Neutral Citation Number: [2024] EWHC 2079 (Ch)

Case No: PT-2023-000926

IN THE HIGH COURT OF JUSTICE
BUSINEES AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice
Rolls Building, Fetter Lane , London EC4A 1NL

Date: 09/08/2024

Before :

MASTER BOWLES (SITTING IN RETIREMENT)

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Between :

Alister Allan Coutts-Lovie	**Claimant**
- and -	
Topaz Finance Limited (t/a Heliodor Mortgages)	**Defendant**

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Rory Turnbull (instructed by **Richards Solicitors**) for the **Claimant**
Charles Sinclair (instructed by **Walker Morris LLP**) for the **Defendant**

Hearing dates: 5 June 2024

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER BOWLES (SITTING IN RETIREMENT)

Master Bowles (sitting in retirement) :

1. By a Part 8 Claim Form, supported by Particulars of Claim and dated 16 October 2023, the Claimant, Alister Coutts- Lovie (Mr Coutts-Lovie), claims an account and inquiry as to the amounts, if any, due from Mr Coutts-Lovie to the Defendant, Topaz Finance Limited (Topaz), and from Topaz to Mr Coutts-Lovie, together with declarations as to the liability of Topaz to Mr Coutts- Lovie in respect of any amounts found to be due from Topaz to Mr Coutts- Lovie, consequential orders for the payment of such amounts as might be found to be due to Mr Coutts-Lovie and an order for the rectification of the Land Register by the removal from the register of Topaz's legal charge over Mr Coutts-Lovie's registered property at 2 Kenley Close, Kent, Chislehurst BR7 6QT (the Property).

2. The Particulars of Claim reiterates the claim for an account and for orders for payment of all sums found to be due, together with interest thereon. The account sought is stated to be for the period 2006 to 2023, but is, in essence, intended to be an account continuing to the date of the account.

3. The account claimed arises out of a mortgage granted by Northern Rock Plc (Northern Rock) to Mr Coutts-Lovie, dated 15 September 2006 and registered at HM Land Registry on 23 October 2006. The mortgage has subsequently been held, successively, whether by transfer, or change of name, by NRAM Plc, NRAM Limited and, latterly, Topaz.

4. Although a possession order was made against Mr Coutts-Lovie, in respect of monies falling due under the mortgage, as long ago as 6 June 2016, although a further order for possession was made against his wife, Mrs Jennifer Lovie, on 26 June 2019, and although multiple applications, respectively, for permission to appeal the possession order made against Mrs Lovie, to suspend eviction, suspend the warrant of possession and to stay eviction have all been dismissed, or struck out, Mr Coutts-Lovie and Mrs Lovie remain in possession of the Property, as their home.

5. In the context of the dismissal, or striking out, of these applications, most recently by orders on 30 and 31 October 2023, and the explicit suggestion that these proceedings have been conceived as a device to obstruct the implementation of the possession orders, all other challenges to those orders having failed, Topaz now applies, by application notice, dated 28 February 2024, to strike out the entirety of this claim, either as disclosing no reasonable grounds for making the claim, or as an abuse of process, or, in the alternative, for the claim to be dismissed, under CPR 24, as having no realistic prospects of success. This judgment pertains to that application.

6. The convenient starting point, in considering this application, seems to me to be a consideration of the question as to whether and to what extent the claim advances reasonable grounds for seeking an account and whether and to what extent there are realistic prospects of the claim for an account succeeding. It is only if those questions are answered, in whole or in part, in favour of Mr Coutts- Lovie that it becomes necessary to consider whether, nonetheless the claim should be struck out as abusive.

7. Although the Claim Form, as drafted, appears to acknowledge that, on the taking of an account, monies might turn out to be due to Topaz, it is, I think, clear from the Claim Form and the Particulars of Claim that the substantial proposition underlying the claim

for an account and, most particularly, the claim for the removal of Topaz's charge from the register is that no monies are due to Topaz and, rather, that the balance of the account, when taken, will favour Mr Coutts-Lovie.

8. That proposition is reflected in the relief sought in the Claim Form, in particular the claims for declarations and payment in respect of monies found to be due to Mr Coutts-Lovie, together, of course, with the claim for the removal of Topaz's charge.

9. That proposition is also reflected in the Particulars of Claim, in particular in paragraphs 1, 7, 12 (misnumbered), 16 and 20. Specifically, paragraph 1 asserts Mr Coutts-Lovie's belief that no monies are due to Topaz in respect of the mortgage; paragraph 7 asserts his belief that the mortgage has been discharged by payment and that, by reason of the costs incurred and added to the security, monies are due to him by way of rebate; paragraph 12 asserts that Mr Coutts-Lovie had already paid more than contractually due under the mortgage and that there remained no further debt due under the mortgage; paragraph 16 asserts Mr Coutts-Lovie's belief that he is due a refund; paragraph 20 seeks an order for the payment any sums overpaid by him and/or equitable compensation in respect any such sums.

10. I am quite satisfied that the proposition advanced by Mr Coutts-Lovie is unrealistic and cannot be made out and, further, that, against the clear factual context in which the current proceedings are brought, the Claim Form and Particulars of Claim disclose no reasonable grounds for advancing any claim that the mortgage has been discharged by payment, or that any monies fall due to Mr Coutts-Lovie.

11. The mortgage granted to Mr Coutts-Lovie in 2006 was a mortgage under which a sum of £640,000 was advanced for a term of eight years and on an interest only basis. The interest chargeable on the loan, as set out in the Offer of Loan dated 16 August 2006, was agreed to be at the rate of 4.79% until 1 August 2008, thereafter, for the next five years and two months the term, at Northern Rock's standard variable rate and, for the 'remainder of the mortgage', at the standard variable rate, but subject to a potential 0.25% discount if payments were kept up to date.

12. The effect of those arrangements was that, on 15 September 2014, the principal sum of £640,000, advanced in 2006, fell to be repaid. If, however, the principal sum was not repaid, or if further monies secured by the mortgage had not been repaid, then the mortgage would not come to an end and would remain in being until discharged by redemption, or sale. In that event and pursuant to the terms of the Offer of Loan, interest would, subject to the potential discount, remain chargeable at the standard variable rate.

13. The principal sum has never been repaid, as such, and there is no suggestion advanced that it has been repaid.

14. What has been advanced and pleaded, by reference to reports prepared for Mr Coutts-Lovie by a Mr Brian Spence of BTMB Ltd and a Mr Flint, of Forths Forensic Accountants, dated, respectively, 15 July 2016 and 31 March 2017, is that, as at the dates of the relevant report, Mr Coutts-Lovie had been, in respect of Mr Spence's report, overcharged to the extent of £30,000 and, in respect of Forths report, overcharged to the extent of £137,000 (the report itself actually refers to £117,000).

15. The pleaded case also adverts (as set out in paragraph 8 of this judgment) to costs incurred and, at least by implication, wrongly charged to the mortgage account. Those sums, as set out in the mortgage spreadsheet provided to Mr Coutts-Lovie, as an exhibit to the witness statement of Ms Broughton, an associate at Walker Morris LLP, Topaz's solicitors, dated 21 November 2023, served and filed in answer to this claim, appear to total in the order of £100,000 (reflecting the very substantial previous litigation in this case).

16. Making full allowance in favour of Mr Coutts-Lovie for the sums adverted to in the two reports and the sums which have been expended on costs and making further allowance for the interest which would have wrongly accrued on those sums, had there been the overcharges and improper addition to the mortgage account of legal costs, which is complained of, it remains the case that the sums that Mr Coutts-Lovie has put in issue do not, as it seems to me, come even close to making good the unpaid principal which has been outstanding under this mortgage since 2014.

17. In the result and while I will return later in this judgment to the merits of the supposed overcharges and to Topaz's entitlement to charge its legal costs to the mortgage account, it is wholly clear that the contention that no monies are outstanding to Topaz and that the mortgage has been discharged by payment is manifestly ill founded.

18. I am reinforced in that view by a consideration of the mortgage account, as exhibited to Ms Broughton's witness statement. That account, which although produced in evidence in November 2023, has not been made the subject of any specific challenge, shows an outstanding liability under the account, as at November 2023, in excess of £1m. Even making a substantial allowance for interest accruing on sums allegedly overcharged, or wrongly charged, there is nothing in the matters put in issue by Mr Coutts-Lovie to demonstrate any serious, or real, possibility that his liability to Topaz has been extinguished, let alone that he is entitled to a rebate.

19. Mr Turnbull, on behalf of Mr Coutts-Lovie, draws my attention to the fact that Mr Coutts-Lovie has indicated, in evidence, his intention to obtain a further forensic accountants report, in respect of the alleged overcharging, and submits that, in determining whether there is a realistic prospect that the mortgage has been discharged by payment and/or that Mr Coutts-Lovie might be entitled to a rebate, in respect of his alleged mortgage overpayments, the court should have regard to the prospective findings of such a further report.

20. I accept that, in a case where there are reasonable prospects that further evidence, supportive of, in this case, a claimant's position, might be available at a trial, then that is a factor to be taken into account in deciding whether, or not, to make a summary determination. If, however, there is no evidential basis advanced, such as to establish the possibility that other evidence might be available at trial, then the broad proposition that 'something might turn up' is not a good enough reason for refusing a summary determination. In this case, as developed later in this judgment, I have seen no evidential basis such as to make me think that a further forensic report will provide Mr Coutts-Lovie with evidence of any significant overcharging, or any improper application of legal, or other, charges, to the mortgage account.

21. I am, in consequence, satisfied that, to the extent that this claim, purports to assert that monies are due to Mr Coutts-Lovie, or that the mortgage has been discharged by

payment, or that he is entitled to rectification of the register by the removal of Topaz's charge, this claim fails. The pleadings do not disclose reasonable grounds for making that claim and there are no realistic prospects of those claims being made out. These aspects of the case are, in my view, unwinnable and, for that reason, should not be allowed to continue.

22. That, however, is not the end of the matter. It remains to consider whether, disregarding what I will call the over-blown proposition that the mortgage account has been discharged by payment, there remains a viable case for an account, or whether, that claim, also, is unwinnable and should be brought to a close. Even if a 'winnable' case for an account exists, it still remains in issue, as foreshadowed in paragraph 5 of this judgment, as to whether the claim should, nonetheless, be struck out as abusive,

23. In this regard, it is not in doubt but that the Claim Form and Particulars of Claim seek to advance, also, a narrower claim for the taking of a mortgage account.

24. The Claim Form, itself, as already stated, seeks an account of the monies (if any) due from Mr Coutts-Lovie to Topaz. The Particulars of Claim, again, as already stated, seeks an account of all dealings between Mr Coutts-Lovie and Topaz. Paragraphs 8 and 17 of the Particulars of Claim asserts the need for an account in order to establish the monies that might be due from Mr Coutts-Lovie to Topaz and, in particular, in paragraph 8, to establish the amount that Mr Coutts-Lovie might have to pay to Topaz to redeem the mortgage and, as it is pleaded, to avoid Mr Coutts-Lovie and his wife from being dispossessed of their home. A similar argument is advanced by Mr Coutts-Lovie in his evidence in answer to the current application.

25. A claim for an account is a claim for a discretionary remedy. It is not a claim which, in this case, a mortgagor, can claim as of right. There must be good reason for the intervention of the court into the dealings between mortgagor and mortgagee. In the usual way, a mortgage account will be sought when a dispute arises as to the sums due to procure redemption, or, following a forced sale, where a dispute emerges as to the amount to which the mortgagee is entitled following such a sale. I am not persuaded, however, that those are the only circumstances where a mortgagee can be asked to account. It seems to me that an account is an available remedy whenever there is a genuine and real dispute as to the state of the mortgage account. If there is such a dispute and, if, in consequence, there is a real risk of either over, or under, payment being made under the mortgage, it seems to me that the parties are entitled to have that dispute resolved and the potentially incorrect position under the mortgage corrected at the point when the dispute arises, even if, at that date, there is no immediate intention to redeem the mortgage. I note that that view is endorsed in **Fisher and Lightwood's Law of Mortgage 15th Edition**, at **paragraph 54.1**, in reliance upon **Ponsford v Hankey and Harrison (1861) 2 Giff. 604,** and I, respectfully, agree.

26. The question, therefore, in respect of this aspect of Mr Coutts-Lovie's claim, is whether, on the material before me, there is a realistic prospect of his establishing, at any final hearing of his claim for an account , that there is such a current and real dispute between the parties as to warrant the court ordering an account.

27. In that regard, the traditional approach, in determining the existence of a realistic dispute and the, consequential, directing of an account; what, in historic language, was termed the surcharging and falsifying of the account (i.e. taking objection to the

account, as advanced, out of court, by the accounting party); was for the court to determine whether a single error in the account had been made out and, if so and even if the error was of an inconsiderable amount, to direct the taking of a full account, upon the apparent footing that where there was one error there would be more.

28. I am not persuaded that, certainly in modern times, that approach to the determination as to whether an account is to be directed is quite as mechanistic as first appears. It seems to me that the court has and must have a degree of flexibility in the matter and must decide whether any error, or errors, which are established, on a claim for the taking of an account, actually point to the likelihood of further errors surfacing, if an account is directed, or whether the mistake, or error, established is a 'one off' error, from which no inference of the existence of other errors can properly be drawn. The court, as it seems to me, will not consider it proportionate, in the exercise of its undoubted discretion, as to whether or not to order an account, to make such an order, unless the material available truly points to the need for a full account to be taken. It was, I think, on that basis, or at least partially so, that, in **Nautch Ltd v Mortgage Express [2012] EWHC4136 (Ch)**, cited, at **54.1** in **Fisher and Lightwood (supra)** the court, rather than directing a full account, elected, instead and on grounds of proportionality, to determine individual points in respect of which objection had been made.

29. The question, then, in the current case, is whether Mr Coutts-Lovie has established, at this interlocutory stage, realistic prospects that at any hearing of his claim for an account he will be able to point to errors in the mortgage account, in respect of the Property, such as to warrant the court directing a full account.

30. The matters relied upon by Mr Coutts-Lovie, in this regard, consist, primarily, of the two reports, already mentioned, coupled with the assertion set out in paragraph 20 of this judgment that there are realistic prospects a further report to be prepared on behalf of Mr Coutts-Lovie will establish, as he would put it, further errors of over-charging in respect of the mortgage account.

31. Additionally, reliance is placed upon certain comments, or notes, appended to the judgment of Mr Recorder Kent QC, in giving judgment against Mrs Lovie, on 26 June 2019. Subsequent to the possession order against Mr Coutts-Lovie, Mrs Lovie had applied to be joined as a defendant to the possession proceedings and to raise the contention that she held a beneficial interest in the Property having priority to that of the mortgagee. That contention was tried out between 24 and 26 June 2019 and rejected by the Recorder. At the end of his judgment, he noted, however, that he had not resolved a question as to whether Topaz had correctly applied contractual interest to Mr Coutts-Lovie's loan, in the period following the term date of the loan, saying that that question required more detailed analysis and argument than he had been able to give it and that it fell to be resolved, if appropriate, on another occasion.

32. As already set out, Mr Coutts-Lovie's pleaded claim adverts, also, to the improper application, or addition, of legal costs to the mortgage account.

33. Mr Turnbull, echoing the words of the Recorder, says that the proposed account affords the appropriate time for the resolution of the question that the Recorder left outstanding. That posits, however, that the issue that he left outstanding has 'legs' and, thus, that it is appropriate for the court to consider it further within the ambit of an account. I will deal with that question when dealing with Mr Spence's report.. What, however, is, I

think, abundantly clear is that the Recorder was not, in his note, expressing any view as to the merits of the question which had been raised. Contrary to Mr Turnbull's submission, the Recorder was saying no more in his note, than that, for the reasons that he gave, he had left the matter unresolved.

34. In regard, to the contention as to legal costs, I am quite satisfied that no serious issue has been raised such as to suggest that costs have not properly been charged to the mortgage account.

35. The provisions of the mortgage offer accepted by Mr Coutts-Lovie and to which the mortgage loan was subject, entitled the mortgagee to recover from the mortgagor, under clause 5.7 of the mortgage offer conditions, read with clause 20 of those conditions, any costs that the mortgagee incurred in recovering the mortgage debt, or in any legal proceedings concerning the mortgage. It follows that, in principle and given the extensive legal proceedings which Topaz has had to conduct in its efforts to secure possession and repayment of its mortgage loan, as set out, in extenso, in particular, in Ms Broughton's witness statement, dated 28 February 2024, in support of the current application, there can be no doubt but that the costs of those proceedings are recoverable under the mortgage.

36. As to the particular amounts claimed as to costs, although these are considerable, there is nothing in those figures, given the extent of the litigation which has taken place between the parties, to suggest that the costs which have been applied to the mortgage account were unrelated to the litigation, or were otherwise oppressive. No such suggestion has been made and, although, the underlying bills, in respect of legal costs, were made available to Mr Coutts-Lovie, by way of exhibit to the witness statement of 24 February 2024, no criticism of any particular invoice, or figure has been raised by Mr Coutts-Lovie, when responding to the current application.

37. Looked at more widely, there cannot be any realistic criticism of Topaz, or its predecessors, in pursuing litigation for the recovery of the Property and the repayment of the debt. The mortgage debt was not repaid at the termination of the mortgage term and, as discussed earlier in this judgment, there is no realistic evidential basis that the mortgage has ever been discharged by payment.

38. I add that it is, in any event, trite law that, subject to the provisions of section 36 of the Administration of Justice Act and section 8 of the Administration of Justice Act 1973, the mortgagee was always entitled to seek possession of the Property and to incur costs for that purpose; as it has done.

39. There remains for consideration the two reports upon which reliance has been placed and the question as to whether there are realistic prospects that an additional report might establish significant errors or overcharges. No permission was sought, prior to the hearing before me, for permission to adduce the existing reports as expert evidence, No point, however, was taken by Topaz, as to this, and I was content to give a retrospective permission for their use and to admit them into evidence.

40. That said, I am satisfied that neither report advances Mr Coutts-Lovie's case.

41. Dealing first with the report prepared by Mr Spence and set out in an email dated 18 July 2016, his contention, in respect of overcharging, is founded, substantially and

primarily, upon the premise that, following the expiration of the mortgage term, in 2014, the mortgagee ceased to have any entitlement to charge interest in respect of its loan. On that footing and reading his report, together with an additional email dated 19 July 2016, his contention would appear to be that, as at the date of his report, there had been an over-charge of interest in the sum of circa £25,000. With that over-charge removed, there would, apparently, remain a minimum over-charge of £5,500.

42. The basis of this residual over-charge is not made at all clear. Doing the best I can and reading the two emails together, it would appear that the further point taken by Mr Spence relates to the application of legal charges and interest on legal charges to the mortgage account. No attempt, however was made to develop, elaborate, or pursue the point in argument and although, as already stated, the opportunity has existed since February no criticism has been made in respect of any particular item of costs which have been charged to the mortgage account. Nor has any attempt been made to identify any item of interest which might have wrongly accrued upon those costs. In that context, I am not persuaded that what is, essentially, an unexplained and unevidenced assertion of over-charge is nearly sufficient to warrant the court directing a full mortgage account, or even to warrant the determination of this assertion of over-charge as a separate, or discrete issue.

43. The position, in law, where a mortgage is not repaid on the term date and does not provide for the payment of interest on the mortgage loan, post-term, is that the court will award, by way of interest, equitable compensation, or damages, reflecting the detention of the debt. In assessing the rate of interest the court will have regard to, but not be bound by, the contractual provisions as to interest which prevailed during the term.

44. It follows from the foregoing that, had it been the case that the mortgage did not provide for the payment of post-term interest, there would have been scope for argument as to the applicable rate of interest, as damages. Whether, however, that would have justified the court in directing a full mortgage account, rather than, simply, resolving the rate of interest as a discrete issue, must, as it seems to me be in real doubt.

45. In the event, the question does not arise. The terms of the mortgage and of the mortgage offer are clear. Under clause 5.1 of the mortgage offer conditions, read with clause 1.2 of those conditions, Mr Coutts-Lovie agreed to pay 'the Monthly Payments' until the 'Offer Debt' was paid off. The 'Offer Debt 'is defined as all monies under the Offer of Loan 'including unpaid interest, Costs and Fees'. 'Monthly Payments' means the monthly payment set out in the Offer. Accordingly, the monthly payments, agreed to be paid under the mortgage, following the mortgage term date and for the remainder of the mortgage, until the Offer Debt is paid off, are those set out in paragraph 12 of this judgment; that is to say, interest at the mortgagee's standard variable rate, subject, potentially, to the agreed discount.

46. It follows that the essential premise underlying the bulk of Mr Spence's report is a false premise and, further, that the alleged overcharging, said to arise from that false premise, is not and cannot be made out and cannot, therefore, form the basis of a direction for the taking of a mortgage account.

47. Turning to Forths' report, dated 31 March 2017, that report is, in my view, equally flawed.

48. The central premise of that report and the basis of the calculations of over-charge carried out by Forths is that Mr Coutts-Lovie should, in 2008/2009, have been offered a new mortgage agreement, under which interest would have been reduced to 2.25% over Bank of England base rate for an initial period and, thereafter, from September 2013, reduced to 2% over base rate. It is on that footing that an over-charge of £117,000 is alleged.

49. There is, however, no legal, or contractual basis for the contention that Mr Coutts-Lovie should have been offered a new mortgage agreement in 2008, or 2009. The mortgage agreement is set out in paragraph 12 of this judgment and makes no provision, at all, for such a new agreement as is contended for by Mr Coutts-Lovie. Nor is there any other evidence that such a new agreement was, or should have been, entered into. In the result, the basis upon which the supposed over-charge has been assessed is a false basis and provides no evidence at all that Mr Coutts-Lovie was overcharged. Rather, the figures produced by Forths, for the period up until the supposed new agreement would have come into operation, make plain that there was, up to that point, no element of over-charge, but rather an, albeit modest, undercharge.

50. Be this last as it may, I am quite satisfied that neither Mr Spence's report, nor Forths report provide any material which afford realistic support for the contention that Mr Coutts-Lovie has been over-charged on his mortgage account and, hence, provide no support for his core contention that a full mortgage account should be directed.

51. In light of all the foregoing, I am left in the position that, as matters stand, Mr Coutts-Lovie has afforded me no realistic evidence of any over-charging in respect of his mortgage account. The only evidence that there has ever been an over-charge on the account arises, in fact, from an investigation of the mortgage account by the mortgagee, in the context of an earlier application by Mr Coutts-Lovie, in the Bromley County Court, in July 2016, for the court to determine, as it was put, the extent by which Mr Coutts-Lovie had been overcharged.

52. I will return to that application, its settlement and its effects in paragraphs 58 to 63 of this judgment. At this stage, however, I note, only, that, following the application and, no doubt, consequent upon the application, the mortgagee, then NRAM Plc, reviewed the mortgage account and, following that review, determined, as set out by letter of 4 January 2017, that there had been a failure to apply the discount referred to in paragraph 12 of this judgment, with the result that there had been an over-charge of £5,122.11, which was duly credited to the account, in reduction of the then existing arrears.

53. Two questions arise out of this admitted over-charge. The first is whether, having regard to the approach to be adopted in determining whether to direct an account, as set out in paragraph 28 of this judgment, in the absence of any other evidence of error in the mortgage account, this single admitted, cured and explained error, would be such, at the hearing of this claim, to warrant, in itself, the court directing a full mortgage account. The second is whether the fact of that error is sufficient to satisfy the court that there are realistic prospects that the further expert report said to have been commissioned by Mr Coutts-Lovie will turn up further errors in the mortgage account, such that on the hearing of this claim, there would then be sufficient evidence of error, or over charge as to justify the directing of a full account.

54. I have decided that the answer to both those questions is 'no'.

55. One long resolved error, in circumstances where no other realistic evidence of overcharging has been produced and where, despite opportunity, it is noteworthy that no specific query, or criticism, has been made in respect of the mortgage spreadsheet provided by Topaz, in November 2023, would not be nearly sufficient to warrant the court directing a full mortgage account at the hearing of this claim. Correspondingly, there is nothing in that single error, given the circumstances, to satisfy the court that a further forensic report, in respect of the mortgage account, would have realistic prospects of turning up sufficient further errors in the account such as to justify the court directing a full account upon the hearing of this claim.

56. In the result and in the light of all the facts and circumstances discussed in this judgment, I am satisfied that there is no realistic prospect that, at any hearing of this claim, the court would direct an account. I am satisfied, accordingly, that Mr Coutts-Lovie's claim must be dismissed

57. I am fortified in that conclusion by a further consideration of Mr Coutts-Lovie's July 2016 application and the circumstances in which it was resolved.

58. That application required, as already stated, the court to determine the extent to which Mr Coutts-Lovie had been overcharged in respect of his mortgage and, following directions, was listed to be heard on 22 February 2017. In early January the mortgage account was reviewed and credited as set out in paragraph 52 of this judgment and, following that review, the solicitors then acting for the mortgagee wrote to Mr Coutts-Lovie to suggest that, in consequence of what was termed the remediation of the account, there remained no need for Mr Coutts-Lovie to continue his application and that the application be vacated and Mr Coutts-Lovie be given time to redeem the mortgage.

59. That proposal was agreed by Mr Coutts-Lovie and reflected in a consent order dated 22 February 2017, which recited that Mr Coutts-Lovie and NRAM Plc had agreed terms of settlement of the 'action', vacated the hearing of the applicant, directed that NRAM Plc should not enforce its possession order until after 19 May 2017 and granted permission to NRAM Plc to issue a warrant of possession if the mortgage had not been redeemed by 19 May 2017. Thereafter, although redemption figures were provided and although there is no evidence that those figures were challenged, the mortgage was not redeemed.

60. The implications of the settlement of Mr Coutts-Lovie's application were discussed, at some length, before me, most particularly as to whether it gave rise to a settled account in respect of the mortgage, as at the date of the order, or otherwise estopped Mr Coutts-Lovie from asserting any element of overcharging prior to that date.

61. Contrary to my provisional view, I do not think that the settlement of Mr Coutts-Lovie's application gave rise to a settled account, as at the date of the order. Mr Coutts Lovie's decision not to pursue his application in respect of alleged overcharging does not, necessarily, indicate, or establish, that the mortgage account was, as at that date, agreed. Rather, it may, simply, reflect that, at that date, the perception of Mr Coutts-Lovie was that his interests were best served in foregoing a determination of his application in return for an agreed period of time to redeem. The most that can be made of his agreement to settle his application is that, at that date, his perception of the extent

of any possible overcharge was that it was not of a sufficient magnitude as to warrant the continued pursuit of his application.

62. The fact that the settlement of the application did not give rise to a settled account does not, however, entitle Mr Coutts-Lovie to resile from his agreement not to pursue his application and to use this claim to re-open issues of over-charging that he has previously elected and agreed not to pursue. Whether regarded as part of the wider species of res judicata, identified in **Henderson v Henderson 3 Hare 100**, or as a form of abuse of process, I have no doubt that, where a party acts in that way and attempts a second bite at the cherry, he is precluded from so doing. If, as is, ordinarily, the case, a party is precluded from raising in later proceedings matters which could and, therefore, should have been advanced in earlier proceedings, then it is, as it seems to me, a fortiori that a party, who raises a matter in earlier proceedings but then elects and agrees not to pursue those matters, for valuable consideration (here, time), must equally be precluded, or estopped, from raising those matters anew in new, or later, proceedings and is acting abusively if he seeks so to do.

63. The consequence of the foregoing is that Mr Coutts-Lovie is estopped from alleging, or asserting, any overcharges prior to the settlement of the July 2016 application and that any attempt, by him, to do so is precluded as an abuse of process.

64. The further consequence of the foregoing is that, in determining, in this case, whether there is any material upon which the court hearing Mr Coutts-Lovie's claim for an account could properly direct an account, the court can only look to evidence of error in the mortgage account subsequent to the settlement date of 22 February 2017.

65. As set out in paragraph 51 of this judgment, no realistic evidence of any such error has been provided by Mr Coutts-Lovie. Nor, as set out in paragraph 55 of this judgment, is there any realistic prospect that such evidence will emerge from any further forensic report prepared on behalf of Mr Coutts-Lovie. In consequence and for these reasons as well as those already set out in paragraph 56 of this judgment, this claim must be dismissed.

66. In so saying, I do not overlook what might be termed Mr Turnbull's last ditch submission that, notwithstanding the paucity of evidence of error in respect of the mortgage account, the claim for an account should be allowed to proceed to a hearing, on the basis that there remains another 'compelling reason' whereby the claim should not be dismissed at this interlocutory stage. The compelling reason advanced was, in essence, that Mr Coutts-Lovie and his wife are elderly and in ill health and, therefore, that they should be given every opportunity to advance their claim and should not be deprived of that opportunity at an interlocutory hearing.

67. There is, with respect, nothing in this submission. There can be no advantage to Mr Coutts-Lovie, or his wife, in allowing an entirely unsustainable case, such as this one, to proceed to a hearing where the outcome will, inevitably, be the dismissal of their claim and the accretion of further costs for which they will, in due course, be liable.

68. Rather, in this case, as in virtually all cases susceptible of summary disposal, it is to the advantage of the unsuccessful party to face the fact that their claim, or defence, is doomed to failure at the earliest, rather than the latest (and most costly) opportunity.

Allowing a non-existent claim to proceed to a trial, or final hearing, is to no one's advantage.

69. My conclusions in this case have the effect that a number of issues, or questions, as to abuse of process, foreshadowed in paragraph 5 of this judgment, no longer call for consideration.

70. Two matters, however, may be worthy of mention.

71. Firstly, if, in fact, Mr Coutts-Lovie had had a good claim for an account then the fact, that he was seeking to use that claim as a means of challenging the possession orders made against him and his wife, would not, in itself, undermine the validity of that claim, or, on that ground alone, justify its dismissal.

72. Secondly, the dismissal, in this case, of a number of applications for the suspension of the warrant of possession, or to stay, or suspend, eviction, in which Mr Coutts-Lovie asserted that he had been overcharged under the mortgage, does not, as I see it, necessarily, have the effect of precluding the issue of overcharging being raised in the current proceedings.

73. The source of the court's jurisdiction to intervene, in respect of the possession orders sought to be stayed, or suspended was, or would have been, section 36 of the Administration of Justice Act 1970 and the question for the court's determination was, or would have been, whether the evidence provided by Mr Coutts-Lovie established that the monies outstanding under the mortgage could be repaid within a reasonable time.

74. Accordingly, the dismissal of those applications did not, or did not, necessarily, constitute a determination that there had been no overcharging, only that the court was not satisfied that the monies, in whatever amount, due under the mortgage, could not be repaid within a reasonable time and did not, necessarily, therefore, amount to a determination that there had been no overcharging, or give rise to an issue estoppel to that effect, as from the date of the dismissal of the application in question.

75. None of the last foregoing, however, affects the outcome of Topaz's application and the outcome of this case. For the reasons already discussed, this is not a case where realistic prospects exist that at a hearing of the claim the court would direct a full account. The claim must be dismissed.