

**IN THE COMMONWEALTH OF THE BAHAMS**  
**IN THE SUPREME COURT**  
**2024/ CLE/GEN/00085**

**BETWEEN**

**GATEWAY ASCENDANCY LTD.**

**Claimant**

**AND**

**PATRICK LIVINGSTONE HANNA**

**DR. AVERY VERNICE HANNA**

**ZOPHIM ENTERPRISES LIMITED**

**Defendants**

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Ms. Akeira Martin for the Claimant  
Mr. Philip McKenzie, KC and Ms Lenthala Culmer with him for the Defendants

Hearing Date: 12<sup>th</sup> November, 2024

*Civil-Mortgage - Breach of covenant to pay – Original Mortgagee obtained judgment for sums due under the Mortgage and Vacant Possession- Original Mortgagee subsequently assigned Mortgage - Enforcement of Judgment by Assignee – Writ of Possession obtained by new Mortgagee set aside – No appeal lodged by Mortgagee – New action commenced by Mortgagee for Foreclosure – Striking Out - Whether new action discloses no reasonable cause of action – whether Frivolous - Vexatious - Abuse of process - Part 26.3(1)(b) and Part 26.3(1)(c) of the Supreme Court Civil Procedure Rules*

**RULING**

**Darville Gomez, J**

**Introduction**

[1.] This action was commenced by way of Fixed Date Claim filed on 31<sup>st</sup> January, 2024 for the continued breach of the mortgage between the Defendants and the Claimant. The Claimant (sometimes referred to as “Gateway Ascendancy”) sought foreclosure and costs. Scotiabank (Bahamas) Limited in 2014 (the “Bank”) had originally commenced an action against the Defendants for vacant possession and sums due and owing pursuant to the

mortgage (the “Original Action”). The Bank obtained both judgment and vacant possession against the Defendants in January, 2015 (the “2015 Judgment”).

- [2.] Both actions were predicated on a mortgage dated 22<sup>nd</sup> March, 2007 for \$750,000 with the Defendants over property located in New Providence.
- [3.] For reasons that will be explained later, Gateway Ascendancy had been substituted as the Judgement Creditor in the Original Action, however, it was unsuccessful in its attempt to enforce the January, 2015 judgment. Therefore, the instant action was commenced in 2024 (the “Second Action”).
- [4.] The Defendants have applied to strike out the Second Action on the grounds that it discloses no reasonable grounds for bringing the claim against them and/or the claim is frivolous, vexatious scandalous and an abuse of process based on the Claimant’s failure to enforce the order for judgment granted on 28th January, 2015 against them during the six-year period for the enforcement of a judgment.
- [5.] For the reasons hereinafter set out, I agree that the Second Action is an abuse of process and I accede to the Defendants’ application to strike it out pursuant to Part 26.3(c) the Supreme Court Civil Procedure Rules (the “CPR”) and award them costs to be paid by the Claimant to be assessed by the Court on the papers.

### **Background and History**

- [6.] By an Originating Summons in action number 2014/CLE/gen/00104 filed on 30<sup>th</sup> January, 2014, the Bank claimed the following reliefs:
  - (1) Payment of moneys secured by the mortgage.
  - (2) An Order directing the mortgagors to deliver up possession of the mortgaged property unto the mortgagee within 28 days of the Order.
  - (3) Further or other relief.
  - (4) That provision be made for costs of this application.

### **PARTICULARS PURSUANT TO ORDER 73, RULE 2 OF THE RULES OF THE SUPREME COURT**

#### **AS REGARDS THE MORTGAGE**

- (i). The Mortgage was initially made on or about the 22<sup>nd</sup> day of March 2007.
- (ii). The amount of principal actually lent was the sum of \$750,000.00.
- (iii). The interest charged on the Mortgage is 6.0% and is accruing at a daily per diem of \$115.36.

- (iv) The contract for repayment of the Loan was originally made on or about the 29<sup>th</sup> day of March, 2007 and was signed by the Defendants.
  - (v) A copy of the said contract was delivered to the Defendants on or about the 29<sup>th</sup> day of March 2007.
  - (vi) The amount of principal repaid on the Mortgage as at the date hereof of \$48,211.69.
  - (vii) The amount of principal due but unpaid on the Mortgage as at the 7<sup>th</sup> day of November, 2013 is \$751,564.65.
  - (viii) The amount of interest but unpaid on the said outstanding principal sum as at the 7<sup>th</sup> day of November, 2013 was \$147,695.47.
  - (ix) By reason of the foregoing, the Defendants are indebted to the Plaintiff as at the 7<sup>th</sup> day of November 2013, in the amount of \$899,720.12
  - (x) Interest continues to accrue on the said unpaid principal sum of \$751,564.65 at the daily per diem rate of \$115.36 from the 7<sup>th</sup> day of November 2013, to the date of payment or Judgment.
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[7.] The Bank obtained a Judgment against the Defendants a year later, on 28 January, 2015 on the following terms:

- “1. That the Order for Vacant Possession is granted and suspended until the 4<sup>th</sup> May, A.D, 2015.
2. That the Defendants shall pay the sum of \$ 899,720.12 on or before the expiration of the suspension period filing which the Defendants shall deliver possession to the Plaintiff of All That piece parcel or lot of land comprising Thirteen Thousand and Seven (13,007) square feet being the Northern portion of Lot Number Sixteen (16) situate on the Southern Side of the B.E.C. Waveline and approximately 1,200 feet East of South Ocean Boulevard in the Western District of the Island of New Providence which said piece parcel or lot of land has such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to an Indenture of Conveyance dated the 29<sup>th</sup> day of November, A.D., 2001 made between Whitney Daniel Scavella and Robert Taylor and now recorded in the Registry of Records in the City of Nassau in Volume 9269 at pages 294 to 300 and thereto coloured pink.
3. That failing payment by the Defendants as stipulated herein, the Plaintiff shall take vacant possession and shall be at liberty to sell the said property pursuant to Order 77 of the Rules of the Supreme Court 1978 and to exercise its Power of Sale pursuant to Chapter 138 Section 22 of the Conveyancing and Law of Property act forthwith after the expiration date of the 4<sup>th</sup> day of May, A.D., 2015.

[8.] After judgment had been obtained the Bank successfully applied by Ex Parte Summons filed on 19 January, 2021 to make Gateway Ascendancy a party to the Original Action and that the proceedings be carried on as if Gateway Ascendancy had been substituted for the

Bank pursuant to Order 15, Rule 8(2) of the Rules of the Supreme Court (the “Substitution Order”).

- [9.] A Writ of Possession was obtained by the Bank on 14 November, 2016 (the “First Writ of Possession”).
- [10.] The Substitution Order was granted on 21 January, 2021, six years after the Judgment had been obtained against the Defendants.
- [11.] A Writ of Possession in the name of Gateway Ascendancy was filed on 11 August, 2021, over six months after the substitution Order and over six years after the Judgment had been obtained against the Defendants (the “Second Writ of Possession”).
- [12.] The Defendants made an application that the Second Writ of Possession filed on 11 August, 2021 and all proceedings thereunder be set aside ex debito justitiae as the same was a nullity.
- [13.] The Honourable Chief Justice Sir Brian M. Moree, kt (as he then was) in a written decision dated July 29, 2022 (the “2022 Ruling”) ordered as follows:
- “1. The Writ of Possession filed herein on the 14<sup>th</sup> November, 2016 is hereby set aside;
  2. The Writ of Possession filed herein on the 11<sup>th</sup> August, 2021 is hereby set aside.
  3. The costs of and occasioned by the application is to be paid to the Defendants by the Plaintiff to be taxed if not agreed.”
- [14.] Gateway Ascendancy did not appeal this Order.
- [15.] Instead, Gateway Ascendancy commenced the Second Action by a Fixed Date Claim Form filed on 31 January, 2024 for the following reliefs:
1. The Claimant, Gateway Ascendancy Ltd. claims the following relief as against the Defendants, Mr. Patrick Livingstone Hanna, Dr. Avery Vernice Hanna and Zophim Enterprises Ltd. (the “Defendants”) as a result of their continued breach of the Indenture of Mortgage made 22<sup>nd</sup> March 2007 between the Defendants of the one part and Scotiabank (Bahamas) Limited of the other part whereby certain property more particularly described herein was granted and conveyed to the Bank in order to secure the amounts set out herein for repayment:
    - a. Enforcement of the mortgage by Foreclosure.
    - b. Costs; and
    - c. Further or other relief as deemed just and expedient.

## The Application

[16.] The Defendants applied by Notice of Application to strike out (the “Strike Out application”) the Claimant’s action on the basis that its claim discloses no reasonable ground for bringing the claim against them and/or the claim is frivolous, vexatious scandalous and an abuse of process based on the Claimant’s failure to enforce the order for judgment granted on 28<sup>th</sup> January, 2015 during the six-year period for the enforcement of a judgment.

[17.] The Defendants’ application was supported by an affidavit of the First Defendant, Patrick Hanna who had this to say:

“3. I make this Affidavit in response to the fixed date claim form filed by the Claimants on 31<sup>st</sup> January, 2024 and in support of the relief prayed for in the Defendant’ Notice of Application for Strike out of the Claim filed before this Honourable Court in the cause on the following grounds:

- a. The Statement of Claim discloses no reasonable ground for bringing the claim; and/or
- b. The Statement of Claim is frivolous, vexatious, scandalous and an abuse of the court process.

4. The Claimant filed a fixed date Claim form on 31<sup>st</sup> January, 2024 for enforcement of the mortgage loan by Foreclosure.

5. The Claimant claims that the Defendants are in breach of the covenant to pay under the mortgage and further that the balance due and owing on the mortgage is the total sum of \$1,421,007.74 (inclusive of interest, additional charges and accrued interest on the additional charges) as at 12<sup>th</sup> December, 2023.

6. The Claimant (previously Scotiabank) on the 30<sup>th</sup> January 2014 initiated a previous action in the Supreme Court (Action Number 2014/CLE/GEN/00104) against the Defendants for inter alia the enforcement of the mortgage and an Order for Judgment against the Defendants was obtained on the 29<sup>th</sup> January, 2015. The terms of the Judgment Order were as follows:

- a. Defendants to pay the sum of \$899,720.12 on or before 4<sup>th</sup> May, 2015 failing which the Defendants were to deliver to the Plaintiff vacant possession of the property...
- b. ...Plaintiff given liberty to sell the property pursuant to Order 77 of the RSC and exercise its Power of Sale pursuant to Chapter 138 section 22 of the Conveyancing and Law of Property Act.

It is now shown and produced to me at TAB 1, a copy of the said Order.

7. Scotiabank sought to enforce the Order for vacant possession contained in the 2015 judgement by the filing of a Praecipe for a Writ of Possession on the 24<sup>th</sup> October, 2016.

8. Scotiabank transferred the Mortgage to Gateway Financial Ltd. by way of Deed of Transfer dated 31<sup>st</sup> October, 2016. On the 19<sup>th</sup> February 2021 Gateway Financial Ltd. transferred all of its rights title and interest in the mortgage to the Claimant.
  9. The Claimant filed a Praecipe for the Issuance of a Writ of Possession on the 22<sup>nd</sup> June 2021 which was served on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the 31<sup>st</sup> December 2021.
  10. The Defendants then made an application for the said Writ of Possession and all proceedings thereunder to be set aside. It is now shown and produced by me at TAB 3 of PLH-1 a copy of the Amended Summons.
  11. On the 29<sup>th</sup> July, 2022 Sir Brian Moree, Chief Justice (as he then was) handed down his decision in the action 2014/CLE/GEN 00104 setting aside the Writ of Possession filed 11<sup>th</sup> August, 2021 and all proceedings thereunder. It is now shown and produced by me at TABS 4 and 5 of PLH-1 a copy of the said Order and Reasons for Decision.
  12. The Claimants did not appeal the decision and the requisite time to do so has expired.
  13. By virtue of the 2014 action and subsequent 2022 Court Ruling all other remedies to enforce the Mortgage in favour of the Claimant are Res Judicata.
  14. Contrary to the Claimant's assertion that the amount due on the mortgage loan is in excess of \$1 million as at December 2023 the Defendant do not owe funds on the mortgage debt. Any funds owing on the mortgage debt were merged into the Judgment dated 28<sup>th</sup> January 2015. Thereby extinguishing the mortgage debt.
  15. Similarly the Claimants are unable to take possession or bring any action to enforce possession of the premises by virtue of the 2015 and 2022 rulings. By these rulings the Claimants are effectively estopped from claiming rights of possession in subsequent proceedings.
  16. In order to obtain an Order for foreclosure the Claimant must be able to demonstrate that there is a sum due and owing on the mortgage and also must be able to take possession of the mortgaged premises.
  17. I verily believe that the Claimants are unable to meet the prerequisites for an Order for foreclosure based on the 2015 and 2022 rulings.
  18. As a result of the foregoing, the Claimant's claim for Foreclosure is unsustainable as a matter of law and is therefore an abuse of the Court's process."
- [18.] The Claimant has opposed the Strike Out application and filed an affidavit in support sworn by Byran Woodside on 29<sup>th</sup> October, 2024 and an affidavit of Allan Butler filed on 31<sup>st</sup> January, 2024.
- [19.] In the affidavit of Mr Woodside, he had this to say:
- "3. In my capacity I am duly authorized to make this affidavit in opposition to the Defendants' Notice of Application filed 11<sup>th</sup> April, 2024 seeking to strike out

Gateway's Fixed Date Claim Form filed 31<sup>st</sup> January 2024 seeking foreclosure against the Defendants (the "Strike-Out Application").

4. I also make this affidavit in response to the Affidavit of Patrick Hanna filed 11<sup>th</sup> April 2024 (the "Hanna Affidavit").
5. Gateway denies the assertions at paras. 13-16 of the Hanna Affidavit that because of the Ruling of the Hon. Mr. Justice Brian Moree CJ (as he then was) made on 29<sup>th</sup> July 2022 as set out in his written Ruling dated 3<sup>rd</sup> January 2024, all other remedies to enforce the Mortgage are Res Judicata.
6. By Clause 6 of the Mortgage, it was agreed between the parties as follows:  
"6. IT IS HEREBY FURTHER AGREED AND DECLARED as follows:  
  - (3) That no neglect or omission on the part of the Bank to take advantage of or enforce any right or remedy arising out of any breach non-observance or non-performance of any covenant or condition herein contained or implied shall be deemed to be or operate as general waiver of such covenant or condition or prejudice the right of the Bank in effecting or taking advantage thereof whether original or recurring.
  - (4) The taking of a judgment or judgments and any covenant or covenants herein contained shall not operate as merger of the said covenant or covenants or affect the Bank's right to interest at the rate and times herein set forth."
7. In the circumstances, Gateway is not estopped from commencing an action against the Defendants for foreclosure of their breach of the covenant to pay which is a recurring breach.
8. I verily believe that the Mortgage Debt has not been extinguished.
9. Moreover, a mortgagee is not required to enforce all the remedies provided to it at one time. Therefore, any argument that Gateway is unable to enforce any other remedy as a mortgagee against a mortgagor amounts to an absurdity.
10. In the circumstances, Gateway humbly requests that the Strike-Out Application be dismissed and that leave be granted to amend the Foreclosure Application to include Clause 6 for the Court's interpretation of these Clauses under the Mortgage.

[20.] Allan Butler had this to say in his affidavit:

2. In my capacity as the General Manager, I am duly authorized to make this Affidavit on behalf of Gateway, in support of its Fixed Date Claim Form filed 15<sup>th</sup> December, 2023 (the "Claim Form") to exhibit the documents

referred to therein as required by Part 62 Rule 62.4 of the Civil Procedure Rules, 2022.

3. Save as is herein expressly stated, the matters deposed to herein are within my personal belief and knowledge and are true. The matters not within my personal knowledge are known to me from information obtained by me in my aforesaid capacity, or derived from files, statements or documents which I have reviewed in my aforesaid capacity and the same are true to the best of my knowledge.
4. I rely on the definitions as set out in the Claim Form filed.
5. There is now produced and shown to me marked Exhibit “AB-1” a true copy of the Mortgage which is referred to as paragraph 2 of the Claim Form.
6. There is now produced and shown to me marked Exhibit “AB-2” a true copy of the Deeds of Transfer dated 31<sup>st</sup> October 2016 and 19<sup>th</sup> February 2018 respectively which are referred to at paragraph 5 of the Claim Form.
7. There is now produced and shown to me marked Exhibit “AB-3” a true copy of the 18<sup>th</sup> November, 2022 letters and the service receipts confirming service on the Defendants which are referred to at paragraph 10 of the Claim Form.
8. There is now produced and shown to me marked Exhibit “AB-4” a true copy of the Claimant’s Statement of Account which set out the figures presented at paragraph 11 of the Claim Form.

#### **Defendant’s submissions**

##### *Circumstances in which a Statement of Case may be Struck out*

- [21.] The CPR Part 26.3 provides the circumstances where a Statement of Case may be struck out and the Defendants sought to rely on 26.3(1) (b) and 26.3(1)(c) which reads as follows:
- (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.
- [22.] Additionally, they referred to **Walsh v Misseldine [2000] CPLR 201** where the court was reminded to keep the overriding objective in mind. Further, reliance was placed on **Purdy v Cambran [1999] Lexis Citation 4011**.

*Reasonable Cause of Action*

[23.] The Defendants then examined the miscellany of authorities on the various circumstances where it may be appropriate to summarily dispose of an action including: **Partco Group Ltd. v Wragg [2002] EWCA Civ 594; Orlean Clarke et al v Kathleen Barry, SCCivApp no. 99 of 2019**. In the latter case, Sir Michael Barnett, President of the Court of Appeal considered an application to strike out under the former Rules of the Supreme Court, Order 18, rule 19.

[24.] They submitted that the law with respect to striking out a claim as disclosing no reasonable cause of action is quite settled. They noted that:

“12. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. See White Book (1999) edition, Notes 18/19/10.

13. Thus it is only in very clear and obvious cases should the court strike out an action on the ground that it discloses no reasonable cause of action.

*Res Judicata and Abuse of Process*

[25.] They submitted that it is settled law that a cause of action is extinguished once a judgment is pronounced by way of the doctrine of Merger. They relied on **Virgin Atlantic Airways Ltd. v Zodiac Seats UK Ltd (2013) UKSC 46**.

*Foreclosure*

[26.] They submitted that in order for the Defendants to obtain foreclosure the Claimant must demonstrate two things: (i) that there are sums due and owing on the mortgage; and (ii) that they are able to take possession of the mortgaged premises.

[27.] The Defendants submitted that this case is suitable for strike out pursuant to part 26.3(1)(b) of the CPR.

[28.] They referred to the decision of the Honourable Chief Justice Sir Brian M. Moree, kt (as he then was) in action 2014/CLE/gen/00104 where he set aside the Second Writ of Possession filed on 11 August, 2021 and all proceedings thereunder. They submitted that Gateway Ascendancy did not appeal that decision and the time for the filing of an appeal has expired.

- [29.] Instead, they say that Gateway Ascendancy commenced the instant action (a new action) for foreclosure on the basis that the Defendants owe in excess of \$1 million on the mortgage debt when calculated to December 2023. The Defendants submitted that this is factually incorrect because the mortgage debt no longer exists because any funds owing on the mortgage debt were merged into the Judgment dated 28<sup>th</sup> January, 2015, thereby extinguishing the mortgage debt. Further, they submitted that the enforcement of the 2015 Order is now statute barred.
- [30.] Similarly, they asserted that the Claimants are unable to take possession or bring any action to enforce possession of the premises by virtue of the 2015 Judgment and 2022 Ruling. The effect of these they say have effectively estopped Gateway Ascendancy from claiming rights of possession in subsequent proceedings.
- [31.] They contend that Gateway Ascendancy is barred from the remedy of foreclosure because they are unable to satisfy the first requirement for an order of foreclosure which is an account of sums due and owing on the Mortgage debt.
- [32.] While they have accepted that a mortgagee can pursue all of the remedies available to them under the Act concurrently or consecutively, in the instant action, Gateway Ascendancy can no longer pursue foreclosure because of the 2015 Judgment and 2022 Ruling, the requirements for foreclosure, viz., the existence of a mortgage debt, possession are Res Judicata.
- [33.] For these reasons, they have submitted that on the face of the pleadings before the Court it is plain and obvious that the claim for Foreclosure is unsustainable as a matter of law and is therefore an abuse of the Court's process.

### **Claimant's Submissions**

#### *Gateway's opposition to the Strike-Out Application*

- [34.] Gateway denies that the claim as set out in its Claim Form discloses no reasonable ground for bringing the claim against the Defendants and/or that the claim is frivolous, vexatious, scandalous and an abuse of process for the following reasons:
- “9.1 The 2015 Judgment was awarded on the 28 January 2015. Despite a judgment being awarded the Defendants last payment made by them was on 25 April, 2016 (the “April 2026 Payment”). This payment would not have been included in the sums awarded in the 2015 judgment. Therefore, failure to pay after the April 2016 Payment gave rise to a breach and accrual of the right of Gateway to bring a foreclosure action. The 25<sup>th</sup> April payment would have also revived the cause of action for payment.
- 9.2 Neglect or omission to enforce a right or remedy arising out of a breach of a covenant is not a waiver thereof whether original or recurring and the taking of a judgment on any covenant is not a merge of the covenant.

*The right of a mortgagee to bring a foreclosure action accrues on the date of payment*

10. The 2015 Judgment was awarded on the 28 January, 2015. The 25<sup>th</sup> April Payment was made a year after the Order was made (See Statement of Account exhibited at Exhibit “A4” of the Butler Affidavit).
11. Section 38 of the Limitation Act states,  
  
“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.”
12. Accordingly, the right to bring a foreclosure action accrued after the Defendants failed to make anymore payments after the 25<sup>th</sup> April and the Claim Form was filed within the twelve (12) year period to bring an action for foreclosure.
13. Moreover, a mortgagee has the right to enforce any remedy consecutively and not concurrently, although it may do so if it wishes.
14. This was confirmed by Card-Stubbs J, in **RBC Royal Bank (Bahamas) Limited v Deals Bus Service Limited 2022/CLE/gen/1000** where at paragraph 59 of her decision she stated:  
  
*“59. The law is that a party is also usually estopped from proceeding with further litigation to claim relief that he could have claimed in a previous matter concerning the same cause of action. However, in mortgage actions the nature of a mortgage is that a mortgagee has several independent reliefs and he may pursue those together or separately. I accept that the correct principle of law is that he can pursue them concurrently or consecutively. I do not find that the entirety of the 2022 action amounts to matters res judicata.”*
15. The right to obtain the 2015 Judgment was a common law right and the right to commence the foreclosure action is an equitable right afforded to Gateway as mortgagee. They are two distinct actions.
16. Ganpatsingh JA confirmed this distinction in **Citibank, N.A. v Major [2001] BHS J. No. 6** in delivering the judgment of the Court,

*"21 In Alliance Perpetual Building Society v Belrum Investments, Ltd. (1957) 1 AER 635 at p. 64 Harman J observed that the procedure for possession is a remedy to which the mortgage is entitled as of right. It has nothing to do with the enforcement of the mortgage debt nor with foreclosure, which are distinct actions on the security. It is usually designed however to enable the mortgage to exercise his power of sale, which can only be done with advantage if vacant possession can be offered. The receipt of profits or rent earned on a lease therefore, is not a receipt of sum in respect of principal or interest which could be taken as security for the debt due on default. See Harlock v Ashberry (1882) 19 CH D 539. In any event, I know of no authority which recognizes a power in the Court to impose a burden on a mortgage to discover a source of income to meet the mortgagor's liability and until unliquidated claim by the mortgagor is successful, whenever that may occur, which put the mortgagor in funds to redeem the mortgage."*

*No waiver or merger on judgment*

17. By clause 6 of the Mortgage, it was agreed between the parties as follows:  
"6. IT IS HEREBY FURTHER AGREED AND DECLARED as follows: -
  - (3) That no neglect or omission on the part of the Bank to take advantage of or enforce any right or remedy arising out of any breach non-observance or non-performance of any covenant or condition herein contained or implied shall be deemed to be or operate as general waiver of such covenant or condition or prejudice the right of the Bank in effecting or taking advantage whether original or recurring.
  - (4) The taking of a judgment or judgments and any covenant or covenants herein contained shall not operate as merger of the said covenant or covenants or affect the Bank's right to interest at the rate and times herein set forth."
18. The non-performance complained of by the Defendants is the continued or recurring breach of the covenant to pay contained in the Mortgage.
19. Therefore, Gateway submits that the right to commence foreclosure proceeding also accrued as a result of the recurring breach of the Defendants' covenant to pay.
20. Gateway submits that the 2015 Judgment was not a merger of the covenant to pay and it did not affect its right to bring the foreclosure action based on the Defendants' continuing breach of the covenant to pay and their failure to pay after the 25 April Payment was made.
21. Gateway accepts that by the 2015 Judgment what was merged is the right of action to sue for payment of the sums lent as was found by Card-Stubs J in RBC Royal Bank (Bahamas) Limited v Deals Bus Service Limited at paragraph 41.
22. Gateway submits that this does not prevent Gateway from commencing a foreclosure action where the cause of action was based on the covenant to pay

pursuant to Clauses 6(3) and (4) the construction and effect of which was not considered by Card-Stubbs J. in **RBC Royal Bank (Bahamas) Limited v Deals Bus Services Limited**.

*Abuse of Process – Inherent Jurisdiction*

[35.] Gateway Ascendancy referred to the case of **Curran and others v Ulster Bank Ireland DAC and others [2023] IEHC 513** where Dingham J, sitting in the Irish High Court considered several cases which addressed the Court’ discretion to strike out a case under its inherent jurisdiction where an abuse of process is alleged and cited paragraphs 28 through 35. Further, reliance was placed on **Governor and Co of the Bank of Scotland v Hussain [2010] All ER (D) 95 (Nov)** Newey, J considered cases which provided guidance on the doctrine of abuse of process.

[36.] Gateway Ascendancy concluded its submissions on this point as follows:

25. Accordingly, Gateway submits that it was proper to file the Claim Form and commence the foreclosure action against the Defendants as the Claim Form involves issues of law and construction which, while they may not be complex, are issues which have not been previously addressed or previously addressed at length and would require analysis and adjudication by the Court.
26. As a mortgagee-mortgagor relationship is a special one, and a mortgagee does not have to pursue each remedy for the enforcement of its security concurrently, Gateway submits that its action for foreclosure is not a misuse or abuse of the process of the Court but a necessary step to enforce its right under the Mortgage.
27. Gateway also submits that the Claim Form could be amended to reflect the reliance on the specific clauses in the Mortgage in support of its claim that it is entitled to the relief sought in its Claim Form.

*Frivolous or Vexatious*

28. In **Re L & N D Development and Design Ltd Dixon v Myers and another [2020] EWHC 2803 (Ch)** Mullen J determined that a claim would be considered ‘frivolous and vexatious’ if it had no prospect of success. He stated

*“42. In my judgment LF2 is not authority for the proposition that the burden lies upon the administrators in an application under paragraph 74 to show that the claim is frivolous or vexatious. While an administrator faced with a request to assign should be prepared to assign it unless it would not be proper for him or her, as an officer of the court, to do so, an applicant under paragraph 74 must demonstrate unfair harm. That requires the applicant to show that the cause of action is one that can properly be pursued. That must, mean in the usual run of cases, that it must be a real prospect of success. The expressions “frivolous or vexatious” or “no reasonable prospect of success” are in my judgment synonymous with the familiar test for summary judgment under Part 24 of the Civil Procedure Rules.*

*43. I reject the submission that some lesser test is appropriate. It seems clear from the passage from Citicorp cited with approval by Morgan J that a claim without a reasonable, or real, prospect of success is frivolous and such a claim is, for that reason, vexatious. By the same token, I do not see that whether a claim is “vexatious” requires separate consideration in a case as this. A claim without a real prospect of success is vexatious for the purpose of an application under paragraph 74. It is difficult to see how a claim with a real prospect of success could nonetheless be considered vexatious.”*

29. Gateway submits that as a mortgagee entitled to realize its security after the mortgagor Defendants breached both after the 25<sup>th</sup> April Payment and the recurring breach of the covenant to pay, it has a real prospect of succeeding in its claim for foreclosure against the defaulting Defendants.

30. As Ganpatsingh JA stated in **Citibank, N.A. v Major [2001] BHS J, No. 6** a Court will only deprive a mortgagee of the benefit of his security if there is some claim by the mortgagor that the mortgage document itself was issued by fraud or irregularity. At para. 25 of his judgment he stated,

*“25 Now there is a general, though not inflexible rule of practice, that the Court will not interfere to deprive a mortgagee of the benefit of his security, in the absence of fraud or irregularity, and a departure from the practice would normally attract the equitable principle, that the mortgagor pay into Court the amount outstanding or claimed or otherwise secure the mortgagee. This rule of paying in was itself not an inflexible one in the nature of a condition. Whether it applied or not depended on the nature of the fraud or irregularity. The Court’s duty in every instance was to do equity between the parties.”*

31. Gateway submits that there is no fraud or irregularity complained of by the Defendants. Therefore, it cannot be submitted by the Defendants that there is no reasonable prospect of success in Gateway’s claim against them.”

### **Analysis and Disposition**

[37.] The Court has to consider whether to strike out this action pursuant to Part 26.3 of the Civil Procedure Rules.

[38.] There is no dispute of facts.

[39.] The germane issue that the Court must consider is whether a mortgagee has a right to pursue foreclosure after it has obtained judgement and an order for vacant possession against the mortgagor.

[40.] The Bank commenced an action against the Defendants in 2014 for judgment and vacant possession due to their default on their mortgage. In 2015, the Bank obtained judgment against them for the sums due and owing under the mortgage and vacant possession of the

mortgaged property. In 2016 Gateway Ascendancy was substituted as the Judgment Creditor in place of the Bank and attempted by a Writ of Possession filed in 2021 to obtain vacant possession of the mortgaged property. This Writ of Possession was set aside by an Order of then Chief Justice Brian M. Moree, kt along with an earlier one obtained by the Bank in 2016.

[41.] The Claimant did not appeal this Order and ten years after the 2014 action, commenced the instant action for foreclosure against the Defendants.

[42.] The Court's power to strike out an action is contained in Part 26.3(1)(b) and (c) of the CPR where it provides as follows:

- (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

[43.] Further, the law relative to the striking out of an action is well settled and the parties both agree that the Court has the jurisdiction to strike out an action on various grounds. I refer in particular to the authorities cited by both parties including those that relied on striking under Order 18, Rule 19 and under Part 26.3 of the Civil Procedure Rules because the considerations are the same. The cases included: **Wragg and Another v Partco Group Limited and another [2002]EWCA Civ; Orlean Clarke, Elsie Mae Johnson, Bunetta Johnson Sands, Norman Rolle v Kathreen Barry SCCivApp No. 99 of 2019, Curran and others v Ulster Bank Ireland DAC and others [2023] IEHC 513.**

[44.] Therefore, the real issue is whether this is a proper case for the court to exercise its discretion to strike out the action.

[45.] The leading text on mortgages, **Fisher and Lightwood's Law of Mortgage, Fifteenth Edition** at page 529 in the chapter 26 entitled "The Mortgagee's Remedies" reads as follows:

**Mortgagees option to exercise all or any of the remedies concurrently**

*"Once the mortgagee has become entitled to exercise his remedies (and subject to restrictions imposed by statute or the terms of the mortgage deed), he is entitled to pursue any or all of them concurrently against the debtor, his assets, or the incumbered estate. As a departure from the general rule that a person is not liable to be harassed by a multiplicity of claims, it is the right of the mortgagee, or other secured creditor, to pursue any or all of his remedies at the same time, for so long as any part of the debt remains unpaid, or until the mortgagee acts in such a way as to amount to an election. Hence the*

mortgagee can at the same time, and in the same claim, claim for payment on the covenant to pay principal and interest, for possession of the mortgaged property and for foreclosure. A mortgagee can obtain a possession order and a money judgment at the same time.

There are, however, certain restrictions on the combination of remedies.

*If the mortgagee chooses to sue the mortgagor on his personal covenant and obtains a money judgment, abandons his security and brings bankruptcy proceedings, he cannot thereafter exercise remedies as a secured creditor.*

#### **Cause of action estoppel and abuse of process**

26.19 A party is not, in the absence of special circumstances, entitled to raise a ground of claim or defence which could have been, but was not, raised in earlier proceedings. Thus a mortgagee who has obtained a judgment for possession and sums expressed to be due under the mortgage is not entitled to bring a subsequent claim for sums due under a guarantee which were also secured by the mortgage. Likewise, where a mortgagee obtains a money judgment for all sums due under the mortgage (loan and accrued interest), its cause of action merges in the judgment; thus if part of the judgment remains unsatisfied, the mortgagee cannot bring new proceedings to recover the unsatisfied sums, such as by seeking to claim possession of a property which was subject to the mortgage; its remedies for recovery are limited to the execution of the original money judgment. However, a judgment in possession proceedings does not itself give rise to an estoppel so as to prevent a claim under the personal covenant. Thus, a mortgagee who brought a claim for possession and payment, but obtained an unopposed order for possession alone, was, following the sale of the security entitled to bring a claim for payment of a shortfall on the personal covenant. In such circumstances, consideration should be given as to why the money claim was not originally pursued to judgment. The maintenance of a second claim which could have been part of an earlier claim is not of itself an abuse of process – an additional element must be found, the onus being on the party alleging the abuse”. (my emphasis added)

[46.] I refer to Lloyds Bank plc v Hawkins [1998] 3 EGLR 109 which was an appeal by the bank of a decision dismissing its action against Mr. Hawkins. The bank had obtained a judgment for possession and repayment of a loan due to the default of a company in which Mr. Hawkins was interested. The question raised in the appeal was whether the bank's cause of action had merged in an earlier judgment which the bank had obtained against Mr. Hawkins. The judge held in the County Court held that it had merged and that there was an estoppel *per rem judicatam*.

[47.] The Court of Appeal agreed.

[48.] The judge in the **Lloyds** case in the County Court cited the speech of Lord Keith in **Arnold v National Westminster Bank plc [1991] 3 All ER 41** at page 104 where he said:

*“It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceeding are identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment...”*

*The same point as to the essential of cause of action estoppel was expressed by Diplock LJ in Thoday v Thoday [1964] 1 All ER 341 at page 197 of the former report:*

*“... ‘cause of action estoppel’ is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam”.*

[49.] I refer to paragraphs 6, 7, 13 and 15 of my Ruling and find that the following conclusions may be drawn from the evidence:

- i) In both the Original and the Second Action, the claim was made pursuant to the March 2007 mortgage viz., the cause of action was based on the 2007 mortgage;
- ii) In both the Original and Second Action, the claim was based upon a breach of the covenants of that 2007 mortgage to pay the debt;
- iii) The only difference is that neither the Bank nor Gateway Ascendancy sought foreclosure as a remedy in the Original Action;
- iv) In both cases any attempt to sue on or enforce the judgment debt is barred by the provisions of the Limitation Act. (per section 5(3) of the Limitation Act 1995)

[50.] In my view, the cause of action based on the mortgage debt was extinguished by the doctrine of merger as a result of the 2015 judgment in the Original Action.

[51.] As recently as January, 2025 the UK Supreme Court discussed the law with respect to the extinguishment of a cause of action following the entry of a judgment in **Nasir v Zavarco plc [2025] UKSC 5**. It summed it up at paragraph 7 where it said:

*7. The doctrine of merger was developed as a means to promote finality in litigation and to prevent duplicative and vexatious litigation. Unlike the standard defence of res judicata in the form of cause of action estoppel, which prevents the contradiction of an earlier judgment as to the existence or non-existence of a cause of action, merger was designed to make a litigant seek his or her remedies in one action by extinguishing a*

cause of action when judgment has been given on it.

[My emphasis added]

- [52.] In that judgement the UK Supreme Court made it clear that the doctrine of merger was designed “to make a litigant seek his or her remedies in one action by extinguishing a cause of action when judgment has been given on it”. Hence the Bank/Gateway Ascendancy could and perhaps should have sought the remedy of foreclosure in the 2014 action, but did not. Gateway Ascendancy has now sought in the Second Action to enforce the judgement debt by obtaining the remedy of foreclosure.
- [53.] The remedy of foreclosure was certainly a cause of action available in the Original Action. However, in that action the Bank only claimed payment of moneys due under the mortgage and delivery of possession of the mortgaged property.
- [54.] The doctrine of merger with respect to a claim under a mortgage was considered by the Supreme Court of Victoria, Australia in **Wolfe v Permanent Custodians Limited [2012] VSC 275**. In that case, an action was brought to recover monies due under a mortgage and a judgment was entered against the borrowers. The court said:

*87. Referred to as the doctrine of merger, a final judgment extinguishes the cause of action and the rights and liabilities that are its basis. The extent of the parties’ rights and liabilities are contained within the judgment and their character is defined by it.*

*88. The doctrine of merger is a form of res judicata, that being that where the cause of action is litigated at judgment and upheld, it merges in the judgment and loses its separate existence. For that reason, in addition to cause of action estoppel, the cause of action ceases to exist and cannot support a second action.*

*89. Clarke JA in Macquarie Bank Ltd v National Mutual Life Association of Australia Ltd and others, put this another way:*

*The first is that the doctrine of merger in the judgment only applies in a case in which the plaintiff establishes his cause of action and it is that cause of action which merges in the judgment. Where the plaintiff fails to establish its cause of action (that is, there is a verdict for the defendant) there is nothing to merge in the judgment and the doctrine of res judicata operates as a true estoppel.*

*90. In Maganja v Arthur, Yeldham J quoted Halsbury’s Law of England where it said:*

*When judgment has been given in an action the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment, so that a second action may not be brought on that cause of action. Merger is not affected by an order which is not a judgment, nor by a judgment which is interlocutory and not final, or which is void. There will be no merger unless the cause of action is the same in both actions, and the plaintiff had an opportunity of recovering the first action... what he seeks to recover in the second...*

91. *In the present case, we have default judgment in respect of Permanent as to possession of the Property, an enforceable warrant and judgment debt as against both parties in the amount of \$326,602.66 plus cost and interest. The Mortgage, the loan and associated security guarantee and any rights associated therein have now been subsumed or merged into the judgments of the Supreme Court.*

*Effect of Judgment – extinguishment of rights pursuant to mortgage*

92. *Any rights or possible causes of action under the Mortgage, MCP or security guarantee were effectively “extinguished” upon default judgment. Mr. Wolfe and Ms Breasley have foregone the opportunity of putting forward a defence seeking to set aside judgment. It would have been at this stage that Mr. Wolfe as a defendant should have sought to defend the matter or have made application to set aside the judgment. There can be no independent cause of action so long as the judgment stood. Any issues related to the notice provisions of the Mortgage, the Transfer of Land Act and the MCP, all needed to be raised at the time prior to default judgment as all rights and liabilities pursuant to the Mortgage were subsumed into the higher remedy-default judgment, warrant and the judgment debt.*

93. *The judgment now has the requisite character of “finality” due to its being an order of the Court it and thus stands as having an independent existence to that of the Mortgage and any rights contained therein. Thus, the original loan, guaranteeing the rights and liabilities under it has no relevance. Mr Wolfe and Permanent’s liabilities and obligations are now to be found pursuant to the court orders and subsequent to this, the December Agreement.*

(my emphasis)

- [55.] The highlighted paragraphs from the **Wolfe** judgement show that “*once the cause of action is the same in both actions*” the judgement in the first action extinguishes the cause of action in the second and the mortgagee’s rights are limited to his rights under the judgement debt.
- [56.] Accordingly, in my view there can be no further action based on the mortgage debt. This includes both an action for the recovery of money under the mortgage debt as well as an action for foreclosure under the mortgage. All claims under the mortgage are extinguished by the judgment and the mortgagee’s rights are limited to rights under the judgment.
- [57.] The claim for foreclosure could have been brought in the first action. It was not. The cause of action for foreclosure has now been extinguished (by the judgment).
- [58.] Gateway Ascendancy sought to rely upon the contractual provisions of the mortgage contained in clause 6 where it was agreed between the parties as follows:

“6. IT IS HEREBY FURTHER AGREED AND DECLARED as follows: -

- (3) That no neglect or omission on the part of the Bank to take advantage of or enforce any right or remedy arising out of any breach non-observance or non- performance of any covenant or

condition herein contained or implied shall be deemed to be or operate as general waiver of such covenant or condition or prejudice the right of the Bank in effecting or taking advantage whether original or recurring.

- (4) The taking of a judgment or judgments and any covenant or covenants herein contained shall not operate as merger of the said covenant or covenants or affect the Bank's right to interest at the rate and times herein set forth."

[59.] These provisions contradict the legal principles set forth in the authorities referred to earlier. As a consequence, it is my view that these contractual provisions are of no effect given the entry of the judgment. I am fortified in my position when I consider the dicta of the Judge in the **Wolfe** case at paragraphs 91, 92 and 93.

[60.] Further, the Claimant submitted that the April 2016 Payment made (post the January 2015 Judgment) had not been included in the sums awarded in the January 2015 Judgment and therefore, failure by the Defendants to pay after that date gave rise to a breach and accrual of the right to bring a foreclosure action, and also, revived the cause of action for payment.

[61.] I disagree.

[62.] I refer to the position taken by the Honourable Madame Justice Carla Card-Stubbs in the **RBC Royal Bank (Bahamas) Limited** case where similarly, payments were made to the Bank by the mortgagor subsequent to the entering of judgment. She had this to say about the treatment of such payments with which I concur: "*I also find that any payment made by the Defendants subsequent to the 2011 judgment are payments that must be applied to that judgment and accounted for as such. On the entering of judgment, the Claimant substituted its rights to collect money on the mortgage with the right to collect under the judgment. Any payment made subsequent to the entry of judgment must apply to extinguishing that judgment.*"

[63.] Again, I rely upon and find further support in my finding that the payment made in 2016 post the 2015 judgment must be applied to the judgment from the **Wolfe** case where the Judge stated at paragraph 93 that: "*the judgment now has the requisite character of "finality" due to it being an order of the Court and thus stands as having an independent existence to that of the Mortgage and any rights contained therein. Thus, the original loan guaranteeing the rights and liabilities under it has no relevance. Mr. Wolf and Permanent's liabilities and obligations are now to be found pursuant to the court orders.....*"

[64.] The Claimant has advanced that "*the right to bring a foreclosure action accrued after the Defendants failed to make anymore payments after the 25<sup>th</sup> April and the Claim Form was filed within the twelve (12) year period to bring an action for foreclosure.*" This argument is unsustainable. For all of the aforementioned reasons, the cause of action was merged

into the judgment, therefore, there could be no revival of it. Consequently, the issue of the limitation period does not arise.

[65.] However, if I am wrong and the cause of action was not extinguished by the judgment under the doctrine of merger, this action should be struck out under the principle of finality in litigation.

[66.] In **Henderson v Henderson (1843) 3 Hare 100 (to check)**, Sir James Wigram V-C stated:

*"... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

[67.] And later in **Johnson v Gore Wood [2002] 2 AC 1 at 31**, Lord Bingham set out what is regarded as the leading formulation of the principles to be applied when determining whether a claim (or defence) should be struck out as an abuse of process under the rule in **Henderson v Henderson** He said:

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

*legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."* (my emphasis)

- [68.] There can be no doubt that an application for foreclosure under the mortgage could properly have been made in the 2014 action. That action sought recovery of the debt and possession of the mortgage property. It could have sought foreclosure as another alternative. It did not.
- [69.] The Claimant relies on the judgement in **RBC v Deals Bus Service Limited and Arthur W. Deal 2022/CLE/gen/1000** where Card-Stubbs J. did not strike out a second action brought after judgement had been obtained for monies due under a mortgage. In that action the Claimant did not seek possession of the mortgaged property nor did it seek an order for sale or foreclosure. In the second action, the Claimant sought declaratory relief and judgement for sums due under the mortgage. The Claimant also sought the appointment of a receiver and delivery of the mortgaged property to the receiver. In that case Justice Card-Stubbs held at paragraphs 86 and 89 of her judgement as follows:

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

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

- [70.] I regret that I am unable to agree with the decision that the Claimant is not barred from seeking relief which was neither pursued nor granted in the earlier proceedings. The relief of foreclosure sought in this action is based on a cause of action arising out of a breach by the Defendants, of their obligations under the mortgage deed. That cause of action is merged into the 2015 Judgment and is extinguished. The Claimant cannot now initiate a fresh claim for the relief or remedy of foreclosure.

- [71.] This present action is not an action to enforce a right under the judgment. It is an action for foreclosure under the mortgage.

- [72.] In my view, it would constitute an abuse of process for the mortgagee—having obtained judgment in the Original action on the 2007 mortgage deed—to now, after a lapse of ten years and without enforcing that judgment, commence, the Second Action for foreclosure premised on the same rights and obligations under the 2007 mortgage deed.

### **Conclusion**

- [73.] Accordingly, I agree with the Defendants that this action cannot succeed and constitutes an abuse of process.

- [74.] For the foregoing reasons, the claim is dismissed in its entirety as an abuse of the court's process pursuant to Part 26.3(c) of the Civil Procedure Rules.
- [75.] Costs are awarded to the Defendants, to be assessed by this Court on the papers unless otherwise agreed between the parties.
- [76.] I thank both Counsel for their clear and helpful submissions.

**Dated this 1<sup>st</sup> day of December, 2025**

A handwritten signature in black ink, appearing to read "Camille Darville Gomez". The signature is written in a cursive, flowing style.

**Camille Darville Gomez**  
**Justice**