice of Appeal sets out 16 grounds of appeal, but I only need to highlight grounds 1, 4 and 13:

> **Ground 1 – Originating Summons Incompetent and Abuse of Process**
>
> The Learned Judge erred in law by failing to hold that the Originating Summons filed on 22 April 2022 was procedurally incompetent, statute-barred, and an abuse of process. The foreclosure judgment of 25 January 2016 (redemption expiring 25 April 2016) exhausted the mortgagee's cause of action and rights merged in judgement (King v Hoare (1844) 13 M & W 494; Tai Hing Cotton Mill Ltd. V Liu Chong Hing Bank Ltd [1986] AC 80 (PC)). The 2022 summons was not enforcement but a new action, contrary to merger/res judicata (Texan Management Ltd v Pacific Electric Wire & Cable Co Ltd [2009] UKPC 46; Henderson v Henderson (1843) 3 Hare 100). The foreclosure orders flowing from it are void ab initio.
>
> **Ground 4 – Defective Foreclosure Orders (expanded)**
>
> The Learned Judge erred in treating the foreclosure nisi (18 July 2024) and foreclosure absolute (17 April 2025) as valid. A foreclosure order must ascertain the true mortgage debt (principal, interest and secured additions). The nisi substituted lease proceeds and unpaid taxes. Equity requires strict accuracy in foreclosure (Campbell v Holyland (1877) 7Ch D 166; Santley v Wilde [1899] 2 Ch 474). An absolute decree built on a defective nisi is void for want of jurisdiction. Further, foreclosure is a drastic equitable remedy designed to bar the equity of redemption only upon non-payment of the **secured mortgage account**. The orthodox form of decree requires the taking of the mortgage account and fixes a redemption date for payment of "what shall be certified due for principal, interest and costs." The Nisi here did not call for, or certify, the mortgage account; instead it substituted collateral sums (lease proceeds and taxes) which, even if contractually relevant as covenants, are not a lawful surrogate for the **secured debt**. The mortgagor was never told the true figure "due under the mortgage," defeating the fairness equity

requires before extinguishing the right to redeem. Because the Absolute merely perfects the Nisi, the foundational defect renders both orders jurisdictionally bad and void.

Ground 13 – Statute-Barred Fixed Date Claim Form (most serious)

The Learned Judge erred in failing to appreciate that the foreclosure orders of 18 July 2024 (Nisi) and 17 April 2025 (Absolute) were obtained in proceedings commenced by a Fixed Date Claim Form first dated 12 September 2023, amended 9 January 2024, and filed 31 January 2024.
(1) The operative foreclosure action proceeded on the 2023/2024 Fixed Date Claim Form, not the April 2022 originating summons.
(2) Limitation Act, s.5(3): "An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgement became enforceable."
(3) The 2016 foreclosure judgment (redemption expiring 25 April 2016) became enforceable in 2016; limitation expired by April 2022.
(4) A Foreclosure claim commenced in September 2023/ January 2024 was statute-barred.
(5) This construction is supported by Perfect Luck (Winder J), which confirms the strict effect of s.5(3) in barring enforcement actions commenced beyond six years.
(6) The foreclosure Nisi and Absolute were therefore made without jurisdiction and are void.

7. The Notice of Motion raises similar issues as in the instant NOA. It appears that the Motion was not advanced before the Court of Appeal. The Claimant made no issue and took no preliminary point in respect of the relief sought in the NOA and the Notice of Motion.

8. The parties agreed at the status hearings on 11 and 27 May 2026 that the Court should proceed to hear the application on the papers after having lodged numerous written submissions, which I will address more below. The parties obtained the Court's leave to lay over further submissions which were done on 29 May 2026 and 16 June 2026 by the Defendant and Claimant, respectively.

Defendant's evidence

9. The Defendant's principal evidence is based on the Affidavits filed by Derek Ryan on 18 August 2025 and 26 May 2026. In essence, Mr. Ryan notes that the mortgaged property was the subject of a possession order made on 25 January 2016 which was appealed by him and that no stay was granted. He alleges that

during the appeal process the mortgage was transferred by the original mortgagee, Scotiabank (Bahamas) Limited, to the Claimant and that the Claimant did not seek to enforce the mortgage until January 2023. Mr. Ryan also notes that in November 2020 he leased the premises to Ian Jupp to operate a law practice and that on or about 27 July 2023 Mr. Jupp was locked out of the premises. I set out below the following paragraphs from the Affidavit:

> 5. The Defendant/ Respondent is the registered owner of the property commonly known as **#37 Village Road, Maude Beatrice House, Nassau, The Bahamas** (the "Property").
>
> 6. The property was originally subject to a mortgage in favor of **Scotia Bank (Bahamas) Limited** ("Scotia").
>
> 7. On **25 January 2016**, a **possession order** was made by the Supreme Court in proceedings involving the Property.
>
> 8. I filed an **appeal** against that order. **No stay of execution** was granted by the Supreme Court or the Court of Appeal at any time.
>
> 9. During the pendency of the appeal, Scotia **transferred/assigned the mortgage**. Thereafter, Gateway came to assert that it held the relevant rights under that mortgage.
>
> 10. From my review of documents available to me, including an affidavit sworn by **Tamika Thompson** (a legal manager at Gateway), the transfer/assignment relied upon by Gateway includes a **supplemental deed dated 12 January 2022**.
>
> 11. Gateway did not seek to enforce the 2016 possession order **until in or about January 2023**.
>
> 12. The Defendant/Respondent has **filed these proceedings** to challenge Gateway's entitlement enforce that order and for related relief. A copy of the Claim Form is exhibited "**DR-A**".

10. In his 26 May 2026 Affidavit, Mr. Ryan disclosed that on 21 August 2025 the Defendant was recently restored to the Register of Companies having been struck from the Register. Although he provided no date for the striking off the register, having regard to the history of payments exhibited to his Affidavit, it appears that the last year of good standing was in 2003. Mr. Ryan goes on to say that to his "**knowledge and belief there exists no written acknowledgement, sign acknowledgement, restructuring agreement, repayment agreement or other written admission by R&R Holdings Ltd. between May/June 2009 and**

May/June 2021 capable of reviving or extending the limitation period under the Limitation Act, 1995". Paragraphs 3, 4, 5, 6, 7 and 8 of the 26 May 2026 Affidavit state as follows:

> **3. R&R Holdings Ltd., Company Number 46252C, was at one stage struck off the Register of Companies maintained by the Registrar General's Department pursuant to section 271 of the Companies Act.**
>
> **4. During the period in which R&R Holdings Ltd. was struck from the Register, the company conducted no active business operation to my knowledge.**
>
> **5. During the said period, R&R Holdings Ltd. did not make any acknowledgment in writing of the mortgage debt which forms the subject matter of these proceedings.**
>
> **6. During the said period, R&R Holdings Ltd. did not make any part payment toward the alleged mortgage indebtedness.**
>
> **7. To my knowledge and belief, there exists no written acknowledgement, signed acknowledgement, restructuring agreement, repayment agreement, or other written admission by R&R Holdings Ltd. between May/June 2009 and May/June 2021 capable of reviving or extending any limitation period under the Limitation Act, 1995.**
>
> **8. On 21 August 2025, R&R Holdings Ltd. was restored to the Register pursuant to section 273B of the Companies (Amendment) Act 2019 after payment of the requisite restoration fees and annual fees.**

11. The Affidavit of Ian Jupp filed on 18 August 2025 chronicles the lease arrangement between himself and the Defendant that appears to have commenced on 28 December 2020. He discovered that the locks to the premises were changed and his entry denied on 30 July 2023 after returning from a two weeks' vacation leave. He suggests that his confidential client files and records as well as equipment were removed and damaged. I find it necessary only to highlight a few of the paragraphs in that Affidavit:

> **3. That on the 28th day of December, A.D., 2020, I executed a Commercial Lease with the Defendant/ Respondent, in relation to ALL THAT piece, parcel, or lot of land and premises situate at #27 Village Road, on the eastern side**

of Village Road, in the Eastern District of the Island of New Providence, and called and known as "Maude Beatice House / Ryan & Co." (hereinafter referred to as "the said demised premises"). This Lease took effect and commenced upon the 1st day of January, A.D., 2021. I was unaware of any legal action or other situation between the Claimant/Applicant and the Defendant/Respondent, until I was locked out the said demised premises.

4. That I had been a Tenant of the Defendant/Respondent continuously operating my law practice therein from that date, up until the date when I was unceremoniously and without notice, locked out of the said demised premises by the Claimant/Applicant. The said demised premises had always served as my principal place of practice under the name and style of "Ian M. Jupp & Co.", and the secure repository of my client files, books, professional implements, professional apparel, office equipment, and personal effects.

5. That despite the Claimant/Applicant having initially framed and stated in its Originating documentation and otherwise, that the Defendants were "persons unknown", the Claimant/Applicant unmistakably and categorically knew that I was operating my law practice from the said demised premises from as early as January, 2021, because its Attorney, Mrs. Sharlyn R. Smith (the daughter of Mr. Franklyn and Mrs. Sharon Wilson, the former of whom was the majority owner of the Claimant), sought out my office location as we were both about to commence dealing with a real estate transaction together. She commenced the real estate transaction with her letter to me dated the 13th day of January, A.D., 2021, in which she addressed the same to me at the said demised premises. A copy of the aforementioned letter, with my initial response thereto in writing, is now produced and shown to me, and is marked as Exhibit "I. M. J. 1" herein.

6. That during the course of the aforementioned real estate transaction, the Claimant's/Applicant's Attorney and I sent several further letters and e-mails to each other, and each time, she addressed each letter to me at the said demised premises. The aforementioned real estate transaction lasted for more than six and a half (6 ½) months, up until the 31st day of July, A.D., 2021, at

which date she cancelled the same, due to the sheer amount of requisitions and the other issues emanating from her draft Agreement of Sale which I had raised, and some of which were left unanswered and/or cured by her. A copy of her final e-mail message to me is now produced and shown to me, and is marked as Exhibit "I. M. J. 2" herein.

7. That whatever and whenever the Claimant/Applicant or anyone swearing any Affidavit upon its behalf, contended in its Originating documentation and otherwise, respectively, regarding the fact that it had no knowledge of anyone being in the said demised premises, that was obviously untrue. The Claimant's/Applicant's Attorney of record to this day, had been dealing directly and continuously with me in writing for a period of six and a half (6½) months, two (2) years prior to the Claimant/ Applicant commencing its Originating documentation. In fact, our respective Law Chambers were, and still are just around the corner from each other: the said demised premises was, and still is, located on Village Road North, and Mrs. Sharlyn R. Smith's office was, and still is, located on the corner of East Shirley Street and Highland Terrace.

8. That on Sunday, the 30th day of July, A.D., 2023, I had just returned from a two (2) week vacation (15th day of July, A.D., 2023 – 30th day of July, A.D., 2023) and on that same evening, I went to the said demised premises to prepare for my return to work the following day (Monday). Upon my arrival at the said demised premises, I noticed that some legal documentation had been taped to the outer gate at the entrance thereto. I then tried to unlock the gate, but I found that my key to the lock was not working. I then realized that the lock had been changed. I then read the entirety of the documentation taped to the gate, and I further realized that I had been locked out of the said demised premises by the Claimant/Applicant, who had obtained an Order for an Injunction to do so among other things.

9. That as a result of the actions taken by the Claimant/ Applicant in the preceding paragraph, I was suddenly prevented from entering the said demised premises and accessing my client files, legal books, professional implements (e.g., degrees, licences, seals, awards, client

rolodex, etc...), Professional apparel (e.g., suits, robes, wig, collars, bibs, shirts, cufflinks, etc...), office equipment (e.g., computer systems, printers, telephones, chairs, paintings, etc...), and other personal effects. Consequently, I was unable to properly, if at all, serve any of my clients, provide them with any of my invoices for payment, or provide them with their files for them to go to another Attorney, if necessary. These circumstances existed in that state up until this past weekend.

10. That on Saturday evening, the 16th day of August, A.D., 2025, when driving past the said demised premises, I observed that boxes of my client files, as well as certain of my books, professional implements, professional apparel, office equipment, and personal effects had shockingly been discarded into multiple garbage bins outside the said demised premises. Much of these items were either damaged or destroyed during that process of discarding them, in particular because it rained for two (2) days over this past weekend. Photographs taken by me of some of the aforementioned items listed in the preceding paragraph are now produced and shown to me, and marked as Exhibit "I.M.J. 3" herein.

...

16. That all of these events have occurred while proceedings were pending before this Honourable Court, in which the Defendant/Respondent has sought to challenge the Claimant's/Applicant's right to enforce the 2016 Order of Possession. In particular, the Claimant/Applicant has acted unilaterally to change locks to the said demised premises, exclude lawful tenants therefrom, discard client property therefrom, and otherwise, while there was an Order for an Injunction in place (in relation to which, the Claimant/Applicant was untruthful in several respects in its *ex parte* application when it obtained the same), instead of awaiting the determination of this Honourable Court.

12. I also note that exhibited in the Supplemental Affidavit of Derek Ryan filed on 22 August 2025 is the Order dated 25 January 2016 (and filed on 1 February 2016) made by then Fraser J. (as she then was) which in terms grants delivery up of possession of the mortgaged property to Scotiabank (Bahamas) Limited in Action 2014/CLE/gen/01030 if the Defendant failed to pay the sum of $185,816.71 with

interest within 90 days. The mortgage property, the subject to that Order, is the same property, the subject of the instant action.

13. In the Supplemental Affidavit of Derek Ryan filed on 17 September 2025 he exhibits the Affidavit of Allan Butler of Scotiabank (Bahamas) Limited filed on 23 July 2014 which was used in Action 2014/CLE/gen/01030 and led to the grant of the Order for Possession and Judgment dated 25 January 2016.

14. For completeness, I also highlight that in the papers before me is the existence of another action, being Action 2022/CLE/gen/00620, where the Claimant sought a foreclosure order of the property against the Defendant. I can only assume that no order was made in that Action, which was commenced by Originating Summons.

Claimant's evidence

15. The Affidavit of Brittany McKenzie filed on 28 August 2025 was used at the hearing to discharge the Ex parte Injunction and it helpfully sets out the steps taken in this action leading to the grant of the Foreclosure Order Absolute. I wish to highlight that Ms. McKenzie refers to an earlier appeal (SCCivApp CAIS No. 20 of 2016) where the Defendant unsuccessfully appealed the Order made for delivery up of possession. The following paragraphs are material:

> **5. By an Indenture of Mortgage made on the 4th day of October, 2000, between the Defendant and Scotiabank (Bahamas) Limited (hereinafter referred to as "the Bank") and of record in the Registry of Records in the City of Nassau on the Island of New Providence (hereinafter referred to as "the Registry") in Volume 8705 at pages 432 to 444, the property more particularly described herein in Paragraph 6 hereof (hereinafter referred to as "the Mortgaged Property") was granted to and conveyed to the Bank by the Defendant to secure a certain sum of money (hereinafter referred to as "the Mortgage"). Exhibited hereto and marked "BM-1" is a true copy of the Mortgage.**
>
> **7. In addition, the chattels were assigned to the Bank.**
>
> **8. By a Supplemental Deed of Transfer made on the 12th day of October, 2021, and of record in the Registry in Volume 14099 at pages 475 to 479, the Mortgage was transferred from the Bank to Gateway Financial Ltd. Exhibited hereto and marked "BM-2" is a true copy of the 2021 Supplemental Deed of Transfer.**

9. By a further Supplemental Deed of Transfer made of the 12th day of January, 2022, and of record in the Registry of Records in the City of Nassau on the Island of New Providence in Volume 13929 at pages 239 to 244, the Mortgage was transferred from Gateway Financial Ltd. to the Claimant. Exhibited hereto and marked "BM-3" is a true copy of the 2022 Supplemental Deed of Transfer.

10. On the 15th day of September, 2023, the Claimant commenced these proceedings by a Fixed Date Claim Form. On the 30th day of August, 2024 an Order of Foreclosure Nisi was granted. On the 17th day of July, 2025 an Order of Foreclosure Absolute was granted by the Honourable Court. Exhibited hereto and marked "BM-4" and "BM-5" are true copies of the Foreclosure Nisi Order and the Foreclosure Absolute Order, respectively.

11. The total of $132,928.98 was ordered, inter alia, by the Honourable Court to be paid by the Defendant on or before the 18th day of January, 2025, but remains unpaid to date.

12. I am aware of 2014/CLE/gen/01030 (hereinafter referred to as "the 2014 Action"). On the 1st day of February, 2016 Judgment was entered against the Defendant, and a Vacant Possession Order was granted. The Defendant appealed the Vacant Possession Order to the Court of Appeal (SCCivApp CAIS No. 20 of 2016), which was dismissed on 22nd February, 2018. There are no applications pending in the 2014 Action. (my emphasis)

13. In or about July 2023, the Claimant discovered unauthorized use of the Property by persons unknown and commenced an action for trespass being styled 2023/CLE/gen/00506 Gateway Ascendancy Ltd. v Persons Unknown. An injunction was granted in this action on the 19th day of July 18th, 2023 and remains in effect (hereinafter referred to as "the 2023 Injunction").

16. The Affidavit of Rico Glinton filed on 28 August 2025, the Claimant's Property Manager, describes the exterior and interior works that were carried out on the property by the Claimant. He also suggests that the property did not have use of the basic utility services from 2020 to 12 August 2025 because the supplies were disconnected. He asserts that the Claimant settled the outstanding sums due and the utility services were restored. Mr. Glinton also questioned whether Mr. Jupp's

firm was operating out of the building. I only wish to highlight the following paragraphs from the Affidavit of Rico Glinton filed on 28 August 2025:

> **6. I am aware of an injunction granted by the Honorable Court in Supreme Court Action Number 2023/Cle/gen/00506 on the 4th day of July, 2023 which remains in effect.**
>
> **7. There has never been any signage or indication of a law practice under the name "Ian M. Jupp & Co." at the Property including on the building. At no time have I observed, nor was I ever made aware of, any external or internal signage, plaque, or professional identifier indicating the operation of such a firm. Instead, the only visible sign affixed to the Property was the sign "Ryan & Co.," which was prominently displayed at the entrance. This fact is consistent with the historical occupation of the building by "Ryan & Co.," a now-defunct law practice, and inconsistent with the Defendant's assertion of any continuing or concurrent use of the Property by "Ian M. Jupp & Co."**
>
> **8. Further, the subject Property has not been in active commercial or professional use or any use for a significant period of time. Until August 2025, there was a complete absence of basic utility services. Since 2020, the building had no electricity or water supply, rendering it wholly unsuitable for occupancy by any law firm or professional tenant. No business of any kind could have effectively operated on the Property under such conditions. Utility services were only reconnected on Tuesday, the 12th day of August, 2025, upon the Claimant's payment of all outstanding accounts and reconnection fees.**

17. In his second Affidavit filed on 22 May 2026, Mr. Glinton stresses the substantial work undertaken on the property by the Claimant and states that "**it no longer bears any resemblance to its former state as described in my earlier Affidavit**". The Affidavit in large part seeks to lay the factual foundation why the "**preservation of any prior status quo is no longer possible**". He states as follows:

> **3. This Affidavit is sworn in opposition to the Defendant's applications for a stay of execution of the Oder dated 3rd September, 2025 and to strike out or set aside the Foreclosure Nisi Order dated 18th July, 2024 and the**

Foreclosure Absolute Order dated 17th April, 2025 and further in support of my prior Affidavit filed herein on the 28th day of August, 2025.

4. In my said Affidavit of 28th August, 2025, I deposed, inter alia, that the property and the building situated thereon the eastern side of Village Road, in the Eastern District of the Island of New Providence (hereinafter referred to as "the Property"), was at that time in a significant state of disrepair and deterioration, including being compromised by termite infestation.

5. I now say that since that time, and in particular since October 2025 the condition of the Property has undergone substantial, material, and irreversible changes, such that it no longer bears any resemblance to its former state as described in my earlier Affidavit.

6. The preservation of any prior status quo is no longer possible, and accordingly, any such order for a stay would be nugatory, devoid of practical effect, and incapable of meaningful enforcement.

...

10. Additional external works comprise the power washing and cleaning of the roof and all exterior walls, including porch areas; repairs to boxing and other exterior structural elements; the painting of the roof and external structures; and the installation of protective tilling measures designed to deter pigeons and prevent infestation.

...

12. The interior of the building has been substantially renovated, reconfigured, and improved to a significant extent. These works include the erection of a partition wall in the lobby, fundamentally altering the layout and configuration of the interior spaces.

...

19. As a direct consequence of the foregoing extensive works, I say that the building is now entirely different in its structure, layout, configuration, and overall appearance from its prior state. Photographs evidencing the renovations period and present overall appearance of

the building and Property are now produced and shown to me marked as "Exhibits RG-2 through RG-13".

Defendant's submissions

18. In the Submissions lodged on 23 September 2023 by the Defendant, Mr. Gomez KC relies on the Affidavit of Allan Butler filed on 23 July 2014 in Action 2014/CLE/gen/01030 to fix "**default under the mortgage at 26 May 2009**". He argues that it is from that date that the mortgagee's right to recover the principal of the mortgage debt was governed by section 32(1) of the Limitation Act 1995, which subsequently expired on 26 May 2021. He relies on **West Bromwich Building Society v Wilkinson [2005] UKHL 44**, to support his argument that under section 20(1) of the UK Limitation Act 1980 a mortgagee's claim for principal is barred 12 years after the right to receive it accrues. He argues that the Defendant has the benefit of the limitation period because both foreclosure rights and recovery of principal were spent before any assignment to the Claimant.

19. He argues that the limitation argument/defence expired due to section 5(3) of the Limitation Act occasioned by the fact that on 25 January 2016 in Action 2014/CLE/gen/01030 the Court granted in favour of Scotiabank (Bahamas) Limited, the Order for delivery up of possession and the sums due under the mortgage. He states that the benefit to the Defendant is that "**by January 2022, all rights to enforce the 2016 judgment were statute-barred. This benefits R&R because Gateway's writs and foreclosure applications brought after 2022 are jurisdictionally null. Even if foreclosure were treated as distinct, its limitation expired in May 2021, twelve years from the 2009 default**".

20. The limitation argument is not his sole argument relying also on the doctrines of res judicata, merger and cause or action estoppel. Mr. Gomez KC suggests that the "**foreclosure orders nisi and absolute relied on by Gateway are themselves defective**". He relies on a recent decision of Justice Darville Gomez in **Gateway Ascendancy Ltd. v Patrick Livingstone Hanna & Ors 2024/CLE/gen/00085**.

Claimant's submissions

21. The Claimant advanced a preliminary issue for the Court's determination as to whether the Court is ***funtus officio*** in respect of the applications before it. There was also an application for a stay but it was abandoned by Mr. Gomez KC on the premise that if the strike out application was successful then the stay application was academic. I agree with that posture.

22. On the preliminary objection, the Claimant's Counsel, Mrs. Smith, relies on the Court of Appeal's decision in **Junkanoo Estates Ltd. v UBS (Bahamas) Ltd SCCivApp No. 24 of 2018** where that Court addressed the common law doctrine of ***functus officio***. The Court held as follows:

The *functus officio* doctrine is a finality rule which is directed at decision-makers (be they a court, arbitrator or administrative tribunal or commission or other statutory body). The rule operates to circumscribe the jurisdiction of the decision-maker by delineating when the jurisdiction of the decision-maker is to be regarded as exhausted and at an end.

23. The Claimant's Counsell also relied on the decision of the Court of Appeal in **Rosina Smith v Fidelity Bank (Bahamas) Ltd SCCivApp No. 122 of 2020**. In **Junkanoo Estates Ltd. (supra)** the Court of Appeal also referred to this decision and stated:

> **40. In Rosina Smith, this Court (differently constituted) refused the intended appellant's application for leave to appeal a ruling of a Supreme Court judge who had refused to hear the applicant's Re-Amended Summons on the basis that she was functus officio. At paragraphs 44 through 46 of its decision, the Court said:**
>
> **"44. The intended appeal is clearly misconceived, as is her Re-Amended Summons of 26 July 2017 and the relief which she still seeks to pursue before this Court by this circuitous route. Since the Order of 30 March 2017 had been perfected, the relief sought in the Re-Amended Summons could not be pursued in the court below. What the intended appellant ought instead to have done was to appeal the Order directly to this Court.**
>
> **45. Miss Smith's numerous complaints about the propriety of the Order, including the possibility of Fidelity's mortgage action being statute-barred and res judicata and the Order being irregular may well have provided arguable points on a direct appeal to the Court of Appeal. However, the law is clear. Once the Order obtained in the Supreme Court had been perfected, there was no way for it to be set aside or discharged as the judge was clearly functus; and no judge of the Supreme Court (or this Court on the intended appeal) has jurisdiction to grant the relief which the intended appellant sought in her Re-Amended Summons.**
>
> **46. The record confirms that the judge's Order in the mortgage action was perfected on 20 April 2027. Accordingly, in keeping with the well-established common law principles outlined earlier, the learned judge was correct**

when she declined jurisdiction to entertain the Re-Amended Summons on the basis that she was functus." [Emphasis added]

24. The Claimant also advanced arguments in its further written submissions inviting the Court to dismiss the application on the principle set out in **Henderson v Henderson (1843) 3 Hare 100**. Its primary contention is that the Defendant failed to advance its whole case at the proper time. Mrs. Smith also argued that the Foreclosure Order Absolute is a final order and no appeal was pursued and thereby the Court should strike out the application as it is an abuse of the court's process under CPR 26.3(1)(c).

25. In the Claimant's final set out submissions filed on 16 June 2026, it addressed several new points inclusive of the case laid over by the Court at a previous hearing, **Case v Quirke [2011] 1 BHS J. No. 72**, and argued that the limitation argument is misconceived. It relied on **Ketteman v Hansel Properties Ltd. & Ors [1987] AC 189** a decision of the English House of Lords which held (in part) that a limitation defence is a procedural bar that must be pleaded and in the absence of a defendant pleading it, the Court cannot take it into account.

Discussion and Analysis

(a) Nature of Foreclosure Order Absolute

26. At the hearing on 27 May 2026, I directed Counsel for the Claimant and the Defendant to consider the decision of Turner J. (as he then was) in **Case v Quirke [2011] 1 BHS J. No. 72.** In that case the Court addressed the jurisdiction to re-open a Foreclosure Order Absolute. Turner J. (as he then was) made the following observations:

> **11 In respect of the jurisdiction to re-open the Order of Foreclosure Absolute (as opposed to setting aside the proceedings that were held before Albury J.), counsel for the Plaintiff submits that there are only a limited number of grounds on which the court would re-open, and that the Defendant has failed to meet any of them. He submits, citing Atkin's Court Forms, Second Edition, vol 28, Campbell v Holyland (1877) 7 Ch D 166 and Megarry and Wade, Law of Real Property 3rd Edition at page 902 those circumstances are four in number, as follows:**
> **a) Where failure to repay the loan was caused by an accident at the last moment preventing the mortgagor from raising the money,**
> **b) Where the value of the property far exceeds the amount borrowed or outstanding or in arrears**

c) Where the property is of unique or sentimental or special value the mortgagor/borrower
d) Where the mortgagor makes prompt payment or demonstrates a readiness, willingness and ability to make prompt payment immediately after the decree of foreclosure was made.
12 I accept that these circumstances as outlined are the correct principles to consider in deciding whether re-open an Order of Foreclosure Absolute.
13 Applied to the facts of this case, there is simply nothing before the court on which the court could determine that the Defendant is able to meet any of these conditions. The affidavit on behalf of the Defendant sets out no factual circumstances in support of any these matters, the only information as to the value of the land coming from the Defendant is found in the affidavit of the Plaintiff where he exhibits a letter from counsel (dated 13 April 2010) on behalf of the Defendant asserting that the land in question is worth in excess of three million dollars, the source or basis of that assertion is nowhere indicated. Indeed, in the affidavit of the Plaintiff, it is indicated that the Defendant had initially approached him indicating that he had an agreement to purchase the land for $200,000.00.
14 It is not suggested that the failure to repay the loan was caused by any accident or other circumstance which prevented the Defendant from repaying the loan, or indeed that he is now in a position to repay the loan. Counsel for the Defendant submits that the Defendant ought to be given a reasonable period of time to pay an amount determined by way of an accounting, but does not indicate that time period, nor, since the date of the Order of Foreclosure Absolute, has it been suggested that any offer to repay promptly was raised. Indeed, notwithstanding the submission that the Order was premature as the Defendant was not afforded the period provided in the Order Nisi for the entry of an appearance or to pay the sum owed, in fact there was no Memorandum of Appearance entered in this matter on behalf of the Defendant until 8 April 2010; followed by the initial summons on the 27 April 2010, the amended summons 20 May 2010 and the affidavit in support of the amended summons filed 11 August 2010.
15 Finally, there is no suggestion that the land has any sentimental or special value, it being described in terms of an investment proposal for development purposes.
16 I find, based on the evidence presented in this matter and the applicable law, that there is no basis on which I can set

aside the Order of Foreclosure Absolute made by Albury J., nor is there any reason for the court to allow the said Order to be re-opened or to enlarge the time for redemption.
(my emphasis)
17 For these reasons, I will dismiss the amended summons of the Defendant, and I do not need to consider the application of the Plaintiff for security of costs.

27. I accept the position enunciated by Turner J in **Quirke** (supra). I also note that the strike out application is not akin to seeking an Order to re-open the Foreclosure Order Absolute because none of the four conditions are relied upon by the Defendant. However, I must decide whether the scope and extent of the Court's discretion and jurisdiction to re-open a Foreclosure Order Absolute is limited to the four conditions or if there is a wider equitable jurisdiction in the Court to re-open the Foreclosure Order Absolute and discharge it. There is also no dispute between the parties that the Foreclosure Orders were perfected.

28. In **Campbell v. Holyland (1877) 7 Ch.D. 166** the Court addressed the effect of a Foreclosure Order Absolute. In that case Jessel M.R. made some statements which are material to the issue and therefore I set them out below:

> **The question in dispute is really whether a mortgagor can be allowed to redeem after an order of foreclosure absolute, and I think, on looking at the authorities, that no Chancellor or Vice-Chancellor has ever laid down that any special circumstances are essential to enable a mortgagor to redeem in such a case.**
>
> **Now what is the principle? The principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and it must be remembered that the doctrine arose at the time when mortgages were made in the form of conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract between the parties; yet Courts of Equity interfered with actual contract to this extent, by saying there was a paramount intention that the estate should be security, and that the mortgage money should be debt; and they gave relief in the shape of redemption on that principle. Of course that would lead, and did lead, to this inconvenience, that even when the mortgagor was not willing to redeem, the mortgagee could not sell or deal with the estate as his own, and to remedy that inconvenience the practice of bringing a foreclosure suit was adopted, by which a mortgagee was entitled to call**

on the mortgagor to redeem within a certain time, under penalty of losing the right of redemption. In that foreclosure suit the Court made various orders - interim orders fixing a time for payment of the money - and at last there came the final order which was called foreclosure absolute, that is, in form, that the mortgagor should not be allowed to redeem at all; but it was form only, just as the original deed was form only; for the Courts of Equity soon decided that, notwithstanding the form of that order, they would after that order allow the mortgagor to redeem. That is, although the order of foreclosure absolute appeared to be a final order of the Court, it was not so, but the mortgagee still remained liable to be treated as mortgagee and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the Court. Therefore everybody who took an order for foreclosure absolute knew that there was still a discretion in the Court to allow the mortgagor to redeem.

Under what circumstances that discretion should be exercised is quite another matter. The mortgagee had a right to deal with an estate acquired under foreclosure absolute the day after he acquired it; but he knew perfectly well that there might be circumstances to entitle the mortgagor to redeem, and everybody buying the estate from a mortgagee who merely acquired a title under such an order was considered to have the same knowledge, namely, that the estate might be taken away from him by the exercise, not of a capricious discretion, but of a judicial discretion by the Court of Equity which had made the order.

That being so, on what terms is that judicial discretion to be exercised? It has been said by the highest authority that it is impossible to say à priori what are the terms. They must depend upon the circumstances of each case. For instance, in Thornhill v. Manning (1) Lord Cranworth said you cannot lay down a general rule. There are certain things laid down which are intelligible to everybody. In the first place the mortgagor must come, as it is said, promptly; that is, within a reasonable time. He is not to let the mortgagee deal with the estate as his own - if it is a landed estate, the mortgagee being in possession of it and using it - and then without any special reason come and say, "Now I will redeem." He cannot do that; he must come within a reasonable time. What is a reasonable time? You must have regard to the nature of the property. As has been stated in more than one of the cases, where the estate is an estate in land in

possession - where the mortgagee takes it in possession and deals with it and alters the property, and so on - the mortgagor must come much more quickly than where it is an estate in reversion, as to which the mortgagee can do nothing except sell it. So that you must have regard to the nature of the estate in ascertaining what is to be considered reasonable time.

...

I think, under these circumstances, that the mortgagor has been sufficiently prompt. I entirely agree with the various authorities which have been quoted, that reasonable promptness ought always to be shewn. I say reasonable promptness, because what is promptness is, as I have said, not an abstract proposition, but must depend on the circumstances of the case. I think the mortgagor has been sufficiently prompt. I think the purchaser is not in a position to terrorize the Court as to the evils that would happen by opening a foreclosure after sale. As I said before, I by no means say that the fact of a sale would not be an important fact; it ought to weigh with the Court in opening foreclosure.

I am of opinion, however, that such a sale as this ought to have no weight whatever, and that under the circumstances the mortgagor is entitled to open the foreclosure on the usual terms, that is, on payment of principal, interest, and costs.

29. Similarly, in **Cukurova Finance International Ltd and Anr v Alfa Telecom Turkey Ltd (No 2) (2013) 83 WIR 266**[1] the Privy Council addressed the principle of equity in the context of the right of appropriation and relief from forfeiture of shares. Neuberger LJ in a dissenting opinion provided some instructive commentary on the equitable right to redeem and foreclosure proceedings.

[77] Foreclosure could only be achieved by order of the court and 'not by any person'—per Warrington in In re Farnol Eades Irvine & Co Ltd [1915] 1 Ch 22 at 24. Normally, a

[1] See also decision of the Privy Council in **Cukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd [2013] UKPC 2** – where it was stated – [73] ... In equity, a mortgagee has a limited title which is available only to secure satisfaction of the debt. The security is enforceable for that purpose and no other: Quennell v Maltby [1979] 1 All ER 568, [1979] 1 WLR 318, 322H (Lord Denning MR); Downsview Nominees Ltd v First City Corporation Ltd [1993] AC 295, 312G, [1993] 3 All ER 626, [1994] 1 BCLC 49 (Lord Templeman). It follows that any act by way of enforcement of the security (at least if it is purely) for a collateral purpose will be ineffective, at any rate as between mortgagor and mortgagee. The reason is that such conduct frustrates the equity of redemption which, as Sir John Stuart V-C observed in Jenkins v Jones (1860) 2 Giff 99, 29 LJ Ch 493, 6 Jur NS 391, a court of equity "is bound to regard with great jealousy".

foreclosure action would initially lead to a foreclosure order nisi, giving the mortgagor a last chance to redeem—see eg Platt v Mendel (1884) 27 Ch D 246. If it did not do so within the time stipulated by the court (which could be extended or 'enlarged'), the mortgagee could apply for the order to be made absolute.

[78] However, such was equity's enthusiasm for the mortgagor's right to redeem that it could even be invoked after the foreclosure had become absolute and the mortgagee had got well under way in selling the land, as in Thornhill v Manning (1851) 1 Sim (NS) 451, (1851) 61 ER 174. In that case, Lord Cranworth V-C said at 454 that a contract 'between a mortgagor and a mortgagee has been treated by this Court from time immemorial as being ... a contract for the repayment of money for which the mortgaged estate is a pledge, which the borrower may redeem notwithstanding the day named in the proviso for redemption has long passed'. And in Campbell's case, Jessel MR permitted a mortgagor to redeem despite the fact that the mortgagee had sold the property concerned after obtaining a foreclosure order absolute, as the mortgagor had acted promptly and the purchaser had bought within a day of the foreclosure, knowing of the mortgage. As Sir George Jessel MR explained at (1877) 7 Ch D 166 at 169and 171–172, '[a]n order for foreclosure, according to the practice of the old Court of Chancery, was never really absolute, nor can it be so now', 'the decree, though final in its terms, was not final in fact', and equity came to regard a foreclosure order in 'form only, just as the original deed was form only'.

[79] Accordingly, when a mortgagor is permitted by the court to invoke its right to redeem, the court is simply extending the time within which the money due under the mortgage must be paid. As Lewison J said in Law Debenture Trust Corp plc v Concord Trust [2007] EWHC 1380 (Ch), [2007] All ER (D) 149 (Jun) at [53], '[t]he essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract, but late'. He immediately added, correctly in my view, that '[a]part from time stipulations, I do not consider that the court, in exercise of its equitable jurisdiction, can or should rewrite the contractual terms of redemption in favour of the mortgagor'.

[80] The right to redeem could be exercised subject to any valid restriction in the mortgage (ie a restriction which did

> **not amount to an unlawful 'clog' on the equity of redemption), or, in any event, if the mortgagee took possession of the land. Redemption could, and normally did, take place out of court, although it could also do so in court, either in the course of proceedings brought by the mortgagee (eg for foreclosure) or through a redemption action brought by the mortgagor. The mortgage remains in being until the money due has been tendered and accepted—see Samuel Keller (Holdings) Ltd v Martins Bank Ltd [1970] 3 All ER 950, [1971] 1 WLR 43.** (my emphasis)

30. I also draw attention to the decision of Strachan J in **Southair Bahamas Ltd. v. Signet Bank (Bahamas) Ltd. [1993] BHS J. No. 25** where he refused to exercise his discretion to re-open the foreclosure order absolute. His decision seems to rest on the inability of the mortgagor to redeem the mortgage.

> **31 <u>It follows that the plaintiff have not satisfied me that the foreclosure should be re-opened or that if it was that they would fare better</u>. One hitherto, unconsidered issue, has however, the potential to change that. Earlier, I stated the absence of any indication of the plaintiff's ability and willingness to repay the monies secured by the mortgages. While that remains true as to both mortgages, there is, as a result of evidence which Mr. Paton sought, at the end of his address to have admitted, evidence to show Plains' ability and willingness to meet its indebtedness, taken to be $5,000.00 plus interest. (See Mr. Bass' affidavit sworn on the 27th November, 1992 and filed on 21 December, 1992). ...**

31. Section 27 of the Conveyancing and Law of Property Act have some relevance as to the foreclose order. It provides:

> **27. (1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale or redemption, in the alternative.**
> **(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of**

the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.
(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.
(4) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrances.
(5) This section applies to actions brought either before or after the commencement of this Act.

32. Based on the authorities noted above, it seems clear that the Court has a discretion to re-open a foreclosure order absolute. The discretion is one that must be exercised sparingly and judiciously. I note and highlight that no contention is made by the Defendant that it can pay the mortgage debt or that the Court should instead order a sale of the property given its significant value. The nature of the Defendant's complaint is that the Foreclosure Orders should not have been made because the recovery of the debt is statute barred by section 5 of the Limitation Act. The principal question for the Court therefore is whether the limitation argument is a good reason for the re-opening of the foreclosure order, or a circumstance to warrant the exercise of the Court's discretion to re-open the Foreclosure Order Absolute.

33. I feel constrained to highlight that it appears on the papers before me that the Defendant did not advance its limitation arguments **prior** to the Foreclosure Order Nisi being made absolute. It was open to the Defendant to make arguments at any stage of the proceedings, either at the time when the Nisi Order was made or any time thereafter. The Nisi Order was made on 18 July 2024 and the Absolute Order on 17 April 2025. It seems too that by the terms of the Claim Form filed on 7 February 2025 the Defendant was seeking a similar relief (although the Claim Form appears to be irregular in form) as set out in the present application. I am unable to glean from the numerous affidavits filed by the Defendant any reasons why that Claim Form was not advanced.

34. Notwithstanding the above, I am satisfied that the Defendant approached the Court with some degree of promptness. The NOA was filed on 17 September 2025, some 5 months after the Foreclosure Order was made absolute and perfected. I do not deem that period to be excessive in the prevailing circumstances.

(b) Preliminary Objection and re-opening the Foreclosure Order

35. Counsel for the Claimant strongly argues that the Court is *functus officio.* I set out above that the Court has *a* limited jurisdiction to re-open the Foreclosure Order Absolute. By raising the strike out application, resting principally on the Limitation Act, 1995 ("**LA**"), the Defendant is in essence seeking to challenge the Court's jurisdiction to make the Foreclosure Order Absolute. The Order was heard without notice it appears and not after arguments as was the Nisi Order.

36. By seeking to entertain the strike out application, the Court may be venturing into waters that go against the tide of decisions of the well-established principle that at common law a judge has jurisdiction to reverse his decision at any time before it is perfected but not afterwards (see **In re Suffield & Watts ex parte Brown (1888) 20 QBD 693** and **In re Barrell Enterprises [1973] 1 WLR 19** – although a limited right exists in the appellate jurisdiction).

37. In **Rosina Smith** the Court of Appeal referenced the decision of Sir Michael Barnett CJ (as he then was) in **Palms of Love Beach Building B Management Company et al v. Love Beach Properties Ltd et al 2010/CLE/gen/001673**, where he refused to entertain two filed Summonses when a perfected Order was made for judgment for outstanding condominium fees due, delivery up of vacant possession to the Plaintiffs and costs. I am guided by the decisions of the Court of Appeal in **Rosina Smith** and **Junkanoo Estates Ltd.**

38. I am persuaded however that the decisions of **Rosina Smith** and **Junkanoo Estates Ltd.** are distinguishable. The Court at first instant made final orders in the truest sense. A Foreclosure Order Absolute is not a "strict" final order with the Court having the right to exercise a limited discretion to re-open the Order. I am therefore constrained to reject the arguments on the principle of *functus officio*.

39. I note that the Defendant filed an appeal to the Court of Appeal in relation to this action, in terms of the refusal to extend the Ex parte Injunction. It was therefore open to the Defendant to enlarge the appeal to strike at the heart of the Foreclosure Order Absolute and/or the action. That in no way limits the equitable jurisdiction of the Court to re-open the Foreclosure Order. The filing of the appeal in my view does not alter the nature of the Foreclosure Order.

40. I deem that there are special circumstances that justify the Court's equitable jurisdiction to re-open the Foreclosure Order Absolute. The special circumstances relate to what may be described as an irregularity in the proceedings which led to the making of the Absolute Order. If the mortgage debt was statute barred and the relief sought was not capable of being made by the Court, it seems judicious for a Court of equity to step in to correct a fundamental procedural and substantive flaw. I also do not deem the circumstances to re-open a foreclosure order to be limited to a mortgagor seeking to redeem the mortgage or to seek a sale. That would be

too restrictive a limitation on the Court's discretion and can potentially lead to injustice. It can also be a means of stifling the Court's equitable jurisdiction.

41. There can be no dispute that the Court has the discretion to re-open a foreclosure order. In my judgment equity should not stand by and deny a mortgagor the right to advance an argument that the right to foreclosure is statutorily barred.

42. I am also guided by section 16 of the Supreme Court Act which mandates that "**...wherever there is any conflict or variance between the rules of equity and the rules of law with reference to the same matter, the rules of equity shall prevail...**". In this regard, the rules of equity should operate to re-open the Foreclosure Order. For my part, the Claimant came seeking equitable relief and must be seen to be willing to do equity. In Snell's Equity (30th Edtn.) the learned author described this maxim as "**a rule of unquestionable justice**". I was assisted in arriving at this view by the decision of **Lewis v Plunket [1937] 1 All ER 530** which centered on the plaintiff's right to a declaration for the return to her of the title deeds by virtue that the mortgage was extinguished due to the expiration of the limitation period. The facts in brief are that the plaintiff made one payment of interest on 2 November 1921. The defendant took no steps to receive any payments due under the mortgage. The additional facts are set out in the decision of Farwell J., which I set out below:

> **Then the plaintiff was desirous of borrowing money, and the only method apparently she could think of for raising money was on the security of this particular property, and for that purpose she required the title deeds. The title deeds were in the possession of the defendant and had been in the possession of the defendant as mortgagee ever since the date of the mortgage. No claim to them had ever been made by the plaintiff, and they had remained in the ordinary course in the possession of the defendant. The plaintiff, having consulted her solicitors, proceeded to write to the defendant a letter dated 17 July 1936, in these terms:**
> **'My dear Dorothy,—Am writing you upon a little matter which just concerns us two about Salwick. With my heavy loads to carry I am in need of raising some money and am obliged to give security to my bank manager, who has often suggested that he would not object to my overdraft if I could deposit some security with him such as the deeds of my property. I wonder if you would help me out by letting me have the deeds of Salwick because Cranley Court was mortgaged in order to purchase same and I cannot borrow more on it. Will you think this over and let me know if you care to do this for me? With love and best wishes to you and yours, Madeline Lewis.'**

43. Farwell J. ruled in favour of the plaintiff on the limitation argument and said as follows:

> **Then, thirdly, as an alternative, or in addition to that, she claims damages for the conversion of the title deeds. It is not now seriously disputed that the plaintiff is entitled to the first relief which she seeks, namely, a declaration that all the estate or interest in the hereditaments which has from time to time been vested in the defendant under the mortgage has ceased and determined. It is, I think, quite plain that by virtue of the Real Property Limitation Act 1833, s 34, and the Real Property Limitation Act 1874, s 1, on the expiration of 12 years from 1921 the mortgagee, the defendant, ceased to have any estate or interest whatsoever in the land. In my judgment, it is plain on the authorities that, even had there been an acknowledgment of any kind since that date, it would not have been sufficient to restore to the mortgagee the estate or interest which she had as mortgagee under the mortgage, but in this case there is not any sort of acknowledgment at all. In my judgment, it is plain that, so far as the property itself is concerned, the only person who now has any right or title to the property is the plaintiff, and she has that right or title freed and discharged from any claim which the defendant had by virtue of her mortgage or otherwise. Accordingly the plaintiff is entitled to the first declaration which she seeks, and she has now a title which is a good title as against the whole world. But it is said, however that may be with regard to the right of the defendant so far as the land itself is concerned, her right under the covenant for payment may not have finally determined because it might revive, as it were, or still be in existence if there was an acknowledgment even after the date of the statutory period. It is not necessary for me to determine that question because, in my judgment, it is impossible to treat the letter of 17 July 1936, as an acknowledgment at all. The letter is obviously one written with care, I think probably under advice, and although it is no doubt a claim or a request to the defendant to hand over the title deeds, and it may be an admission that the defendant had the title deeds, it cannot be read as an admission that the plaintiff owes the defendant money under the covenant or otherwise. It is quite plain that, in the absence of an acknowledgment, the personal remedy under the covenant in the mortgage has now also determined, and the defendant is in no position to claim relief in respect of the covenant from the plaintiff.**

44. The UK Court of Appeal's decision in **Ashe v National Westminster Bank Plc [2008] 1 WLR 710** is also instructive. It similarly addressed the mortgagee's right to possession when more than 12 years elapsed after the past payment was made by the borrower. The Court's decision was delivered by Mummery LJ, with whom the other Justices agreed, he said:

> **77 As to possession of property with permission it is worth making a preliminary and obvious point that the circumstances of the mortgagee's right of action against the mortgagor are, of course, quite different from the circumstances in a case like the Pye case [2003] 1 AC 419, where the contest is between the paper title owner of land and a person in possession of the land claiming squatter's title against the owner. The paper title owner has no right of action for the recovery of the land from a person who has permission to be in possession of his land. This explains the references in the Pye case to possession of the land with the consent of the paper title owner not constituting dispossession or possession by the squatter for the purposes of the 1980 Act: see paras 29, 36 and 37 of the speech of Lord Browne-Wilkinson.**
>
> **78 In the case of a squatter, unless and until the permission for a person to be on the land has expired or been revoked or otherwise terminated, there is no accrued right of action in the owner. No question of it becoming statute-barred can arise. Time cannot start to run against the paper title owner until his right of action has accrued. If he has no right of action to recover the land against a person who is in possession of the land with consent, the additional requirement of adverse possession under paragraph 8 of Schedule 1 is not even reached.**
>
> **79 In this case the bank had an immediate right of action to possession of the property as soon as the legal charge was executed. Its initial right of action to possession of the property was not dependent on the termination of a permission granted by the bank for Mr & Mrs Babai to be in possession of the property.**
>
> **80 Mr & Mrs Babai's continuance in possession of the property after the grant of the legal charge and after the last part payment was made was, Mr Fenwick insisted, with the permission or consent of the bank. It could not therefore be adverse possession and the bank's right of action is treated under paragraph 8 as not accruing.**

81 In my judgment, this argument is wrong for several reasons. The following points of fact and law can be made.

82 First, as a matter of fact, there was no evidence that Mr & Mrs Babai applied for, or were positively given, express permission by the bank to remain in possession of the property after the legal charge or after the last payment in respect of the mortgage debt.

83 Secondly, as for the implied/implicit permission of the bank to Mr & Mrs Babai's possession of the property, it is certainly true that the bank has never enforced its immediate right to possession against them. But it does not necessarily follow from the bank's non-enforcement of its right to possession, or its lack of objection to, or tolerance of, Mr & Mrs Babai's possession that the bank was impliedly granting them permission to remain in possession of the property so as to prevent them from being in adverse possession within paragraph 8 of Schedule 1. The bank was simply not doing anything to enforce its right of action. I do not agree with Mr Fenwick's reading of the correspondence between the parties that it can be inferred from the bank's proposals or from its forbearance from enforcing its security by possession proceedings, or from Mr & Mrs Babai's financial and personal circumstances or from other circumstances that permission was given by the bank for Mr & Mrs Babai to remain in possession. Nor is it necessary to imply any permission to explain the continued possession of Mr & Mrs Babai. This leads to the next point.

84 There is, thirdly, the question whether Mr & Mrs Babai in fact needed to be given or to have the permission by the bank in order to be in possession of the property. Their possession of the property was referable to their own registered legal title to the property. It was not derived from the bank's title to the property. If an officious bystander were asked to explain Mr & Mrs Babai's possession of the property, the answer would be that it was their property, not that the bank had given them permission to live in their own property.

85 The true nature of the transaction was that the legal charge was given as security for moneys owed to the bank and that they were to remain in possession of the property which was, in substance, theirs: see Heath v Pugh 6 QBD

345, 359 and Fairclough v Marshall (1878) 4 Ex D 37, 48. It is true that in some of the cases there are references to a mortgagee permitting the mortgagor to remain in possession and to the mortgagor remaining in possession "only by leave and licence of the mortgagee": see, for example, Rhodes v Allied Dunbar Pension Services Ltd [1989] 1 WLR 800, 807 d–e, per Nicholls LJ, in the context of the mortgagor's right to receive and retain the income of the mortgaged property without any liability to account.

86 In my judgment, however, the continued possession of the property by Mr & Mrs Babai after they had mortgaged it was referable to their property interest in it. This was not objected to by the bank. It must have been tacitly accepted by the bank in the context of the charge, but the bank's right of action and its tolerance of their possession did not prevent them from being in ordinary possession of the property which satisfied the requirements of paragraph 8. The nature of this possession did not therefore prevent time running against the bank once its cause of action had accrued, or had accrued afresh by reason of a part payment.

87 In summary, the bank had a right of action. More than 12 years passed since it accrued afresh. Mr & Mrs Babai's continued possession of the property with the apparent leave and licence of the bank did not prevent them from being persons against whom the bank's right of action to recover the property arose on the granting of the legal charge, which right is treated as having accrued afresh when a payment in respect of it was made. Nor did it prevent Mr & Mrs Babai from being persons in whose favour time can run under the 1980 Act. According to the ruling in the Pye case [2003] 1 AC 419 their possession was "adverse possession" within paragraph 8.

88 The question of a mortgagee's right to possession of the mortgaged land vis-à-vis the mortgagor and the impact of the 1980 Act did not arise for consideration in the Pye case, but the meaning given to "adverse possession" in the Pye case is of general application to actions for the recovery of land, even though it may come as an unpleasant surprise to the bank and other mortgagees that their mortgagors are in adverse possession of the mortgaged property.

45. I also find great comfort in the comments made by Mustill LJ in **Thomas Oke & Son Ltd v Williams [1991] Lexis Citation 1497** as to why the Court must act to re-open the Foreclosure Order:

> **Again, it may be said that this case does not in substance differ from one where, for example, the defendant is sued on a contract debt more than six years old, and where the defendant's advisers and the judge fail to notice the limitation point, so that judgment is given for the plaintiff in circumstances where, if the legal system had operated efficiently, the defendant would have won. Nobody could suggest that the judgment was in excess of jurisdiction, in any meaning of that word. It simply reflects the fact of life in an adversarial legal system that if a party has a point to make he should make it, and cannot complain of the consequences if he does not. So also here. A theoretical difference between right-barring and remedy-barring is undeniable, as witness the difficult rules of the conflicts of laws concerning foreign limitation statutes. Nevertheless in circumstances such as the present it is one of form alone. A debt which cannot be enforced by legal proceedings is for practical purposes just as dead as the plaintiffs' title in the present case. If it can be brought back from the grave by the debtor's omission to take the time point in the one case, why not in the other -- at least so far as concerns the power of the court to give a valid judgment in the light of the contentions which are actually presented to it.**
>
> **We must therefore reject the defendant's first contention, which seems to us too extreme. But as the debate before the court developed, it became apparent that two rather different lines of attack were open to the defendant.**
>
> **The first is allied to the argument already discussed, but it emphasises the exercise of the discretion by this court rather than the substantive effect of the judgment under appeal. A title to land differs essentially from a bare contractual right to the payment of money, in that it confers rights in rem transferable to third parties and valid against the world. It is one thing to say that as between immediate contractual parties the court should insist, as a means of ensuring finality, that limitation points should be taken at the proper time or not at all; <u>it is something quite different to assert that a title which had upon the expiry of the limitation period became alienable by the defendant free of encumbrances should, simply by virtue of an order for</u>**

possession which would not have been made if the issues had been explored, have been converted to a worthless shell of no value to any transferee. The court should we believe be rather cautious before strictly enforcing in such a context a pair of trial and appellate rules which are essentially procedural in character.

This leads immediately to another thought. One would expect that if the effect of the defendant's failure to put his best case forward was to extinguish his title the result would be a title in the plaintiffs which, with the court's validation, they could confidently proffer to a purchaser. A glance at the form of order under appeal shows, however, that this is not so. The plaintiffs did not seek or obtain a declaration as to their title to the land, or an order for payment of the arrears: only an order for possession. Perhaps the former was thought unnecessary, on the basis that the plaintiffs could (as they asserted on the argument of the appeal) do all that was necessary for the purpose of a sale by giving the purchaser an unassailable possessionary right. The latter is more interesting. Perhaps the plaintiffs foresaw that if they asked for a money judgment the registrar or judge was bound to notice that the claim was well out of time.

At all events the plaintiffs did not obtain judgment for anything more than possession. The result is a curious state of affairs, for the cases show that absent the judgment of the court the plaintiffs' title was extinguished and their entry on the estate would have been as trespassers: Bryan v Cowdal (1873) 21 WR 693; Brassington v Llewellyn (1858) 27 LJ Ex 297; Lewis v Plunkett [1937] 1 All ER 530 and Cotterell v Price [1960] 1 WLR 1097. No doubt the court's order for possession would, at least pro tempore, have been an answer to a claim in trespass, but if the point on title was then taken there would have been nothing in any order of the court to prevent the whole matter from being gone into and properly resolved.

The relevance of this is as follows. The exercise of the rules which require defences to be taken at the proper time, rather than when the matter comes on for a belated appeal, is that the interests of justice normally require finality. If the court of trial has not perceptibly erred in the deciding between the cases actually advanced before it, the successful party ought to enjoy the fruits of his victory undisturbed. The

plaintiffs are saying as much in the present case. They have won, and should be allowed to retain their prize.

If however one comes to look at what this prize really amounts to, it seems to be very little, for all that they have is a right to possession declared by the court, unsupported by any title. The plaintiffs seemed to be saying in argument that they can successfully dispose of the farm at a country auction on the basis of the court order together with a mortgage fifteen and more years old, without the purchaser noticing that the title is defective. Well, this may be so, but to our mind it is not the kind of vested "right" which the court should be too alert to protect.

The result of the order now under appeal is therefore that the defendant has a full title resumed once the plaintiffs' title was extinguished, but a title which he cannot enjoy since the order under appeal has put him out of possession; and the plaintiffs have an order to enter into possession of property which, if candid disclosure is made, they cannot sell. We find this absurd, and an ample reason for this court, quite exceptionally, to intervene. (my emphasis)

46. To refuse to re-open the Foreclosure Order would mean that the Court is "shutting out" the Defendant from advancing arguments which may "evaporate" the claim of the Claimant to the Foreclosure Orders or make the Foreclosure Orders "**unsupported by any title**". In my judgment it is not just or prudent to ignore this possibility when considering the Court's equitable discretion. The eyes of equity must be open to such a possibility and in doing so I must be prepared to act in the interest of justice by re-opening the Foreclosure Orders to investigate and determine the limitation arguments advanced by the Defendant, which go to the heart of the matter. In fact, the limitation argument, in my mind is stronger than seeking a redemption of the mortgaged debt. It is an assertion that the right to foreclosure is not available because the debt is extinguished arising from the delay by the mortgagee to enforce his rights. That to me justifies the Court exercising its discretion to re-open the Foreclosure Order.

47. For all of the reasons enunciated above, I exercise my discretion to re-open the Foreclosure Orders primarily because should the limitation argument prevail, the Claimant ought not to have the benefit of the mortgaged property; or alternatively, the Defendant ought not be deprived of its right to the property. Equity must be seen to do equity; starving off any unjust advantage or benefit to the party who came to the court seeking equity.

48. Furthermore, if the Defendant's limitation arguments prevail, the effect of the Foreclosure Order is paperless or as stated in **Thomas Oke & Son Ltd v Williams (supra)** "**unsupported by any title**".

(c) <u>The limitation arguments</u>

49. The Limitation Act, 1995[2] prescribes the period for the enforcement of a judgment debt. Section 5 provides:

> **5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say —**
> **(a) actions founded on simple contract (including quasi contract) or on tort;**
> **(b) actions to enforce the award of an arbitrator where the submission is not by an instrument under seal;**
> **(c) actions to recover any sum recoverable by virtue of any written law; (d) actions to enforce a recognisance.**
> **(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued:**
> **Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.**
> **(3) <u>An action shall not be brought upon any judgment after the expiry of six years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiry of six years from the date on which the interest became due</u>.**

50. There is no complaint by the Defendant that the action (2014/CLE/gen/01030) which lead to the grant of the Possession and Judgment Order was not commenced within the requisite period under the Limitation Act.

51. The Order granting judgment and delivery up of possession of the mortgaged property was obtained on **<u>25 January 2016</u>** and filed on 1 February 2016 in Action 2014/CLE/gen/01030 between Scotiabank (Bahamas) Limited and the Defendant. The Claimant in this action came to benefit from the mortgage by way of a Deed of Transfer dated 12 October 2021 and a Supplemental Deed of Transfer made on 12 January 2022. There is no dispute that by the time of the two Deeds of Transfer,

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[2] Although not applicable, see also section 23(3) of the Homeowners Protection Act 2017 - **No mortgagee shall recover from any mortgagor any sum owing under any judgment by the Court for the repayment of any sums borrowed by the mortgagor from the mortgagee after the expiry of six years from the date on which the judgment was obtained or the date of the last payment pursuant to that judgment.**

the Possession and Judgment Order was made in favour of Scotiabank (Bahamas) Limited. The Claimant states at paragraphs 7 and 9 of the Amended Claim Form filed on 31 January 2024 that the Defendant breached the mortgage by allowing "**a third party to occupy the building**" and failing "**to pay the real property taxes**". None of the affidavits filed by the Claimant in securing the Foreclosure Orders explained to the Court the reasons for the non-enforcement of the Possession and Judgment Order. By the time of the filing of the Claim Form in this action, the Possession and Judgment Order was in existence for 7 years, as it was granted on 25 January 2016.

52. There is also no evidence before the Court whether a Writ of Possession was obtained arising from the Possession Order. It seems to follow that the Claimant did not obtain a Writ of Possession because it complains that the Defendant allowed "**a third party to occupy the building**" in breach of the mortgage and sought an injunction to evict the "unknown occupiers". If a Writ of Possession was obtained, I assume that the Claimant would thereby occupy the property avoiding any of the alleged breaches by the Defendant as mortgagor.

53. It seems clear that the recovery of the judgment debt (by way of Action 2014/CLE/gen/01030) was statute barred when the Amended Claim Form was filed on 31 January 2024 (or the Claim Form on 12 September 2023). In **Perfect Luck Investments Limited & Anr. v. CTF BM Holding Ltd. & Anr. [2017] 2 BHS J. No. 122** Winder J (as he then was) held that section 5(3) of the Limitation Act is not limited to fresh actions on a judgment but to the enforcement of a judgment. He further held:

> **20 I am satisfied that the position in The Bahamas ought to follow the wider interpretation given to the language in Section 5(3) in the Hong Kong and Trinidad and Tobago cases, namely that the limitation period on actions relates not only to actions on judgments but also to the enforcement of judgments as well. The definition of action to include Section 2 of the Limitation Act could not make the intent of parliament any clearer that it was meant to include "any proceedings in a court of law". This must have intended to include proceedings in execution of a judgment, otherwise the expansion of the definition of action would not have a real purpose.**

54. Based on **Perfect Luck (supra)**, it seems clear that the Claimant was statutorily barred from seeking to enforce the Possession and Judgment Order 6 years after its grant (unless the limitation period was extended). Klein J. in **Gateway Ascendancy Ltd. v Bertram Wallace & Keva Wallace – 2012/CLE/gen/01179** held that 6 years was the applicable limitation period for the enforcement of a Writ of Possession.

55. This leads me now to decide if the Amended Claim Form and/or the resulting Foreclosure Orders are likewise statute barred. I note that the Amended Claim Form does not seek to enforce the Possession Order. It seeks a "new" or "fresh" relief under the arsenal of the mortgage.

56. The effect of the judgment debt being barred means that the Claimant cannot take any steps to enforce the Possession and Judgment Order and its rights as mortgagee thereunder ceased to exist. The judgment debt was extinguished in law occasioned by the Limitation Act and therefore the mortgagee lost all rights under the Possession and Judgment Order and thereby could not seek recovery of the judgment debt.

57. I further note that the date of default of the Defendant under the mortgage deed was on 26 May 2009. This is confirmed at paragraph 7 of the Affidavit of Allan Butler filed on 23 July 2014 in Action 2014/CLE/gen/01030. That Affidavit is exhibited to the Supplemental Affidavit of Derek Ryan filed on 17 September 2025. It states in part:

> 3. On **4 October 2000**, R&R executed a Mortgage in favour of Scotiabank (Bahamas) Ltd. securing BSD 232,000, together with a Promissory Note dated **18 October 2000**. [Exhibit DBR-1]
>
> 4. By paragraph 7 of the **Affidavit of Allan Butler**, filed on **23 July 2014** in Action 2014/Cle/gen/01030, Scotiabank admitted: "*The principal amount under the Mortgage and Promissory Note became due and owing on the 26th day of May A.D. 2009...*" [Exhibit DBR-2]
>
> 5. Under **s.5(3) Limitation Act (Ch. 83)**, the right to enforce a mortgage is limited to **12 years from accrual**. That period expired on **26 May 2021**.
>
> 6. On **25 January 2016**, Scotiabank obtained judgment against R&R for money due on the covenant and for possession of the mortgaged property. [Exhibit DBR-3] Enforcement of that judgment expired on **25 January 2022**.

58. The Defendant states in the Affidavit filed on 26 May 2026 that it made no acknowledgment of the debt and made no payment in partial liquidation of the debt. These statements are not contested by the Claimant in any of the affidavits filed in this matter. In fact, these statements went unanswered and therefore I have to consider them in the context of the limitation argument.

59. Based on section 32 of the Limitation Act, the recovery of the principal and interest of the mortgaged debt is statute barred arising from the default in May 2009. The

time for recovery is 12 years from the date of default of the principal balance and 6 years for the interest owed. That section provides:

> **32. (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover the proceeds of the sale of land, after the expiry of twelve years from the date when the right to receive the money accrued.**
> **(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiry of twelve years from the date on which the right to foreclose accrued:**
> **Provided that if after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in the mortgagee's possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which that possession was discontinued.**
> **(3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not be deemed to accrue so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.**
> **(4) Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action.**
> **(5) No action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiry of six years from the date on which the interest became due:**
> **Provided that —**
> **(a) where a prior mortgagee or other encumbrancer has been in possession of the property charged, and an action is brought within one year of the discontinuance of such possession by the subsequent encumbrancer, that encumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior encumbrances or damages in respect thereof, notwithstanding that the period exceeded six years;**
> **(b) where the property subject to the mortgage or charge comprises any future interest or life insurance policy and it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money**

secured by the mortgage or charge, interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

60. For completeness I set out section 16 of the Limitation Act arising from section 32(4) of the Act:

> **16. (1) Subject to subsection (2), no action shall be brought by the Crown to recover any land after the expiry of thirty years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through whom the Crown claims, to that person:**
>
> **Provided that the time for bringing an action to which the provisions of this section apply in respect of a cause of action which has accrued before the commencement of this Act, shall, if it has not then already expired, expire at the time when it would have expired apart from those provisions:**
>
> **Provided further that the time when the cause of action would have expired as aforesaid shall not exceed thirty years from the date of commencement of this Act. (2) An action to recover foreshore may be brought by the Crown at any time before the expiry of sixty years from the date of the accrual of the right of action, or of thirty years from the date when the land ceased to be foreshore, whichever period first expires.**
>
> **(3) No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person:**
>
> **Provided that, if the right of action first accrued to the Crown and the person bringing the action claims through the Crown, the action may be brought at any time before the expiry of the period during which the action could have been brought by the Crown or of twelve years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.**

61. In my view, the effect of sections 32(4) and 16(3) of the LA is to prescribe a limitation period of 12 years for a mortgagee to commence "**a foreclosure action in respect of mortgaged land**". It must follow that the right to foreclosure arises from the date of default of the mortgage. In this instant, the **unchallenged** date of default was on or about 26 May 2009. That means therefore that the period to seek foreclosure expired as of 2021. The instant action was commenced in 2023, 2 years after the expiration of the period set out in the LA.

62. In the Claimant's affidavit evidence, no allegation is made that there was an acknowledgement of the debt or a part payment by the Defendant at any time after the default in May 2009. It is accepted that the limitation period can only be extended in such circumstances or where there is an intervening disability. Sections 38, 39 and 40 of the LA provide:

> **38. (1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and —**
> **(a) the person in possession of the land or personal property, acknowledges the title of the person to whom the right of action has accrued; or**
> **(b) in the case of a foreclosure or other action by a mortgagee, the person in possession as aforesaid or any person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment.**
> **(2) Subsection (1) shall apply to a right of action to recover land accrued to a person entitled to an estate or interest taking effect on the determination of an entailed interest against whom time is running under section 24, and on the making of the acknowledgement that section shall cease to apply to the land.**
> **(3) Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor, or his equity of redemption, an action to redeem the land in such mortgagee's possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgement.**
> **(4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment:**
> **Provided that a payment of a part of any rent or interest that is due at any time shall not extend the period for claiming the remainder then due, and any payment of interest shall be treated as a payment in respect of the principal debt.**

(5) Subject to the proviso to subsection (4), a current period of limitation may be repeatedly extended under this section by further acknowledgements or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgement or payment.

39. For the purposes of section 40 —
(a) an acknowledgement shall be in writing and signed by the person making the acknowledgement; and
(b) an acknowledgement or payment may be made by the agent of the person by whom it is required to be made by section 38 and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

40. (1) An acknowledgement of the title to any land, or mortgaged personally, by any person in possession thereof shall bind all other persons in possession during the ensuing period of limitation.
(2) A payment in respect of a mortgage debt by the mortgagor or any person in possession of the mortgaged property shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.
(3) Where two or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, and acknowledgement of the mortgagor's title or equity of redemption by one of the mortgagees shall only bind that mortgagee and that mortgagee's successors and shall not bind any other mortgagees or their successors, and where the mortgagee by whom the acknowledgement is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt, the mortgagor shall be entitled to redeem that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.
(4) Where there are two or more mortgagors, and the title or right to redemption of one of the mortgagors is acknowledged as aforesaid, the acknowledgement shall be deemed to have been made to all the mortgagors.
(5) An acknowledgement of any debt or other liquidated pecuniary claim shall bind the acknowledgor and that acknowledgor's successors but not any other person:

Provided that an acknowledgement made after the expiry of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the acknowledgement.

(6) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect thereof:

Provided that a payment made after the expiry of the period of limitation prescribed for the bringing of an action to recover the debt or other claim shall not bind any person other than the person making the payment and that person's successors, and shall not bind any successor on whom the liability devolves on the determination of a preceding estate or interest in property under a settlement taking effect before the date of the payment.

(7) An acknowledgement by one of several personal representatives of any claim to the personal estate of a deceased person, or to any share or interest therein, or a payment by one of several personal representatives in respect of any such claim shall bind the estate of the deceased person.

(8) In this section the expression "successor" in relation to any mortgagee or person liable in respect of any debt or claim, means that mortgagee's or that person's personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve, whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise.

63. The limitation defence advanced by the Defendant appears to be unimpeachable. Under the LA, a foreclosure action in respect of mortgaged land is treated as an action for the recovery of land. No such action may be commenced after the expiration of 12 years from the date on which the right of action accrued. If the mortgage contains a fixed date for redemption, the right of action accrues at that date. It is generally accepted in law that the action accrues at the time of default (or non-payment).

64. On the accrual of the cause of action, it is widely accepted that it is the date of default or the date of last payment. In **West Bromwich Building Society v Wilkinson and another [2005] 4 All ER 97** Hoffmann LJ said:

[10] I think that Bartlett's case [2002] 4 All ER 544, [2003] 1 WLR 284 was rightly decided. Putting aside actions for the recovery of land, where questions of title are involved, English law attributes periods of limitation by reference to the cause of action which the claimant seeks to enforce. Thus there are periods of limitation for personal injury actions, defamation actions, other actions in tort, actions founded on simple contract, actions on a specialty and so on. This method of classification suggests that ordinarily time will run from the moment when the cause of action designated by the appropriate rule has arisen. It would be strange if the lender could then stop time running by his own act in exercising the power of sale. If, therefore, the cause of action when it arose was a claim to a debt secured on a mortgage, I do not think s 20 ceases to apply when the security is subsequently realised.

[11] The second question is when the right to receive the moneys secured by the mortgage accrued to the building society. That turns upon the construction of certain provisions of the mortgage deed. It contains a legal charge with a proviso for redemption in conventional form. The borrower covenants in cl 4(a) to repay the advance by 'the repayments', which are defined as the monthly sums specified. But the relevant clause is 5(c) and (d):

'(c) The moneys hereby secured shall be deemed to become due within the meaning of section 101 of the Law of Property Act 1925 and all powers conferred on the mortgagee by the said Act or by this Legal Charge shall in favour of a purchaser be deemed to be conferred on and exercisable by the Lender at the expiration of one calendar month from the date hereof.

(d) After the expiration of such period of one calendar month as between the Lender and the Borrower the Lender may exercise such powers on the happening of any of the following events: (i) on the giving to the Borrower by the Lender of a notice in writing requiring payment forthwith of the moneys hereby secured; (ii) if default shall have been made for one calendar month in the payment of some repayment ... hereby secured ... (iii) if the Borrower shall fail to observe or perform any of the rules and regulations of the Lender or any of the

covenants and conditions herein contained; (iv) if the Borrower shall commit any act of bankruptcy or shall abscond or being a body corporate shall have a petition for winding up whether voluntary or compulsory presented by or against it or shall have a receiver appointed; (v) if the Borrower shall pull down waste destroy or in any manner impair or lessen the value of the security or any part thereof; (vi) if the Borrower shall fail to pay any chief ground rent or other sum charged upon the security or shall commit or suffer any breach of any covenant affecting the security.'

[12] Clause 5(c) has to be read against the background of s 101 of the Law of Property Act 1925, to which it refers:

'(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely): (i) A power, when the mortgage money has become due, to sell ... the mortgaged property ... (iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property ...'

As per Lord Scott

[28] The first of the specified events compels, in my opinion, an affirmative answer to the question. The event is 'the giving to the Borrower by the Lender of a notice in writing requiring payment forthwith of the moneys hereby secured'. It is, in my opinion, necessarily implicit in this language that upon the giving of the notice in writing the 'moneys hereby secured' would become payable 'forthwith'. Otherwise the notice would be a dishonest one, suggesting an entitlement to which the giver of the notice, the building society, would not be entitled. As to each of the other events, the implied term would make clear commercial sense but as to the first event it would, to my mind, be positively necessary.

[29] It follows that, in my opinion, the mortgage money outstanding became due and payable by Mr and Mrs Wilkinson one month after they had made default in paying a monthly instalment. For the purposes of the Limitation Act 1980, whether s 8 (an action on a specialty) or s 20 (an action to recover a principal sum secured by

a mortgage), time, therefore, had begun to run well before 9 October 1989 when the building society took possession of the house with a view to its sale. It follows, also, that the building society's claim in this action, which was commenced on 12 November 2002, is statute-barred.

65. After carefully reviewing the affidavit evidence, the Court must conclude that as no evidence was put before the Court that any payment was tendered by the Defendant post the grant of the Possession and Judgment Order on 25 January 2016, and/or after the date of default on 26 May 2009. This being the state of facts before me, I am bound to conclude that the foreclosure proceedings which were commenced in 2023 by the Amended Claim Form was in fact commenced outside of the prescribed limitation period. It must follow therefore that the claim to seek a foreclosure order was statute barred. The Court thereby lacked the jurisdiction to grant the Foreclosure Orders (Nisi and Absolute).

66. The Claimant argued that the failure of the Defendant to plead the limitation defence is a bar to the Defendant relying on it. Mrs. Smith relies on **Ketteman** (supra). In my judgment that authority is not applicable on the facts in light of the import of section 25 of the LA. That section provides:

> **25. (1) At the expiration of the period prescribed by this Act for any person to bring an action to recover land, the estate or interest of that person in the land shall vest in the person who is then in adverse possession of the land within the meaning of section 24.**
> **(2) Where land is held under a lease and the leasehold estate in part only of the land vests in the person under subsection (1), that person (or anyone claiming through that person) and the lessee of the remainder of the land shall share the cost of paying the rent reserved by the lease and the cost of discharging any other obligation under the lease in such proportions respectively as may be agreed by them and the lessor with respect to the rent or, as the case may be, with respect to the other obligation.**
> **(3) If a dispute arises regarding the apportionment of costs under subsection (2), any of the parties mentioned in that subsection may refer the dispute to the court for decision and the decision of the court shall be final and binding upon all the parties.**
> **(4) This section shall have effect subject to subsections (1) and (2) of section 21[3].**

67. For completeness I also set out section 24 of the LA:

[3] **That section deals with land held upon trust.**

24. (1) For the purposes of this Act, a right of action to recover land shall not accrue and shall not be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession").

(2) Where under the foregoing provisions any right of action to recover land is deemed to accrue on a certain date and no person is in adverse possession of the land on that date, the right of action shall not accrue unless the land is thereafter taken into adverse possession, in which case the right of action shall be deemed to accrue at the commencement of the adverse possession.

(3) Where a right of action to recover land has accrued and thereafter, but before the right is barred by this Act, the land ceases to be in adverse possession —

(a) the former adverse possession shall for the purposes of this Act have no effect; and

(b) if the land is again taken into adverse possession a fresh right of action shall be deemed to accrue at the commencement of that adverse possession.

(4) For the purposes of this section —

(a) possession of land subject to a rentcharge by a person (other than the person entitled to a rentcharge) who does not pay the rent shall be deemed to be adverse possession of the rentcharge; and

(b) in such a case as is referred to in subsection (2) of section 23 receipt of rent under a lease by a person wrongfully claiming the land in reversion shall be deemed to be adverse possession of land.

(5) For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that such person's occupation is by permission of the person entitled to the land merely by virtue of the fact that such person's occupation is not inconsistent with the present or future enjoyment of the land by the person entitled.

(6) Subsection (5) shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case.

68. Section 25 of the LA has the effect of vesting the title in the land to the person in adverse possession. The section therefore does not require a defendant to plead

the limitation defence or to seek a declaration from the court. He is in effect the landowner and has the right to remain in possession of the land by operation of the period of his possession and of the law. This was confirmed by the Court of Appeal in **Fairness Ltd v Bain et al (SCCivApp No 30 of 2015)** and by the Privy Council in **Keith Rolle & Anr v Raymond Meadows [2025] UKPC 25**. I set out below paragraph 19 of the Privy Council's decision in **Keith Rolle & Anr (supra)**:

> **19. The Court of Appeal departed from its earlier decision in *Fairness* which had held at para 41 that "...adverse possession gives no interest or title unless or until it is declared by the Supreme Court on the conclusion of an investigation under the [QTA]. Before such title is declared, possession of the land remains just that...". The Court of Appeal, after observing that this view completely ignored section 25(1) of the Limitation Act, at para 46, concluded: "The vesting of title in the trespasser operates as a matter of law and does not require a grant of a Certificate of Title under the [QTA] or any action for declaratory relief in an ordinary action in the Supreme Court." In the Board's view, the Court of Appeal was right to so hold. To require a process under the QTA as a first step or precondition to utilising section 16(3) of the Limitation Act as a defence would negate the use of section 16(3), for which it is designed, as a defence to an action for recovery.**

69. I also quote from the decision of the Court of Appeal in **Keith Rolle & Anr. v Raymond Meadows SCCivApp. No. 128 of 2020**. Barnett P (as he then was) said:

> **22. In Halsbury Laws of England Vol 28 (4th ed) the learned authors state:**
> **"919. Operation of the Act. The Limitation Act 1980 prescribes a normal limitation period of 12 years from the date on which the right of action accrued for actions for the recovery of land, with longer periods in a number of special cases.**
> **An action to recover land is an action to obtain any land by judgment of a court and is not limited to actions which claim possession. A foreclosure action by a mortgagee is treated as an action to recover land; other types of action by a mortgagee are treated as actions to recover money charged on land and are dealt with subsequently in this title.**
> **After the prescribed period has expired, the title of the person whose action has been time-barred is**

extinguished. As the law regards possession of land as evidence of seisin the effect of barring the true owner's right is to make the possessor's title an absolute one and such a title, if proved, can even be forced on a purchaser. Once the true owner's title has been barred no subsequent acknowledgment can revive his right."

...

33. The combined effect of sections 16(3) and 25(1) of the Limitation Act, 1995 extinguishes a landowner's title if he has been dispossessed by the adverse possession of a trespasser.

...

36. In the result, ex facie, this is a claim to recover land and if the appellants had been in adverse possession for a period of 12 years immediately preceding the issue of the Writ, the respondent's title would have, by operation of law, been vested in the appellants and the respondent would have had no right to the relief of vacant possession nor to damages for trespass.

...

46. The vesting of title in the trespasser operates as a matter of law and does not require a grant of a Certificate of Title under the Quieting Titles Act or any action for declaratory relief in an ordinary action in the Supreme Court. If in an action for trespass or possession the court finds as a fact that the defendants were in exclusive possession for twelve years immediately preceding the commencement of the action the courts can find that the plaintiffs title and right to possession has been defeated.

...

56. It is settled law that time does not stop running until a writ was issued.

70. On the facts before me, the Defendant defaulted on the mortgage as of 26 May 2009. The Possession and Judgment Order was obtained on 25 January 2016 (and filed on 1 February 2016 in Action 2014/CLE/gen/01030). It is apparent on the evidence before me that the Defendant remained in occupation of the mortgaged property after the date of default in May 2009 and even after the grant of the Possession and Judgment Order. The acts of the Defendant on and over the mortgaged property is evident by the lease to Ian Jupp in December 2020. After the period of 6 years to enforce the judgment debt expired, the Defendant remained in occupation of the mortgaged property. The Defendant's possession of the mortgaged property did not cease after its default, and it appears that it remained in continuous occupation of the property. The Claimant on the evidence before me did not disturb the Defendant's occupation until it received an injunctive Order to evict Ian Jupp from the property, but that did not occur until July 2023.

The fact that the Defendant remained in occupation after its default in May 2009 and continued to occupy the mortgaged property until July 2023 led me to my findings on the evidence that the periods to enforce the judgment debt and to seek foreclosure of the mortgaged property expired by the time this action was filed.

71. Having so found that the limitation defence prevail, I am confined to dismiss the action and strike it out as being frivolous vexatious and an abuse of the Court's process pursuant to CPR Parts 1.2 and 26.3 (see **Glenard Evans v Airport Authority 2022/CLE/gen/01521** and see **Partco Group Ltd v Wragg [2002] EWCA Civ 594).** The Rule is as follows:

> **26.3 Sanctions – striking out statement of case.**
> **(1) 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 be struck out is prolix or does not comply with the requirements of Part 8 or 10.**

72. The submissions on the issue of merger and res judicata were similarly entertaining legal arguments, however; in light of the ruling above on the effect of the Limitation Act, I do not think it necessary to extensively address them in this ruling.

73. In respect of the arguments on merger, Card-Stubbs J. in **RBC Royal Bank (Bahamas) Limited v Deals Bus Service Limited& Anr. – 2022/CLE/gen/1000** addressed the doctrine of merger. She quoted from the decision of **Virgin Atlantic Airways Ltd. v Zodiac Seats UK Ltd. (2013) UKSC 46**. Card-Stubbs J. did not find that the doctrine of merger applied on the facts before her in relation to the claims for possession and the appointment of a receiver manager. She however applied the doctrine to strike out the claimant's claim for monetary remedies under the mortgage. She made the following statements at paragraphs 31 to 34 (inclusive) of the Ruling:

> **31.The doctrine provides that where judgment has been given in an action, the cause of action merges in that**

judgment so that the judgment stands in its place. Having moved on the cause of action for relief and having received a judgment in relation to that relief, the cause of action is said to be merged in the judgment. I believe that the effect of the principle is that the party with the judgment must now have recourse to the judgment. The cause of action has been adjudicated upon and the party's rights then flow from the judgment.

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

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

34.In this case, the Claimant has been at pains to indicate that the reliefs sought in the 2022 action include vacant possession and a declaration of the right to exercise the power of sale. I find that the Claimant is not estopped from pursuing these reliefs. These reliefs were not sought in the 2011 action nor pronounced upon. The Claimant is entitled to pursue these reliefs in the 2022 action. 35.The Claimant is estopped, as a result of the doctrine of merger, from pursuing any action for monetary damages. That cause of action was litigated upon, and that relief granted, in the earlier proceedings. The Claimant cannot by way of this 2022 action re-assert that same claim in these subsequent proceedings. Any action to recover such damages must be by way of enforcing the 2011 judgment which the Claimant already holds.

74. In **Gateway Ascendancy Ltd. v Patrick Livingstone Hanna & Ors 2024/CLE/gen/00085** Darville-Gomez J found that the doctrine of merger applied to prevent the claimant from commencing a second action for foreclosure after 10 years of securing judgment in an earlier mortgage action. The facts are fairly similar to the facts before me, but for the colour of the history of litigation between the parties. She quoted from the recent UK Supreme Court decision in **Zavarco Plc v Nasir [2025] UKSC 5**.

75. In **Zavarco (supra)** the UK Supreme Court decided that the doctrine of merger did not extend to declaratory judgments. In the course of the decision, the Court made some helpful statements on the doctrine of merger that I set out below:

> **34 Going back in time to an age in which causes of action were divided into categories according to the form of action by which the remedy was obtained, in *Putt v Royston* (1692) 2 Show KB 211; 89 ER 896 it was held that a judgment in favour of a defendant in an action of trespass barred an action by the claimant in trover in relation to the same property and one sees an emphasis being placed on the identity of the factual basis of each action. The Lord Chief Justice (Sir Francis Pemberton) stated (p 213):**
> **"Where the same evidence will maintain one or the other, there without question a bar in the one will be so in the other, as in *Ferrer's case* [(1597) 6 Co Rep 7] but where the evidence will not, it is otherwise."**
>
> **This judgment was not a case of merger but the application of the doctrine of res judicata to defeat a duplicative claim which sought to contradict a prior judgment. Although this was concerned with a different legal issue, the approach is consistent with Brennan J's discussion (see para 36 below) of the circumstance where a claimant has a right to remedies on different legal bases and where the obtaining of a judgment on one legal basis bars recovery of a further judgment on the same facts on another legal basis.**
>
> **35 More recently, in *Letang v Cooper* [1965] 1 QB 232, 242-243 ("*Letang*") in an often-cited passage Diplock LJ defined a "cause of action" as:**
> **"simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."**

This definition covers both the factual situation and the entitlement to obtain a remedy from the court. In *Clark* (above) Arden LJ, in explaining the doctrine of merger at para 4, adopted Diplock LJ's approach in *Letang* to the meaning of a "cause of action".

36 In an Australian case on *Henderson v Henderson* abuse of process and, alternatively, merger, *Port of Melbourne Authority v Anshun Proprietary Ltd* (1981) 147 CLR 589, Brennan J, who analysed the case as involving merger, stated at p 610:
"There is an imprecision in the meaning of the term cause of action, which is sometimes used to mean the facts which support a right to judgment ... sometimes to mean a right which has been infringed ... and sometimes to mean the substance of an action as distinct from its form ... Imprecision in the meaning of cause of action tends to uncertainty in defining the ambit of the rule that a judgment bars subsequent proceedings between the same parties on the same cause of action."

He addressed case law which treated cause of action to mean a right and case law which treated the concept to mean the facts which support a right to judgment. He then considered a circumstance where the same facts support rights to different remedies against the same defendant. He continued (p 612):
"Accordingly, inconsistency between judgments against the same defendant is avoided by the merger in the judgment first recovered of the right to the remedy thereby given and of all other rights which arise on the same facts. Thus, a plaintiff who recovers a judgment for damages in assumpsit is precluded from recovering a judgment for damages in tort arising out of the same facts ... a principal who recovers a judgment for damages in fraud against his bribed agent is precluded from recovering a judgment in the amount of the bribe as moneys had and received to his use ... and a party whose goods have been wrongfully seized and who recovers in replevin, is precluded from recovering a judgment for damages in trespass to goods ... ."

37 In the context of the doctrine of merger, in my view, the concept of a cause of action which is extinguished by the obtaining of a judgment involves the right to a remedy in the given factual circumstances: see *Serrao v Noel*

(1885) 15 QBD 549, Bowen LJ at pp 559-560; and *Conquer v Boot* [1928] 2 KB 336, Sankey LJ at pp 339, 342-343, Talbot J at p 343. The two cases from the Court of Appeal of Victoria, Australia, to which reference was made in the appellant's written case – *King v Lintrose Nominees Pty Ltd* [2001] VSCA 140; 4 VR 619 and *Sahin v National Australia Bank Ltd* [2012] VSCA 317 – are consistent with this analysis. So also is the judgment of the Court of Appeal of British Columbia in *Dhillon v Jaffer* 2016 BCCA 119, which is an application of the doctrine of merger to prevent an action for damages for breach of fiduciary duty where a claimant has already recovered damages for negligence arising out of the same facts. The facts are the facts and cannot be extinguished by a judgment. It is the right to claim a further remedy arising from those factual circumstances and not the factual circumstances themselves, that the first judgment extinguishes by creating *an obligation* of a higher nature.

76. It seems to me that there will be no inconsistency in decisions in a foreclosure action and a money judgment arising from a default under the mortgage. The two causes of action flow from the default under the mortgage deed and there is no procedural or substantive reason why the two remedies cannot be pursued simultaneously. By electing to sue on a breach of the covenant to pay and seeking an order for delivery of possession of the mortgaged property, the mortgagee appears to have elected its remedies in that action.

77. There are competing Supreme Court decisions in this jurisdiction on the doctrine of merger. Neither decision was yet argued before the Court of Appeal. This Court being a court of concurrent jurisdiction, I am not bound by either decision. However, I must say solely for academic purposes that I prefer the decision of Darville Gomez J. in **Gateway Ascendancy Ltd. v Patrick Livingstone Hanna & Ors 2024/CLE/gen/00085**. Based on that decision if I had not rule that the claim was statute barred, I therefore would have also found that the doctrine of merger applies in this matter.

Conclusion

78. In light of the findings and observations above, I hereby exercise my discretion to re-open the Foreclosure Orders.

79. I also find that and occasioned by the expiration of the limitation periods to enforce the judgment debt and to seek foreclosure, the Claimant's Claim is frivolous and vexatious and thereby I grant the strike out application.

80. Based on my findings and the conclusions set out above, and as costs follow the event, I award costs occasioned thereby to the Defendant to be assessed by the Registrar in the absence of agreement.

DATED this 29 day of June 2026

RS Rigby J. Acting.

Raynard S Rigby KC
Acting Justice