IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Patrick Street Holdings Limited v. 11368 NL Inc.*, 2024 NLCA 11
Date: March 28, 2024
Docket Number: 202001H0054

BETWEEN:

PATRICK STREET HOLDINGS LIMITED — APPELLANT

AND:

11368 NL INC. — RESPONDENT

Coram: L.R. Hoegg, F.P. O'Brien and G.D. Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland Labrador, General Division 201601G6652 and 201601G6654 (2020 NLSC 99)

Appeal Heard: April 12 and 20, 2022, and June 15, 2022
Judgment Rendered: March 28, 2024

Reasons for Judgment by: G.D. Butler J.A.
Concurred in by: F.P. O'Brien J.A.
Dissenting Reasons by: L.R. Hoegg J.A.

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Counsel for the Respondent: Sarah J. Clarke

Authorities Cited:

CASES CITED:

G.D. Butler J.A.:
*11368 NL Inc. v. Patrick Street Holdings Limit*ed (14 October 2016), St. John's 201601G1797 (NLSC); *11368 NL Inc. v. Patrick Street Holdings Limited* (10 August 2016), St. John's 201601G1797 (NLSC); *Cook v. Patrick Street Holdings Ltd.*, 2017 NLTD(G) 167; *Patrick Street Holdings Ltd. v. John Cook, J-3 Consulting & Excavating Ltd., and 11368 NL Inc.*, 2019 NLCA 69; *Cook v. Patrick Street Holdings Ltd.*, 2020 NLSC 99; *Jennings & Long v. Hunt and Beard* (1820), Tucker's Select Cases 1817-1828, 248 (Nfld. S.C.); *Henderson v. Henderson* (1843), 3 Hare 100; *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46; *Quinlan v. Newfoundland (Minister of Natural Resources)*, 2000 NFCA 49; *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62, leave to appeal to SCC refused, 35667 (24 April 2014); *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *Kew v. Burlington*, [1980] 2 S.C.R. 598; *Grandview v. Doering*, [1976] 2 S.C.R. 621; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.*, 1994 CanLII 4518 (NSSC), aff'd 1994 CanLII 4083 (NSCA); *Cooper v. Molson's Bank* (1896), 26 S.C.R. 611; *McMillan v. Davies* (1892), Cameron 306 (S.C.C.); *Bailey v. Nelson*, 1987 ABCA 95; *Dhillon v. Dhillon*, 2006 BCCA 524; *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, leave to appeal to SCC refused, 31336 (4 May 2006); *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422.

F.P. O'Brien J.A. (Concurring):
Brenton Brothers Ltd., Re, 1979 CarswellNfld 104 (Nfld. T.D.); *Cook v. Patrick Street Holdings Ltd.*, 2017 NLTD(G) 167; *Patrick Street Holdings Ltd. v. Cook*, 2019 NLCA 69; *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.*, 1994 CanLII 4518 (NSSC), aff'd 1994 CanLII 4083 (NSCA); *Cook v. Patrick Street Holdings Ltd*., 2020 NLSC 99; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *EnerNorth Industries Inc. (Re)*, 2009 ONCA 536, leave to appeal to SCC refused, 33354 (14 January 2010); *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, [2001] 2 S.C.R. 460; *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Grandview v. Doering*, [1976] 2 S.C.R. 621; *Guardian Insurance Company of Canada v.*

Roman Catholic Episcopal Corp. of St. John's, 2013 NLCA 62, leave to appeal to SCC refused, 35667 (24 April 2014); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *La Française IC 2 v. Wires*, 2024 ONCA 171; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227; *Gough v. Newfoundland and Labrador***,** 2006 NLCA 3, leave to appeal to SCC refused, 31336 (4 May 2006); *Fieldbloom v. Olympic Sport Togs Ltd. (No. 2)*, 1954 CanLII 573 (MBCA); *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72; *Avalon Bookkeeping Services Ltd. v. Furlong*, 2004 NLCA 46; *Apotex Inc. v. Merck & Co.*, 2002 FCA 210, leave to appeal to SCC refused, 29324 (13 February 2003); *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2020 NLCA 38; *MacDougall v. Lake Country (District)*, 2012 BCCA 408; *Quinlan v. Newfoundland (Minister of Natural Resources)*, 2000 NFCA 49; *Leyson Holdings Inc. v. Newfoundland and Labrador (Department of Works, Services and Transportation)*, 2008 NLCA 66; *Patrick Street Holdings Ltd. v. 11368 NL Inc.*, 2021 NLSC 29; *Cook v. Patrick Street Holdings Ltd.*, 2022 NLSC 92.

L.R. Hoegg J.A. (Dissenting):

Cook v. Patrick Street Holdings Ltd., 2017 NLTD(G) 167; *Patrick Street Holdings Ltd. v. Cook*, 2019 NLCA 69; *11368 NL Inc. v. Patrick Street Holdings Limit*ed (14 October 2016), St. John's 201601G1797 (NLSC); *11368 NL Inc. v. Patrick Street Holdings Limited* (10 August 2016), St. John's 201601G1797 (NLSC); *Re Brenton Brothers Limited*, [1979] N.J. No. 107 (NFSC (TD)), 1979 CarswellNfld 104; *Royal Bank v. Slack*, 1958 CarswellOnt 92, 1958 CanLII 114 (ON CA); *Dorbern Investments v. Provincial Bank*, [1981] 1 S.C.R. 459; *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.*, [1994] N.S.J. No. 479, 1994 CanLII 4083 (NS CA); *Waugh v. Pioneer Logging Co. Ltd.*, [1949] S.C.R. 299; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540; *R. v. Van Rassel*, [1990] 1 S.C.R. 225; *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62, leave to appeal to SCC refused, 35667 (24 April 2014); *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Davis et al. v. Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78; *Dhillon v. Dhillon*, 2006 BCCA 524; *Coady v. Quadrangle Holdings Ltd.*, 2015 NSCA 13, leave to appeal to SCC refused, 36378 (15 October 2015); *Canada (Attorney General) v. Confederation des syndicats nationaux*, 2014 SCC 49, [2014] 2 S.C.R. 477; *Federal Business Development Bank and Sidestreet Limited et al., Re*, 1986 CanLII 3485 (NL SC); *Patrick Street Holdings Ltd. v. 11368 NL Inc.*, 2021 NLSC 29; *Danyluk v. Ainsworth Technologies Inc.*, 2001

SCC 44, [2001] 2 S.C.R. 460; *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, leave to appeal to SCC refused, 31336 (4 May 2006); *Montreal Trust Co. of Canada v. R M Holdings Ltd.*, 2001 CanLII 33841 (NL SC), rev'd in part on other grounds 2002 NFCA 29.

STATUTES CONSIDERED:

G.D. Butler J.A.:
Conveyancing Act, RSNL 1990, c. C-34, sections 6, 10, 11, 7-9, 14(3); *Mechanics' Lien Act*, RSNL 1990, c. M-3; *Registration of Deeds Act, 2009*, SNL 2009, c. R-10.01.

F.P. O'Brien J.A. (Concurring):
Conveyancing Act, RSNL 1990, c. C-34, sections 8, 9, 10, 14(3), 11; *Judgment Interest Act*, RSNL 1990, c. J-2.

L.R. Hoegg J.A. (Dissenting):
Conveyancing Act, RSNL 1990, c. C-34, sections 9, 12, 14, 2; *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3; *Judgment Interest Act*, RSNL 1990, c. J-2, section 6.

RULES CONSIDERED:

G.D. Butler J.A.:
Court of Appeal Rules, NLR 38/16.

L.R. Hoegg J.A. (Dissenting):
Rules of the Supreme Court, 1986, SNL 1986, c. 42, Schedule D.

TEXTS CONSIDERED:

G.D. Butler J.A.:
Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto, ON: LexisNexis, 2021).

F.P. O'Brien J.A. (Concurring):
Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto, ON: LexisNexis, 2021).

L.R. Hoegg J.A. (Dissenting):
Joseph E. Roach, *The Canadian Law of Mortgages*, 3rd ed (Toronto, ON: LexisNexis, 2018); Kevin McGuinness, *The Law of Guarantee*, 3rd ed (Toronto, ON: LexisNexis, 2013); Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022); Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto, ON: LexisNexis, 2021).

ARTICLES CONSIDERED:

L.R. Hoegg J.A. (Dissenting):
George F. Curtis, "Stare Decisis at Common Law in Canada" (1978) 12:1 UBC L Rev 1.

OTHER:

L.R. Hoegg J.A. (Dissenting):
CED 4th (Online), *Mortgages* (Ontario), "Notice of Mortgage: Definition" at § 1 (October 2021); Halsbury's Laws of Canada (online), *Mortgages*, "Overview: Definitions: Common Law Mortgage" (I.1(2)) at HMO-2 "Definition" (2023 Reissue); Halsbury's Laws of Canada (online), *Mortgages*, "Action on the Covenant: Rule in *Lockhart v. Hardy*: Collateral Mortgages" (VI.4(3)) at HMO-73 "Definition" (2023 Reissue); Halsbury's Laws of Canada (online), *Guarantee and Indemnity*, "Introduction: Definition of the Term "Guarantee"" (I.1) at HGI-1 "Nature of guarantee" (Cum Supp Release 61, 2022 Reissue); Halsbury's Laws of Canada (online), *Guarantee and Indemnity*, "Basic Principles: Guarantees and the Law of Contract: Collateral Nature of a Guarantee" (II.1(2)) at HGI-6 "Nature of a guarantee" (Cum Supp Release 61, 2022 Reissue).

G.D. Butler J.A.:

INTRODUCTION

[1] This appeal relates to a power of sale conducted pursuant to section 6 of the *Conveyancing Act*, RSNL 1990, c. C-34, and three applications to the Supreme

Court of Newfoundland and Labrador. The first two applications were brought by two registered encumbrancers pursuant to sections 10 and 11 of the *Conveyancing Act* who were dissatisfied with the accounting given by Patrick Street Holdings Limited ("Patrick Street") following the power of sale; the third was brought by 11368 NL Inc. ("11368") seeking distribution of the surplus funds on the power of sale.

[2] Patrick Street appeals two conclusions from the applications judge's decision on the third application:

(a) that the contract interest rate was payable on a mortgage given by Patrick Street to Deanna Cheeke; and

(b) that 11368 was entitled to the surplus funds.

[3] I would find no error in the applications judge's conclusions and I would therefore dismiss this appeal.

BACKGROUND

[4] Patrick Street, Madden's Limited, P & P Holdings Limited and PMC Holdings Limited are related companies (the "Patrick Street Group") and in each case, Paul Madden is the sole director.

[5] Bill Clarke is the sole director of 11368. 11368 owned property on Kenmount Road, in the City of St. John's, known as the Kenmount Terrace subdivision. Related companies to 11368, in which either Bill Clarke or Ryan Clarke were sole directors, are CBS Land Development Inc., Powder House Hill Investments Limited and Harmony Homes Limited. I will refer to all four companies as the "Clarke Group".

[6] The Patrick Street and Clarke Groups of companies had a business relationship for many years. As a result, one or more of the companies in the Patrick Street Group (or Mr. Madden) advanced funds to one or more of the companies in the Clarke Group (or Mr. Clarke) to assist in the development of various properties for commercial or residential use.

[7] On July 22, 2013, CBS Land Development Inc., Powder House Hill Investments Limited, and Harmony Homes Limited gave Patrick Street, Madden's Limited, P & P Holdings Limited, and Paul Madden a $10,072,816.52 mortgage securing various properties that they owned in St. John's and Conception Bay South but not Kenmount Terrace (Mortgage 608132).

[8] On April 4, 2014, 11368 guaranteed Mortgage 608132 but gave no security for its guarantee.

[9] On April 24, 2015, 11368 gave PMC Holdings Limited a $1,875,000.00 mortgage on its Kenmount Terrace property (Mortgage 708519). This mortgage was later assigned by PMC Holdings Limited to Patrick Street.

[10] By early 2016, both Mortgage 608132 securing other property and Mortgage 708519 securing the Kenmount Terrace property were in default. This led to the commencement of two power of sale proceedings under the *Conveyancing Act*. The power of sale on Mortgage 608132 for which Notice was given on April 8, 2016 did not proceed at all (Appeal Book, Vol. 2, p. 232-233). The power of sale on Mortgage 708519 for which Notice was given on March 2, 2016 was interrupted because the parties reached an agreement.

[11] By virtue of this agreement in April 2016, 11368 gave Patrick Street, Madden's Limited, P & P Holdings Limited and Paul Madden a collateral mortgage on its Kenmount Terrace property in support of 11368's guarantee of Mortgage 608132, to a limit of $4,000,000.00 (Mortgage 759678).

[12] Within weeks of their agreement, Patrick Street reactivated power of sale proceedings under Mortgage 708519 securing the Kenmount Terrace property. 11368 made two attempts to stop the sale but in each case, it was ordered to proceed (Orders: Hurley J. dated April 10, 2016 and Faour, J. dated July 8, 2016).

[13] In accordance with sections 7-9 of the *Conveyancing Act*, a public auction was held on July 11, 2016 and Patrick Street obtained the Kenmount Terrace property for $11,400,000.00, which was $75,000.00 more than seventy-five percent of its appraised value ($15,100,000.00). On September 16, 2016, Patrick Street became the owner of the Kenmount Terrace property described in Mortgage 708519.

[14] As required under section 10 of the *Conveyancing Act*, following its acquisition of the property, Patrick Street provided an accounting to all encumbrancers and 11368 (as mortgagor under Mortgage 708519). This accounting identified twenty-two charges on the Kenmount Terrace property. Patrick Street refused to pay certain encumbrances on the basis that, in its view, Mortgage 759678 (securing 11368's guarantee of Mortgage 608132 for up to $4,000,000.00) took priority and, once paid, there were insufficient funds to pay the other encumbrancers. By applications filed in the Supreme Court, two encumbrancers (referred to here as J-3 and Cook), challenged the priorities and amounts that Patrick Street claimed to be due on various charges pursuant to sections 10 and 11 of the *Conveyancing Act* (201601G6652 and 6654).

[15] In *Cook v. Patrick Street Holdings Ltd.*, 2017 NLTD(G) 167 (the "2017 Decision"), the applications judge determined the validity and priority of the twenty-two encumbrances and determined that only nine needed to be considered on the distribution of proceeds on the power of sale (paras. 55-56). For any encumbrance on which the amount was challenged, the applications judge addressed the evidence presented and made specific conclusions.

[16] In the course of this assessment, the applications judge found (*inter alia*) that Patrick Street had allowed $3,521,564.61 for three mortgages it held whereas the third mortgage was merely a consolidation of the first two. He therefore allowed only $2,237,180.95 for these three. He also rejected Patrick Street's claim to an $800,000.00 bonus on a mortgage given to Madden's Limited. Further, the applications judge found that Patrick Street had mistakenly added interest of $100,000.00 to another mortgage which was non-interest bearing (2017 Decision, at paras. 57-58).

[17] Specific to the mortgage being addressed on this appeal, the applications judge rejected Patrick Street's claim to $4,000,000.00 under Mortgage 759678 on the basis that Patrick Street had "failed to complete any analysis of the actual amount, if any, owing under the mortgage" (2017 Decision, at paras. 61-62). This conclusion is critical to the estoppel doctrines I address in this decision.

[18] As a result of these conclusions, the applications judge found that there was a surplus on the power of sale (2017 Decision, at paras. 63-64).

[19] Patrick Street appealed the applications judge's decision to this Court. The appeal was dismissed and the decision was upheld. In *Patrick Street Holdings Ltd. v. John Cook, J-3 Consulting & Excavating Ltd., and 11368 NL Inc.*, 2019 NLCA 69 (the "2019 Appeal Decision"), White J.A., on behalf of a unanimous court, made the following relevant conclusions respecting the amount due under Mortgage 759678:

> [60] On appeal, Patrick Street Holdings did not argue that the specific language of the mortgage caused the $4,000,000 to become payable at the time of the power of sale. Rather, they submitted that this Court should follow the approach taken in *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.*, (1994) 130 N.S.R. (2d) 241, [1994] N.S.J. No. 133, (N.S.S.C.), aff'd (1994), 134 N.S.R. (2d) 356, 119 D.L.R. (4th) 713 (N.S.C.A.) where it was concluded that a mortgage given to support a guarantee can be a valid claim entitled to priority in accordance with its registration timing. The Nova Scotia Court reached this conclusion despite recognizing the "apparent unfairness" it created:
>
> > A collateral mortgage, even if provided as collateral security for the debts or obligations of a different corporate entity, may be prior to a later registered lien claim. The priority in favour of a collateral mortgage security given to secure the debts of another is not excluded, notwithstanding the apparent unfairness created by mortgage monies being advanced to another entity, on another project and not for the purpose of increasing the selling value of the lands on which the lien holders have expended labour or furnished supplies.
>
> [61] However, even if this Court were to find that the legal conclusion in *Glasswall* should be followed, there is a significant factual distinction. *Glasswall* proceeded based upon an agreed statement of facts which established that the amount of the mortgage securing the guarantee was due and payable in full by the guarantor.
>
> [62] In the present case, the Applications Judge did not find that there was sufficient evidence to conclude that 11368 NL as guarantor was liable to make payment at the time of the sale. The mere fact that the registration cost of the mortgage reflected a value of $4,000,000 is not determinative of the amount actually owing under the mortgage.
>
> [63] The Applications Judge's conclusion that the amount owing was not established, and that therefore the mortgage should be disallowed from the accounting, is entitled to deference on appeal. As there is no basis before the Court to warrant appellate intervention, I would uphold the decision of the Applications Judge in finding that there should be no payment under the $4,000,000 mortgage in priority to the J-3 Consulting lien or the Cook mortgages.

[20] Patrick Street did not appeal the 2019 Appeal Decision and the determinations made by this Court therein are critical to the question of whether estoppel doctrines apply.

[21] Subsequent to the 2019 Appeal Decision, Patrick Street paid the J-3 and Cook claims but withheld the surplus of approximately $4,000,000.00.

[22] In the same actions as the first two applications (201601G6652 and 6654) on November 26, 2019, 11368 filed an interlocutory application for the surplus funds plus interest payable to itself less $150,000.00, plus interest to Deanna Cheeke who held a registered mortgage on a portion of the property. This application was heard and determined by the same Supreme Court Justice who had heard J-3 and Cook's applications in the 2017 Decision (*Cook v. Patrick Street Holdings Ltd.*, 2020 NLSC 99, the "2020 Decision").

[23] In response to 11368's application, Patrick Street did not dispute that payment was due to Cheeke from the surplus but disputed the amount owing (Appeal Book, Vol. 2, Tab 1, para. 24). It maintained its claim to entitlement to $4,000,000.00 under Mortgage 759678 that it had previously made on J-3 and Cook's applications.

[24] The only issue on the Cheeke Mortgage was therefore the applicable interest rate. The applications judge concluded that the contract rate of 18% applied and he determined the amount due under the Cheeke Mortgage (2020 Decision, at paras. 15-16, 32-34).

[25] Relative to Mortgage 759678, the applications judge determined that his prior conclusion (that Patrick Street had not established what was owing to it under Mortgage 759678) had been accepted by this Court and that he had been shown nothing to cause him to change his mind on this issue (para. 25). The applications judge ordered therefore that Patrick Street pay the surplus (less the amount due to Cheeke) to 11368 (para. 40).

[26] Patrick Street appeals the applications judge's conclusion that the 18% interest rate was payable on the Cheeke Mortgage, and the applications judge's conclusion that 11368 was entitled to the surplus funds (Appellant's Factum, at paras. 25-26).

ISSUES

[27] There are two issues to be addressed on this appeal:

(1) Did the applications judge err in concluding that the 18% interest rate was payable on the Cheeke Mortgage?

(2) Did the applications judge err in concluding that 11368 was entitled to the surplus funds?

[28] On the first issue, I agree with the reasons of Hoegg J.A. respecting the 18% interest rate payable on the Cheeke Mortgage. Since O'Brien, J.A. also agrees, the panel is unanimous that the appeal on this issue should be dismissed. On the second issue regarding entitlement to the surplus funds, I am of the view that this appeal may be disposed of by considering the sole question of whether estoppel doctrines apply. My analysis is therefore confined to Issue 2.

ANALYSIS

The Six Essential Estoppel Doctrines

[29] The six essential estoppel doctrines identified by Donald J. Lange in *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto, ON: LexisNexis, 2021) at page 11 are as follows:

> There are six essential estoppel doctrines developed by the courts of Canada. Each one of these doctrines may be applied with rigour based on its precise meaning. In their most concise definitions, the six essential estoppel doctrines are:
>
> (1) Issue estoppel bars an issue which has actually been decided in the first proceeding.
>
> (2) Issue estoppel under the rule in *Henderson* bars an issue which could have been brought in the first proceeding.
>
> (3) Cause of action estoppel, the true *res judicata*, bars a cause which has actually been decided in the first proceeding.
>
> (4) Cause of action estoppel under the rule in *Henderson* bars a cause which could have been brought in the first proceeding.
>
> (5) Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined.

> (6) Collateral attack bars a second proceeding when a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.
>
> With respect to the policy grounds, a consideration of issue estoppel or cause of action estoppel focuses upon the interests of the litigants. A consideration of abuse of process by relitigation or collateral attack focuses upon the justice system.

[30] For the reasons that follow, on the facts of this case, I would conclude that each of the first five of these doctrines apply and are fatal to the success of this appeal.

Res Judicata

[31] The first four estoppel doctrines fall within the broader term of *res judicata*.

[32] The doctrine of *res judicata* "has two distinct forms: issue estoppel and cause of action estoppel… [w]hen *res judicata* applies, a litigant is 'estopped' by the previous proceeding." In issue estoppel, the "litigant is estopped because the issue has clearly been decided in the previous proceeding." In cause of action estoppel, the "litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding" (*The Doctrine of Res Judicata in Canada*, at p. 1).

[33] Jurisprudence from this jurisdiction has influenced both forms of the doctrine. As noted by Lange in *The Doctrine of Res Judicata in Canada* at page 2, the earliest reported case to explain *res judicata* was the 1820 decision of our Supreme Court in *Jennings & Long v. Hunt and Beard* (1820), Tucker's Select Cases 1817-1828, 248 (Nfld. S.C.) at pages 256-257. Further, "[b]oth forms of estoppel have been influenced by the early, well-known rule in *Henderson*, which is an estoppel doctrine that encompasses not only what has been decided, but also what could have been decided but was not before the court to be decided" (*The Doctrine of Res Judicata in Canada*, at p. 2, citing *Henderson v. Henderson* (1843), 3 Hare 100, at p. 112). The *Henderson* case had its beginnings with a default judgment against the defendant in this province.

[34] The doctrine of *res judicata* "is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interest of the

public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause" (*The Doctrine of Res Judicata in Canada*, at p. 5). This Court has accepted these policy considerations on multiple occasions (*Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46, at para. 1; *Quinlan v. Newfoundland (Minister of National Resources)*, 2000 NFCA 49, at para. 6; *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62, leave to appeal to SCC refused, 35667 (24 April 2014), at para. 40).

Cause of Action Estoppel

[35] My colleague's dissent does not address cause of action estoppel. However, I am of the view that "issue estoppel is only relevant where the cause of action in the second action is different from the one in the first" (*Furlong*, at para. 50). Therefore, the initial step is to consider whether cause of action estoppel applies. This approach is consistent with *Quinlan* at paragraphs 6-7. Also see *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at page 254, and *Kew v. Burlington*, [1980] 2 S.C.R. 598 at pages 617-618.

[36] I must consider the four elements required for cause of action estoppel as they have been extracted from the Supreme Court of Canada's decision in *Grandview v. Doering*, [1976] 2 S.C.R. 621 and accepted by this Court in *Furlong* at paragraph 17 (see also *The Doctrine of Res Judicata in Canada*, at ps. 149-151):

1. There must be a final decision of a court of competent jurisdiction in the prior action;

2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action (mutuality);

3. The cause of action in the prior action must not be separate and distinct; and

4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

1. The judicial decision which is said to create the estoppel was final

[37] Little time need be spent on this criterion. The 2019 Appeal Decision affirmed the 2017 Decision. The 2019 Appeal Decision was not appealed to the Supreme Court of Canada and it is final.

2. The parties to the prior judicial decision are parties to the current action

[38] The J-3 and Cook applications were filed in Supreme Court actions 201601G6652 and 6654 and were heard together. 11368's interlocutory application for the surplus funds was filed in the same actions. As a result, the parties to all three applications were the same. J-3 and Cook did not have the same interest in the third application because the applications judge had previously ordered that their encumbrances be paid and they had received their funds (2020 Decision, at para. 2).

[39] However, 11368 and Patrick Street were not only active participants on all three applications, but the parties with the greatest financial interests. Relevant to the issue on this appeal, 11368 and Patrick Street had the same dispute on all three applications, namely, what amount was due, if any, under Mortgage 759678 and whether it was payable to Patrick Street from the proceeds of the power of sale.

3. The cause of action was not separate and distinct

[40] Cause of action estoppel does not turn on whether the style of cause for the relevant actions under consideration was the same (although in this case it was). Instead, as explained in *Guardian Insurance* at paragraph 42:

> … If the facts relied on to support the cause of action in the prior proceeding constitute substantially the same facts supporting the cause of action in the current proceeding, the causes of action will be regarded as the same (i.e. not separate and distinct) for the purposes of cause of action estoppel, even though the actual relief sought in the two proceedings is not the same. …

[41] To similar effect, in *Furlong* at paragraph 50, this Court cited and applied the Supreme Court of Canada's definition of cause of action from *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at paragraph 54:

> A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. …

[42] Therefore, if the facts upon which the applications judge founded his conclusions in the J-3 and Cook applications (relative to Mortgage 759678) are substantially the same as those relied upon on 11368's application, cause of action estoppel applies (see *The Doctrine of Res Judicata in Canada*, at ps. 156-158).

[43] Relevant to the issue on this appeal, on the J-3 and Cook applications, it was necessary for Patrick Street to establish the validity of Mortgage 759678, its priority *vis à vis* other encumbrances and the amount owing under Mortgage 759678 (if any) at the time of the power of sale. The applications judge found that Mortgage 759678 was valid and that it was eighth amongst nine valid encumbrances to be considered in the distribution of funds on the power of sale (2017 Decision, at para. 55). However, he concluded that Patrick Street had failed to establish that any monies were due thereunder (2017 Decision, at paras. 61-62). This conclusion was upheld by this Court in the 2019 Appeal Decision at paragraphs 59-63.

[44] On 11368's subsequent application for payment of the surplus funds (less the Cheeke Mortgage), the success of Patrick Street's position required it to establish the same material facts as had been determined by the applications judge on the J-3 and Cook applications; namely, the validity, priority and amount due (if any) under Mortgage 759678.

[45] In this case, we have multiple applications involving the same parties, in the same court file, relying upon the same facts, determined on the same evidence, heard by the same applications judge and the applications judge's first decision was confirmed by this Court on appeal. The facts of this appeal are remarkable.

[46] These facts distinguish this case from *Guardian Insurance* where this Court concluded that cause of action estoppel did not apply. In relevant part, at paragraph 49, the Court held:

> The *cause of action* in the first case was a claim for indemnification and defence of a particular lawsuit by a particular plaintiff in relation to specific alleged sexual misconduct. The cause of action in the current proceeding, while based on the same policy and raising the almost *identical issues*, is not the *same cause of action*. It is a cause of action for indemnification and defence of a completely "separate and distinct" lawsuit by another plaintiff in relation to separate sexual misconduct occurring at different times and places…
>
> (Emphasis in Original)

[47] The facts of this case are also distinguishable from *Quinlan* where this Court found no congruence between the causes of action in the two proceedings because (para. 14):

> … In the first, the cause of action involved a claim by the Crown for the recovery of land from an alleged wrongful possessor, based on pre-eminent Crown title. By contrast, in the second, the possessor of land sought an order under the *Conveyancing Act*, R.S.N. 1990, c. C-34 based on alleged entitlement flowing from an intermediate transaction. …

[48] The Court, in *Quinlan*, therefore concluded that the case was "if anything, one of issue estoppel rather than cause of action estoppel" (para. 14).

[49] The present case is not a situation where the material facts have changed since the applications judge's 2017 Decision on the J-3 and Cook applications (*Guardian Insurance*, at para. 82). In fact, on the third application, Patrick Street relied upon precisely the same facts as it had on the J-3 and Cook applications in its attempt to revisit its alleged entitlement to the surplus funds.

[50] There is no separate "lawsuit" (*Guardian Insurance*, at para. 49) or "transaction" (*Quinlan*, at para. 14) and there is no "new information that could not with reasonable diligence have been discovered earlier and… is of such a nature that it would 'entirely change the aspect of the case'." (*Guardian Insurance*, at para. 59).

[51] I conclude therefore that the causes of action on the J-3 and Cook applications and 11368's subsequent application are not separate and distinct. The "cause has passed into a matter adjudged in the previous proceeding" (*The Doctrine of Res Judicata in Canada*, at p. 1). This element of cause of action estoppel is therefore established.

4. The basis of the cause of action was argued or could have been argued

[52] As noted by this Court in the 2019 Appeal Decision at paragraph 60, in maintaining that it was entitled to $4,000,000.00 thereunder, Patrick Street had not relied upon the wording of Mortgage 759678 respecting terms of default either before the applications judge on the J-3 and Cook applications or on the prior appeal to this Court. Instead, it relied upon the approach taken by the Nova Scotia Supreme Court in *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.*, 1994 CanLII 4518 (NSSC) (aff'd 1994 CanLII 4083 (NSCA)).

[53] On the J-3 and Cook applications, the applications judge endorsed two principles stated in *Glasswall*. First that there was no supportable distinction between a collateral and a traditional mortgage when addressing priorities and secondly that a "collateral mortgage, even if provided as collateral security for the debts or obligations of a different corporate entity, may be prior to a later registered lien claimant" (2017 Decision, at paras. 42-44). However, on the facts he concluded that Patrick Street had not established that any amount was due under Mortgage 759678 (2017 Decision, at para. 62).

[54] On appeal, this Court did not disturb the applications judge's endorsement of these principles of law from *Glasswall*. However, it distinguished *Glasswall* on its facts, reasoning that it had been determined on the basis of an agreed statement of facts which established "that the amount of the mortgage securing the guarantee was due and payable in full by the guarantor" (2019 Appeal Decision, at paras. 60-61). There was no agreed statement of facts in the present case.

[55] On this appeal, Patrick Street relies for the first time on the wording of Mortgage 759678 to support the same position it took previously and which position was rejected both by the applications judge in the 2017 Decision and by this Court in the 2019 Appeal Decision.

[56] Firstly, Patrick Street now asserts that the conveyance by Patrick Street, to Patrick Street after the power of sale on Mortgage 708519 constituted a default on Mortgage 759678 entitling Patrick Street to the surplus on the power of sale. Patrick Street's Factum reads:

> 44. The effect of the conveyance of title due to the power of sale (reference paragraph 43 and 6(g) herein) to the Appellant of the said property secured under the $4,000,000.00 Mortgage and the Cheeke Mortgage on the 16th day of September, 2016, triggered clause h of the $4,000,000.00 Mortgage and Clause h of the Cheeke Mortgage:
>
> > "the entire principal sum and all other monies outstanding under the documents evidencing the indebtedness and hereunder shall, at the option of the Mortgagee, become immediately due and payable ..."

[57] Paragraphs (g) and (h) of Mortgage 759678 address incidents of default that would make Mortgage 759678 due and payable:

> (g) to not, without the consent, in writing, of the Mortgagee first obtained, sell or assign the said land and premises and in the event of doing so, the said principal sum and all other monies then owing under the documents evidencing the indebtedness and hereunder shall immediately become due and payable;
>
> (h) that should the Mortgagor default in making payments of any monies due under the Guarantee, and, the default continue for thirty (30) or more days; or, in the event of a sale of the said lands and premises without the written consent of the Mortgagee; or, in the event of any legal action being taken against the said lands and premises such that the security given herein may be put in jeopardy; or, should the Mortgagor default in doing, observing, performing, fulfilling or keeping some or more of the provisions, agreements and stipulations herein contained contrary to the true intent and meaning of these presents; or, should the Mortgagor commit any breach of any of the covenants and conditions herein contained and on the part of the Mortgagor to be observed and performed, then, and in every such case, the entire principal sum and all other monies outstanding under the documents evidencing the indebtedness and hereunder shall, at the option of the Mortgagee, become immediately due and payable, the Mortgagor shall surrender and yield up to the Mortgagee the mortgaged premises and it shall be lawful for the Mortgagee to peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy the mortgaged premises hereby conveyed or mentioned or intended so to be, with all appurtenances, without the let, suit, hindrance, interruption or denial of the Mortgagor or any other person or persons whatsoever.

[58] To be clear, paragraph (h) identifies five incidents of default:

1. failure to make payments of any monies due under the Guarantee for 30 or more days;

2. sale of the lands and premises without the written consent of the mortgagee;

3. any legal action being taken against the said lands and premises such that the security given herein may be put in jeopardy;

4. default in doing, observing, performing, fulfilling or keeping some or more of the provisions, arguments and stipulations herein contained;

5. breach of any of the covenants and conditions herein contained on the part of the mortgagor.

[59] Sale of the Kenmount Terrace property is addressed in both paragraphs (g) and (h). Although it had not been relied upon by Patrick Street either before the applications judge on the hearing of the J-3 and Cook applications or before this Court on the appeal therefrom, this Court did reference paragraph (g) in the 2019 Appeal Decision. At paragraph 59, this Court determined that the power of sale proceeding did not constitute an incident of default under paragraph (g) of Mortgage 759678 and therefore did not trigger acceleration of the mortgage.

[60] While this determination may be characterized as obiter to the ratio of the 2019 Appeal Decision (which was determined on the basis that the *Glasswall* decision was distinguishable), this Court has nevertheless previously determined that there was no error in the applications judge's conclusion that "the amount owing (under Mortgage 759678) was not established" (2019 Appeal Decision, at paras. 60-63).

[61] Paragraph (h), incident 2, is essentially a duplication of paragraph (g) which this Court addressed in the 2019 Appeal Decision and concluded previously was not an incident of default. There is no practical difference between "to not, without the consent in writing of the Mortgagee… sell or assign the said land" and "a sale of the said lands and premises without the written consent of the Mortgagee". Both address the sale of the Kenmount Terrace property "without the written consent" of Patrick Street. Patrick Street could have argued (that the

conveyance to itself after the power of sale was an incident of default), before the applications judge on the J-3 and Cook applications, on its prior appeal or in its response to 11368's November 2019 application for the surplus which led to the 2020 Decision. It did neither.

[62] Secondly, while it was not addressed in its Factum, during oral submissions and in answer to questions from the panel, Patrick Street asserted (again, for the first time in the parties' longstanding dispute over the surplus funds) that the power of sale resulting from 11368's default on Mortgage 708519 was a "legal action" under paragraph (h) that jeopardized the security that 11368 had provided Patrick Street by Mortgage 759678.

[63] I would conclude similarly that on the exercise of due diligence, Patrick Street could (on J-3 and Cook's applications, on its prior appeal, and in its response to 11368's November 2019 application), have argued that the language of paragraph (h).3 of Mortgage 759678, triggered payment thereunder and that Patrick Street was entitled to retain the surplus on the power of sale.

[64] Whether Patrick Street relies on the "sale" of the Kenmount Terrace property or the power of sale as a "legal action" to support its position on this appeal, the basis of the cause of action upon which it now seeks to rely, could have been previously argued. I would conclude that the final element of cause of action estoppel is therefore established.

Conclusion on Cause of Action Estoppel

[65] As this Court stated in *Furlong* (at para. 42, citing Green J.A. in *Quinlan*, at para. 6):

> ... The principles underlying the *res judicata* doctrine are the promotion of finality of litigation and the prevention of a multiplicity or fragmentation of proceedings. Subject to the restrictive rules respecting reopening a case on the grounds of mistake or fraud or to allow for the reception of new evidence, a litigant ought not to be able to retry a cause of action, or to claim any relief flowing therefrom, that has already been litigated between the same parties or their privies (often referred to as "cause of action estoppel" or "merger" of the cause of action in the original judgment).

[66] Consistent with this Court's finding in *Furlong*, the underlying principles of finality and prevention of multiplicity of proceedings prevent Patrick Street

from retrying the cause of action that was determined on the J-3 and Cook applications. Cause of action estoppel applies and is a complete answer to Patrick Street's second attempt to establish that it is entitled to payment of $4,000,000.00 for Mortgage 759678 from the power of sale proceeds.

[67] In a later section of this decision, I will explain why it is not appropriate to exercise discretion to avoid the consequences of cause of action estoppel. But first, I shall address issue estoppel.

Issue Estoppel

[68] For the reasons stated below, I would conclude that issue estoppel also applies.

[69] The leading case on issue estoppel is the Supreme Court of Canada's decision in *Angle*, which established that the doctrine included three criteria (ps. 254-256):

1. That the same question has been decided;

2. That the judicial decision which is said to create the estoppel was final; and

3. That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

1. The same question has been decided

[70] On the first element of cause of action estoppel, this Court must focus on the material facts that needed to be established in order for Patrick Street to support its right to $4,000,000.00 from Mortgage 759678 on the power of sale (*Furlong*, at para. 50, citing *Danyluk*, at para. 54).

[71] In comparison, on the first element of issue estoppel, the Court addresses whether Patrick Street is attempting to relitigate "an issue that was fundamental to, and was decided in, previous litigation between the same parties or their privies…" (*Quinlan*, at para. 7).

[72] My colleague's dissent suggests that there is a difference between "substantially the same" and "the same" when considering whether the same question has been decided. I disagree. I have already addressed this in the context of cause of action estoppel. To similar effect in issue estoppel, this Court has endorsed a "substantive approach" to whether the Court is being asked to adjudicate upon an issue previously decided (*Quinlan*, at paras. 12, 17-19). It is the substance of the matter actually decided that should control whether *res judicata* applies, not the form of judgment itself or the remedy that was ordered. This requires an examination of the pleadings, orders, reasons for judgment and other formal documents relating to the original proceeding decided by the applications judge in the 2017 Decision, in comparison with those involved in the current proceeding (*Quinlan*, at paras. 12, 17-19).

The 2017 Decision

[73] John Cook and J-3's applications were filed in 201601G6652 and 6654 in November, 2016 and were heard together. Each sought orders that Patrick Street "provide a more detailed accounting of how it distributed the proceeds of the power of sale and directing [Patrick Street] to pay the J-3 consulting lien and the John Cook mortgages." As the applications judge noted at paragraph 3:

> … In effect, J-3 Consulting and John Cook claim that their charges on the Kenmount Terrace properties rank in priority to some other charges on the property that [Patrick Street] elected to pay from the proceeds of the power of sale. Thus, these applications require me to examine the priorities between the various charges affecting [11368]'s Kenmount Terrace properties when [Patrick Street] executed its power of sale proceedings against them in 2016.

[74] In the course of examining the priorities between the various charges, the applications judge considered the appropriate sections of the *Mechanics' Lien Act*, RSNL 1990, c. M-3, the *Conveyancing Act*, and the *Registration of Deeds Act*, *2009*, SNL 2009, c. R-10.01 (paras. 5-12). He referred to relevant jurisprudence on the priorities of registered mortgages and mechanics liens (paras. 13-15) and applied this law to the issue before him. The applications judge provided a comprehensive list of the twenty-two charges on the Kenmount Terrace property and proceeded to "look more closely at the mortgages and the directions to pay, to examine the parties to them, the monies they secure or direct and the terms and conditions that they carry; starting with the mortgages" (paras. 26-31).

[75] The applications judge concluded that the priorities followed the order of registration and, citing *Glasswall*, he accepted that there was no supportable distinction between a collateral mortgage and a traditional mortgage in this respect (paras. 41-44).

[76] The applications judge turned his attention to the directions to pay and concluded that the *Conveyancing Act* required mortgagees acting under power of sale to account to "mortgagors" and "encumbrancers" and he defined "encumbrance" in the *Conveyancing Act* to include mortgages and liens. He held that the *Conveyancing Act* definitions did not include "directions to pay", registered or otherwise as they confer no interest in estate or real property (para. 54) and he therefore eliminated them from consideration.

[77] On the basis of these conclusions on the relevant law, the applications judge considered only nine encumbrances in the distribution of funds as follows:

#	Encumbrance	Date Registered	Parties	Consideration
1	Mortgage	December 20, 2011	11368 & Madden's Limited	$1,613,141.50
2	Mortgage	December 20, 2011	11368 & Madden's Limited	$468,000.00
3	Mortgage	December 20, 2011	11368 & Madden's Limited	$2,081,141.50
4	Mortgage	April 28, 2015	11368 & PMC Holdings Limited	$1,875,000.00
5	Mortgage	June 29, 2015	11368 & PMC Holdings Limited	$1,000,000.00
6	Mechanics' Lien	December 22, 2015	11368 & J-3 Consulting	$695,535.05
7	Mortgage	February 23, 2016	11368 & Deanna Cheeke	$150,000.00
8	Mortgage	April 21, 2016	11368 & Patrick Street Holdings	$4,000,000.00
~~9~~	~~Mortgage~~	~~June 17, 2016~~	~~11368 & Patrick Street Holdings~~	~~$1,400,000.00~~
10	Mortgage(s)	July 21, 2016	11368 & John Cook	$225,000.00

[78] This is how the table appears at paragraph 55 of the applications judge's decision but, at paragraph 56, the applications judge explained why he removed

#9 from the accounting. The applications judge then proceeded to consider the amounts owed under each of the remaining nine valid encumbrances.

[79] Relative to #8 (being Mortgage 759678), the applications judge was aware that this had been provided as collateral to 11368's guarantee of Mortgage 608132 (see "Mortgage # 18: April 21, 2016" at para. 26). However, the applications judge accepted 11368's submissions that no money may actually be owing under Mortgage 759678. The basis for this conclusion was not (as my colleague suggests) that "no new money was advanced". The applications judge had already determined that this argument had no merit and that collateral mortgages ranked the same as conventional mortgages "notwithstanding the apparent unfairness created by mortgage monies being advanced to another entity, on another project and not for the purpose of increasing the selling value of the lands on which the lien holders have expended labour or furnished supplies" (paras. 41-44). Instead, his conclusion was based upon Patrick Street's failure to prepare "a proper analysis if it wished to include any amount from this mortgage to be paid from the power of sale proceedings" (para. 62). The applications judge therefore excluded encumbrance #8 being the $4,000,000.00 Mortgage 759678.

[80] As a result, the applications judge summarized the allowances for the accounting from the power of sale proceedings and concluded that these legitimate encumbrances required Patrick Street to pay the encumbrancers (para. 63) as follows:

Encumbrance	**Amount**	**Balance**
Proceeds of Power of Sale Proceedings		**$11,400,000.00**
Mortgages #1, 2 & 3	$2,237,180.95	$9,162,819.05
Mortgage #4	$2,592,072.27	$6,570,746.78
Mortgage #5	$1,339,612.16	$5,231,134.62
Mechanics' Lien – J-3	$608,509.23	$4,622,625.39
Mortgage #7	$168,237.82	$4,454,387.57
Mechanics' Lien – Doyle	$30,000.00	$4,424,387.57
Mechanics' Lien – Dynamic	$118,538.96	$4,305,848.61
Mortgage #10	$63,983.60	$4,241,865.01
Balance		**$4,241,865.01**

[81] The applications judge "deduced" from this accounting that there were sufficient funds remaining to pay the J-3 lien and the Cook mortgages and ordered these to be paid (para. 64).

The 2019 Appeal Decision

[82] On October 24, 2019, this Court concluded that the applications judge did not err in determining the priority, validity and amounts owing under the valid encumbrances payable on the power of sale. In dismissing the appeal, this Court made the following conclusions relative to Mortgage 759678:

(1) The Kenmount Terrace property was not sold by 11368 but instead by Patrick Street under power of sale provisions in the mortgage and under the *Conveyancing Act* (para. 51).

(2) While the mortgage contained an acceleration clause in the event of a sale by the mortgagor, the power of sale proceedings do not constitute a sale by the mortgagor that would trigger acceleration under the mortgage (para. 59).

(3) Patrick Street had not relied on the specific language of the mortgage in maintaining that $4,000,000.00 was payable to Patrick Street on the power of sale. It submitted only that the collateral mortgage in support of a guarantee can be a valid claim entitled to priority in accordance with its registration (para. 60).

(4) Patrick Street had not established that $4,000,000.00 was owing. The mere fact that the registration cost of the mortgage reflected a value of $4,000,000.00 was not determinative of the amount actually owing under the mortgage (para. 62).

(5) The applications judge's conclusion that the amount owing under Mortgage 759678 was not established and that therefore the mortgage should be disallowed from the accounting is entitled to deference on appeal (para. 63).

(6) The applications judge did not commit an error in disallowing the $4,000,000.00 mortgage (para. 64(3)).

[83] I would conclude therefore that, relevant to issue estoppel, the substance of the matter decided (*Quinlan*, at paras. 12, 17-19) by both the applications judge on the J-3 and Cook applications (the 2017 Decision) and by this Court in the 2019 Appeal Decision was whether Patrick Street had established that it was entitled to $4,000,000.00 under Mortgage 759678 on the power of sale.

[84] I would also conclude that the determination that the $4,000,000.00 secured by Mortgage 759678 was not payable at the time of the power of sale, was an essential and fundamental conclusion in both the 2017 Decision and the 2019 Appeal Decision. It was neither collateral nor incidental (*Angle*, at ps. 254-255; *The Doctrine of Res Judicata in Canada*, at p. 46).

The 2020 Decision

[85] I turn now to consider 11368's November 26, 2019 application to the Supreme Court which was brought in the same actions as the previous applications by J-3 and Cook. On this occasion, 11368 sought the surplus funds on the power of sale by right asserted under section 14(3) of the *Conveyancing Act* less $150,000.00 plus interest to Deanna Cheeke (Appeal Book, Vol. 1, Tab 5, para. 28). In reply, Patrick Street did not challenge that monies were due under the Cheeke Mortgage but challenged the amount thereof and the interest rate applicable. It also re-argued its entitlement to $4,000,000.00 under Mortgage 759678 (Appeal Book, Vol. 2, Tab 1).

[86] The applications judge concluded that the contract interest rate of 18% was payable on the Cheeke Mortgage and ordered the principal amount ($150,000.00) to be paid, plus the applicable interest (paras. 15, 34). As previously noted, for the reasons stated by Hoegg J.A., I would agree that no error has been established in the applications judge's decision in this regard. Since O'Brien J.A. agrees, the panel is unanimous on this issue.

[87] As to whether there was a surplus on the power of sale, the applications judge addressed Patrick Street's re-argument that it was entitled to payment of Mortgage 759678. On this issue, the applications judge confirmed that he had previously determined (in the 2017 Decision) that there was a surplus on the

power of sale (para. 29) and he concluded that he had been "shown nothing to cause me to change my mind on" the amount owing on Mortgage 759678. He accepted this Court's affirmation of the conclusion he had reached on the $4,000,000.00 mortgage amount (in the 2019 Appeal Decision) (para. 25).

[88] These conclusions led the applications judge to order Patrick Street to pay the surplus on the power of sale (less the amount due to Deanna Cheeke) to 11368 (para. 31).

[89] The applications judge's conclusion (that he had been shown nothing to cause him to change his mind on the amount owing on Mortgage 759678) was based on appropriate criterion. The same evidence was relied upon in the three applications and while the relief sought by J-3 and Cook was different than that sought by 11368, that is not the determining factor for the same question test. "It is not necessary that the question said to be estopped in the subsequent action be the main point or ratio in the previous action. It is only necessary that it be an essential point or fundamental to the decision" (*The Doctrine of Res Judicata in Canada*, at ps. 55-56). The question of entitlement to the $4,000,000.00 under Mortgage 759678 was an essential point to the 2017 Decision.

[90] While the applications judge did not reference *res judicata*, there can be no doubt that he concluded that Patrick Street's disentitlement to payment under Mortgage 759678 on the power of sale, had been determined in his 2017 Decision and affirmed in this Court's 2019 Appeal Decision.

[91] Therefore, relevant to the second issue on this appeal, I would conclude that the same question was decided in the applications judge's decision on the J-3 and Cook claims (affirmed by this Court in the 2019 Appeal Decision) and in the 2020 Decision. Patrick Street therefore has attempted to relitigate "an issue that was fundamental to, and was decided in, previous litigation between the same parties or their privies" on 11368's application for the surplus (*Quinlan*, at para. 7, see also *The Doctrine of Res Judicata in Canada*, at p. 1). Patrick Street attempts to do so again, on this appeal.

[92] This element of issue estoppel is therefore established.

2. The judicial decision which is said to create the estoppel was final

[93] I have previously addressed this in my assessment of cause of action estoppel. The 2017 Decision was upheld by this Court in the 2019 Appeal Decision and was not appealed. It is therefore final.

3. The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies

[94] I have also previously addressed this in my assessment of cause of action estoppel. 11368 and Patrick Street were parties to the J-3 and Cook applications and had the greatest financial interests in both the J-3 and Cook applications and 11368's subsequent application for the surplus funds. This element is therefore established.

The Rule in *Henderson v. Henderson*

[95] I have determined that all three elements required under the traditional view of issue estoppel have been established. There is however a broadened view of issue estoppel which has not been addressed in my colleague's dissent but was accepted by this Court in *Quinlan*, at paragraphs 7 and 22 and by the Ontario, Prince Edward Island and Federal Courts of Appeal (see *The Doctrine of Res Judicata in Canada*, at ps. 63-65). This broadened view permits consideration of whether Patrick Street's current position could have been argued on J-3 and Cook's applications or Patrick Street's subsequent appeal before this Court (*Furlong*, at paras. 40-43).

[96] I have addressed this consideration in my assessment and conclusion on the fourth element of cause of action estoppel. Patrick Street could have argued the position it now takes on this appeal during the J-3 and Cook applications or Patrick Street's previous appeal before this Court.

Conclusion on Issue Estoppel

[97] I would conclude therefore that all elements of issue estoppel are established. The question of whether Patrick Street was entitled to $4,000,000.00

for Mortgage 759678 at the time of the power of sale has been decided and upheld by this Court on appeal. The current parties were parties to the prior proceedings (*Angle*, at ps. 254-255) and the judicial decision was final. Patrick Street's new position (that 11368 was in default of para. (h) of Mortgage 759678 causing the $4,000,000.00 to be payable) could, with reasonable diligence, have been argued on the J-3 and Cook applications, or on Patrick Street's appeal therefrom, but was not. The underlying principles of finality and prevention of multiplicity of proceedings prevent Patrick Street from arguing the issue that was determined on and fundamental to, the J-3 and Cook applications, namely that Patrick Street had not established that $4,000,000.00 was payable to it under Mortgage 759678 on the power of sale.

Pleading Estoppel Doctrines

[98] In her dissent, my colleague concludes that 11368 had not pleaded *res judicata* on its November 2019 application and suggests that this is fatal to the success of this appeal. I disagree.

[99] *Res judicata* is judge-made law and must be developed on a case by case basis.

[100] There is jurisprudence to support the necessity for a **defendant** to plead *res judicata*, when the matter is proceeding to **trial** (*Cooper v. Molson's Bank* (1896), 26 S.C.R. 611 at 620; *McMillan v. Davies* (1892), Cameron 306 (S.C.C.) at 317; *Bailey v. Nelson*, 1987 ABCA 95, at para. 32).

[101] In this case, 11368 was the applicant and the matter was not proceeding to trial.

[102] Further, there is no jurisprudence to support the necessity for an **applicant** to plead *res judicata*.

[103] This appeal arises from an application where the pleadings were confined to 11368's application and Patrick Street's response. These facts must be considered in order to appreciate whether 11368 had the opportunity to plead *res judicata*.

[104] 11368's application in November 2019 had been for an order under section 11 of the *Conveyancing Act* for payment to itself of the surplus funds (less the amount due to Deanna Cheeke). At paragraphs 26 and 27 of its application, 11368 asserted that in response to its demand for the surplus funds, Patrick Street had "largely [repeated] the same objections cited at the Supreme Court and Court of Appeal levels" and that such objections "ha[d] been heard and dismissed at the Court of Appeal" (Appeal Book, Vol. 1, Tab 5, p. 57).

[105] When Patrick Street filed its response on December 9, 2019, it revisited the claim it had made on the J-3 and Cook applications, to entitlement to payment of $4,000,000.00 under Mortgage 759678 (Appeal Book, Vol. 2, Tab 1, ps. 150-156). The matter was set for hearing and no briefs were filed to assist the applications judge. The next opportunity that 11368 had to address Patrick Street's re-argument to entitlement to payment under Mortgage 759678 was during oral submissions and it did so.

[106] On the hearing of the application, counsel for 11368 asserted that this issue had already been determined and confirmed by the Court of Appeal. The transcript of June 24, 2020 (Appeal Book, Vol. 1, Tab 3, p. 14) reflects the following submission:

> … Just a few comments on my friend's response. He seems to take biggest issue with the 4 million dollars of collateral security on the loan guaranteed by 11368 Newfoundland Inc. Our position with respect to that is that you considered these arguments at trial already, the Court of Appeal has also heard these arguments and agreed with you that this mortgage (unintelligible) proven at trial and should not be considered in account whatsoever…

[107] Patrick Street replied comprehensively to this in its oral submission (Appeal Book, Vol. 1, Tab 3, ps. 14-16) during which Patrick Street merely pursued the same argument it had made on the J-3 and Cook applications. The applications judge reminded counsel that paragraph 63 of the 2019 Appeal Decision confirmed the applications judge's conclusion that the amount owing on Mortgage 759678 had not been established (Appeal Book, Vol. 1, Tab 3, p. 21).

[108] In oral reply submissions on the application, 11368 asserted:

> Thank you, Justice. Replying to my friend's argument… You have already ruled on this matter before and the Court of Appeal ruled on it as well. These arguments were made

> in front of the Court of Appeal... My friend is essentially relied on the argument in the Glasswall Limited v. 2009861 Nova Scotia Limited case. However, they proceeded upon an agreed statement of facts which establishes the amount of the mortgage securing a guarantee in that case was due and payable in full by the guarantor. Here, there's-we have no agreement.
>
> …
>
> So, what I think my friend is trying to do is trying to skip a step essentially and try to get relief from this accounting application which he might get elsewhere, but I mean, what he's essentially asking you to do is now reverse your position on… [the] 4-million-dollar mortgage to say, yes, there was sufficient evidence to determine what was owing under the mortgage. In fact, the Court of Appeal says in paragraph 62 of their decision:
>
> > "The mere fact that the registration cost of the mortgage reflected a value of $4,000,000 is not determinative of the amount actually owing under the mortgage."
>
> There has been no new evidence to establish what's actually owing under that mortgage… In light of that, I think that's really the only other encumbrance that we're dealing with here, and once we get passed the Cheeke Mortgage and if we just count this mortgage as you did and as the Court of Appeal did, there are no other encumbrancers.

(Appeal Book, Vol. 1, Tab 3, p. 25)

[109] The question of whether Patrick Street was precluded from pursuing its claim to entitlement to payment under Mortgage 759678 was therefore squarely placed before the applications judge for determination and he did so, finding in favour of 11368.

[110] In addition, while "pleading *res judicata* permits a litigant to argue that the earlier determination is conclusive evidence", it is nevertheless "*prima facie* evidence when not pleaded" (*The Doctrine of Res Judicata in Canada*, at p. 13, citing *Dhillon v. Dhillon*, 2006 BCCA 524, at para. 22). Where the point is not raised in the pleadings "but the reasons for judgment determine the point and the judgment in question is based upon it, issue estoppel applies to the point" (*The Doctrine of Res Judicata in Canada*, at p. 58).

[111] In this case, the applications judge concluded that he had previously determined that Patrick Street had not established that there was any money owing on Mortgage 759678. I would conclude therefore that it is immaterial that 11368 had not pleaded *res judicata* on its November 2019 application. Issue estoppel applies to the point.

Abuse of Process by Relitigation

[112] I acknowledge that the 2020 Decision does not specifically reference *res judicata* but this is where the fifth of the essential estoppel doctrines identified at page 11 of *The Doctrine of Res Judicata in Canada* (and cited in paragraph 29 of my decision) becomes relevant. As Donald J. Lange notes therein: "Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined".

[113] It was the applications judge's duty to exercise the inherent jurisdiction of the court and consider the doctrine of abuse of process by relitigation, even if the parties had not raised an estoppel argument; however, in this case, 11368 had done so in oral submissions (*The Doctrine of Res Judicata in Canada*, at p. 201, citing *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, leave to appeal to SCC refused, 31336 (4 May 2006), at para. 50).

[114] The applications judge identified that Patrick Street was re-addressing the same question addressed in his earlier decision, which had been confirmed on appeal, and which was final (paras. 24-25). Further, there had been no suggestion of unfairness to Patrick Street.

[115] In refusing Patrick Street's second attempt to pursue entitlement to payment of $4,000,000.00 under Mortgage 759678, the applications judge effectively found abuse of process by relitigation.

[116] In concluding as he did and refusing to reconsider whether any amount was due to Patrick Street under Mortgage 759678, the applications judge effectively exercised his discretion. Such a decision will not be reversed on appeal absent an error of law or principle, or a failure to exercise the discretion judicially (*The Doctrine of Res Judicata in Canada*, at p. 205).

[117] I would find no error in the applications judge's conclusion that the question of whether Patrick Street was entitled to payment of the surplus as a result of Mortgage 759678 had already been decided and that 11368 was entitled to the surplus. The integrity of the judicial decision-making process in the 2019 Appeal Decision would be undermined had the applications judge concluded otherwise.

Special Circumstances

[118] Before proceeding further, I note that this is not a case where the court must address whether an exception to *res judicata* applies once its constituent elements are established as I conclude they are (compare *Guardian Insurance*, at para. 1). It was not asserted by either Patrick Street or 11368 on this appeal that "the first decision was obtained by fraud" or that there was "new evidence that with reasonable diligence, could not have been discovered prior to the original decision and which, had it been considered, could have changed the outcome of the original decision" (*Guardian Insurance*, at para. 52).

[119] These are the well-recognized limited exceptions under which special circumstances may be considered. It is unnecessary therefore for me to address special circumstances.

Is it appropriate to exercise discretion to avoid the consequences of estoppel?

[120] *The Doctrine of Res Judicata in Canada* summarizes the key principles of discretion as follows:

> The key principles governing the exercise of discretion as decided by the courts of Canada are:
>
> - When the criteria for issue estoppel have been met, the court *must* consider, in the exercise of its discretion, whether or not issue estoppel should apply to the second proceeding.
>
> - When the first proceeding is a court proceeding and the second proceeding is a court proceeding involving issue estoppel, the court has very limited discretion to refuse its application.

- When the first proceeding is a tribunal proceeding and the second proceeding is a court proceeding involving issue estoppel, the court's discretion is governed by a flexible approach.

- When the criteria for cause of action estoppel have been met in a court proceeding, the court *may* consider whether or not cause of action estoppel should apply to the second court proceeding, but the court has very limited discretion to refuse its application.

- When the court considers an application of abuse of process by relitigation to a second proceeding, the discretionary factors of issue estoppel apply to the doctrine.

- A consideration of issue estoppel or cause of action estoppel focuses upon the interests of the litigants.

- A consideration of abuse of process by relitigation focuses upon the justice system.

[121] 11368 has, in my view, established all preconditions to the application of both cause of action and issue estoppel. However, in the case of issue estoppel, the Court is **required** to consider, as a matter of discretion, whether estoppel should apply to the second proceeding (*Danyluk*, at para. 33).

[122] While discretion is not a **required** consideration where cause of action estoppel is established, this Court has previously applied this discretion equally to both issue estoppel and cause of action estoppel (*Furlong*, at paras. 40-43) and I will do so here.

[123] The constraints to discretion are loosened or wider when the prior decision is that of an administrative tribunal "because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers" (*Danyluk*, at para. 62). However, this flexible approach is **not** available when the criteria for estoppel are met in a court to court proceeding (*Guardian Insurance*, at paras. 67-69, 77). The concerns that justify a broader discretion where the prior decision is administrative are not relevant where, as here, the prior decision is that of a court (*Guardian Insurance* , at para. 67).

[124] When the estoppel arises in court to court proceedings, as is the case here, discretion has been described as, available only "in the rarest of cases" (*The Doctrine of Res Judicata in Canada*, at p. 241), or as, being "very limited in application" (*Danyluk*, at para. 62, citing *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72, at p. 101; *The Doctrine of Res Judicata in Canada*, at p. 239).

[125] Exercise of discretion when the estoppel arises in court to court proceedings requires this Court to "balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case" (*Danyluk*, at para. 33).

Finality of Litigation

[126] As to finality of litigation, the Supreme Court of Canada stated in *British Columbia* (*Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at paragraph 34:

> It is in the interests of the public and the parties that the finality of a decision can be relied on…
>
> Respect for the finality of a judicial… decision increases fairness and the integrity of the courts…; on the other hand, re-litigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings…
>
> The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal… mechanisms that are intended by the legislature…
>
> Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial… decision…
>
> Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources.

[127] The power of sale concluded in July 2016. In the last seven years, Patrick Street has withheld approximately $4,000,000.00 in surplus funds notwithstanding the 2017 Decision and the 2019 Appeal Decision. In response to 11368's application in November 2019, Patrick Street attempted to relitigate its entitlement to the power of sale proceeds on the same facts and in reliance upon the same arguments made on the J-3 and Cook applications and on appeal of the 2017 Decision. On this appeal of the 2020 Decision, Patrick Street pursued for the first time, the arguments that "the effect of the conveyance of title due to the

power of sale" and/or the power of sale proceeding as "a legal action", caused 11368 to be in default of Mortgage 759678 and that this entitled Patrick Street to the $4,000,000.00 on the power of sale (Appellant's Factum, para. 44; 2020 Decision, at para. 60). This is an argument that could, with due diligence, have been advanced seven years ago.

[128] Patrick Street's position reflects a lack of respect for the finality of the 2017 Decision and 2019 Appeal Decision. Patrick Street could have sought leave to appeal the 2019 Appeal Decision to the Supreme Court of Canada but did not. Instead, it used 11368's subsequent application for the surplus funds to revisit its prior position in an attempt to circumvent the appropriate review mechanism.

[129] As Binnie, J. stated in *Danyluk* at paragraph. 18, "an issue, once decided, should not generally be relitigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided."

[130] I would conclude that the public interest in finality of litigation favours 11368's position.

Ensuring Justice is Done

[131] As to ensuring that justice is done, 11368 and Patrick Street are corporations controlled by Bill Clarke and Paul Madden respectively. They have had a lengthy business relationship which has resulted in multiple legal proceedings. Neither party could be said to be unsophisticated in business or finance, or unfamiliar with court proceedings. Both parties have been represented throughout by counsel who they have instructed, and both could be expected to appreciate the terms of their mortgages and the consequences of power of sale proceedings on the Kenmount Terrace property.

[132] Patrick Street obtained the Kenmount Terrace property on the power of sale proceeding for just over seventy-five percent of its appraised value paying $11,400,000.00 for a property appraised at $15,100,000.00. It has therefore already benefitted on the power of sale. In addition, it continues to hold an enforceable guarantee by 11368 (to a limit of $4,000,000.00) respecting Mortgage 608132.

[133] No suggestion has been made that Patrick Street did not receive a fair hearing on either application or on the prior appeal.

[134] In comparison, 11368 has been deprived for almost seven years of the substantial funds which the applications judge noted Patrick Street was required to hold in trust pursuant to section 14(3) of the *Conveyancing Act* (2020 Decision, at paras. 30-31). 11368 has been entitled to these funds since the power of sale concluded in July 2016.

[135] In my view, exercising discretion to avoid the consequences of estoppel would result in an injustice (*Furlong*, at para. 42).

Conclusion on Discretion

[136] On consideration of both the public interest in finality of litigation and in ensuring that justice is done, I would conclude that it is not appropriate to exercise discretion to avoid the consequences of estoppel.

CONCLUSION AND DISPOSITION

[137] For these reasons, I would dismiss the appeal. I would award costs on appeal to 11368 on Column 3 of the *Court of Appeal Rules*.

_____

G.D. Butler J.A.

F.P. O'Brien J.A. (Concurring Reasons):

OVERVIEW

[138] I agree with Butler J.A. that the appeal should be dismissed.

[139] On the first issue on appeal, there was no error in awarding mortgage interest at the contractual rate of 18%. Therefore, I would concur with both my colleagues, Hoegg J.A. and Butler J.A., in the result on this issue and dismiss this ground of appeal.

[140] On the second issue on appeal, there was no error made in confirming what had previously been decided, namely that Patrick Street Holdings Limited ("Patrick Street") is not entitled to keep $4 million from the proceeds arising from the sale of real property. Therefore, I would concur with Butler J.A. in the result on this issue and dismiss this ground of appeal.

[141] Regarding the second issue, the doctrines of *res judicata* and abuse of process by relitigation prevent Patrick Street from relitigating this issue on appeal.

[142] These doctrines apply because the central issue that Patrick Street is attempting to reargue on appeal is the same issue that it has previously argued, unsuccessfully, in the courts of this province over the past seven years.

[143] Specifically, Patrick Street wishes to reargue that it is entitled to be paid $4 million from the proceeds of the 2016 sale of a St. John's real estate development known as Kenmount Terrace (hereafter "Kenmount Terrace" or the "property").

[144] This issue has been litigated and decided. Patrick Street's position on the issue has been rejected. Patrick Street has not accepted the result and this appeal is an attempt to have this Court revisit this settled issue.

[145] On this appeal Patrick Street alleges, as it has alleged in previous litigation, that its entitlement to $4 million arises from a mortgage between itself as mortgagee, and 11368 NL Inc. ("11368"), as owner and mortgagor of Kenmount Terrace (hereafter the "mortgage" or the "$4 million mortgage").

[146] It asserts, as it has asserted in prior litigation, that the $4 million should be retained by Patrick Street, and not be paid to others, including 11368.

[147] This is not a new issue.

[148] Patrick Street has litigated this same issue in three separate court proceedings since 2017: twice in the Supreme Court of Newfoundland and Labrador (in 2017 and 2020) and once in this Court of Appeal (in 2019).

[149] The result was the same every time. The respective courts decided that the $4 million should rightfully be paid to other parties, including 11368.

[150] On all prior occasions, the parties to the litigation included Patrick Street, arguing that it was entitled to $4 million, and 11368 arguing that Patrick Street had no such entitlement.

[151] This issue has already been decided by this Court of Appeal, in 2019, following the first appeal in this litigation. Patrick Street wants this Court to reconsider and decide the issue again, on a second appeal.

[152] Both Patrick Street and 11368 were parties to and fully participated in all prior litigation. Both parties took the opportunity to advocate for their respective positions. They received a final decision from the Court of Appeal on the very issue that Patrick Street purports to reargue on this appeal.

[153] As the issue has already been judicially considered and decided by this Court, Patrick Street cannot relitigate it. To permit it to do so would violate the doctrines of *res judicata* and abuse of process by relitigation.

[154] Simply put, this is a classic case where both doctrines clearly apply. To conclude otherwise would offend the basis on which these doctrines have been developed and would result in the very circumstance the doctrines are meant to preclude.

[155] Accordingly, I would concur with Butler J.A. in the result and dismiss the appeal.

BACKGROUND

Power of sale proceedings pursuant to the *Conveyancing Act*

[156] This appeal, and the litigation preceding it, must be considered in context.

[157] This is a dispute among Patrick Street and other parties about who is entitled to the proceeds of the sale of Kenmount Terrace. Entitlement to payment in this context is determined pursuant to the *Conveyancing Act*, RSNL 1990, c. C-34.

[158] Kenmount Terrace was owned by 11368 and was encumbered by numerous mortgages and other claims, including a mechanics' lien claim.

[159] Most of the mortgages on Kenmount Terrace were held by Patrick Street (or companies or individuals closely related to Patrick Street) as mortgagee, with 11368 as mortgagor.

[160] When one of the mortgages on the property held by Patrick Street (not the $4 million mortgage but another mortgage, valued at approximately $1.875 million) went into default, Patrick Street sold Kenmount Terrace pursuant to the power of sale provisions in the *Conveyancing Act*.

[161] The *Conveyancing Act* provides statutory direction regarding the requirements and procedures to be followed when a mortgagee sells property pursuant to a power of sale. It also provides direction on distribution of funds.

[162] Litigation began after Patrick Street took the position that it would retain the proceeds received from the sale, and advised other parties, including 11368, that they were not entitled to recover from the proceeds.

[163] Specifically, Patrick Street decided that it could retain $4 million from the sale proceeds, and that this entitlement arose from the $4 million mortgage. Accordingly, Patrick Street advised that, as a result, 11368 and other parties would not receive any payment arising from the sale.

[164] This was ultimately challenged in the Supreme Court, and the Court was asked to determine entitlement among competing parties and decide how the proceeds from the sale were to be distributed, in accordance with the *Conveyancing Act*.

[165] Patrick Street's position was that it could retain $4 million. As discussed below, its position was rejected by the Supreme Court and later by the Court of Appeal. The $4 million that Patrick Street had attempted to retain was ordered to be paid to others, including 11368.

The appraisal and sale

[166] The *Conveyancing Act* requires a written appraisal before there can be a sale of a mortgaged property under power of sale (s. 8). It further requires that a mortgaged property shall not be sold for less than 75% of the appraised value without the prior approval of a Supreme Court Judge (s. 9).

[167] In this case, the appraised value of Kenmount Terrace was $15,100,000. Therefore, Court approval would have been required for any sale under $11,325,000 (i.e., 75% of $15,100,000).

[168] Patrick Street sold Kenmount Terrace to itself. That is, Patrick Street was the vendor of the property (as mortgagee exercising power of sale of mortgaged property under the *Conveyancing Act*), and it conveyed title to the property to itself, as purchaser.

[169] The sale price was $11,400,000. As $11,400,000 exceeded (by $75,000) the statutory minimum of $11,325,000, the property was conveyed, from Patrick Street to Patrick Street, without requiring judicial approval.

[170] By virtue of the sale, Patrick Street became the new owner of the property.

The accounting and Patrick Street's denial of claims

[171] As mortgagee/vendor, Patrick Street was required to "prepare an accounting" regarding the sale of Kenmount Terrace, pursuant to the *Conveyancing Act* (s.10).

[172] An accounting provides a breakdown of money received from the sale, expenses related to the sale, payments made, and any funds remaining. It is meant to show how the sale proceeds were distributed and the order, or priority, of payments. It indicates which parties were paid, which ones were not, and whether there was any money remaining after all valid payments were made.

[173] If there is money remaining after expenses and all other accepted claims are paid, the *Act* states that this surplus "residue" is to be paid to the person entitled to the mortgaged property, which in this case is 11368, the mortgagor.

[174] The *Act* mandates that a copy of the accounting must be sent to the mortgagor (11368) and to any other "registered encumbrancer". Registered encumbrancers may include, for example, a mortgage holder (i.e., a mortgagee) on the property or a mechanics' lien claimant.

[175] In this case, there were three registered encumbrancers that are relevant to this appeal. These were John Cook, who held a mortgage on the property (the Cook mortgage), J-3 Consulting and Excavating Ltd., who had a mechanics' lien claim arising from work done on the property (the J-3 claim), and Deanna Cheeke, who also held a mortgage on the property (the Cheeke mortgage).

[176] As required by the *Conveyancing Act*, Patrick Street sent a copy of the accounting to 11368, as mortgagor, and to Cook, J-3 and Cheeke as registered encumbrancers. Because Patrick Street sold the property to itself, it held the proceeds received from the sale and determined, in the accounting, which claims were paid, and which ones were not.

[177] The accounting prepared and sent by Patrick Street indicated that the three registered encumbrancers would receive nothing from the proceeds of the sale. Likewise, 11368 as mortgagor would receive nothing, because Patrick Street concluded there was no surplus remaining.

[178] This was because the accounting indicated Patrick Street's intention to pay itself $4 million from the sale proceeds. Once it paid itself this $4 million, Patrick Street's accounting indicated that there were no funds remaining to pay the registered encumbrancers, and there was no residual surplus that would go to the mortgagor, 11368.

The statutory entitlement of 11368, as a mortgagor, pursuant to the *Conveyancing Act*

[179] Section 14(3) of the *Conveyancing Act* sets out the statutory basis for entitlement of the mortgagor (11368) and the registered encumbrancers (Cook, J-3, and Cheeke). The section states:

> 14(3) The money that is received by the mortgagee arising from the sale, after the discharge of prior encumbrances to which the sale is not made subject, shall be held by him or her in trust to be applied
>
> (a) 1st, in payment of all costs, charges and expenses properly incurred as incident to the sale or an attempted sale, or otherwise;
>
> (b) secondly, in discharge of the mortgage money, interest and costs, and other money due under the mortgage; and
>
> (c) the residue of the money received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale of the mortgaged property.

[180] Three points arise from s. 14(3).

[181] First, as mortgagee, Patrick Street has a statutory duty to hold the proceeds of the sale of Kenmount Terrace "in trust" for the benefit of those entitled to receive money under the *Act*.

[182] Second, once all valid encumbrancers are paid, "the residue of the money received shall be paid to the person entitled to the mortgaged property". This term, "the person entitled to the mortgaged property", has been interpreted to include the mortgagor of property that is sold under a power of sale. In this case that is 11368.

[183] This was decided by Justice Noel Goodridge, of the Supreme Court (Trial Division) in *Brenton Brothers Ltd.*, *Re*, 1979 Carswell Nfld 104 (Nfld. T.D.). The *Re Brenton* decision was referenced by the Court of Appeal in 2019, in the first appeal decision in this litigation.

[184] Justice Goodridge in *Re Brenton* queried who were the persons entitled to the mortgaged property under s. 14(3), and concluded, in paras. 21 and 22, that "they are those same persons who would be entitled to redeem the mortgage … and clearly include … subsequent or puisne encumbrances and, of course the mortgagor itself" (Emphasis added).

[185] Accordingly, 11368 (as mortgagor) has a statutory right, arising from s. 14(3) of the *Act*, to the residue or remainder of the proceeds received by Patrick Street from the sale of Kenmount Terrace once all approved costs and encumbrancers have been paid. 11368 is entitled to whatever funds, if any, that remain after the claims of the registered encumbrancers have been proved, accepted and satisfied.

[186] The residual amount payable to 11368 depends on the amounts that the registered encumbrancers are paid. The amount remaining must be held in trust by the mortgagee, Patrick Street, for the benefit of the mortgagor, 11368.

[187] Third, registered encumbrancers (for example mortgagees or mechanics' lien claimants) must prove or establish their entitlement to be paid, and the amount owing, before they can recover. However, 11368, as mortgagor of the property that was sold under the *Conveyancing Act*, does not have a "claim" to prove in the same way. That is, its entitlement does not arise because it was a mortgagee or a mechanics lien claimant.

[188] Rather, 11368's entitlement arises because it was the mortgagor, and owner, of the property before it was sold. This fact, that 11368 was the mortgagor of Kenmount Terrace, was not contested. All parties accepted this. Therefore, 11368's entitlement is automatic, by operation of the *Act*, provided there are funds remaining after all other established claims have been paid. The only thing to be determined is how much is remaining. Whatever that amount is, it is to be provided to 11368 as mortgagor.

The first round of litigation following the denial of claims

[189] As noted, Patrick Street paid itself $4 million, claiming that it could retain this amount because of the $4 million mortgage on the property.

[190] This was challenged and, as described below, both the Supreme Court and the Court of Appeal decided that Patrick Street was not entitled to keep this $4 million. Rather, the $4 million had to be used to pay other parties.

[191] Although this issue has already been litigated and decided, Patrick Street presently attempts to relitigate the same issue on this appeal.

[192] As will be considered below, the doctrines of *res judicata* and abuse of process by relitigation preclude this. The application of these doctrines is fact dependent and must be considered on a case-by-case basis.

[193] A review of the prior court proceedings, and the decisions made in those proceedings, will demonstrate that the present appeal is an attempt to relitigate that which has been already decided.

The first Supreme Court decision – 2017

[194] After Patrick Street denied payment, proceedings were commenced in the Supreme Court to challenge Patrick Street's accounting, and its refusal to pay.

[195] Pursuant to the *Conveyancing Act*, a mortgagor (11368) or a registered encumbrancer (J-3, Cook or Cheeke) "who is dissatisfied with an accounting given by a mortgagee" can apply to a Supreme Court Judge "for whatever relief that the judge may think appropriate in the circumstances to grant" (s.11).

[196] Two applications were commenced in the Supreme Court.

[197] One was brought by John Cook seeking payment as a mortgagee on the property. The parties to that application were Cook, 11368, and Patrick Street. The other application was brought by J-3, seeking payment as a mechanics' lien holder. The parties to that application were 11368, J-3 and Patrick Street. Cheeke was not a party to this first round of litigation, but was a party to the second round, discussed below.

[198] In both applications the parties, including 11368, challenged the accounting and Patrick Street's decision to pay itself the $4 million. The parties asserted that

they were entitled to be paid from the sale proceeds of Kenmount Terrace, which included the $4 million. Patrick Street contested the applications.

[199] The applications were heard together, and the Supreme Court decided them together in a 2017 decision, *Cook v. Patrick Street Holdings Ltd.*, 2017 NLTD(G) 167 (the 2017 decision).

[200] The Judge itemized and carefully reviewed all encumbrances and claims related to the property. He considered the claims that Patrick Street had paid, and the claims that Patrick Street had not paid.

[201] The Judge accepted Patrick Street's decision to pay certain amounts to itself. For example, he allowed Patrick Street to retain approximately $6.1 million, based on five separate mortgages that Patrick Street held on Kenmount Terrace (para. 63).

[202] However, in other instances, the Judge found Patrick Street's accounting to be in error and concluded that Patrick Street purported to retain amounts to which it was not entitled. These amounts were challenged, considered by the Judge, and disallowed from the accounting. In some cases, the Judge found that mathematical errors led Patrick Street to retain amounts to which it was not entitled. The Judge noted that some of these errors in the accounting were attributable to improper calculations attributed to Patrick Street's financial officer, Mr. Jason Weston.

[203] Examples of amounts disallowed in the accounting follow next. In all examples, Patrick Street originally claimed it could retain these amounts from the proceeds, rather than paying other parties. The Judge, after a careful analysis, concluded that Patrick Street was in error in purporting to retain these amounts.

[204] First, Patrick Street had claimed in the accounting that it was entitled to retain approximately $1.1 million from the sale proceeds, allegedly arising from five "directions to pay". The Judge rejected this, noting that this $1.1 million amount could not be retained by Patrick Street, as these directions to pay "confer no interest". They did not create a security interest in Kenmount Terrace (paras. 45, 54). The Judge did not allow this amount in the accounting.

[205] Second Patrick Street had claimed that it was entitled to retain $800,000 from the sale proceeds, which it described as a "bonus". The Judge disallowed this amount from the accounting and held that it was not payable to Patrick Street because the conditions for payment had not been satisfied (para. 57).

[206] Third, the Judge held that, "from Mr. Weston's cross-examination, it is apparent that Patrick Street incorrectly added interest to [this] $800,000 bonus that should not have been included in the calculations" (para. 57). This was excluded from the accounting.

[207] Fourth, the Judge removed from the accounting a mortgage, in the amount of $1.4 million, that Patrick Street had originally included and retained, because the principal of Patrick Street "acknowledged on cross-examination on his affidavit that the mortgage should not have been registered and that it was not a valid charge on Kenmount Terrace" (para. 56).

[208] Fifth, with respect to another mortgage held by Patrick Street, the Judge noted that "Mr. Weston acknowledged on cross-examination that he mistakenly added interest to $100,000 of the face amount of the mortgage, when that portion was non-interest bearing" (para. 58).

[209] Sixth, Patrick Street had claimed that it was entitled to retain funds arising from three separate mortgages. In Patrick Street's accounting, the first mortgage was valued at $1,613,141.50. The second mortgage was valued at $468,000, and the third mortgage was valued at $2,081,141.50. The Judge noted that there was a clear mathematical error in the accounting of these mortgages, and that "the face amount of mortgage #3 [i.e., $2,081,141.50] is simply a consolidation of the two amounts that show in mortgages #1 and 2" [i.e., $1,613,14.50 + $468,000 = $2,081,141.50]. As a result, the Judge found that mortgage #3 was not to be added to 11368's indebtedness. The Judge made an appropriate adjustment to correct Patrick Street's error, and to significantly reduce the amount to which Patrick Street had claimed it was entitled in the accounting (para. 57).

[210] Seventh, and particularly relevant to this appeal, Patrick Street claimed in the accounting that it was entitled to retain $4 million, arising from the $4 million mortgage on Kenmount Terrace. Patrick Street's argument was that, once this $4 million was paid to itself, there would be no money remaining to pay 11368 or the others.

[211] The Judge carefully considered Patrick Street's position on this issue and concluded that it was not entitled to retain $4 million from the sale proceeds. Rather, the Judge disallowed the $4 million mortgage from the accounting and decided that that this money should be made available to pay other parties.

[212] The $4 million mortgage, and the Judge's decision to disallow it from the accounting, will be considered next.

The purpose of the $4 million mortgage

[213] The $4 million mortgage that Patrick Street relied on as the basis for retaining $4 million was a collateral mortgage, related to a guarantee. The $4 million mortgage was security for the "satisfaction and performance" of the guarantee, respecting a different mortgage, on property unrelated to Kenmount Terrace.

[214] 11368 had provided the guarantee in relation to another mortgage that Patrick Street (and corporations and individuals related to Patrick Street) held on property that was unrelated to Kenmount Terrace. The record indicates that the amount owing on this other mortgage was $10,072,818.52 (hereafter the "$10 million mortgage").

[215] The $10 million mortgage did not secure the Kenmount Terrace property. It secured other commercial property developments on Water Street, in St. John's, and other property in St. Johns and surrounding areas.

[216] 11368 was not a party to this $10 million mortgage, on this unrelated property. It was a guarantor.

[217] The guarantee in question included a specific clause, clause 7, titled "payment and remedying defaults". This clause indicated that the guarantor (11368) "immediately on receiving a demand" was to pay the amount guaranteed on the $10 million mortgage or rectify any default.

[218] According to the parties' submissions on appeal, the Court understands that this $10 million mortgage still exists. The property (on Water Street and elsewhere) continues to be secured by the $10 million mortgage. Unlike

Kenmount Terrace, from what the Court understands this property that secures the $10 million mortgage has not been sold by power of sale under the *Conveyancing Act*.

[219] As such, presumably, the principal remains payable, and interest continues to accrue, according to the terms of the $10 million mortgage. As well, presumably, under the terms of the guarantee, should the $10 million mortgage go into default in the future, 11368, as guarantor, may be called upon to pay or rectify any such default, after receiving the appropriate demand under clause 7.

[220] To the Court's knowledge, this has not occurred to date. Nor is it the basis for Patrick Street's claim to the $4 million.

The Supreme Court decided that Patrick Street was not entitled to the $4 million

[221] Rather, Patrick Street's claim relates to a $4 million mortgage on Kenmount Terrace. This $4 million mortgage is meant to secure 11368's guarantee on the $10 million mortgage. Approximately two years after 11368 provided the guarantee respecting the $10 million mortgage, the $4 million mortgage was executed to secure the "satisfaction and performance" of this guarantee.

[222] Specifically, the mortgage documents state that the $4 million mortgage was "to secure satisfaction and performance of the subject Guarantee, to the limit of Four Million ($4,000,000.00) Dollars".

[223] The Supreme Court Judge considered the context described above, including the fact that the $4 million mortgage on Kenmount Terrace was to "secure satisfaction and performance" of a guarantee relating to the $10 million mortgage on other, unrelated property, located at Water Street and elsewhere.

[224] The Supreme Court Judge did not accept Patrick Street's argument that this entitled it to retain $4 million from the proceeds of the sale of Kenmount Terrace. Rather the Judge concluded that the $4 million claimed by Patrick Street in this context, arising from 11368's guarantee of an unrelated mortgage, had not been established. Accordingly, the Judge disallowed the $4 million mortgage from the accounting, stating:

> [62] 11368 NL Inc. says this mortgage simply acted as collateral security up to $4,000,000.00 for a guarantee dated April 4, 2014 that 11368 NL Inc. gave on behalf of companies related to 11368 NL Inc. to secure $10,072,818.52 that the related companies owed to Patrick Street Holdings. In 11368 NL's estimation, no money or a lesser amount than $4,000,000.00 may actually be owing under the mortgage. 11368 NL Inc. says Patrick Street Holdings should have done a proper analysis if it wished to include any amount from this mortgage to be paid from the power of sale proceedings. I accept this analysis and make no allowance for this mortgage in the accounting.

[225] As a result, the Supreme Court Judge found that Patrick Street was not entitled to keep the $4 million from the sale proceeds of Kenmount Terrace. Rather, this money was ordered to be made available to pay other parties to whom Patrick Street had originally denied payment in its accounting.

[226] Patrick Street's accounting had indicated that there were insufficient funds available to pay Cook and J-3, and no surplus remaining for the mortgagor 11368.

[227] However, the Judge concluded otherwise. Specifically, the Judge noted that, after disallowing Patrick Street's $4 million payment to itself, there was $4,241,865.01 remaining from the sale proceeds of Kenmount Terrace (paras. 63, 64).

The first Court of Appeal decision - 2019

[228] Patrick Street appealed the 2017 decision to the Court of Appeal. The parties to the appeal were the same as the parties on the original applications, namely Cook, J-3, 11368 and Patrick Street.

[229] On appeal, Patrick Street again argued its entitlement to the $4 million. It continued to assert that, after payment of the $4 million to itself, there were no funds remaining to pay others.

[230] In a decision released in 2019, the Court of Appeal dismissed Patrick Street's appeal and upheld the decision of the Supreme Court (*Patrick Street Holdings Ltd. v. Cook*, 2019 NLCA 69, the 2019 Court of Appeal decision).

[231] The Court of Appeal confirmed the Supreme Court's decision that the $4 million mortgage did not entitle Patrick Street to retain $4 million from the proceeds of sale of Kenmount Terrace.

[232] The Court of Appeal addressed the issue, as follows:

> The Disallowed Mortgage
>
> [54] Patrick Street Holdings was the mortgagee with respect to a mortgage on the Subject Property which was registered for an amount of $4,000,000. This mortgage acted as collateral security for a guarantee given by 11368 NL on behalf of a group of companies. The principal debt guaranteed totaled $10,072,816.52 and was owed by a group of companies to another group of companies, including Patrick Street Holdings.
>
> [55] The Applications Judge disallowed this mortgage entirely from the accounting. He found that the actual amount owing under the mortgage was not properly established on the evidence.

[233] Patrick Street argued on appeal that the Court of Appeal should follow the decision of the Nova Scotia Supreme Court in *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.*, 1994 CanLII 4518 (NSSC), affirmed on appeal by the Nova Scotia Court of Appeal at 1994 CanLII 4083 (NSCA).

[234] The Court of Appeal noted Patrick Street's position on this point:

> [60] On appeal, Patrick Street Holdings did not argue that the specific language of the mortgage caused the $4,000,000 to become payable at the time of the power of sale. Rather, they submitted that this Court should follow the approach taken in *Glasswall Ltd. v. 2009861 Nova Scotia Ltd.*, [citations omitted] where it was concluded that a mortgage given to support a guarantee can be a valid claim entitled to priority in accordance with its registration timing. The Nova Scotia Court reached this conclusion despite recognizing the "apparent unfairness" it created:
>
> > A collateral mortgage, even if provided as collateral security for the debts or obligations of a different corporate entity, may be prior to a later registered lien claim. The priority in favour of a collateral mortgage security given to secure the debts of another is not excluded, notwithstanding the apparent unfairness created by mortgage monies being advanced to another entity, on another project and not for the purpose of increasing the selling value of the lands on which the lien holders have expended labour or furnished supplies.

[235] However, the Court of Appeal observed that *Glasswall* was based on an agreed statement of facts regarding the amount owing. No such agreement existed in the present case, where this issue was very much contested:

> [61] However, even if this Court were to find that the legal conclusion in *Glasswall* should be followed, there is a significant factual distinction. *Glasswall* proceeded based upon an agreed statement of facts which established that the amount of the mortgage securing the guarantee was due and payable in full by the guarantor.
>
> [62] In the present case, the Applications Judge did not find that there was sufficient evidence to conclude that 11368 NL as guarantor was liable to make payment at the time of the sale. The mere fact that the registration cost of the mortgage reflected a value of $4,000,000 is not determinative of the amount actually owing under the mortgage.

[236] The Court of Appeal also noted that Patrick Street's financial officer, Mr. Weston, had provided affidavit evidence that "the amount owing under the principal debt", (i.e., the amount owing on the $10 million mortgage on property unrelated to Kenmount Terrace) was approximately $8.5 million at the time Kenmount Terrace was sold.

[237] This amount related to what was owing on the $10 million mortgage, which secured the property on Water Street and elsewhere, but did not secure the Kenmount Terrace property.

[238] With respect to what was owed by 11368, the Court of Appeal noted the Supreme Court Judge's conclusion, reached after having considered all the circumstances, that there was insufficient evidence to find that 11368 was liable for payment "in its capacity as guarantor". The Court of Appeal stated that the Supreme Court Judge "did not find that there was sufficient evidence to conclude that 11368 as guarantor was liable to make payment at the time of the sale" (Emphasis added) (para. 62).

[239] As such, the Court of Appeal rejected Patrick Street's position on appeal that it was entitled to retain $4 million from the sale proceeds of Kenmount Terrace. The Court specifically confirmed that the $4 million mortgage was disallowed from the accounting:

> [63] The Applications Judge's conclusion that the amount owing was not established, and that therefore the mortgage should be disallowed from the accounting, is entitled to deference on appeal ... (Emphasis added).

[240] As such, the Court of Appeal confirmed the 2017 Supreme Court decision that these funds were to be made available for distribution to others:

> [63] … As there is no basis before the Court to warrant appellate intervention, I would uphold the decision of the Applications Judge in finding that there should be no payment under the $4,000,000 mortgage in priority to the J-3 Consulting lien or the Cook mortgages.

[241] In the result, the Court of Appeal dismissed Patrick Street's appeal. This was a final decision on this issue.

Patrick Street's refusal to pay the residual surplus to 11368 necessitated a second round of litigation

[242] Patrick Street did not seek leave to appeal the 2019 Court of Appeal decision to the Supreme Court of Canada.

[243] Rather, it paid the claims of J-3 and Cook. These payments were consistent with the Court of Appeal's decision, in which the Court had rejected Patrick Street's position that it could keep the $4 million, and the Court had confirmed that the surplus must be paid to others.

[244] However, not everyone was paid.

[245] After the 2019 Court of Appeal decision, 11368 also requested payment. This request was made in light of the Court's decision that the $4 million was disallowed from the accounting, and that Patrick Street could not retain it.

[246] As discussed above, as mortgagor of Kenmount Terrace, 11368 was automatically entitled by statute to any residual surplus funds remaining once all other accepted encumbrancers were paid. 11368's entitlement to the remaining surplus is grounded in s.14(3) of the *Conveyancing Act.*

[247] 11368 advised Patrick Street that, because the Court of Appeal had denied Patrick Street's $4 million claim, there was a surplus remaining from the sale. It reminded Patrick Street that, because the Court of Appeal had decided that Patrick Street could not keep the money, it must be distributed to the registered encumbrancers, with any residue payable to 11368, as mortgagor. As noted

above, the Supreme Court had determined in 2017 that the amount of the surplus was $4,241,865.01.

[248] Patrick Street refused to pay 11368.

[249] In denying payment, Patrick Street continued to maintain its earlier position that it was entitled to the $4 million, due to the $4 million mortgage on the property. It repeated that its accounting was correct, and that there would be no surplus available after the $4 million was retained by Patrick Street. Therefore, it restated that 11368 was entitled to nothing (Appeal Book, Vol. II, Tab 2, pages 336-339).

[250] By this time, of course, Patrick Street's position had already been considered and rejected by the Supreme Court and the Court of Appeal. While Patrick Street paid two registered encumbrancers (J-3 and Cook) following the 2019 Court of Appeal decision, it refused to pay 11368, the party entitled to the residual surplus.

[251] This is wholly inconsistent with the judicial determinations of the Supreme Court and the Court of Appeal, which both confirmed that Patrick Street's claim to the $4 million was disallowed from the accounting, and that Patrick Street could not retain this money.

The second round of litigation

[252] Faced with Patrick Street's ongoing denial of its claim, which denial was based on an argument that had already been rejected by the Court of Appeal, 11368 was required to return to the Supreme Court for a second round of litigation.

[253] 11368 applied to the Supreme Court asking the Court to confirm that the remaining surplus funds were to be paid to 11368, as required by the *Conveyancing Act*.

The second Supreme Court decision – 2020

[254] 11368 then brought a further application to the Supreme Court in this matter. This was a continuation of the prior applications (that involved J-3, Cook, 11368 and Patrick Street), which had been heard and decided together in 2017. As J-3 and Cook had received payment by this point, they did not participate in this second round of litigation.

[255] This was not a new application. In fact, when 11368 was required to return to the Supreme Court in 2020, the same court docket numbers that had been assigned to the Cook and J-3 applications were used. The 2017 Cook and J-3 applications were originating applications, and 11368's 2020 application was an interlocutory application in the same proceeding.

[256] As such, the 2020 Supreme Court decision has the same style of cause as the Supreme Court's 2017 decision, namely *Cook v. Patrick Street Holdings Ltd*., 2020 NLSC 99 (the 2020 decision). The Supreme Court Judge hearing the 2020 application was the same Judge who decided the Supreme Court applications in 2017.

[257] In its 2020 application to the Supreme Court, 11368 set out the procedural history of this matter. 11368 noted that the Supreme Court had previously rejected Patrick Street's claim to the $4 million and had disallowed the $4 million mortgage from the accounting. 11368 further noted that this decision was confirmed on appeal (Appeal Book, Vol. I, Tab 5, pages 50-65).

[258] In fact, 11368 appended the 2017 Supreme Court decision and the 2019 Court of Appeal decision to its application, as Schedules "B" and "C" respectively (Appeal Book, Vol. I, Tab 5, pages 66-107).

[259] Notably, 11368's application was not requesting that the Supreme Court determine whether there was a surplus. This had already been decided. Rather it was asking the Court to confirm the amount of the residual surplus owing to 11368 and to order payment of that amount (Appeal Book, Vol. I, Tab 5, page 57).

[260] 11368 noted in its application that, notwithstanding the 2019 Court of Appeal decision, Patrick Street continued to deny payment to 11368 "largely repeating the same objections cited at the Supreme Court and Court of Appeal

levels". 11368 stated in its application that "[Patrick Street's] appeal in the [J-3 and Cook applications] has been heard and dismissed at the Court of Appeal". As such, 11368 sought an order "confirming the balance payable" to it, so that it could be paid, as mortgagor, pursuant to the *Conveyancing Act* (Appeal Book, Vol. I, Tab 5, page 57).

[261] In its written response to the application, Patrick Street repeated its same argument that there was no surplus payable to 11368 because Patrick Street was entitled to pay itself $4 million, arising from the mortgage. Patrick Street stated that "therefore from the accounting proceeds, as a result of the $4,000,000 mortgage … [Patrick Street] is entitled to the amount available", namely the $4 million (Appeal Book, Vol. II, Tab 1, pages 149-156). This argument ignored the Court of Appeal's 2019 decision.

[262] At the oral hearing on the 2020 application in Supreme Court, Patrick Street continued to argue that it had a $4 million entitlement, based on the mortgage, and that there was no surplus remaining as a result (Transcript, Appeal Book, Vol. I, Tab 3, pages 22-65).

[263] At the hearing, 11368 reminded the Judge that, in 2017, the Judge had previously heard and rejected Patrick Street's argument that it was entitled to the $4 million. 11368 also noted that the Supreme Court Judge had previously determined, in 2017, that the surplus from the proceeds of the sale, in the amount of $4,241,865.01, was not to be retained by Patrick Street but was to be paid to other parties (Transcript, Appeal Book, Vol. I, Tab 3, pages 2-22, 65-68).

[264] The Judge made several comments relating to the findings he had previously made in his 2017 decision.

[265] First, the Judge confirmed that, in the 2017 decision, he had rejected Patrick Street's position that it was entitled to the $4 million. The Judge also noted that, in 2017, he determined that the Cook and J-3 claims were to be paid from the sale proceeds, and that a significant surplus remained after those claims were paid:

> [2] I allowed the Originating Application and set out the priorities amongst various 11368 creditors for distributing the proceeds that Patrick Street Holdings received from the power of sale. In particular, I ordered Patrick Street Holdings to pay the balances that 11368 owed to J-3 Consulting and John Cook; and I am informed that Patrick Street

> Holdings paid those balances. In my accounting, I rejected several amounts that Patrick Streets Holding allowed in its accounting of the power of sale, including an $800,000 bonus and $4,000,000, both supported by collateral mortgages.

[266] Next, the Judge adjusted the amount of the surplus remaining, deducting the amounts Patrick Street had paid to Cook and J-3 from the sale proceeds. He determined that the revised amount of the residual surplus was $4,080,961.94:

> [3] 11368 gave the $4,000,000 collateral mortgage to Patrick Street Holdings to secure a guarantee that 11368 gave on behalf of a group of companies related to 11368, to another group of companies, including Patrick Street Holdings. In the result, because I did not allow those amounts, I found that Patrick Street Holdings had a surplus from the power of sale, and I valued the surplus at $4,241,865.01. That, of course, was before Patrick Street Holdings paid the balances it owed to J-3 Consulting and John Cook. With the payments that Patrick Street Holdings made to both, 11368 says that Patrick Street Holdings still has a surplus from the power of sale, which it values at $4,080,961.94.

[267] While Patrick Street invited the Judge to reconsider its alleged entitlement to the $4 million, he did not do so.

[268] Rather, the Judge noted that he had already decided this issue in 2017, and that the Court of Appeal had upheld his decision on this very point in 2019 and dismissed Patrick Street's appeal. The Judge concluded that he was "shown nothing" to cause him to alter his prior determination:

> [24] Again, as I noted earlier, I deducted the $4,000,000 that Patrick Street Holdings claimed through the collateral mortgage in its accounting of the power of sale because Patrick Street Holdings provided no analysis of what amount, if any, may have been owing to it under the collateral mortgage. White, J.A. accepted my conclusion and ended his discussion of the issue this way:
>
> > The Applications Judge's conclusion that the amount owing was not established, and that therefore the mortgage should be disallowed from the accounting, is entitled to deference on appeal. As there is no basis before the Court to warrant appellate intervention, I would uphold the decision of the Applications Judge in finding that there should be no payment under the $4,000,000 mortgage in priority to the J-3 Consulting lien or the Cook mortgages.
>
> [25] I have been shown nothing to cause me to change my mind on this issue; and I accept White, J.A.'s affirmation of the conclusion I stated on the $4,000,000 mortgage amount in the reasons I filed on the Originating Application.

[269] Patrick Street attempted to advance the same issue on this 2020 application that it had previously advanced in the prior applications in the Supreme Court in 2017, and in the prior appeal in the Court of Appeal in 2019.

The Cheeke claim

[270] In the 2020 application in Supreme Court, the Judge also noted that there was one additional registered encumbrancer, Cheeke, who was making a claim. The Judge was asked to consider Cheeke's entitlement and determine the amount of this claim.

[271] The Judge confirmed that the remaining surplus, after J-3 and Cook had been paid, was $4,080,961.94. He ordered that this amount was to be paid to 11368, as the mortgagor, subject to deducting the amount payable to the only other remaining registered encumbrancer, namely Cheeke (2020 decision, at para. 36).

[272] The Judge made two findings regarding Cheeke's entitlement to payment, and the amount owing.

[273] First, he found that Cheeke was entitled to be paid from the proceeds of the sale of Kenmount Terrace based on a $150,000 loan that Cheeke had provided to 11368. That loan was secured by a collateral mortgage on the property.

[274] There was nothing contentious about the loan, the mortgage provided to secure the loan, or Cheeke's entitlement to be paid. The Judge allowed this $150,000 claim, noting:

> [32] 11368 gave Deanna Cheeke a collateral mortgage to secure the $150,000 that it borrowed from Ms. Cheeke by a promissory note for that amount. …
>
> [33] I have already addressed the efficacy of collateral mortgages as security instruments, ranking in priority to other security interests, even where the funds disbursed are not used for the properties over which the mortgage is granted. ...

[275] Second, the Judge allowed interest on the $150,000 at the contractual rate of 18%, as set out in the terms of the promissory note:

> [34] Accordingly, I order Patrick Street Holdings to pay Deanna Cheeke $150,000, the principal amount of the promissory note, together with interest at the contract rate of 18% per annum, starting February 23, 2016.

The outcome of the second application in Supreme Court

[276] In the result, in the 2020 decision the Supreme Court Judge confirmed that 11368 was entitled to the residual surplus from the proceeds of the sale of Kenmount Terrace. That amount was $4,080,961.94, less the amount of the Cheeke claim, which was $150,000 plus interest at 18%:

> [36] Accordingly, I order Patrick Street Holdings to pay to 11368 NL Inc. the balance of the surplus of $4,080,961.94 that Patrick Street Holdings realized on the power of sale of the Kenmount Terrace properties, less what it pays to Deanna Cheeke.

[277] This decision confirmed that Patrick Street's claim to the $4 million had previously been rejected by the Supreme Court and the Court of Appeal.

The second appeal

[278] Following the Supreme Court's 2020 decision, Patrick Street again appealed to this Court. This is the matter presently under appeal.

ISSUES

[279] Patrick Street's present appeal raises two issues:

Issue 1: The 18% interest awarded on the Cheeke claim

[280] On the first issue, Patrick Street appeals the Judge's 2020 decision that 18% interest is payable on the Cheeke claim. It states that the interest payable should be less than 18%, using the interest rate set by the *Judgment Interest Act*, RSNL 1990, c. J-2.

[281] Patrick Street does not appeal the finding that Cheeke's claim is payable. It is only the interest rate finding that is being appealed.

[282] On this issue of the interest rate, I would agree with my colleagues Hoegg J.A. and Butler J.A. that, based on the case law considered in this jurisdiction, the 18% interest rate is applicable and the Judge did not err on this issue.

[283] Accordingly, I would concur with both of my colleagues that the appeal on this issue should be dismissed.

Issue 2: Patrick Street's attempt to reargue that it can retain $4 million

[284] On the second issue, Patrick Street wishes to argue again, on this appeal, that it has a $4 million entitlement to the sale proceeds, based on the $4 million mortgage. It wants to advance the same position on appeal that, after it pays itself this $4 million, there are no residual surplus funds available to 11368.

[285] This is the same issue that Patrick Street argued, unsuccessfully, in the Supreme Court in 2017 and in the Court of Appeal in 2019. Both courts held that the $4 million mortgage was disallowed from the accounting, that the $4 million could not be retained by Patrick Street, and that other parties were entitled to this money.

[286] The Supreme Court, in 2020, had confirmed what was previously decided, and had also confirmed the amount of the remaining surplus that 11368 would receive, subject to payment of the Cheeke claim.

ANALYSIS

***Res judicata* precludes a further appeal by Patrick Street on this issue**

[287] Having reviewed in some detail the prior judicial proceedings in this matter and the prior decisions, I would agree in the result with my colleague Butler J.A. on this issue. The doctrine of *res judicata* prohibits Patrick Street from relitigating, on this second appeal, that which has already been decided on the first appeal.

[288] After first addressing how *res judicata* applies, I will discuss how this appeal also constitutes an abuse of process by relitigation.

[289] As stated in *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto, ON: LexisNexis, 2021) by Donald J. Lange, "*res judicata* is a fundamental doctrine of the justice system in Canada. It has two distinct forms: issue estoppel and cause of action estoppel". As *Lange* indicates, the Supreme Court of Canada has defined *res judicata* as "something that has clearly been decided" in a previous proceeding (*Lange*, 1). The Supreme Court of Canada in *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at para. 105, also noted that *res judicata* is "one of the pillars of the rule of law in Canadian society" (*Lange*, 9).

[290] *Res judicata* embodies two policy considerations, namely finality and fairness. That is, it is in the public interest to ensure finality in litigation, and fairness involves the right not to have the same matter litigated twice (*Lange*, 5).

[291] These policy considerations are discussed in many decisions. For example, the Court of Appeal for Ontario in *EnerNorth Industries Inc. (Re)*, 2009 ONCA 536, at para. 53, (leave to appeal to SCC refused, 33354 (14 January 2010), reiterated that *res judicata* "is founded on two central policy concerns: finality (it is in the interest of the public that an end be put to litigation); and fairness (no one should be twice vexed by the same cause)".

[292] In *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18, the Supreme Court of Canada considered the rationale behind *res judicata*, observing: "The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry".

[293] In considering *res judicata*, the Supreme Court in *Danyluk* further noted that: "An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided".

[294] Mindful of this articulated policy rationale, what follows is a review of the specific requirements of issue estoppel and cause of action estoppel, to demonstrate how these requirements have been clearly met in the factual context of this litigation.

[295] The requirements of issue estoppel will be considered first, and then cause of action estoppel.

Issue estoppel applies in this matter as its requirements are satisfied

[296] In a leading Supreme Court of Canada decision on issue estoppel, *Angle v. M.N.R.*, [1975] 2 S.C.R. 248**,** at p. 254, the Supreme Court identified three factors to be satisfied for issue estoppel to apply (see also *Danyluk*, at para. 25).

[297] These are:

> 1. That the same question has been decided.
>
> 2. That the judicial decision which is said to create the estoppel was final.
>
> 3. That the parties to the judicial decision … were the same persons as the parties to the proceedings in which the estoppel is raised.

[298] These requirements have been met.

[299] First, the same question that Patrick Street seeks this Court to revisit on appeal has already been decided. That question is whether Patrick Street, in distributing the sale proceeds from the sale of Kenmount Terrace, can keep $4 million itself or whether this must be provided to other parties.

[300] This entails a straightforward consideration of the statutory directions in the *Conveyancing Act*.

[301] In considering whether issue estoppel applies, the question is whether it has already been decided that Patrick Street was not entitled to retain the $4 million (*Danyluk*, at para. 54).

[302] The review of the prior court decisions in this matter, discussed above, clearly shows that this $4 million was disallowed from the accounting. This was decided in the first round of litigation, by the Supreme Court in 2017, and

confirmed by the Court of Appeal in 2019. Both courts rejected Patrick Street's alleged entitlement to the $4 million.

[303] In the Supreme Court's 2020 decision, the Supreme Court Judge properly referenced his earlier 2017 decision and the 2019 Court of Appeal decision, indicating that this question was previously decided and confirmed on appeal.

[304] The Supreme Court of Canada in *Angle*, at pages 255-256, noted that, for issue estoppel to apply, the question (i.e., the issue) decided in the earlier decision would need to have been fundamental to that earlier decision, as opposed to merely collateral or incidental.

[305] In the present case, the fundamental issue decided by the Supreme Court and the Court of Appeal was that Patrick Street's $4 million mortgage was not to be included in Patrick Street's accounting.

[306] On a fair review of the record and the prior decisions, it is clear that this was the fundamental issue that was decided. Therefore, Patrick Street could not retain $4 million and deny payment to other parties under s. 14(3) of the *Conveyancing Act.*

[307] This was not an incidental or ancillary issue (see *Angle*, at p. 255; *Danyluk*, at para. 24). Rather it was the very question that the Courts were asked to determine. It was the very basis on which Patrick Street claimed the $4 million, and the very basis that 11368 argued that Patrick Street was not entitled to retain this money. It was at the core of Patrick Street's claim, which was litigated and rejected.

[308] It is this fundamental determination that Patrick Street now wishes to contest and reargue on a second appeal. Having been finally decided, the question cannot be litigated in this Court a second time.

[309] Patrick Street argues that the fundamental issue on this appeal is different because the original applications were commenced by J-3 and Cook, whereas the later application was commenced by 11368, as mortgagor. Therefore, Patrick Street asserts, *res judicata* does not apply because the parties seeking payment were different.

[310] Patrick Street also appears to argue that, because the Court did not explicitly order that 11368 be paid in the first round of litigation, this somehow left 11368's entitlement undecided.

[311] However, this misses the point about the fundamental issue that was decided in the first round of litigation (by the Supreme Court in 2017 and the Court of Appeal in 2019) which was that the $4 million mortgage was disallowed, and that Patrick Street could not rely on it as a basis to pay itself. What was decided was that Patrick Street was not entitled to keep this money; it belonged to others.

[312] The fundamental decision was to exclude the $4 million from the accounting. Once that decision was made, the registered encumbrancers (J-3 and Cook and Cheeke), and the mortgagor (11368) were entitled to payment of this $4 million as part of the sale proceeds. In its oral and written submissions on this appeal Patrick Street continues to argue that it is entitled to keep the $4 million, notwithstanding that the issue has already been decided by this Court.

[313] As noted above, 11368's entitlement arises by operation of law. It is entitled to whatever is left, if anything, once all accepted claims are paid. Once Patrick Street's claim to the $4 million was not accepted, the $4 million from the sale proceeds of Kenmount Terrace goes first to the other registered encumbrancers and, finally, the remainder goes to 11368.

[314] In the 2020 application in Supreme Court, Patrick Street was not a disinterested mortgagee, holding funds from the proceeds of sale, and simply asking the Court to confirm that 11368 was entitled to the money so that it could pay 11368. Rather, Patrick Street contested 11368's statutory residual claim, as mortgagor, and again asserted its own entitlement to the $4 million.

[315] The fact that parties claiming entitlement to the sale proceeds pursuant to s.14(3) of the *Conveyancing Act* were different entities, or that they were paid at different times, does not change the fact that the basis for their recovery is the same, and was previously decided. The fundamental issue was decided, namely that Patrick Street's claim for $4 million arising from a mortgage was rejected. This was the fundamental basis on which all parties were paid. This issue was decided on appeal by this Court in 2019 and cannot be now revisited on a further appeal to this Court.

[316] This appeal is really an attempt to relitigate the same issue by reframing it in a different fashion, and attempting to shift the focus to what parties were paid and when. However, from Patrick Street's perspective, what is key is that it was previously decided that Patrick Street had no right to this money. No matter what other parties got paid, and when, is irrelevant; it was no longer Patrick Street's money.

[317] As stated in *Lange*, the "fundamental nature of the question cannot be changed by advancing it in a different fashion. … the question is estopped since "re-engineering" a claim and the "never-ending ingenuity of counsel to create new formulations and characterizations cannot displace" issue estoppel" (*Lange*, 57-58).

[318] The second requirement of issue estoppel has also been met. Issue estoppel requires that the "the judicial decision which is said to create the estoppel was final". In this case, there is clearly a final decision. The issue was litigated in the Supreme Court and in the Court of Appeal, and a final decision was made by the Court of Appeal in 2019, dismissing Patrick Street's appeal.

[319] As the Supreme Court of Canada noted in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 34, it "is in the interests of the public and the parties that the finality of a decision can be relied on" …and the "method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal … mechanisms that are intended by the legislature".

[320] Patrick Street has already exercised its right of appeal on this issue in this Court of Appeal. Had Patrick Street been dissatisfied with the 2019 Court of Appeal decision, and felt it had grounds for a further appeal, it could have sought leave to appeal to the Supreme Court of Canada. It did not do so. Therefore, the Court of Appeal's decision was final.

[321] Finally, the third requirement of issue estoppel is also satisfied. Issue estoppel requires that "the parties to the judicial decision" are the same as the parties to the proceedings in which the estoppel is raised. In this case, this requirement is satisfied because Patrick Street and 11368 were parties to all prior proceedings, were adverse in interest and in their submissions, and both are parties to this present appeal.

[322] Accordingly, the three requirements of issue estoppel are met. I would therefore agree with Butler J.A. in the result, namely that issue estoppel applies to preclude or stop a further appeal on this decided issue.

Cause of action estoppel also applies

[323] In *Grandview v. Doering,* [1976] 2 S.C.R. 621, the Supreme Court of Canada outlined the requirements of cause of action estoppel, which are accepted as follows:

> 1. There must be a final decision of a court of competent jurisdiction in the prior action.
>
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action.
>
> 3. The cause of action in the prior action must not be separate and distinct.
>
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[324] These requirements are also met in the instant case.

[325] First, as discussed above, the 2019 Court of Appeal decision was a final decision on the issue in question.

[326] Second, 11368 and Patrick Street have been parties in all prior court proceedings, and they are parties in the present appeal to this Court.

[327] Third, the cause of action in the prior proceeding is not separate and distinct from the present appeal. Rather the cause of action is the same. As *Lange* observes, the "cause" in cause of action estoppel is analogous to the "issue" or the "question" in issue estoppel. In cause of action estoppel, "where the facts are the same and the causes of action are the same ... the second action is barred" (*Lange*, 161-162).

[328] In the present circumstances, the cause of action and the facts relied upon in this appeal are the same as those relied upon in the prior court proceedings. That is, claims were brought by registered encumbrancers and the mortgagor (J-3, Cook, Cheeke, and 11368) to enforce their rights arising from statute (i.e., the *Conveyancing Act)*, and to be paid from the proceeds received from the sale of Kenmount Terrace.

[329] In the prior court proceedings, and in this present appeal, Patrick Street has resisted these claims, alleging that it has a $4 million entitlement to the proceeds, again in the context of determining distribution of the proceeds under s.14(3) of the *Conveyancing Act*.

[330] Patrick Street's position on this issue was rejected by the Court of Appeal in 2019, and it wishes to reargue this same issue on a further appeal. Accordingly, the same cause of action has been advanced throughout, based on the same facts (*Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62, leave to appeal to SCC refused, 35667 (24 April 2014), at para. 42).

[331] Fourth, the basis of the cause of action that Patrick Street wishes to argue on appeal is the same as that argued in the prior proceedings. Patrick Street, in all proceedings, has claimed a $4 million entitlement to the sale proceeds of Kenmount Terrace based on a mortgage between Patrick Street and 11368.

[332] For their parts, 11368, J-3, Cook, and Cheeke all claimed entitlement to the proceeds from the sale of Kenmount Terrace based on their recognized status, under the *Conveyancing Act*, either as mortgagor, mechanics' lien claimant, or mortgagees respectively. Again, the basis of the cause of action has remained constant.

[333] In the result, all requirements of cause of action estoppel have been satisfied. Therefore, I am in agreement with Butler J.A's conclusion that cause of action estoppel also applies.

The doctrine of abuse of process by relitigation

[334] In addition to issue estoppel and cause of action estoppel, the doctrine of abuse of process by relitigation also applies to preclude Patrick Street's further attempt to appeal that which has already been decided.

[335] The Supreme Court of Canada, in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, referenced the term abuse of process by relitigation which, *Lange* notes, joins issue estoppel and cause of action estoppel as a further, essential estoppel doctrine in Canadian common law (*Lange*, 4).

[336] The doctrine was considered by the Supreme Court in *Toronto (City).* It bars litigation, in a second proceeding, in circumstances where allowing the second proceeding would undermine the integrity of the decision-making process in the first proceeding. Abuse of process by relitigation focuses on maintaining the interests of the judicial system, as opposed to issue estoppel and cause of action estoppel where the focus is on the litigants' interests (*Lange*, 199). For a recent example of the application of abuse of process by relitigation see *La Française IC 2 v. Wires*, 2024 ONCA 171, at para. 8, citing *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 39-41.

[337] The Supreme Court in *Toronto (City)* indicated that the doctrine of abuse of process by relitigation is not encumbered by the specific requirements of *res judicata*.

[338] In the circumstances under review in *Toronto (City),* the Supreme Court concluded that there was an abuse of process by relitigation because the proposed relitigation amounted to an implicit attack on the correctness of the factual basis of the original decision. The Supreme Court of Canada applied the doctrine to preclude this attempt to relitigate. Again, the emphasis is on the integrity of the decision-making process (para. 34).

[339] The Supreme Court in *Toronto (City)*, at para. 51, made a number of significant observations regarding abuse of process by relitigation, noting: "First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional

hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality".

[340] These observations are applicable to the present appeal.

[341] As *Lange* indicates, the doctrine of abuse of process by relitigation "has been increasingly applied by the courts to litigants who are intent on relitigating or redefending causes of action or issues which have already been decided by the courts". Accordingly, "litigating the same question twice is an abuse of process" (*Lange*, 201, 221).

[342] Further, as noted by *Lange*, it "has been recognized that the application of abuse of process by relitigation to a particular litigant does not necessarily bring with it the moral condemnation of the court". Similarly, the "lack of moral outrage in the face of a second proceeding is not a determining factor to refuse to apply the doctrine" (*Lange*, 216). As the Supreme Court noted in *Toronto (City)*, the focus is not on the "motive or status of the parties" (para. 51).

[343] Therefore, it is noted that the application of the doctrine of abuse of process by relitigation in the present appeal is not meant to "bring with it the moral condemnation of the court" on the appellant, Patrick Street, the party wishing to relitigate a decided issue. Rather, there is simply a recognition and determination that the doctrine applies in the present factual circumstances.

[344] This Court of Appeal observed in *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, leave to appeal to SCC refused, 31336 (4 May 2006), that it was appropriate to consider the doctrine of abuse of process by relitigation at the appellate level, even in circumstances where it was not previously raised by the parties in the proceedings below or on appeal.

[345] The Court stated: "… While it was not specifically raised by the Crown at trial, there may be some question as to whether these proceedings, instituted by the King family, amount to an abuse of process. The Crown did not raise it on appeal either, although it could be argued that it is implicit in the fourth issue. In any event, because of its nature, it is appropriate for the Court to comment on it, notwithstanding that the proceedings are now at the appeal stage".

[346] The Court of Appeal in *Gough*, at para. 49, referenced the review, in *Lange*, of relevant case law on point, including *Fieldbloom v. Olympic Sport Togs Limited (No. 2)*, 1954 CanLII 573 (MBCA), in which it was noted that a court has "an inherent power and duty to protect itself, and its processes and proceedings, in order to preserve and further the proper and due administration of justice".

[347] This Court in *Gough*, at para. 49, referenced the policy rationale and goals underlying the doctrine of abuse of process by relitigation, again citing *Fieldbloom*, including that "there be an end to litigation and that no one should be twice vexed by the same cause", and also noted the doctrine's purpose "to preserve the courts' and litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice".

[348] In the result, this Court in *Gough* concluded that the doctrine of abuse of process by relitigation could be considered as part of the inherent jurisdiction of the Court, even where not raised by the litigants:

> … Notwithstanding the failure of the Crown to raise the issue, I am of the view, following the *Fieldbloom* decision as quoted by Lange in his text, that the trial judge ought to have considered any duty he might have to exercise the inherent jurisdiction of the court in order to avoid abuse of process by relitigation.

Abuse of process by relitigation precludes a further appeal in this matter

[349] In the present matter, Patrick Street's attempt to reargue, on this second appeal, that which has already been decided on the first appeal, amounts to an abuse of process by relitigation.

[350] Again, the context is relevant.

[351] The only reason this matter returned to the courts for a second round of litigation, after the 2017 decision and the 2019 Court of Appeal decision, is because Patrick Street ignored this Court's endorsement of the 2017 decision and refused to pay the residual surplus to 11368.

[352] In 2017, the Supreme Court first rejected Patrick Street's alleged entitlement to $4 million and determined there was a surplus of $4,241,865.01

remaining from the sale proceeds. This amount was available to pay other parties, and it could not be retained by Patrick Street.

[353] In 2019 this Court confirmed that the Supreme Court Judge committed no error in dismissing Patrick Street's claim to $4 million, and in disallowing the $4 million from the accounting.

[354] At that point, what parties could claim an entitlement to the remaining surplus?

[355] Patrick Street could not. Both the Supreme Court and the Court of Appeal clearly concluded that Patrick Street was not entitled to this money. Patrick Street ought to have known this, as it was clearly decided.

[356] J-3 and Cook, who were entitled to payment as registered encumbrancers, had already been paid after the 2019 Court of Appeal decision.

[357] Under s.14(3) of the *Conveyancing Act*, once all accepted claims to the sale proceeds were paid, it was the mortgagor, 11368, who was entitled to any remaining surplus, again by operation of the statute. That was the basis of 11368's request for payment.

[358] However, when 11368 requested payment of the residual surplus pursuant to s.14(3), payment was refused. Patrick Street reverted to its unsuccessful argument that it was still entitled to retain the $4 million, and that there was no surplus remaining to pay 11368. At that point, 11368 was required to return to the Supreme Court, for a second round of litigation, to compel payment of the remaining surplus.

[359] It was in this context that Patrick Street attempted to once again reargue the issue that had already been decided - namely that Patrick Street's mortgage had been disallowed, and therefore that Patrick Street could not retain the $4 million.

[360] Patrick Street retained the money, ignoring the Court of Appeal's decision that Patrick Street had no entitlement to it. Further litigation in the Supreme Court was required to disgorge the money being wrongfully withheld. Patrick Street now wishes to appeal this same issue a second time.

[361] Patrick Street seeks to take advantage of its own refusal to pay, which necessitated this second round of litigation, in order to argue on a second appeal the same issue that was decided on the first appeal.

[362] Patrick Street's actions in ignoring this Court's prior decision, in retaining the $4 million, and in refusing to pay 11368 the residual surplus, created the need for further, unnecessary litigation.

[363] Patrick Street's actions in this respect should not yield a further opportunity to argue, in this Court, what has already been decided by this Court. To do so in this circumstance would constitute an abuse of process by relitigation. Accordingly, I agree with Butler J.A.'s conclusion on this point.

While judicial discretion may displace the application of *res judicata*, this discretion is limited

[364] Where *res judicata* has been found to apply (either in the form of issue estoppel or cause of action estoppel) judicial discretion may be exercised in appropriate cases to allow a proceeding to continue. But this discretion is very limited (*Danyluk,* at para. 62).

[365] The limited and prescribed context in which judicial discretion might be exercised does not exist in the present case. Therefore, this is not an appropriate instance to exercise judicial discretion to displace the proper application of *res judicata*.

[366] The limited nature of the discretion has been described by the Supreme Court of Canada.

[367] For example, in *Danyluk* the Supreme Court referenced its earlier decision in *G.M. (Canada) v. Naken*, [1983] 1 S.C.R. 72, wherein it stated at page 101 that "there is a discretion in the courts … but such a discretion must be very limited in application", and "the fact that harsh results follow the application of the doctrine has not deterred its application by the courts".

[368] Where a decision in the first litigation proceeding is a decision of a court (as opposed to an administrative tribunal decision), and the second litigation

proceeding is also a court proceeding (i.e., a court-to-court context), the discretion to refuse to apply *res judicata* is especially constrained. This is the case in the present appeal.

[369] This constrained nature of the discretion in a "court-to-court context" has also been recognized by this Court.

[370] In *Avalon Bookkeeping Services Ltd. v. Furlong*, 2004 NLCA 46, at para. 41, this Court noted the very narrow scope of the discretion described in *Danyluk* and *Naken*. Indeed, this Court in *Furlong* expressed considerable doubt that discretion exists to oust the application of *res judicata*, where (as in the instant case) the requirements of cause of action estoppel have been met in a court-to court context (para. 44).

[371] Similarly, in *Guardian Insurance* at para. 77, this Court stated that "there is no basis for applying the discretion discussed in *Danyluk* to a court-to-court situation".

[372] The nature of this limited discretion has also been consistently acknowledged and applied by courts throughout Canada. The Federal Court of Appeal has observed that a "decision to relax the rules of issue estoppel will not be made lightly with regard to a final judicial decision", and that only in the clearest of cases should discretion be used to override the application of issue estoppel (see *Apotex Inc. v. Merck & Co.*, 2002 FCA 210, at paras. 46, 48, leave to appeal to SCC refused, 29324 (13 February 2003)).

This is not an appropriate context in which to exercise judicial discretion

[373] Given the very limited scope of discretion available to displace the application of *res judicata*, once the requirements have been satisfied, in the present context it would not be appropriate to exercise discretion to prevent *res judicata*'s proper application.

[374] The record on appeal reveals that this present appeal is an attempt to reargue the same issue as has been previously decided by this Court.

[375] There is no new issue on this appeal. Patrick Street presents no new documents, no new evidence, and no new law.

[376] Patrick Street's written documentation provided for this appeal, including the appeal books and Patrick Street's factum, features the same documents (e.g., the $4 million mortgage, the guarantee, the $10 million mortgage), as previously provided and considered in the first appeal.

[377] Patrick Street's principal oral submissions on this appeal mirror its previous submissions made to this Court on the first appeal.

[378] This Court is being asked to entertain this second appeal as if Patrick Street's first appeal had never been heard or decided. However, it was heard, and a final decision was made. The appeal prompts a sense of *déjà vu* which Patrick Street would have the Court ignore. However, *res judicata* is meant to recognize and respect the principle of finality in litigation, and fairness in not having the Court and other litigants reconsider a fundamental issue once that issue has been decided.

[379] This is not a situation where an issue previously decided is considered again because of new legislation that creates a new right (*Lange*, 59). Nor is this a situation where a statute has modified or displaced the application of *res judicata*.

[380] There is no suggestion or submission by Patrick Street that there was a denial of procedural fairness or a breach of natural justice. There is no suggestion that new evidence is available that should be considered on appeal. There is no suggestion that fraud or misconduct might have undermined or compromised the previous litigation, or the previous result.

[381] Patrick Street was fully engaged as a litigant in all court proceedings. It exercised its right of appeal to this Court after the initial decision of the Supreme Court. Ultimately, it was unsuccessful. *Res judicata* rightly precludes a litigation do-over of this kind.

[382] Patrick Street, having litigated the matter, does not accept the result and is asking that the other parties, and the Court, participate in another proceeding to relitigate this decided issue, hoping for a different result.

[383] In this context it would be inappropriate for this Court, through the exercise of what is acknowledged to be a very limited and narrow discretion, to displace the proper application of *res judicata*. The requirements of *res judicata* have been satisfied, and the doctrine should be given effect. In this regard, I agree with my colleague.

[384] As this Court concluded in *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2020 NLCA 38, there is "no rationale or basis on which the exercise of discretion not to apply issue estoppel would be warranted" (para. 22). This conclusion is equally apt here.

There are no special circumstances that would preclude the application of *res judicata*

[385] In limited cases, there may also be "special circumstances" that might preclude the application of *res judicata*. However, again these circumstances are very restricted and do not exist in the present matter.

[386] For example, courts have found special circumstances to include situations involving fraud, or instances where new evidence is submitted that could not have been made available at the first court proceeding (even with the exercise of reasonable diligence), which would have had a major impact on the original decision.

[387] In *Guardian Insurance*, this Court considered new evidence that arose after the original decision and determined that, considering the evidence and the impact the evidence would have had on the original decision, *res judicata* should not be applied.

[388] This Court in *Guardian Insurance* concluded that "the existence of new evidence that entirely changes the aspect of the earlier case and was not discoverable with reasonable diligence before the earlier decision, is a recognized stand-alone category of justification for not applying the doctrine of *res judicata* in court-to-court situations involving issue estoppel" (para. 91).

[389] In contrast, in the present case, there is no suggestion that Patrick Street's appeal involves any new evidence, let alone "game-changing new evidence" (*Guardian Insurance*, at para. 61).

[390] There has been no application to the Court to admit and consider new evidence. The evidence is the same, the facts are the same, and the fundamental issue is the same as in the prior appeal where the issue was decided.

[391] *Lange* also cites other examples where courts have found special circumstances to exist that might preclude *res judicata*'s proper application. Examples include circumstances involving "underhanded or improper conduct", "undue influence or duress", "procedural unfairness akin to fraud", and "circumstances amounting to something akin to a denial of natural justice" (*Lange*, 264). Again, none of these circumstances exist in the present case.

[392] Finally, Patrick Street appears to invite this Court to conclude that *res judicata* should not apply because, in Patrick Street's view, the Supreme Court Judge erred and did not make the correct decision in the original proceedings.

[393] Therefore, Patrick Street appears to argue that this is a factor or a special circumstance for this Court to consider when determining whether to exercise its discretion to not apply *res judicata*.

[394] This same argument has been advanced in other courts where it has been decided that the correctness of a judge's conclusion, or decision, is not a factor to be considered when deciding whether to oust the proper application of *res judicata*.

[395] To do so, it has been determined, would essentially gut the application of *res judicata*, and invite further litigation in any circumstance whenever an unsuccessful litigant believed that a judge's decision was incorrect. This would defeat the very purpose of why *res judicata* has been established as a "cornerstone of the common law" and would undermine the goals of finality and fairness that *res judicata* embodies.

[396] For example, the Court of Appeal for British Columbia determined that, when considering the exercise of discretion, the court in the second proceeding should not address, as a factor, whether the first proceeding reached the right conclusion (see *MacDougall v. Lake Country (District)*, 2012 BCCA 408, at para 36).

[397] The Court of Appeal for British Columbia decided this point in *MacDougall*, as follows: "As I analyze the appellants' argument, it is simply that the [prior] decision was wrong, and that it would therefore be unjust to follow it. To accept that as a basis for refusing to apply the doctrine of *res judicata* would be to eliminate the doctrine entirely. The doctrine of *res judicata* exists precisely to obviate the re-litigation of issues. At least where a previous decision is not patently perverse, the question of whether the court, in the end, reached the right conclusion is not one which should be addressed in exercising discretion to apply or not apply the doctrine" (*MacDougall*, at para. 36).

[398] This reasoning and conclusion are equally applicable to the present appeal.

[399] Patrick Street maintains that the Supreme Court Judge's 2017 decision was incorrect and thereby asserts a right to relitigate what has been decided by the Supreme Court and confirmed by this Court on appeal.

[400] If the correctness of a judge's conclusion or decision is questioned, this should be addressed through an appeal, not relitigation.

[401] Notably, in the present case, Patrick Street has already exercised its right of appeal of the Supreme Court's 2017 decision. That appeal was dismissed by this Court of Appeal in 2019. *Res judicata* precludes a second appeal on the same issue that was decided on the first appeal.

[402] This conclusion is also supported by the decision of this Court in *Quinlan v. Newfoundland (Minister of Natural Resources)*, 2000 NFCA 49. In *Quinlan*, the Court considered a land dispute where the appellant, Quinlan, claimed to own certain land that the Crown argued was crown land.

[403] The Crown was successful in the original proceedings in Supreme Court. Quinlan appealed to the Court of Appeal and was unsuccessful on appeal. He sought leave to appeal to the Supreme Court of Canada and the application for leave was dismissed.

[404] As in the present matter, Quinlan then reargued his position in a subsequent application in Supreme Court, where he was again unsuccessful. He then attempted to appeal that decision again to this Court. On the second appeal to this Court, it was confirmed that the matter was precluded by *res judicata.*

[405] As in the present appeal, Quinlan argued that the reason he could reargue, on a second appeal, an issue that had already been decided in the first appeal was that, in his view, there was a misapprehension of the evidence that resulted in a wrong decision.

[406] This Court in *Quinlan* rejected this proposition and found that this was an attempt to relitigate a final decision. The Court of Appeal in *Quinlan* observed: "It is obvious that the appellant believes that this Court misapprehended the evidence in coming to its conclusion in the previous proceeding ... In essence, the appellant is seeking to relitigate an issue that has previously been authoritatively decided against him and which in the normal course could only be challenged by way of appeal…" (para. 20).

[407] The Court of Appeal noted that Quinlan's position was that an "alleged misapprehension of the evidence by this Court in the previous case is a sufficient "special circumstance" that allows the matter to be re-examined anew" (para. 21). The Court of Appeal rejected this argument, confirming that Quinlan could not revisit what was a final decision of the Court.

[408] The Court of Appeal concluded that Quinlan's second appeal, on the same issue that had been previously decided on the first appeal, could not proceed, as it would constitute an attempt to inappropriately do a run-around of the previous decision:

> [19] The same question is thus fundamental to both decisions. It does not arise collaterally or incidentally but in fact is a necessary determination for the resolution of the legal issues engaged in both proceedings.
>
> …
>
> [23] … If the "special circumstances" exception were to apply to such a situation where the matter was expressly dealt with previously, it would effectively allow an appellant to challenge indirectly what is clearly a matter that properly should be dealt with by appellate challenge, which, as noted, the appellant attempted to do here by seeking leave to appeal to the Supreme Court of Canada, but was unsuccessful.

[409] Again, consistent with the rationale in *Quinlan*, Patrick Street's attempt at a second appeal of a decided issue must also be precluded.

[410] Notably, my colleague Hoegg J.A. concludes that the Judge made errors in his decision, including that he "misinterpreted the evidence", "misapprehended the law" and that his decision "belies a lack of appreciation of this law" regarding the operation of collateral mortgages.

[411] I would note three things in this respect. First, the Judge's 2017 decision was considered by this Court of Appeal and the decision was upheld in this regard. Second, and as my colleague Butler J.A. has observed, in the 2017 decision the Judge discusses collateral mortgages at some length (citing decisions from the Supreme Court of Canada and other relevant authorities to support his conclusions) in a way that, on a fair reading, does not obviously appear to evince any lack of appreciation of the law of collateral mortgages (see for example paras. 43-45, and 53 of the Judge's 2017 decision). Third, as noted in both *Quinlan* and *MacDougall* above, even if my colleague, Hoegg J.A., has reached the conclusion that the Judge erred, that is not a "special circumstance" that would displace the proper application of *res judicata*.

[412] Patrick Street's claim has been "properly considered and adjudicated" (*Danyluk*, at para. 80). As such, finality and fairness operate such that "a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings…" (*Danyluk*, at para. 20). (See also *Leyson Holdings Inc. v. Newfoundland and Labrador (Department of Works, Services and Transportation)*, 2008 NLCA 66, at paras. 28-29).

[413] In summary, there are no "special circumstances" in this case that would create an exception or merit any deviation from the conclusion that, as the requirements of *res judicata* have been satisfied, *res judicata* applies to bring the litigation to an end.

The doctrine of *res judicata* can be properly considered by this Court on this appeal

[414] There is nothing preventing 11368 from arguing on appeal that Patrick Street's appeal is precluded by the doctrine of *res judicata*. There are several reasons for this.

[415] First, 11368's written and oral presentations during the second Supreme Court application (decided in 2020) clearly addressed 11368's concern that the

issue Patrick Street wished to relitigate had already been decided, both by the Supreme Court in 2017 and the Court of Appeal in 2019.

[416] In its written application to the Supreme Court in 2020, 11368 referenced the earlier decisions of the Supreme Court and Court of Appeal, even attaching copies of these decisions to its application, as Schedules.

[417] Based on these decisions, 11368 then requested an order confirming that it is entitled to the remaining balance of the power of sale proceeds, as mortgagor, given that "Patrick Street Holdings Limited's appeal … ha[d] been heard and dismissed by the Court of Appeal". This clearly indicates 11368's objection to Patrick Street raising the same issue that had been previously considered and decided on appeal (Appeal Book, Vol. I, Tab 5).

[418] Similarly, in oral submissions on the 2020 Supreme Court application, 11368's position was clear. This was an application to determine the amount of money payable to it as the mortgagor. It was not an application to determine whether Patrick Street was entitled to $4 million – this had already been decided.

[419] There are many excerpts in the 2020 Supreme Court application transcript where counsel for 11368 noted that Patrick Street's entitlement to the $4 million had been previously decided (Transcript, Appeal Book, Vol. I, Tab 3). Examples of counsel's submissions on this point include the following:

> As you noted Justice, this is an application by 11368…for confirmation of monies owed …to the mortgagor from the power of sale proceeds and, Justice, you heard this matter previously so I'm not going to belabour the facts. You've heard them all; you've decided on them (page 2).
>
> Our position with respect to that is that you considered these arguments at trial already, the Court of Appeal has also heard these arguments and agreed with you that the [$4 million] mortgage… should not be considered in account whatsoever (page 21).
>
> Again, those arguments were made at both levels of court and did not hold any water as well (page 21).
>
> You have already ruled on this matter before, and the Court of Appeal ruled on it as well. These arguments were made in front of the Court of Appeal (page 65).

> What [Patrick Street is] essentially asking you to do is now reverse your position on that … [$4 million] mortgage to say, yes, there was sufficient evidence to determine what was owing under the mortgage (page 66).
>
> There has been no new evidence to establish what's owing under that mortgage … (page 67).

[420] The written and oral submissions that 11368 made in the Supreme Court on the 2020 application support the conclusion that 11368 appropriately raised and addressed that Patrick Street was attempting to reargue an issue that had already been decided.

[421] The second reason why 11368 is not precluded from arguing *res judicata* on this appeal is that both Patrick Street and 11368 made submissions on this issue on appeal, on the basis that it was an appropriate issue for consideration by this Court.

[422] Patrick Street did not suggest that it was inappropriate that *res judicata* be argued on appeal. It never indicated that this was not raised in the Supreme Court. It never submitted that 11368 was precluded from arguing *res judicata* on appeal. Neither party raised, at any point on appeal, any objection to this Court considering *res judicata.* The Court of Appeal was not asked to ignore or disregard arguments on this issue.

[423] Rather, both parties fully addressed *res judicata* on appeal. Patrick Street acknowledged that 11368 was arguing that *res judicata* applied. However, Patrick Street took the position that it did not apply because, in its submission, the issue decided earlier by the Supreme Court in 2017 and the Court of Appeal in 2019 was different than the issue under appeal.

[424] Patrick Street proceeded on the basis that *res judicata* could appropriately be considered on appeal but argued that the doctrine simply did not apply because, based on the facts, the requirements of *res judicata* were not met. It never took the position that *res judicata* could not be considered on appeal because it was not previously argued.

[425] There was no unfairness to either Patrick Street or 11368 in this regard. Patrick Street and 11368 both filed case authorities (including the Supreme Court

of Canada's decision in *Danyluk* and this Court's decision in *Furlong*) to support their respective positions. Both parties made extensive oral submissions on the issue of whether the requirements of *res judicata* were met. The issue was appropriately before this Court on appeal.

[426] The third reason why *res judicata* can be considered on this appeal is because Patrick Street is seeking not only to have the Court of Appeal reconsider a decision of the Supreme Court, but also to reconsider (and come to a different outcome) on a prior decision of this Court in this matter. The Court of Appeal had already decided in 2019 that Patrick Street was not entitled to retain the $4 million in question, and that the $4 million mortgage was disallowed from the accounting.

[427] Patrick Street is now asking this Court to reconsider (and decide differently) this same issue that has been previously decided by this Court, with finality, in 2019. 11368 relies on the Court of Appeal's prior decision to preclude this.

[428] This is the first opportunity for 11368 to raise, in this Court, that *res judicata* applies because of the 2019 decision of this Court. As such, it is appropriate for this Court to consider whether its prior decision in 2019 (quite apart from the Supreme Court's decision) prevents the same issue being reargued on this second appeal. In these circumstances, it is appropriate for the Court of Appeal to consider its prior decision in the context of whether *res judicata* applies.

[429] Finally, in addition to the Court's ability to consider *res judicata* on this appeal, as discussed earlier in these reasons this Court has indicated that it can appropriately consider (as part of its inherent jurisdiction) whether an appeal proceeding is an abuse of process by relitigation, even in circumstances where that doctrine was not considered in the proceedings below (see *Gough*, at paras. 47, 49- 50).

Patrick Street's position would result in an inconsistency, contrary to the *Conveyancing Act* and the principles of *res judicata*

[430] Patrick Street's position on appeal, if accepted, would lead to an inconsistency of outcomes, contrary to the applicable legislation and the tenets of *res judicata*.

[431] For Patrick Street to be successful on appeal, this Court would have to conclude (contrary to its prior determination) that Patrick Street was entitled to retain the $4 million. That is the fundamental issue that Patrick Street is advancing, once again, on appeal.

[432] Cook, J-3 (and subsequently Cheeke) were paid on the basis that Patrick Street did not have any entitlement to the $4 million.

[433] If this Court were now to allow Patrick Street to retain the $4 million this would result in an inconsistency in principle and in outcome.

[434] Accepting Patrick Street's position would require reconsideration of the payments made to others, because Patrick Street's $4 million entitlement might need to be satisfied before the others.

[435] However, if Patrick Street's claim were truly in priority, it would take priority over all other parties, not just 11368. Again, this is not what the Supreme Court or the Court of Appeal has found.

[436] Therefore, it is not only 11368's entitlement that would be impacted, but the claims that have already been finally decided and paid out as a result of the 2017 decision, and the 2019 Court of Appeal decision.

[437] This internal inconsistency is also present in Patrick Street's position on the present appeal.

[438] It asserts that it is entitled to retain the $4 million, and as a result it does not need to pay 11368 the residual surplus. However, it does not assert that it can retain the $4 million in priority to the Cheeke claim. Patrick Street only contests the interest rate owing under the Cheeke claim, not the claim itself.

[439] However, Patrick Street cannot be entitled to the $4 million in respect of 11368, only, without having the same entitlement *vis à vis* Cheeke. That is, Patrick Street's entitlement to the $4 million either exists or it does not. All prior decisions, including the 2019 Court of Appeal decision, have decided that it does not exist.

[440] There is no principled basis on which Patrick Street's alleged entitlement to the $4 million would operate to preclude payment to 11368 but would not operate to preclude payment to Cheeke or others. To conclude otherwise would create an inconsistency, contrary to the stated rationale and goals of *res judicata*, namely to prevent inconsistent results, ensure fairness, and promote finality in litigation.

[441] It would also be contrary to the relevant legislation under which 11368 and the other registered encumbrancers are entitled to the sale proceeds. That is, the entitlement of Cook, J-3, Cheeke and 11368 all arise pursuant to the *Conveyancing Act*.

[442] The legislation does not distinguish between a registered encumbrancer (J-3, Cook and Cheeke) and a mortgagor (11368), except to indicate that the mortgagor is entitled to any surplus remaining after the registered encumbrancers are paid. Assuming there is a surplus remaining, it goes automatically to the mortgagor, in this case 11368.

[443] There is no basis to treat these parties differently, or to allow Patrick Street's alleged entitlement to $4 million to trump 11368's entitlement to the residual surplus, but not trump the claims of the other parties. This is the outcome that Patrick Street invites this Court to reach on this appeal. This would yield a result that is neither principled nor sound.

[444] To do this would be an error, and contrary to the objective of ensuring predictability and consistency in distributing the proceeds of the Kenmount Terrace sale, pursuant to the *Conveyancing Act*. To do so would also offend the principles of finality and fairness that *res judicata* directs.

Subsequent Supreme Court decisions confirm that the issue was decided by the Court in 2017 and 2020

[445] The ongoing litigation between Patrick Street and 11368 is not limited to the three decisions previously discussed.

[446] The Supreme Court Judge who heard the applications between the parties, and provided the decisions in 2017 and 2020, has also decided other matters between these parties since then.

[447] Two applications decided after the Supreme Court's 2020 decision are relevant to this appeal. The decisions in these matters were decided in 2021 and 2022 (before the oral submissions on this appeal were completed), they are relevant to the appeal, and both parties would have been aware of these decisions, as litigants in the matters. Further, the Supreme Court decisions were published and made available as a matter of record.

[448] These decisions confirm that the Supreme Court Judge clearly decided, in 2017, that 11368 should be paid out of the sale proceeds, and that Patrick Street had an obligation to hold the sale proceeds in trust and pay the residue to 11368.

[449] In *Patrick Street Holdings Ltd. v. 11368 NL Inc.,* 2021 NLSC 29 (the 2021 decision), in the context of considering another application between the parties, the Judge noted that he had decided in the 2017 decision, and again in the 2020 decision, that 11368 had a priority claim to the surplus from the sale of Kenmount Road. The judge stated at para. 54:

> … On two previous occasions, October 3, 2017, and July 16, 2020, I declared that the collateral mortgage ranked behind 11368 NL Inc. in priority for the distribution of the surplus from the power of sale. The Court of Appeal accepted my finding in the first instance … (Emphasis added).

[450] Further, in *Cook v. Patrick Street Holdings Ltd.*, 2022 NLSC 92, the Judge confirmed that 11368's claim to the surplus was impressed with a trust, pursuant to s. 14(3) of the *Conveyancing Act*:

> [18] Patrick Street Holdings held the mortgage from 11368 by which it exercised the power of sale proceedings on September 19, 2016, and then transferred the mortgaged properties to itself for the stated consideration of $11,400,000. When Patrick Street Holdings satisfied all permissible claims on those properties it realized a surplus of $4,080,961.94, which belonged to 11368. By section 14(3)(c) of the *Conveyancing Act*, and to paraphrase that section, Patrick Street Holdings should have paid that residue to 11368, which was "the person entitled to the mortgaged property"; but it did not.
>
> [19] Otherwise, to follow the reasoning of Goodridge, J. in *Brenton Brothers*, the funds were impressed with a trust in favour of 11368 and Patrick Street Holdings was obliged to hold those funds for 11368 on that trust. Patrick Street Holdings did not pay over funds, and it did not honour the trust that section 14(3) of the *Conveyancing Act* impressed on them. To that end, Patrick Street Holdings breached the trust and 11368 is entitled to the funds.

[451] The Judge noted that 11368's entitlement to the residual surplus, as mortgagor under s. 14(3), came into existence in September 2016, when Kenmount Terrace was sold:

> [26] Overall, the power of sale proceedings took place on September 19, 2016. Patrick Street Holdings' liability to 11368 for the $4,080,961.94 surplus proceeds came into existence at that time. It appears that Patrick Street Holdings has still not met its obligation to 11368 … (Emphasis added).

[452] These decisions further confirm that 11368's entitlement to the residual surplus arose in 2016 (when Kenmount Terrace was sold), and that the Judge previously decided, in 2017 and again in 2020, that 11368's entitlement to the surplus took priority over Patrick Street's alleged $4 million claim.

[453] This is a further support for the conclusion that *res judicata* applies, and that permitting a second appeal in these circumstances would amount to an abuse of process by relitigation.

The proper role of this Court on this appeal

[454] Certain facts related to this matter, but not salient to this appeal, are contested by the parties in ongoing litigation.

[455] Given the ongoing litigation between the parties, this Court must be sensitive to and cautious about making determinations (in the absence of the necessary factual context that will be provided when these claims are considered in Supreme Court), which may inadvertently impact issues not yet determined in the ongoing litigation, or possible future appeals.

[456] The Supreme Court Judge noted, in the 2021 decision, the ongoing and extensive litigation (quite apart from this appeal) involving these two parties:

> [57] Patrick Street Holdings and 11368 NL Inc. have been involved in ongoing litigation over real estate development at Kenmount Terrace in St. John's, NL for many years. This litigation included several Originating Applications, as well as a number of Interlocutory Applications. Presently there are three Interlocutory Applications and one Statement of Claim before the Court. Patrick Street Holdings brought two of the Interlocutory Applications and 11368 NL Inc., the other. Patrick Street Holdings filed a

> third Interlocutory Application asking Handrigan, J. to recuse himself from hearing the other three Interlocutory Applications.

[457] The Judge indicated that 11368 commenced legal action against Patrick Street claiming, among other things, that Patrick Street did not allow 11368 reasonable time to obtain financing before selling Kenmount Terrace by power of sale.

[458] This relates directly to Patrick Street's position on appeal that it was entitled to take power of sale proceedings within weeks after agreeing to stop its original power of sale action.

[459] The claim by 11368, as described by the Judge, suggests that, from 11368's perspective, Patrick Street's proceeding to power of sale in these circumstances (within weeks of 11368 executing a $4 million mortgage, and within weeks of Patrick Street agreeing to end its original power of sale proceedings as a result) was not reasonable and resulted in a loss to 11368.

[460] The Judge noted 11368's position: "11368 NL Inc. says that Patrick Street Holdings failed to properly account for property that it took from 11368 NL Inc. in 2016 through a pre-emptive power of sale the same year; for various reasons but, in particular, that Patrick Street Holdings did not allow 11368 NL Inc. a reasonable time to obtain financing to pay its mortgage debt" (2021 decision, at para. 2).

[461] In addition, the Judge observed that in 2020 (after the 2019 Court of Appeal decision) Patrick Street sold part of Kenmount Terrace to Patrick Street's principal, for $4 million. 11368 is seeking to have this transaction set aside as a fraudulent conveyance. The Judge explained:

> [33] On March 17, 2020, Patrick Street Holdings transferred 45 parcels of land in Kenmount Terrace to Paul Madden by deed of conveyance of the same date. The deed states the consideration for the sale as $4,000,000, the same amount that 11368 NL Inc. claimed Patrick Street Holdings owed to it, and which I ordered Patrick Street Holdings to pay to 11368 NL Inc. in my judgment on July 16, 2020. Mr. Madden registered the deed at the Registry of Deeds for this Province on March 18, 2020.

[462] The Judge also noted that 11368 filed a notice of *lis pendens* in this matter in the Registry of Deeds for Newfoundland and Labrador, noting that the pending

litigation was grounded in the "… *Fraudulent Conveyances Act*, R.S.N.L. 1990, c. F-24 and/or the *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1" (para. 25).

[463] The Judge further explained that 11368 "asks for orders that the conveyance of the Kenmount Terrace properties from Patrick Street Holdings to Paul J. Madden be declared a fraudulent transaction by s. 170 of the *Judgment Enforcement Act*, and further that monies owing to Deanne Cheeke and 11368 NL Inc. rank in priority to a mortgage between Paul J. Madden and Patrick Street Holdings" (para. 34).

[464] Patrick Street also has ongoing claims against 11368. For example, Patrick Street commenced a claim against 11368, filed in July 2020 (after the 2019 Court of Appeal decision and approximately a week after the 2020 decision) seeking $13,060,672.80. This claim appears to relate to the $10 million mortgage, discussed earlier. Patrick Street claims this amount is based on the guarantee that 11368 signed, relating to the $10 million mortgage on property unrelated to Kenmount Terrace (para. 1).

[465] In the alternative, Patrick Street asked the Supreme Court Judge "to set off the $4,080,961.94 that [the Judge] ordered Patrick Street Holdings to pay to 11368 NL Inc. on July 16, 2020 against the $13,060,677.80", instead of having Patrick Street pay the $4,080,961.94 to 11368 (para. 39).

[466] Further, Patrick Street is seeking an attachment order regarding the $4,080,961.94 that the Judge ordered it to pay 11368 in 2020. The Supreme Court Judge described this request as follows: "As I understand its request, Patrick Street Holdings is looking to attach the $4,080,961.94 that I ordered it to pay to 11368 NL Inc., although it has not actually paid those monies to 11368 NL Inc. as yet" (para. 29).

[467] The status of the ongoing litigation between the parties is not known. The validity of the competing claims may need to be considered and proved in a different forum than this appeal, based on evidence that is not before this Court on this appeal. For example, the Supreme Court may need to determine the merits of 11368's claim, based on the facts and evidence presented, that Patrick Street provided an unreasonable amount of time to 11368 before taking power of sale proceedings and selling Kenmount Terrace.

[468] Decisions reached in the ongoing litigation in the Supreme Court may also be appealed to this Court. Therefore, this Court must be sensitive to and cautious about making determinations, in the absence of an appropriate factual context, which may inadvertently impact the ongoing litigation in Supreme Court, or any future appeals to this Court.

CONCLUSION AND DISPOSITION

[469] In conclusion both issues on appeal should be dismissed.

[470] On the first issue, relating to the interest awarded on the Cheeke mortgage, I would conclude that the Judge did not err. Therefore, I would agree with both of my colleagues, Hoegg, J.A. and Butler J.A., that the appeal on this issue should be dismissed.

[471] On the second issue, relating to Patrick Street's claim that it is entitled to $4 million from the sale proceeds of Kenmount Terrace, I would agree with my colleague Butler J.A. in concluding that this ground of appeal should also be dismissed.

[472] The Supreme Court in *Danyluk* stated that a "litigant, to use the vernacular, is only entitled to one bite at the cherry" (para. 18). In this case, Patrick Street has already taken several "bites", in the Supreme Court and in this Court, in arguing that it is entitled to $4 million from the proceeds of the sale of Kenmount Terrace in 2016. Patrick Street wishes to take a further "bite" respecting this same issue on this appeal.

[473] However, as the Supreme Court also noted in *Danyluk*, the "law rightly seeks a finality to litigation. … An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18).

[474] This is why the doctrines of *res judicata* (including issue estoppel and cause of action estoppel) and abuse of process by relitigation have been developed and are applied. While there may be circumstances where, through an exercise of

proper judicial discretion, it might be properly determined that these doctrines may not apply, these circumstances do not exist in the present appeal.

[475] Accordingly, for the reasons provided, the doctrines of *res judicata* and abuse of process by relitigation apply to preclude a further appeal on this issue. I agree with Butler J.A. that the appeal be dismissed.

[476] My colleague, Hoegg J.A., notes that Butler J.A. and I have not "addressed the grounds of Patrick Street's appeal", which "leaves the issue unadjudicated". This is not an oversight; there is good reason for this. As the appeal is being decided based on the application of *res judicata* and abuse of process by relitigation, it is neither necessary nor advisable to address arguments on issues that have been previously decided.

[477] The application of *res judicata* and abuse of process by relitigation precludes this Court from reconsidering issues already determined. Any such reconsideration would be wholly inconsistent with the respective application of these doctrines and would be contrary to the essence of why the doctrines exist and are applied.

[478] With respect to the issue being left unadjudicated, I would note that the issue has been previously adjudicated and decided by this Court. This is precisely why it cannot be re-adjudicated on this appeal.

[479] As 11368 has been successful on both issues on appeal, it is entitled to costs in the normal course. I would dismiss the appeal with costs payable to 11368 on Column 3 of the *Court of Appeal Rules*.

F.P. O'Brien J.A.

L.R. Hoegg J.A. (Dissenting Reasons):

INTRODUCTION

[480] This appeal involves the distribution of the proceeds of sale of property known as Kenmount Terrace, which was sold by power of sale on September 16, 2016.

[481] Three previous decisions are relevant to this appeal. The first is a decision whereby an applications judge determined that two encumbrances on Kenmount Terrace took priority over other previously registered encumbrances and ordered them paid (*Cook v. Patrick Street Holdings Ltd.*, 2017 NLTD(G) 167 (*Cook 2017*)). The second is this Court's decision upholding the applications judge's decision (*Patrick Street Holdings Ltd. v. Cook*, 2019 NLCA 69 (*Cook 2019 Appeal*)). The third is the decision under appeal, which allowed 11368 NL Inc.'s ("11368") application that the surplus from the sale by power of sale belonged to 11368 (*Cook v. Patrick Street Holdings Ltd.*, 2020 NLSC 99 (*Cook 2020*)).

[482] The appeal involves a dispute over the surplus that was realized on the sale of Kenmount Terrace, in St. John's, Newfoundland and Labrador. The property was sold pursuant to the provisions of the *Conveyancing Act*, RSNL 1990, c. C-34 (the "*Act"*), and the sale was endorsed by the Supreme Court of Newfoundland and Labrador (*11368 NL Inc. v. Patrick Street Holdings Limited* (14 October 2016), St. John's 201601G1797 (NLSC) (*Hurley J.'s Order*); and *11368 NL Inc. v. Patrick Street Holdings Limited* (10 August 2016), St. John's 201601G1797 (NLSC) (*Faour J.'s Order*)). The power of sale resulted from the respondent, 11368, defaulting on a mortgage, registration number 708519, held by the appellant, Patrick Street Holdings Limited.

[483] At all material times to this appeal, Patrick Street Holdings Limited, as well as, Madden's Limited, and P & P Holdings Limited (collectively "Patrick Street"), were owned and under the control of Paul Madden. In this appeal, no point in issue turns on the separate identities of any of these companies.

[484] The respondent, 11368, is a company owned and controlled by William Clarke. At all times material to this appeal, William Clarke also controlled CBS Land Development Inc., Powder House Hill Investments Limited, and Harmony

Homes Limited (collectively "CBS"). Similarly, no point in issue in this appeal turns on the separate identities of the companies comprising CBS.

[485] The appeal involves four mortgages and a pre-judgment attachment application.

[486] The first mortgage, registration number 608132 in the amount of $10,072,816.52, is between Patrick Street as mortgagee and CBS as mortgagor. This mortgage covered a number of properties owned by CBS. 11368 is the guarantor of this mortgage. The second mortgage, registration number 708519 in the amount of $1,875,000.00, was between Patrick Street as mortgagee and 11368 as mortgagor. This mortgage covered Kenmount Terrace and it was under this mortgage that the relevant power of sale was exercised. The third mortgage, registration number 759678 to the limit of $4,000,000.00, is between Patrick Street as mortgagee and 11368 as mortgagor. It also covered Kenmount Terrace. The fourth mortgage is mortgage 752030 for $150,000.00, between mortgagee Infini-T Holdings Inc., a company owned by the solicitor for 11368, and 11368 as mortgagor. This mortgage also covered the Kenmount Terrace property formerly held by Deanne Cheeke, and will be referred to in this decision as the Cheeke mortgage.

[487] On July 22, 2013, CBS (mortgagor) gave registered mortgage 608132 in the amount of $10,072,816.52 to Patrick Street (mortgagee). This mortgage covered three parcels of property — two located in St. John's and one in Conception Bay South, Newfoundland and Labrador. On April 2, 2014, CBS, Bill Clarke and Ryan Clarke, guaranteed this mortgage, and 11368 was signatory to this guarantee. Two days later, on April 4, 2014, 11368 also guaranteed this mortgage. 11368's April 4, 2014 guarantee incorporated the April 2, 2014 guarantee. The guarantees provided that Patrick Street had the right to monies from the sale of lots in Kenmount Terrace, which property was not secured by mortgage 608132, to be applied to the outstanding interest and principal on mortgage 608132.

[488] On April 24, 2015, 11368 gave Patrick Street mortgage 708519 in the amount of $1,875,000.00 over Kenmount Terrace. The purpose of this mortgage was to provide collateral security for promissory notes which 11368 had previously given to Patrick Street for funds advanced by Patrick Street to 11368

respecting Kenmount Terrace. In March 2016, this mortgage was in default and the property was set to be sold by power of sale on April 21, 2016.

[489] On April 20, 2016 mortgage 759678 between Patrick Street and 11368 was executed. It was registered on April 21, 2016. The recitals in the mortgage explain that it was a collateral mortgage "to the limit of Four Million ($4,000,000.00) Dollars" given by 11368 to Patrick Street to secure 11368's indebtedness respecting its guarantee of mortgage 608132.

[490] The fourth mortgage, the Cheeke mortgage, is a collateral mortgage over Kenmount Terrace which was given by 11368 to Ms. Cheeke to secure the payment of a promissory note respecting $150,000.00 which 11368 owed to Ms. Cheeke.

[491] On March 23, 2016, Patrick Street filed a pre-judgment attachment application which sought to attach monies realized on the sale of lots in Kenmount Terrace in order to protect Patrick Street's significant provision of mortgage and other monies to 11368 respecting Kenmount Terrace.

[492] When mortgage 759678 was executed on April 20, 2016, CBS was in default on mortgage 608132, and 11368 was in default on mortgage 708519. Prior to April 20, 2016, Patrick Street had issued notices to CBS and 11368 respecting mortgage 608132 stating its intention to have the property covered by mortgage 608132 sold by power of sale. Patrick Street had also given notice to 11368 that it would proceed to sell by power of sale the property covered by mortgage 708519, which was Kenmount Terrace.

[493] In addition to the parties' execution of mortgage 759678, the parties agreed that Patrick Street would not proceed to sell Kenmount Terrace on April 21, 2016, or move to have its pre-judgment attachment application heard (Patrick Street's Factum, at paras. 6(d-f), 32; and 11368's Factum, at paras. 9, 16).

[494] Following execution of mortgage 759678, the power of sale proceedings respecting CBS's default on mortgage 608132 were not pursued. As well, the power of sale proceedings respecting 11368's default on mortgage 708519 did not take place as scheduled on April 21, 2016, and Patrick Street's pre-judgment attachment application was not heard. However, several weeks later, power of sale proceedings respecting 11368's continuing default on mortgage 708519 were

commenced and a public auction respecting the sale of Kenmount Terrace was held on July 11, 2016. Patrick Street purchased it for $11,400,000.00, and the sale concluded on September 16, 2016 (Patrick Street's Factum, at para. 6(g); and 11368's Factum, at paras. 18, 19). After encumbrances against the property were paid in accordance with *Cook 2017*, a balance of $4,313,183.36 remained. This figure is derived from the balance of $4,241,865.01 remaining (as per the Judge's accounting at paragraph 63 of *Cook 2017*), plus $168,237.82 (the Cheeke mortgage plus interest which the Judge had already deducted in his accounting but which was not ordered paid), minus the $96,919.47 remaining of J-3 mechanic's lien which was ordered paid to J-3 but not listed in the Judge's accounting. In other words, the surplus relevant to this appeal is derived from adding the Cheeke mortgage back into the accounting and subtracting the J-3 claim ordered to be paid: $4,241,865.01 + $168,237.82 - $96,919.47 = $4,313,183.36.

[495] Patrick Street appealed the Judge's *Cook 2017* decision to this Court, and it was upheld (*Cook 2019 Appeal*).

[496] Patrick Street kept the remaining surplus, reasoning that it was entitled to $4,000,000.00 pursuant to collateral mortgage 759678 on the Kenmount Terrace property, which 11368 had executed in Patrick Street's favour.

[497] 11368 disagreed, maintaining that collateral mortgage 759678 was not due and payable upon the sale of Kenmount Terrace, and that the surplus was theirs. 11368 applied for court orders directing Patrick Street to pay the surplus to 11368 and also to pay the mortgage formerly held by Deanna Cheeke to Infini-T Holdings Inc., which had not been discharged in *Cook 2017*.

[498] The Judge in the decision under appeal agreed with 11368, and at paragraph 40 of his decision, ordered Patrick Street to pay: (1) the Cheeke mortgage in the amount of $150,000.00 plus 18 % per annum interest from February 23, 2016; (2) the surplus of $4,080,961.94, minus payment of the Cheeke mortgage and interest to 11368; and (3) 11368's taxed costs on column 3 of the scale of costs under the *Rules of the Supreme Court, 1986,* SNL 1986, c. 42, Schedule D.

[499] The amount of the surplus before the Cheeke mortgage would be paid is not correctly stated in the order. The Judge deducted from his balance of $4,241,865.01 the amount of $63,983.60 again owing to John Cook (it had already

been deducted as per the Judge's accounting), and also deducted $168,237.82 for the Cheeke mortgage (which also had already been deducted but not ordered paid in *Cook 2017* (*Cook 2020* at para. 3). These amounts had to be added. Both parties repeated the error in their factums by relying on the incorrect amount that the Judge stated was the surplus in his *Cook 2020* order. The correct surplus amount was $4,313,183.36, from which the Cheeke mortgage and interest were ordered to be deducted.

[500] Patrick Street appeals the Judge's orders respecting payment of the surplus to 11368, and the payment of interest on the Cheeke mortgage.

BACKGROUND

[501] Relations between Patrick Street and 11368 are tangled. 11368 describes their relationship as companies that were in business with each other instead of being true mortgagors and mortgagees (11368's Factum, at para. 7). The record shows that Patrick Street and 11368 had business and contractual relations with each other since at least 2011. Whatever the nature of their business relationship, Patrick Street and 11368 formalized certain of their business dealings by executing and registering mortgages 708519 and 759678, and 11368's guarantee of mortgage 608132, as well as other mortgages and agreements not at issue in this appeal.

[502] After CBS gave mortgage 608132 for $10,072,816.52 to Patrick Street on July 22, 2013, Patrick Street became concerned about its exposure under that mortgage. To allay this concern, 11368, the owner of Kenmount Terrace, whose sole director was also in control of CBS, gave a guarantee to Patrick Street for the full amount of mortgage 608132 between Patrick Street and CBS. The guarantee, dated April 4, 2014, was properly executed and registered.

[503] Meanwhile, 11368 was developing property in Kenmount Terrace. 11368 gave mortgages over Kenmount Terrace to Patrick Street, including mortgage 708519 for $1,875,000.00 registered on April 28, 2015. A mechanics lien and two mortgages involving another mortgagee were subsequently registered against the Kenmount Terrace property.

[504] CBS and 11368 were financially strained, and matters came to a head early in 2016. CBS was in default on mortgage 608132 and 11368 was in default on mortgage 708519.

[505] On or about March 2, 2016, Patrick Street provided 11368 with notice of power of sale respecting mortgage 708519 for $1,875,000.00 over Kenmount Terrace. The sale by power of sale was set for April 21, 2016.

[506] On March 23, 2016, Patrick Street filed an Originating Application seeking a pre-judgment attachment order respecting 11368's sale of lots in Kenmount Terrace and/or payment into court of any of the sale proceeds. Patrick Street's application stated that two mortgages given by 11368 to Patrick Street, of which one was mortgage 708519 for $1,875,000.00, were in default, and that the appropriate demands and notices under the *Act* had been provided to 11368. The pre-judgment attachment application was set for April 5, 2016. On that date it was postponed, and it was adjourned *sine die* on April 28, 2016.

[507] On April 8, 2016, Patrick Street served CBS with a demand for payment and notice of power of sale respecting mortgage 608132 for $10,072,816.52, which 11368 had guaranteed. The demand and notice to CBS stated that Patrick Street would be proceeding to have the properties secured by mortgage 608132 sold under the power of sale provisions of the *Act*. Patrick Street's notice to CBS also provided notice of its intention to enforce its security pursuant to the provisions of the *Bankruptcy and Insolvency Act*, RSC, 1985, c. B-3.

[508] On April 14, 2016, Patrick Street provided 11368 (as guarantor) with notice of power of sale under the *Act* respecting the property secured by mortgage 608132 and notice of intention to enforce its (Patrick Street's) security under the provisions of the *Bankruptcy and Insolvency Act*, as required.

[509] CBS and 11368 did not want the properties covered by mortgage 608132 to be sold by power of sale. Neither did 11368 want Kenmount Terrace to be sold by power of sale on April 21, 2016, nor did it want Patrick Street's pre-judgment application to be heard. To that end, 11368 filed an emergency *ex parte* application on April 20, 2016.

[510] 11368's April 20, 2016 application was not heard on April 21, 2016 because Patrick Street and 11368 reached an agreement. The agreement was that

11368 gave Patrick Street collateral mortgage 759678 "to the limit of" $4,000,000.00 over Kenmount Terrace as additional security respecting its exposure on mortgage 608132, and that Patrick Street would not proceed with power of sale proceedings respecting the property covered by mortgage 608132. Patrick Street also agreed not to proceed with its pre-judgment attachment application respecting monies realized from the sale of lots in Kenmount Terrace. Further, Patrick Street agreed not to proceed to sell Kenmount Terrace by power of sale on April 21, 2016.

[511] While part of the parties' agreement was formalized to some extent by the parties' execution of collateral mortgage 759678, the agreement to stop the power of sale proceedings respecting 11368's default on mortgage 708519 was not reduced to writing. Neither was there agreement respecting how long the power of sale proceedings respecting 11368's default on mortgage 708519 would be forestalled. 11368 did not argue, and the record does not disclose, that Patrick Street was not able to bring forward the power of sale proceedings respecting mortgage 708519 if 11368's default on mortgage 708519 continued.

[512] Matters did not improve for CBS or 11368, and 11368 was unable to raise funds to liquidate mortgage 708519 over Kenmount Terrace. Several weeks later, Patrick Street brought forward power of sale proceedings respecting 11368's continuing default under mortgage 708519, and a date was set for the sale.

[513] 11368 attempted to stop the sale and applied twice to the Supreme Court of Newfoundland and Labrador to do so. Each time a Supreme Court Justice ordered the sale of Kenmount Terrace to proceed under power of sale due to 11368's default on mortgage 708519 (*Hurley J.'s Order*; and *Faour J.'s Order*). Of note, in deciding 11368's application to prevent the power of sale of Kenmount Terrace, Hurley J. stated that "[e]ven if there was a business relationship between [11368 and Patrick Street] this does not preclude or affect [Patrick Street] … from realizing on the security under the Mortgage".

[514] The public auction respecting the Kenmount Terrace property took place on July 11, 2016. Patrick Street purchased the property for $11,400,000.00, which was $75,000.00 more than seventy-five percent of its assessed value, in accordance with the provisions of section 9 of the *Act*. On September 16, 2016, Patrick Street became the owner of the Kenmount Terrace property described in mortgage 708519.

[515] Following its acquisition of Kenmount Terrace, Patrick Street refused to pay J-3 Consulting & Excavation Ltd. ("J-3"), which had registered a mechanic's lien against Kenmount Terrace, of which $96,919.47 remained owing, and John Cook, who held two registered collateral mortgages securing a total of $225,000.00 against the property (the "Cook claims") of which $63,983.60 remained owing. The basis for Patrick Street's refusal to pay the J-3 and Cook claims was that once all of the previously registered encumbrances were ordered paid, there would not be sufficient funds remaining to pay the subsequently registered claims of J-3 and Mr. Cook (*Cook 2017*, at paras. 1-2, 16-22, 25-31, 53, 64).

[516] J-3 and Mr. Cook disagreed with Patrick Street's accounting and initiated legal proceedings to recover their respective claims, focusing on priorities issues respecting the alleged encumbrances (*Cook 2017*, at paras. 3-4, 10-11) registered before their claims. 11368 was the second respondent in that litigation. 11368 was not an encumbrancer in that litigation but had an interest in it as the mortgagor of the mortgage which drove the power of sale, because as mortgagor, 11368 could be liable for any encumbrances remaining after the sale proceeds were exhausted by distribution, and conversely, any residue from the sale proceeds could belong to 11368 (*Act*, at ss. 12, 14; and *Re Brenton Brothers Limited*, [1979] N.J. No. 107 (NFSC (TD)), 1974 CarswellNfld 104, at paras. 22, 39).

[517] Jason Weston, the in-house financial officer of Patrick Street, provided an accounting to the Court. His evidence set out the registration dates of and amounts owing on the encumbrances on Kenmount Terrace. Some of Mr. Weston's evidence respecting amounts owing on some of the encumbrances against Kenmount Terrace was challenged on cross-examination, and some of the amounts were modified or corrected. Mr. Weston's accounting showed that as of September 16, 2016, $8,523,007.86 remained owing on mortgage 608132 between Patrick Street and CBS, which 11368 had guaranteed, and in respect of which mortgage 759678 had secured up to $4,000,000.00. There was no challenge to Mr. Weston's evidence that $8,523,007.86 remained owing on mortgage 608132. The Judge accepted Mr. Weston's modified evidence as to the amounts owing on the encumbrances, except that he said nothing about mortgage 608132 or the balance owing on it.

[518] The Judge removed the five directions to pay and an $800,000.00 bonus from the accounting saying that the directions to pay did not constitute

encumbrances under the *Act*, and the $800,000.00 bonus was not properly included in Patrick Street's accounting because the conditions for payment of the bonus were not met. The Judge in *Cook 2017* also removed mortgage 759678 for up to $4,000,000.00 from the accounting, saying that Patrick Street "should have done a proper analysis if it wished to include any amount from this mortgage to be paid from the power of sale proceedings" (*Cook 2017*, at para. 62). The Judge's comment respecting Patrick Street's failure to do a proper analysis respecting any money owing under mortgage 759678 was just that; he said nothing about the amount owing on mortgage 608132 or its relationship to mortgage 759678, and he did not elaborate as to how Patrick Street's claim under the mortgage was lacking in analysis or lacking in proof of money owed. The Judge then determined that the Cook and J-3 claims could be paid from the proceeds. Of note, the Judge did not deal with the Cheeke mortgage, which, despite its prior registration, followed the J-3 and Cook claims in priority due to a postponement agreement. The Judge did not specify why he did not deal with the Cheeke mortgage, but he did say that he had "no information about what 11368 NL Inc. used the $150,000.00 for or why the company was indebted to Deanna Cheeke" (*Cook 2017*, at para. 26). Neither did the Judge say anything about the balance remaining from the sale of Kenmount Terrace. He decided only the priority issue put forward in the litigation by J-3 and Cook.

[519] In the result in *Cook 2017*, the Judge found that there were sufficient funds from the sale to cover the balances of J-3's lien and the Cook mortgages, and he made the following order:

> [68] In the result, I order that:
>
> 1. Patrick Street Holdings Limited pay $96,919.47 to J-3 Consulting and Excavation Limited from the proceeds of its power of sale of the Kenmount Terrace Subdivision.
>
> 2. Patrick Street Holdings Limited pay $63,983.60 to John Cook from the proceeds of its power of sale of the Kenmount Terrace Subdivision.
>
> 3. Patrick Street Holdings Limited pay to J-3 Consulting and Excavation Limited its costs to be taxed by Column 3 of the Scale of Costs.
>
> 4. Patrick Street Holdings Limited pay to John Cook his costs to be taxed by Column 3 of the Scale of Costs.

[520] Patrick Street appealed the Judge's removal from the accounting of the Directions to Pay, the $800,000.00 bonus, and the up to $4,000,000.00 mortgage, arguing that the Directions to Pay ranked in priority to the J-3 and Cook claims; the $800,000.00 bonus was wrongly removed from an otherwise valid mortgage; and the $4,000,000.00 mortgage ranked in priority to the J-3 and Cook claims and that the amount owing was established on the evidence.

[521] The Judge's rulings respecting the Directions to Pay and the $800,000.00 bonus were upheld by this Court. This Court also upheld the Judge's decision that the J-3 and Cook claims were to be paid in priority to the J-3 and Cook claims (*Cook 2019 Appeal*, at para. 63). With respect to the Judge's disallowance of mortgage 759678 from the accounting, this Court said at paragraph 62:

> … the Applications Judge did not find that there was sufficient evidence to conclude that 11368 NL as guarantor was liable to make payment at the time of sale. The mere fact that the registration cost of the mortgage reflected a value of $4,000,000 is not determinative of the amount actually owing under the mortgage.

The Court went on to say at paragraph 63:

> The Applications Judge's conclusion that the amount owing was not established, and that therefore the mortgage should be disallowed from the accounting, *is entitled to deference on appeal*. As there is no basis before the Court to warrant appellate intervention, I would uphold the decision of the Applications Judge in finding that there should be no payment under the $4,000,000 mortgage in priority to the J-3 Consulting lien or the Cook mortgages.
>
> (Emphasis added.)

[522] This Court, at paragraph 64, went on to conclude:

> 1. In assessing the registrations against title to the Subject Property, the Applications Judge correctly removed the five directions to pay from the accounting.
>
> 2. There was no reviewable error in the Applications Judge's decision to deduct the $800,000 from what was otherwise accepted as a valid mortgage.
>
> 3. The Applications Judge did not commit an error in disallowing the $4,000,000 mortgage registered to secure a guarantee.

[523] Subsequently, 11368 applied to the Supreme Court of Newfoundland and Labrador claiming that any surplus remaining from the power of sale of Kenmount Terrace was lawfully theirs (Patrick Street's Factum, at para. 21; 11368's Factum, at para. 25; and *Cook 2020*, at para. 1). To support its position, 11368 reiterated its previous argument that the fact that no money had passed on mortgage 759678 should be the end of the matter, relying on the comment of the Judge in *Cook 2017* that mortgage 759678 had not been properly analyzed (paras. 61-62) and this Court's decision in *Cook 2019 Appeal* upholding the Judge's decision (paras. 63-64). In its application, 11368 also sought to have Patrick Street pay the Cheeke mortgage held by Infini-T Holdings Inc., which the Judge in *Cook 2017* did not order to be paid.

[524] The same Supreme Court of Newfoundland and Labrador Judge who had heard the J-3 and Cook applications heard 11368's 2019 application. He considered the parties' positions and ordered Patrick Street to pay the Cheeke mortgage and the balance remaining from the surplus to 11368. In so ruling, the Judge referenced his comment in *Cook 2017* that "[Patrick Street] should have done a proper analysis if it wished to include any amount from this mortgage to be paid from the power of sale proceedings" (*Cook 2020*, at para. 20), and stated that his *Cook 2017* decision had been upheld by the Court of Appeal, and that he had been shown nothing to cause him to change his mind (*Cook 2020*, at paras. 24-25).

[525] In his *Cook 2020* decision, the Judge stated that 11368 had raised the $800,000.00 bonus as an issue to be decided. The Judge repeated his reasoning respecting this issue from his *Cook 2017* decision. Although the Judge identified the $800,000.00 bonus as an issue in his 2020 decision, it was not raised as an issue in 11368's application, nor was it addressed by Patrick Street in its response. Moreover, there is no reference to it in the transcript of the hearing before the Judge. While it is a mystery why the Judge addressed this issue in *Cook 2020*, it is clear that Patrick Street neither raised or relitigated the $800,000.00 bonus issue. Patrick Street accepted this Court's decision upholding the Judge's decision that its payment was contingent on events that did not occur.

Patrick Street's Appeal

[526] Patrick Street appeals the Judge's order that it pay the surplus to 11368. Patrick Street argues that the Judge erred in failing to recognize Patrick Street's

claim under mortgage 759678 and that it should be paid prior to a determination respecting 11368's claim to the surplus. Patrick Street maintains that the Judge:

1. failed to recognize that the purpose of collateral mortgage 759678 for up to $4,000,000.00 was to *support* the guarantee provided by 11368 respecting mortgage 608132 for $10,072,816.52, to stop Patrick Street's pre-judgment attachment application, and prevent the power of sale of Kenmount Terrace due to default on mortgage 708519;

2. failed to appreciate that the September 16, 2016 sale of Kenmount Terrace secured by the up to $4,000,000.00 mortgage made the up to $4,000,000.00 collateral mortgage immediately due and payable, and therefore deductible from the sale proceeds; and

3. failed to recognize the evidence of Mr. Weston respecting the indebtedness ($8,523,007.86) owing under mortgage 608132, which was guaranteed by 11368 and partially secured by collateral mortgage 759678 for up to $4,000,000.00, despite accepting Mr. Weston's evidence in *Cook 2017* respecting the Cook mortgages and the J-3 mechanic's lien (as well as other encumbrances), and despite accepting Mr. Weston's evidence in *Cook 2020* respecting the Cheeke mortgage.

[527] Patrick Street does not appeal the Judge's order that it pay the Cheeke mortgage. However, it does appeal the Judge's award of 18% per annum interest from February 23, 2016 on the Cheeke mortgage, arguing that the applicable interest rate from the date of the power of sale was the statutory interest rate per section 6 of the *Judgment Interest Act*, RSNL 1990, c. J-2.

ISSUES

[528] The central issue is whether the Judge erred in removing mortgage 759678 for up to $4,000,000.00 from the accounting when deciding how the surplus was to be distributed, or in other words, when ordering Patrick Street to pay the surplus from the proceeds of sale of Kenmount Terrace to 11368. Put another way, did the Judge properly remove mortgage 759678 from the accounting when deciding the surplus issue.

[529] A second issue is whether the Judge erred in ordering that 18% per annum interest from February 23, 2016 was payable on the Cheeke mortgage.

ANALYSIS

Issue 1: Is collateral mortgage 759678 payable to Patrick Street from the proceeds of sale of Kenmount Terrace?

[530] Deciding this question requires an appreciation of mortgage law.

What is a mortgage?

[531] Section 2 of the *Act* contains definitions for the terms "mortgage", "mortgagee", and "mortgagor":

> (g) "mortgage" includes a charge on property for securing money or money's worth;
>
> …
>
> (i) "mortgagee" includes a person deriving title under the original mortgagee;
>
> …
>
> (k) "mortgagor" includes a person deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his or her estate, interest or right in the mortgaged property;

[532] Joseph E. Roach, in *The Canadian law of Mortgages*, 3rd ed (Toronto, ON: LexisNexis, 2018) at 5, defines mortgage as follows:

> The present day classical definition of the term "mortgage" is succinctly formulated by Lord Lindley in the *Santley v. Wilde* case. The essential elements of the mortgage are described as follows:
>
> > [A] mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. … [A]nd the security is redeemable on the payment or discharge of such debt or obligation.

> The mortgage is a transfer of property which becomes null and void upon payment of the mortgage debt or discharge of the obligation which motivated the transaction. It is obvious, from this definition, that although the mortgage of land is normally created to guarantee a loan, it may also be used to guarantee the execution of other obligations, such as the exclusive sale of goods.
>
> (Citations omitted.)

[533] A similar definition in CED 4th (online), *Mortgages* (Ontario), "Nature of Mortgage: Definition" at §1 (October 2021), provides that a mortgage is a "a conveyance of land or an assignment of chattels *as security for the payment of a debt or for the discharge of some other obligation for which it is given*. Under the *Mortgages Act* [R.S.O. 1990, c. M. 40, s. 1], a 'mortgage' is defined as including any charge on any property *for securing money or money's worth*." (Citations omitted, emphasis added; see also Halsbury's Laws of Canada (online), *Mortgages*, "Overview: Definitions: Common Law Mortgage" (I.1(2)) at HMO-2 "Definition" (2023 Reissue)).

[534] A conventional mortgage is a security instrument that usually involves money advanced by a mortgagee (a lender) to a mortgagor (a debtor) respecting the property covered by the mortgage in exchange for the legal ownership of the mortgaged property passing to the mortgagee; beneficial ownership of the mortgaged property remains with the mortgagor, who can assume legal ownership of the property upon payment of the money advanced in accordance with the terms of the mortgage.

[535] In contrast to a conventional mortgage, a collateral mortgage involves a mortgagor who pledges or assigns property to a mortgagee to secure the payment of an obligation. When the obligation is paid, the property is to be surrendered or discharged to the mortgagor (Roach, at 161-162.). Two ways in which a collateral mortgage may differ from a conventional mortgage include (1) a collateral mortgage may not involve the concurrent advancement of money, and (2) the property a collateral mortgage covers does not necessarily relate to the obligation, it secures. See also Halsbury's Laws of Canada (online), *Mortgages*, "Action on the Covenant: Rule in *Lockhart v. Hardy*: Collateral Mortgages" (VI.4(3)) at HMO-73 "Definition" (2023 Reissue).

[536] The definition of collateral mortgage relied on in Roach at pages 161-162, is drawn from *Royal Bank v. Slack*, 1958 CarswellOnt 92 at para. 49, 1958 CanLII 114 (ON CA):

> … Collateral security is any property which is assigned or pledged to secure the performance of an obligation and as additional thereto, and which upon the performance of the obligation is to be surrendered or discharged…

[537] In *Dorbern Investments v. Provincial Bank*, [1981] 1 S.C.R. 459, the Supreme Court of Canada considered the status of a collateral mortgage in the context of a priorities case. The collateral mortgage was given as security for a previous advance of monies not related to the land covered by the collateral mortgage. The comments of Laskin C.J., at page 466, pertain:

> I do not think that any supportable distinction can be drawn between a collateral mortgage which, as here, was given as additional security for a previous advance made to finance construction on the land on which a lien is claimed and a collateral mortgage given as additional security for an advance not related to construction on the particular land. … *The Mechanics' Lien Act* does not purport to control the destination of advances made on security of land on which a lien arises. They may be put to uses other than for construction and improvement of the mortgaged land, save as the mortgage itself, through the requirement of progress certificates to support further advances as stipulated in the mortgage, provides some control. In the present case, therefore, I find no basis upon which the collateral mortgage, by reason only of being collateral, may be subordinated to an unregistered or later registered lien claim of which the mortgagee had no previous notice.

[538] Similarly, *Glasswall Ltd., v. 2009861 Nova Scotia Ltd.* [1994] N.S.J. No. 479, 1994 CanLII 4083 (NS CA), concerned the priority of a mortgage that did not involve new or contemporaneously advanced money was securing a guarantee for payment of money that had been previously advanced, and that In *Glasswall*, the appellate court applied *Dorbern*, and held that the collateral mortgage was a valid mortgage encumbering the property sold and that it was due and payable in priority to a subsequently registered lien, from the proceeds of sale of the mortgaged property.

What is a guarantee?

[539] While this case principally concerns mortgage law, 11368's guarantee of CBS's mortgage 608132 is implicated. Accordingly, it is useful to consider the law respecting guarantees.

[540] A guarantee is a contractual promise by one person (the guarantor) to be answerable for a legal obligation that a second person (the debtor) owes to a third person (the lender) (Kevin McGuinness, *The Law of Guarantee*, 3rd ed (Toronto, ON: LexisNexis, 2013) at 7; and Halsbury's Laws of Canada (online), *Guarantee and Indemnity*, "Introduction: Definition of the Term "Guarantee"" (I.1) at HGI-1 "Nature of guarantee" (Cum Supp Release 61, 2022 Reissue)). A guarantee contract becomes enforceable when the debtor defaults on its legal obligation to the lender.

[541] A guarantee is considered to be a secondary security instrument (*Waugh v. Pioneer Logging Co. Ltd*., [1949] S.C.R. 299, at 309; Halsbury's Laws of Canada (online), *Guarantee and Indemnity*, "Introduction: Definition of the Term "Guarantee" " (I.1) at HGI-1 "Nature of guarantee" (Cum Supp Release 61, 2022 Reissue); and Halsbury's Laws of Canada (online), *Guarantee and Indemnity*, "Basic Principles: Guarantees and The Law of Contract: Collateral Nature of Guarantee" (II.1(2)) at HGI-6 "Nature of guarantee" (Cum Supp Release 61, 2022 Reissue)). The liability of a guarantor arises after any notice requirements are met and only upon the proved default of the debtor to the lender.

The Interpretation of Contracts

[542] Mortgages and guarantees are contracts. So, their explicit terms are governed by the principles of contractual interpretation.

[543] The modern rules governing the interpretation of contracts were set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and more recently summarized in *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540:

> [20] This Court set out the current approach to contractual interpretation in *Sattva*. *Sattva* directs courts to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances

> known to the parties at the time of formation of the contract": para. 47. This Court explained that "[t]he meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement", but that the surrounding circumstances "must never be allowed to overwhelm the words of that agreement": paras. 48 and 57. "While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement": para. 57. This Court also clarified that the relevant surrounding circumstances "consist only of objective evidence of the background facts at the time of the execution of the contract …, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": para. 58.

[544] *Sattva* establishes that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (para. 50).

The Mortgages in this Case

[545] Mortgage 608132 is a conventional mortgage, which involved the mortgagee, Patrick Street, contemporaneously advancing monies to mortgagor CBS respecting the property it covered in exchange for the transfer of legal title, or equitable title where other mortgages preceded them.

[546] Mortgage 708519 was a collateral mortgage which secured two promissory notes respecting money which had been advanced for Kenmount Terrace.

[547] Mortgage 759678 over Kenmount Terrace is different; it is a collateral mortgage. While it encumbered Kenmount Terrace, 11368 gave it to Patrick Street as security for up to $4,000,000.00 of 11368's obligation pertaining to mortgage 608132. Mortgage 759678 did not involve the advancement of any money for Kenmount Terrace, rather, it secured 11368's obligation respecting mortgage 608132. The terms of mortgage 759678 set out the rights and obligations of Patrick Street as the mortgagee and 11368 as the mortgagor.

[548] The Cheeke mortgage is also a collateral mortgage. 11368 gave Deanna Cheeke a $150,000.00 mortgage over Kenmount Terrace to secure a promissory note respecting $150,000.00 Ms. Cheeke had advanced to 11368.

11368's Guarantee

[549] 11368's guarantee of CBS's mortgage 608132 was executed on April 4, 2014. It is a duly executed document, stating that 11368 unconditionally guarantees CBS's mortgage with Patrick Street for $10,072,816.52 (mortgage 608132). The guarantee clearly states that the guarantor, 11368, acknowledged liability as the principal debtor. The document contains the standard clauses to which guarantee law would apply.

The Propriety of the Power of Sale

[550] It is worth noting that the propriety of the sale by power of sale of Kenmount Terrace is not at issue in this appeal. 11368 does not argue that Patrick Street was not entitled to initiate new power of sale proceedings respecting 11368's default on mortgage 708519 over Kenmount Terrace after stopping the sale on April 21, 2016. Stopping the sale on April 21, 2016 did not mean that Patrick Street could not initiate new power of sale proceedings at a later date if the default on mortgage 708519 continued, as two different Supreme Court of Newfoundland and Labrador justices concluded.

Analysis

[551] The answer to whether the Judge erred in ordering that the surplus be paid to 11368 involves determining whether there is a reason why collateral mortgage 759678 would not be payable to Patrick Street from the proceeds of sale of the property it covered. Was the mortgage not validly executed and registered? Has Patrick Street not complied with its terms? Has 11368's obligation secured by the mortgage not been established?

[552] Patrick Street argues that in ordering that the surplus be paid to 11368, the Judge:

(1) failed to recognize that the purpose of collateral mortgage 759678 was to support 11368's legal obligation respecting mortgage 608132;

(2) failed to recognize that no money needed to pass upon execution of mortgage 759678; and

(3) failed to recognize that Mr. Weston's evidence respecting the amount outstanding on mortgage 608132 established that mortgage 759678 was due and payable in full from the sale proceeds of Kenmount Terrace.

[553] 11368's principal argument is that mortgage 759678 is not payable to Patrick Street because no money was advanced on it (11368's Factum, at paras. 46-47). 11368 also argues that the doctrine of issue estoppel supports its position, because the surplus issue in *Cook 2020* involves substantially the same issue as the appeal of the Judge's rulings in *Cook 2019 Appeal*. As well, in oral argument on appeal, counsel for 11368 intimated that Patrick Street had to call 11368's guarantee of mortgage 608132 in order for mortgage 759678 to be payable to Patrick Street. Simply put, 11368's position is that mortgage 759678 is not payable, ever, from the proceeds of sale of Kenmount Terrace, which in turn, means that any surplus from the proceeds of sale is theirs.

Was Mortgage 759678 Triggered?

[554] 11368 does not dispute that mortgage 759678 was duly executed and registered. Neither does 11368 suggest that mortgage 759678 was otherwise flawed or invalid. In fact, 11368 does not dispute that it voluntarily gave mortgage 759678 to Patrick Street for three reasons: (1) to provide additional security to Patrick Street in relation to Patrick Street's exposure under mortgage 608132 for $10,072,816.52 so as to prevent power of sale proceedings respecting the property that mortgage 608132 covered; (2) to prevent the hearing of Patrick Street's pre-judgment attachment application; and (3) to stop the sale by power of sale of Kenmount Terrace on April 21, 2016. In its factum, at paragraphs 16 and 17, 11368 puts it this way:

> [16] The Power of Sale relating to Mortgage no. 708519 was ultimately abandoned following an Agreement dated April 21st, 2016, the terms of which resulted in 11368 NL Inc. providing further security over the Kenmount Terrace property to Patrick Street Holdings Limited *in exchange for* the cancellation of the Power of Sale. In particular, 11368 NL Inc. entered into a collateral mortgage (registered April 21st, 2016, registration no. 759678) with Patrick Street Holdings Limited, Maddens Limited, P&P Holdings Limited and Paul Madden to secure 11368 NL Inc.'s aforementioned Guarantee to the limit of Four Million ($4,000,000.00) dollars (hereinafter referred to as Mortgage no. 759678).

> [17] While 11368 NL Inc. was attempting to obtain funds to liquidate the subject mortgages and avoid there being a sale of land to satisfy the outstanding mortgages, Patrick Street Holdings Limited caused a further Notice of Power of Sale to be advertised in respect of mortgage no. 708519, with the sale scheduled to proceed on Monday, July 11th, 2016.
>
> (Emphasis added, underlining in original.)

[555] The parties' execution of mortgage 759678, which was drafted by 11368's solicitor pursuant to the parties' agreement of April 20 and 21, 2016, did stop further power of sale proceedings respecting mortgage 608132. The security that mortgage 759678 provided to Patrick Street gave Patrick Street a measure of comfort respecting its exposure on mortgage 608132 in light of the continuing default on mortgage 608132. As well, the mortgage prevented, in some measure, funds from the sale of lots in Kenmount Terrace being dissipated by 11368, which is what Patrick Street was attempting to prevent by its pre-judgment attachment application. Patrick Street's agreement not to proceed to have its pre-judgment attachment application heard gave 11368 the benefit of financial flexibility respecting use of the proceeds from the sale of lots in Kenmount Terrace. Further, stopping the sale of Kenmount Terrace on April 21, 2016 gave 11368 time to find financing to rectify its default on mortgage 708519, which was driving the power of sale. But 11368 was unable to find such financing, and after a short while, Patrick Street commenced new power of sale proceedings to sell Kenmount Terrace due to 11368's continuing default on mortgage 708519 (11368's Factum, at para. 17).

[556] It is clear that 11368 derived considerable benefit from its provision of mortgage 759678 to Patrick Street, a contract from which 11368 now seeks to resile.

[557] 11368 never did, and still does not, challenge the integrity of mortgage 759678 or its triggers for payment. Neither did the Judge ever state or even intimate that Patrick Street's mortgage 759678 was not triggered by the power of sale. In fact, the Judge included mortgage 759678 in his list of encumbrances in *Cook 2017*, and removed it from the accounting because he was not satisfied of the amount owing on it.

[558] Despite the lack of challenge to the triggering of mortgage 759678, Patrick Street argues on appeal, based on the mortgage document, that the conditions for

its payment from the proceeds of sale of Kenmount Terrace were met. Patrick Street might have thought that such argument was not necessary, given that 11368, J-3, and Mr. Cook, as well as the Judge, took no issue with it. But at this stage, Patrick Street was taking nothing for granted. Accordingly, I am considering whether payment of mortgage 759678 was triggered upon the sale of Kenmount Terrace.

[559] Patrick Street relies on clause (h) of mortgage 759678 to show that payment of the mortgage was triggered:

> (h) that should the Mortgagor default in making payments of any monies due under the Guarantee, and, the default continue for thirty (30) or more days; or, in the event of a sale of the said lands and premises without the written consent of the Mortgagee; or, in the event of any legal action being taken against the said lands and premises such that the security given herein may be put in jeopardy; or, should the Mortgagor default in doing, observing, performing, fulfilling or keeping some or more of the provisions, agreements and stipulations herein contained contrary to the true intent and meaning of these presents; or, should the Mortgagor commit any breach of any of the covenants and conditions herein contained and on the part of the Mortgagor to be observed and performed, then, and in every such case, the entire principal sum and all other monies outstanding under the documents evidencing the indebtedness and hereunder shall, at the option of the Mortgagee, become immediately due and payable, the Mortgagor shall surrender and yield up to the Mortgagee the mortgaged premises and it shall be lawful for the Mortgagee to peaceably and quietly enter into, have, hold, use, occupy, possess and enjoy the mortgaged premises hereby conveyed or mentioned or intended so to be, with all appurtenances, without the let, suit, hindrance, interruption or denial of the Mortgagor or any other person or persons whatsoever.
>
> (Appeal Book, Vol. II, at 250)

[560] Patrick Street relies particularly on the subclause in clause (h) which states "in the event of any legal action being taken against the said lands and premises such that the security given herein may be put in jeopardy…the entire principal sum and all other monies outstanding under the documents evidencing the indebtedness [up to $4,000,000.00] and hereunder shall, at the option of the Mortgagee, become immediately due and payable". Patrick Street maintains that the legal action respecting 11368's default on mortgage 708519 caused 11368 to lose Kenmount Terrace, thereby jeopardizing the security 11368 had provided to Patrick Street by mortgage 759678 and triggering payment of mortgage 759678 to Patrick Street.

[561] To my mind, it is abundantly clear that clause (h) triggered payment of mortgage 759678 upon the sale of Kenmount Terrace.

[562] When legal action alters the ownership of mortgaged property, it jeopardizes the security provided by the mortgagor, as beneficial owner of the property, to the mortgagee. This is because the legal action results in the beneficial owner's loss of the mortgaged property and any control over it, such that the beneficial owner can no longer honour the mortgage contract. In such cases, the law provides that when a mortgaged property is sold, mortgages and other valid encumbrances on the property must be discharged from the proceeds of sale in order of priority under the *Act*. This is so for conventional mortgages as well as for collateral mortgages (*Dorbern*; and *Glasswall*). This legislative protection is fundamental to commercial and personal financing in our economy.

[563] In this case, the security provided by mortgage 759678 was in jeopardy once 11368 defaulted on mortgage 708519, because the resulting power of sale proceedings caused 11368 to lose Kenmount Terrace. Therefore 11368 could no longer provide the security it had given to Patrick Street by way of mortgage 759678. Given that the loss of Kenmount Terrace resulted from a power of sale proceeding, established law clearly provided for the payment of the amount owing on a valid and registered mortgage, whose mortgagor was no longer able to provide the specific security the mortgage provided, out of the sale proceeds. In effect, 11368 broke its mortgage contract with Patrick Street, so Patrick Street looked to the contract and established law for a remedy. This is the way that forced sales of mortgaged property works and why encumbrances on the sold property are discharged from the sale proceeds.

[564] I note that other subclauses in clause (h) of the mortgage could possibly be relied on to trigger payment of mortgage 759678. However, Patrick Street chose not to argue other possible triggers, so it is not necessary for the Court to rely on or discuss them.

[565] As well, Patrick Street points out that the very same jeopardy which informed the Judge's order that the Cheeke mortgage be paid to Infini-T Holdings Inc. in *Cook 2020* operated to make the $4,000,000.00 mortgage payable to Patrick Street. I agree. The Cheeke mortgage was also a collateral mortgage, given to secure 11368's obligation to Ms. Cheeke which had been secured by a

promissory note. 11368 formalized its debt to Ms. Cheeke by executing a mortgage in her favour.

[566] The Judge did not order the Cheeke mortgage to be paid in *Cook 2017*. The Cheeke mortgage was determined to follow the J-3 and Cook claims in priority, so it was not necessary to the issue being litigated, which was whether J-3 and Mr. Cook could recover their claims. The Judge did not make any order respecting the funds remaining from the sale of Kenmount Terrace after J-3 and Mr. Cook were ordered paid. However, the Judge did state that he did not know what the $150,000.00 constituting 11368's debt to Infini-T Holdings Inc. had been used for. In any event, once the debt was established, what the money was used for was irrelevant.

[567] In *Cook 2020*, the Judge ordered the Cheeke mortgage to be paid. Its payment was triggered for the very same reason and by the very same process that Patrick Street argues ought to have triggered payment of $4,000,000.00 on mortgage 759678, that being that the security provided by the mortgage was in jeopardy because the property (Kenmount Terrace) covered by both mortgages was sold.

[568] For the above reasons, it is clear that clause (h) made mortgage 759678 payable upon the sale of Kenmount Terrace.

Patrick Street's Grounds of Appeal

[569] In deciding how the surplus from the proceeds of sale of Kenmount Terrace would be distributed, the Judge considered the arguments of 11368 and Patrick Street, and ordered that the surplus be paid to 11368. He wrote:

> [24] Again, as I noted earlier, I deducted the $4,000,000 that Patrick Street Holdings claimed through the collateral mortgage in its accounting of the power of sale *because Patrick Street Holdings provided no analysis of what amount, if any, may have been owing to it under the collateral mortgage*. White, J.A. accepted my conclusion and ended his discussion of the issue this way:
>
> …

> [25] I have been shown nothing to cause me to change my mind on this issue; and I accept White, J.A.'s affirmation of the conclusion I stated on the $4,000,000 mortgage amount in the reasons I filed on the Originating Application.
>
> (Emphasis added.)

[570] Patrick Street first argues that the Judge failed to recognize that the purpose of collateral mortgage 759678 was to support 11368's legal obligation respecting mortgage 608132.

[571] The recitals in mortgage 759678 provide the context in which mortgage 759678 was executed. They provide the reason for the mortgage, the surrounding circumstances, and the intentions of the parties at the time the mortgage contract was made (*Sattva*, at paras. 56-58). Specifically, they state 11368's acknowledgement of its indebtedness to Patrick Street in connection with loans advanced by Patrick Street for various purposes to 11368, Mr. Clarke, and bodies corporate related to the mortgagor of mortgage 608132 (CBS) which were secured by 11368's guarantee dated April 4, 2014. As well, the recitals show 11368's acknowledgement of the execution and enforceability of its guarantee, and its agreement to provide collateral mortgage 759678 to secure its satisfaction. In short, the recitals explain how mortgage 759678 was collateral, and that its purpose was to secure up to $4,000,000.00 of 11368's obligation to Patrick Street under mortgage 608132.

[572] The mortgage goes on to state that in consideration of the indebtedness referenced in the recitals, 11368 as mortgagor "assigns, transfers, conveys and mortgages" ("to the limit of Four Million ($4,000,000.00) Dollars") of Kenmount Terrace to Patrick Street.

[573] The covenants binding Patrick Street and 11368 follow the recitals. They apply "while any amount of principal and/or interest is outstanding on the indebtedness".

[574] The final paragraph in mortgage 759678 declares that the mortgage is collateral to the indebtedness secured by the guarantee and that nothing but the actual payment of that indebtedness or payment of up to $4,000,000.00 discharges mortgage 759678.

[575] The terms of mortgage 759678 and the surrounding circumstances known to the parties at the time of the formation of the mortgage contract (*Sattva*, at para. 47) clearly establish that 11368 acknowledged its legal obligation to Patrick Street and provided a mortgage for up to $4,000,000.00 secured by Kenmount Terrace respecting this obligation in order to avoid power of sale proceedings of the property secured by mortgage 608132. In exchange, 11368 was relieved from its obligation respecting the forthcoming power of sale proceedings, and CBS, controlled by the same person who owned 11368, was relieved of the risk of losing its property mortgaged by mortgage 608132. The parties' agreement also relieved 11368 from the imminent sale by power of sale of Kenmount Terrace due to its default on mortgage 708519, which gave 11368 some time to try to liquidate encumbrances on Kenmount Terrace, and relieved the risk to 11368 that funds from the sale of lots in Kenmount Terrace would be attached per Patrick Street's pre-judgment attachment application.

[576] Something more must be said. 11368 and CBS were deeply connected. The same person, Mr. William Clarke, controlled both entities. This close connection is patently obvious from the record. It is particularly shown by CBS's guarantee of mortgage 608132, which guarantee states that one of its purposes was to provide 11368 with flexibility to liquidate a mortgage between 11368 and Patrick Street, and also by 11368's guarantee of mortgage 608132 as the principal debtor.

[577] The precarious financial situation of 11368 informed the execution of mortgage 759678. Kenmount Terrace was the only asset of 11368. In 2016, 11368 had defaulted on mortgage 708519, and CBS had also defaulted on 608132 which was guaranteed by 11368. Despite the fact that Patrick Street already had guarantees from Mr. Clarke and 11368 respecting mortgage 608132, Patrick Street was concerned about its exposure under the mortgage. Why? Because Patrick Street knew the financial position of Mr. Clarke, who controlled both 11368 and CBS, and had little confidence in their respective guarantees. What is more, 11368 knew that Patrick Street knew that, and 11368 freely and knowingly allayed Patrick Street's concern by executing mortgage 759678 to provide additional security to Patrick Street respecting its exposure on mortgage 608132, and in substitution for probable pre-judgment attachment orders respecting the sale of lots in Kenmount Terrace.

[578] It is therefore clear that there is no issue respecting the integrity of mortgage 759678, and that its purpose was to provide additional security to Patrick Street from 11368 in respect of Patrick Street's exposure (the amount owing) under mortgage 608132. The triggering provisions and contractual terms which govern payment of mortgage 759678 from the proceeds of sale of Kenmount Terrace and the parties' agreement of April 20, 2016 make clear that mortgage 759678 was a legitimate encumbrance on Kenmount Terrace. The Judge's simple reliance in *Cook 2020* on his reasoning for disallowing mortgage 759678 from the accounting in *Cook 2017*, without consideration of the mortgage document, the purpose of mortgage 759678 or the parties' agreement of April 20, 2016, shows a failure to appreciate that mortgage 759678 supported 11368's acknowledged debt to Patrick Street, and that as a mortgage covering Kenmount Terrace, it had to be paid upon the sale of Kenmount Terrace.

[579] Secondly, Patrick Street argues that the Judge failed to recognize that no money needed to pass upon execution of mortgage 759678.

[580] On appeal, 11368 doubles down on its argument that the surplus was theirs because no new money pertaining to the Kenmount Terrace property was advanced on mortgage 759678. This was the argument of J-3 and Mr. Cook and echoed by 11368 in *Cook 2017*, and made again by 11368 in *Cook 2020* and on this appeal. The argument is one which the Judge has neither addressed nor dispelled.

[581] The jurisprudence and legislation respecting the nature of mortgages, including collateral mortgages, easily dispose of this argument. It is clear that a collateral mortgage can cover property that is unrelated to the obligation it secures. It is also clear that a collateral mortgage need not involve money advanced to a mortgagor (*Dorbern*; and *Glasswall*). Indeed, a collateral mortgage can secure an obligation that does not involve money at all. If money were required to be advanced for a mortgage to be declared valid, the language of "or money's worth" would be superfluous in the definition of "mortgage" in the section of the *Act* quoted above, and run counter to the presumption against tautology (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis, 2022) at 211-212).

[582] The Judge's simple importation of his *Cook 2017* reasoning to decide *Cook 2020* with no further explanation belies a lack of appreciation of this law, and

creates doubt about the Judge's appreciation that no money had to pass on the execution of mortgage 759678.

[583] Third, Patrick Street argues that in ordering that the surplus belonged to 11368, the Judge failed to recognize that Mr. Weston's evidence respecting the amount outstanding on mortgage 608132 established that mortgage 759678 was due and payable in full from the sale proceeds of Kenmount Terrace.

[584] In *Cook 2017*, the Judge accepted Mr. Weston's evidence respecting the amounts owing on the several other mortgages and encumbrances, with some corrections and adjustments which were acknowledged by Mr. Weston. However, in *Cook 2020*, the Judge failed to consider, or even mention, Mr. Weston's evidence respecting mortgage 759678. Mr. Weston's unchallenged evidence, acknowledged by this Court in *Cook 2019 Appeal* (paras. 10, 56) was that $8,523,007.86 remained owing on mortgage 608132 at the relevant time, which was the basis for establishing the amount owing on mortgage 759678. Indeed, it was Mr. Weston's evidence that determined the amounts owing on all accepted encumbrances against Kenmount Terrace, including mortgage 759678.

[585] Mortgage 759678 stipulates that the amount secured by mortgage 759678 was up to $4,000,000.00 of the amount owing on mortgage 608132. Mr. Weston's unchallenged evidence was that $8,523,007.86 was owing on mortgage 608132, which was the debt 11368 acknowledged to Patrick Street on mortgage 608132. This amount is what had to be measured against mortgage 759678. When so measured, it established that the full amount of mortgage 759678 was owing from the proceeds of sale of Kenmount Terrace. The Judge's failure to recognize that Mr. Weston's evidence that $8,523,007.86 was owing on mortgage 608132 established the amount owing on mortgage 759678 was a misapprehension of evidence. The Judge failed to apprehend that the evidence clearly established the amount owing under mortgage 759678 was $4,000,000.00. There was nothing more that Patrick Street could do to prove the amount owing.

[586] Something else may have caused the Judge to ignore or misapprehend Mr. Weston's evidence respecting mortgage 608132. At the hearing, the Judge said:

> Now, a mortgage related to what was actually before me, the issues that — on that particular application which is not the issue that we're dealing with now, obviously, but you know, Ms. Clarke would say, you know, there's been acceptance of what my finding

> was by the Court of Appeal; and therefore, there's no issue to discuss with respect to any obligation that 11368 might have to Patrick Street Holdings Limited under this mortgage — under this guarantee, I should say.
>
> (Appeal Book, Vol. I, at 21)

[587] This comment shows the Judge's focus on 11368 as the guarantor of mortgage 608132. In this matter, 11368 was the mortgagor of mortgage 759678. The fact that 11368 was also a guarantor does not vitiate Patrick Street's rights as the mortgagee of mortgage 759678.

[588] In summary, the Judge did not explain how and why his determination that Patrick Street did not do an analysis of what amount if any was owing on mortgage 759678 related to his decision to remove mortgage 759678 from the proceeds of sale in *Cook 2020*. The Judge's failure to address 11368's argument that "no money passed" creates doubt as to whether the Judge correctly apprehended the law respecting collateral mortgages. In *Cook 2020,* the Judge did not refer to the purpose of collateral mortgage 759678, or appear to appreciate that it supported 11368's acknowledged legal obligation respecting mortgage 608132, or that its extent (up to $4,000,000.00) was what was securing up to $4,000,000.00 of 11368's acknowledged obligation. The Judge's conclusion to remove, once again, mortgage 759678 from the proceeds of sale shows that he misapprehended the evidence that established why and how the $4,000,000.00 secured by mortgage 759678 was due and payable from the sale proceeds of Kenmount Terrace.

11368's Argument that Patrick Street had to call the Guarantee in order to recover Mortgage 759678

[589] As noted above, during oral argument 11368 intimated that Patrick Street had to call 11368's guarantee of mortgage 608132 in order for mortgage 759678 to be payable to Patrick Street upon the sale of Kenmount Terrace. 11368 did not support this veiled argument by reference to any evidence, the record, or law.

[590] The root of 11368's veiled argument is that because mortgage 759678 secured part of 11368's guarantee and the guarantee was not called, no amount could be owing under the mortgage. In my view, this is not a conclusion available on any interpretation of the evidence.

[591] Mortgages are different from guarantees. 11368 is the mortgagor of mortgage 759678, not a guarantor. There is no provision in mortgage 759678 that stipulates that the law of guarantee applies to mortgage 759678 or to the parties to the mortgage. Mortgage 759678 contains the terms and conditions to which 11368 and Patrick Street have agreed, and these terms determine their respective rights and remedies, including whether and when the mortgage becomes payable and in what amount. Because part of 11368's obligation that was the basis for mortgage 759678 also happens to be secured by a guarantee, does not mean that the guarantee has to be called in order for the separately executed mortgage to be payable. What 11368's suggestion overlooks is that the $4,000,000.00 is not payable under the guarantee; it is payable under the mortgage. 11368 remains a guarantor of mortgage 608132 for any balance owing on it if and when the guarantee is called. A mortgage given to support an obligation, be it a guarantee or an obligation of another kind, is a valid security instrument. The security provided by such a mortgage is not invalid because there is a guarantee respecting the same mortgage.

[592] Not only does mortgage 759678 not stipulate that 11368's guarantee had to be called in order for mortgage 759678 to be due and payable, but the opposite is true. Specifically, the first subclause in clause (h), which states that if the guarantee were to be called the mortgage could be due and payable, would not be necessary to include as a term of the mortgage if it were assumed by the parties that the guarantee had to be called for the mortgage to be payable.

[593] Moreover, if it were necessary to call 11368's guarantee of CBS's mortgage, all of the triggering clauses in clauses (g) and (h) of the mortgage, except the one specifically relying on the guarantee being called, would be rendered meaningless.

[594] The effect of 11368's suggestion is that 11368 could breach any of the provisions in clauses (g) and (h) without ever risking mortgage 759678 becoming payable as long as the guarantee was not called at the time of the breach. This is not a reasonable interpretation of the mortgage or of the parties' intention in executing it (*Sattva*, at paras. 47-50). It is not reasonable to assume that Patrick Street executed mortgage 759678 on the understanding that it had to call 11368's unsecured guarantee in order for the mortgage to become payable. 11368's obligation to pay the mortgage, or Patrick Street's ability to collect on the mortgage, is triggered because the security provided by the mortgage is gone

(discharged). Patrick Street already had 11368's unsecured guarantee of mortgage 608132 and the right to call it under certain conditions. Patrick Street took mortgage 759678 to secure up to $4,000,000.00 of the guarantee, knowing that the worth of 11368's guarantee of mortgage 608132 was questionable and that Kenmount Terrace was the only asset 11368 had. 11368 knew that Patrick Street was concerned about its exposure on mortgage 608132 and 11368's questionable financial situation, and, allayed this concern by executing mortgage 759678 over Kenmount Terrace, in exchange for time to try to find other financing to, avoid losing Kenmount Terrace by power of sale and the attachment of monies from the sale of lots in Kenmount Terrace. 11368 knew that Patrick Street could eventually attempt to recover under 11368's guarantee, but that would likely still involve CBS losing the property covered by mortgage 608132 due to 11368's financial situation. By 11368 giving Patrick Street mortgage 759678, Mr. Clarke's loss of the property secured by mortgage 608132 was avoided and PSH's calling of 11368's guarantee was also avoided. This was precisely what Mr. Clarke and 11368 wanted. To be clear, 11368 is now attempting to remove the security it provided to Patrick Street in the form of mortgage 759678 by way of an argument about "amount owing" or "payability" that obscures application of the law pertaining to the discharge of a mortgage on a power of sale. Accepting that the guarantee had to be called in order for the mortgage to be payable would render the execution of mortgage 759678 a useless exercise and mortgage 759678 an empty contract.

11368's Issue Estoppel Argument

[595] As part of its position that the Judge did not err in finding that no payment ought to be made on mortgage 759678, 11368 argues that the doctrine of issue estoppel "falls to be considered in this Appeal" (11368's Factum, at para. 41). 11368 argues that the Judge's decisions in *Cook 2017*, *Cook 2020*, and this Court's decision in *Cook 2019 Appeal* together constitute "a final decision with respect to the admissibility of the $4,000,000.00 mortgage in the accounting" (11368's Factum, at para. 43). 11368 maintains that Patrick Street's ground of appeal in this case is substantially the same as the ground of appeal it argued in *Cook 2019 Appeal*, and further, 11368 maintains that Patrick Street is attempting to raise again the priority of mortgage 759678 in the accounting from the proceeds of sale of Kenmount Terrace.

[596] I would not give effect to these arguments for the following reasons.

[597] First, I note that "substantially the same" is not the same as the "the same". Patrick Street argued in *Cook 2019 Appeal* that mortgage 759678 took priority over the J-3 and Cook claims. It is not so that Patrick Street is attempting to reargue the priority of mortgage 759678 in the accounting in this appeal; Patrick Street is arguing that mortgage 759678 was a valid encumbrance on Kenmount Terrace and that it should be paid from the proceeds of its sale. This appeal is about whether a valid and registered mortgage, mortgage 759678, entered into by a mortgagor and a mortgagee who knew the full consequences of what they were doing, and which covered property sold by power of sale, will ever be paid from the proceeds of that sale. Patrick Street did not re-argue that it should be paid in priority to the J-3 and Cook claims; Patrick Street has paid those claims.

[598] 11368 has not provided any analysis of the similarities and differences between the two appeals, has not explored how they relate to disbursement of the surplus, or why they matter. In short, 11368 did not argued facts sufficient to show that the question raised in *Cook 2020* "was absolutely adjudicated upon" in *Cook 2017* or *Cook 2019 Appeal* (*Lange*, at 12). Deciding an appeal on the basis of a ground that is only *substantially* the same as a ground decided in a previous case, with no explanation of why and how, is not a decision that the question has been decided (*R. v. Van Rassel*, [1990] 1 S.C.R. 225, at 238).

[599] Second, application of the doctrine of issue estoppel does not operate to dismiss an appeal unless it was raised and decided in the decision under appeal. Issue estoppel is a species of the doctrine of *res judicata*. It arises where a point or issue in play in a current legal proceeding has been previously decided between the parties in an earlier legal proceeding. The doctrine is grounded on two policy considerations. First, to support finality of litigation by preventing the multiplicity or fragmentation of litigation (by preventing a party from relitigating the same issue in a subsequent litigation), and second, to prevent a party from being twice vexed in the same cause. These policies are well established in Canadian law and have been endorsed by this Court in *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's,* 2013 NLCA 62 (*Guardian*), leave to appeal to SCC refused, 35667 (24 April 2014).

[600] 11368 raises issue estoppel for the first time on appeal. 11368 applied to the Court in *Cook 2020* for a determination that the surplus from the sale of Kenmount Terrace was theirs. 11368 did not apply to the Court for a determination that the surplus issue was already decided, or argue that the doctrine

of issue estoppel should somehow be invoked to prevent Patrick Street from arguing its position. Neither did 11368 ask for a contempt application against Patrick Street, which it could have done had the surplus issue been clearly decided. Moreover, the Judge made no reference to issue estoppel, nor did he intimate that his previous decision had decided the surplus issue.

[601] The test for hearing a new issue for the first time on appeal is outlined in *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3. It is stringent:

> [22] The test for whether new issues should be considered is a stringent one. As Binnie J. put it in *Sylvan Lake*, "The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice": para. 33. While this Court can hear and decide new issues, this discretion is not exercised routinely or lightly.

[602] The above test was applied by the Manitoba Court of Appeal in *Davis et al. v. Her Majesty the Queen in Right of the Province of Manitoba*, 2019 MBCA 78, which involved a party raising issue estoppel for the first time on appeal. The appellate court dismissed a party's issue estoppel submission on the basis that it was raised for the first time on appeal (paras. 16-22).

[603] In this case, neither party provided arguments on this point. Nor does this Court have the benefit of the reasons why the Judge below did not invoke the doctrine of issue estoppel or make any comment about it. This is because issue estoppel was not argued in *Cook 2020*.

[604] In my view, the doctrine of issue estoppel cannot be applied to decide this appeal. The doctrine is available to be raised by an applying party to *prevent* relitigation, to *prevent* that party from being vexed a second time; or, it can be pleaded as a defence. Such prevention is moot if the issue is raised for the first time on appeal. In *Cook 2020*, 11368 did not raise issue estoppel or plead the specific facts necessary to support its application to the surplus issue (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto, ON: LexisNexis, 2021) at 12). 11368's application to have the surplus issue decided was heard and decided. It is that decision which Patrick Street appeals, *as of right*, to this Court.

[605] The doctrine of issue estoppel, if not pleaded in the court below, cannot be raised as a ground on appeal. Put another way, the party omitting to plead it waives the estoppel (Lange, at 14-15).

[606] Arguing issue estoppel for the first time on appeal was addressed in *Dhillon v. Dhillon*, 2006 BCCA 524, and in *Coady v. Quadrangle Holdings Ltd.*, 2015 NSCA 13, leave to appeal to SCC refused, 36378 (15 October 2015). In *Dhillon*, the British Columbia Court of Appeal said:

> [21] The fact that *res judicata* was not pleaded as a defence, and that there was no application to introduce it as a defence, explains why the reasons for judgment are silent on this issue. The appellants cannot now raise *res judicata* in this appeal, having not pleaded it or formally applied to raise it at trial. I will, nevertheless, deal with *res judicata* in order to give a full answer to the appellants.
>
> [22] Lange states, in *The Doctrine of Res Judicata in Canada*:
>
> > Pleading *r*es *judicata* permits a litigant to argue that the earlier determination is conclusive evidence rather than merely *prima facie* evidence when not pleaded (at page 11).
> >
> > The plea of *res judicata* must set out fully the facts which create the plea, not simply plead the first proceeding and the order. *It must distinctly plead facts sufficient to show that the question raised in the second proceeding was absolutely adjudicated upon in the first proceeding* (at page 12) [footnotes omitted].
>
> The author notes that Gwynne J., for the majority of the Supreme Court of Canada in ***McMillan v. Davies*** (1892), reported in Edward Robert Cameron, *Canada: Supreme Court Cases* (Toronto: Canada Law Book, 1905) 306 at 317, stated this requirement to be as follows:
>
> > ... it would be necessary that *the plea [of estoppel] should contain suitable averments of what was the precise matter in contestation in such interpleader issue and of what is the precise matter in contestation in the present action* so as to raise for adjudication the question of estoppel relied upon by the defendant.
>
> (Emphasis added.)

[607] In *Quadrangle*, the Nova Scotia Court of Appeal came to the same conclusion.

[608] In my view, this appeal cannot be decided on the basis of issue estoppel. Doing so is contrary to established law, out of step with the logic behind the doctrine and its application, and does not in any way further the policies of finality and fairness.

[609] Closely tied to *res judicata* and issue estoppel is the doctrine of *stare decisis*, commonly referred to as the doctrine of precedent. Lange states that the doctrines have been applied interchangeably (542-543). 11368's issue estoppel argument could really be an argument that the Judge's reason for decision in *Cook 2017*, upheld by this Court and restated in *Cook 2020*, is a precedent that ought to determine whether Patrick Street or 11368 was entitled to the surplus remaining from the sale proceeds by virtue of mortgage 759678. In other words, does the doctrine of precedent determine Patrick Street's appeal. In fairness to 11368, I will consider whether the doctrine of precedent applies to determine this appeal.

[610] A leading case on the doctrine of precedent is *Canada (Attorney General) v. Confederation des syndicats nationaux*, 2014 SCC 49, [2014] 2 S.C.R. 477. At paragraph 22, the Court stated:

> [22] … However, an action will sometimes be dismissed if it is clear that an authoritative decision has already resolved the issue or issues raised in the motion to institute proceedings.

The Court went on to say at paragraph 24:

> [24] Of course, the doctrine of *stare decisis* is no longer completely inflexible. As the Court noted in *Bedford*, the precedential value of a judgment may be questioned "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (para. 42). …

The Court went on at paragraphs 26 and 27 to further quote Gascon J.A. with approval:

> [26] In *Canada v. Imperial Tobacco*, Gascon J.A., as he then was, explained as follows:
>
> > … *Stare decisis* is a less stringent basis for an argument than *res judicata*, since it requires only a similar or analogous factual framework. *Stare decisis* is a

> principle "under which a court must follow earlier judicial decisions when the same points arise again in litigation" [*Black's Law Dictionary* (9th ed. 2009), at p. 1537]. It applies, of course, to decisions of the Supreme Court, particularly in the area of public law…
>
> [27] This being said, before granting a motion to dismiss an action because it has no basis in law, the judge must also be satisfied in light of the record and the alleged facts that the precedent relied on by the applicant actually concerns *the entire dispute* that it should normally resolve, and that it provides a *complete, certain and final* solution to the dispute. In case of doubt, the judge may not grant the motion to dismiss, but must instead give the parties an opportunity to argue the issues on the merits.
>
> (Emphasis in original.)

[611] While the law stated in *Confederation* respecting *stare decisis* is in the context of dismissing actions at a preliminary stage, its logic, unlike the logic of issue estoppel, does apply to an argument on appeal.

[612] In my view, the simple answer to whether *Cook 2017*, *Cook 2019 Appeal*, and *Cook 2020*, together, constitute a binding precedent to decide this appeal, is "no".

[613] First, as noted above, Patrick Street has appealed the Judge's decision in *Cook 2020* to this Court *as of right*. *Cook 2020* cannot have precedential value, or even be persuasive authority, on this appeal. The Judge's decision in *Cook 2020* is the very subject of this appeal.

[614] Second, *Cook 2017* is not a precedent binding this Court. *Cook 2017* did not do a full accounting of the proceeds of sale from Kenmount Terrace, according to the procedure set out in *Brenton Brothers*, at paragraph 39. (See also *Federal Business Development Bank and Sidestreet Limited et al., Re*, 1986 CanLII 3485 (NL SC), at paras. 3, 9). In this case the Judge stopped after deciding the priorities issue put before him – that being whether J-3 and Mr. Cook would be paid in priority to mortgage 759678. Even if the Judge had done a full accounting of the proceeds from the power of sale of Kenmount Terrace, the Court of Appeal would not be bound by it. Vertical *stare decisis* does not operate to bind a higher court to a lower court's decision.

[615] In *Cook 2019 Appeal*, this Court distinguished *Cook 2017* from *Glasswall* on the basis that *Glasswall* involved an agreed statement of facts which established that the amount of the mortgage securing the guarantee in that case was due and payable by the guarantor (*Cook 2019 Appeal*, at para. 61). This Court also commented on the fact that clause (g) did not apply. While it is so that clause (g) does not apply, why it is referenced is a mystery. Review of the record, including both written and oral arguments in *Cook 2019 Appeal*, shows that clause (g) was not relied or even touched on by Patrick Street or 11368 in *Cook 2019 Appeal*. In any event, 11368's liability to pay mortgage 759678 is as the mortgagor, not as a guarantor. Additionally, 11368 agreed, as stated in the guarantee, that it was the principal debtor respecting mortgage 608132.

[616] Thirdly, *Cook 2019 Appeal* does not bind this Court to discharge mortgage 759678 with impunity from the sale proceeds of Kenmount Terrace. In *Cook 2019 Appeal*, this Court upheld the Judge's finding in *Cook 2017* and determined that "there should be no payment under the $4,000,000.00 mortgage in *priority to the J-3 Consulting lien or Cook mortgages*" (emphasis added, at para. 63). This Court decided only *that mortgage 759678 would not be paid in priority to the J-3 and Cook claims*, which is all that *Cook 2017* had decided. Neither this Court, nor *Cook 2017*, ruled or decided that mortgage 759678 would never be paid from the proceeds of sale of Kenmount Terrace, and neither this Court, nor *Cook 2017*, made any comment whatsoever about distribution of the surplus remaining from the sale. In fact, this Court's order in *Cook 2019 Appeal* leaves open the distinct possibly that mortgage 759678 could be paid from the proceeds of sale.

[617] In deciding that Mr. Cook and J-3 would be paid in priority to mortgage 759678, this Court in *Cook 2019 Appeal* deferred to the Judge not being satisfied of the sufficiency of evidence respecting the money owing on mortgage 759678. A decision made on the basis of a judge not being satisfied of the sufficiency of evidence respecting a controversial point is not, in my view, a binding precedent governing the merits of the controversial issue. The fact that this Court deferred to the Judge's removal of mortgage 759678 from the accounting in *Cook 2017* in determining the priority of the J-3 and Cook claims does not mean that mortgage 759678 cannot ever be paid from the proceeds of sale of Kenmount Terrace. Neither would deference to a Judge's finding regarding the sufficiency of evidence be a ruling to justify invoking the doctrine of issue estoppel even if issue estoppel had been argued before the Judge in *Cook 2020*. This Court's priority ruling at paragraph 63 of *Cook 2019 Appeal*, saying "I would uphold the decision

of the Applications Judge in finding that there should be no payment under the $4,000,000.00 mortgage *in priority* to the J-3 Consulting lien or the Cook mortgages" (emphasis added) is hardly a precedent that determines that mortgage 759678 ought never to be paid from the proceeds of sale. In short, *Cook 2019 Appeal* did not demonstrate resolution of the entire dispute between 11368 and Patrick Street, nor did it provide a complete, certain, and final solution to the current dispute between them (*Confederation*, at para. 27).

[618] For the above reasons, I am of the view that this Court's decision in *Cook 2019 Appeal* does not provide a binding legal or factual precedent respecting whether mortgage 759678 should be paid from the surplus of the proceeds of sale.

[619] The parties disagreed on what *Cook 2019 Appeal* decided and 11368 applied for a determination of the surplus issue. Whether Patrick Street could recover mortgage 759678 from the surplus remaining from the proceeds of the sale of Kenmount Terrace, or whether the surplus belonged to 11368 as the mortgagor of mortgage 708519, was the issue put forward by 11368 in *Cook 2020*. The Judge considered the parties' positions and decided in favour of 11368. He did not say that he could not consider the surplus issue because he was bound by his decision in *Cook 2017*, or by *Cook 2019 Appeal*. In fact, the Judge acknowledged that he was deciding a different issue, in a different context than the priorities issue he had decided in *Cook 2017*, saying at the conclusion of the *Cook 2020* hearing:

> I'll say it would come as no surprise to either of you, I'm sure, that I'll have to reserve my judgment in this matter. So, I need to go through this as they say, with a fine-toothed comb and see what the legalities of it are and the priorities and I will file a written judgment as soon as time permits me to do that.
>
> (Appeal Book, Vol. I, at 25)

[620] My colleague, O'Brien J.A., refers to two subsequently decided cases involving 11368 and Patrick Street, one of which is *Patrick Street Holdings Ltd. v. 11368 NL Ltd.*, 2021 NLSC 29. I have grave concerns about the propriety of relying on subsequent litigation to decide an appeal of a previous decision. An appeal comes to this Court on the basis of the record and the issues put forward by the parties.

[621] That said, the Judge's comments at paragraphs 20 to 22 of this case confirm, in my view, that the Judge appreciated that he was deciding a different issue in *Cook 2020* than the one he had decided in *Cook 2017*, but his comments at paragraph 54 do not accurately represent what he did in *Cook 2017*. In *Cook 2017*, he did not declare that mortgage 759678 ranked behind 11368 in priority; rather, he decided that the amount owing on mortgage 759678 was not established to his satisfaction and took it out of the accounting to enable payment of the J-3 and Cook claims. A mortgagor's entitlement to residue is not an encumbrance to be considered in determining the priority of encumbrances. Further, the Judge's comment that he could not rely on *Cook 2019 Appeal* "to negate or even nullify the perception that I might do the same again if I hear the Interlocutory Applications. If nothing else, I may actually be constrained by two precedents of my own making", actually shows that the Judge turned his mind to making a different decision in the context of the different issue in the case before him (para. 54). In this regard, I know of no law which constrains a trial judge from not accepting an argument in one context and accepting it in another context. Nor do I know of a law which compels a trial judge to repeat, in a subsequent matter, an error made in an earlier matter. Moreover, the doctrine of precedent does not mean that a trial judge is not able to change their mind about their reasoning in a previous case.

[622] The fact that the Judge decided mortgage 759678 should be discharged in *Cook 2020* for ostensibly the same reason that he removed mortgage 759678 from the accounting in *Cook 2017* does not mean his reasoning in the earlier case correctly determines, or even applies, to the surplus case, or that he cannot change his mind. Lawyers make the same arguments respecting different issues in different cases all the time, and judges accept those same arguments in different cases all the time.

[623] In summary, 11368 gave an up to $4,000,000.00 mortgage over Kenmount Terrace as security for its acknowledged indebtedness respecting mortgage 608132. 11368 had the right to have mortgage 759678 discharged upon its full payment or if mortgage 608132 was fully paid. But 11368 did not pay mortgage 759678, and mortgage 608132 was in default. The $8,523,007.86 outstanding on it at the time of the *Cook 2017* court proceeding which exceeded the $4,000,000.00 security provided by mortgage 759678, which made mortgage 759678 fully payable. As noted above, in *Cook 2020*, the Judge misapprehended the law and the evidence in concluding that mortgage 759678 was not payable

from the sale proceeds of Kenmount Terrace. To my mind, the facts and the law admit no other conclusion.

[624] The Judge's reason for ordering the surplus to be paid to 11368 is effectively a decision that a valid and properly executed mortgage can be discharged with impunity when sufficient funds remain from sale proceeds to pay it. Such a result is untenable. It is simply wrong and an affront to established mortgage law. Accepting 11368's position would set a dangerous precedent in the practice of commercial law in the Province. Moreover, 11368 gave mortgage 759678 to Patrick Street to avoid power of sale proceedings respecting the property covered by mortgage 608132, to get flexibility respecting the use of moneys from the sale of lots in Kenmount Terrace, and to get time to find other financing to enable them to pay mortgage 708519, which was driving the power of sale of Kenmount Terrace. After receiving the benefits of their April 20, 2016 agreement with Patrick Street, they now seek the Court's blessing to enable them to break it. I cannot condone this duplicitous conduct.

[625] In *Cook 2020*, the Judge calculated that a surplus remained from the sale of Kenmount Terrace. He ordered the Cheeke mortgage plus interest to be paid from this surplus, that mortgage 759678 be discharged with impunity, and the balance to be paid to 11368. The correct surplus remaining after the *Cook 2019 Appeal* was $4,313,183.36. This surplus was in all likelihood sufficient to pay both the Cheeke mortgage plus interest and mortgage 759678. Any residue remaining would have to go to 11368 as the mortgagor, in accordance with established law.

[626] However, while I would order that mortgage 759678 must be paid to Patrick Street , that would not mean that Patrick Street could simply pocket this money. Mortgage 759678 provided $4,000,000.00 security against 11368's legal obligation regarding mortgage 608132. Accordingly, after the Cheeke mortgage and the interest owing on it are paid, $4,000,000.00 paid to Patrick Street must be applied directly to 11368's legal obligation, that being mortgage 608132. This is no different than a situation where a parent mortgages their own home to secure a child's mortgage. If the parent loses their home through a power of sale, the mortgagee holding the parent's mortgage can recover the value of its mortgage on the parent's property from the proceeds of its sale, but it cannot simply pocket the money and walk away. That money must be applied to the debt the parent's mortgage secured, which is the child's mortgage.

[627] In this case, the basis for mortgage 759678 was to provide Patrick Street with security of up to $4,000,000.00 respecting Patrick Street's exposure on mortgage 608132. On my analysis, the $4,000,000.00 security realized must be applied directly against the debt which mortgage 759678 secured, that being 11368's stated obligation respecting mortgage 608132.

FURTHER THOUGHTS ON ISSUE ESTOPPEL AND ABUSE OF PROCESS

[628] Given that my colleagues see fit to decide this appeal by applying the doctrines of issue estoppel and/or abuse of process, it behooves me to make the following additional comments.

Issue Estoppel

[629] If 11368 had based its 2019 application on issue estoppel and its argument had prevailed, and Patrick Street appealed that decision, I would have allowed Patrick Street's appeal on the basis that the pre-conditions for application of the doctrine of issue estoppel had not been met. Moreover, even if they had been met, I would have exercised my discretion not to apply the doctrine.

[630] The two-step test for application of the doctrine of issue estoppel was outlined by Binnie J., for a unanimous court, in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. At paragraph 25, he set out the preconditions to the first step which had been previously established in *Angle v. M.N.R.*, [1975] 2 S.C.R. 248:

> [25] The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[631] At paragraph 33, Justice Binnie described the second step:

> [33] … The first step is to determine whether the moving party … has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied…
>
> (Emphasis in original.)

[632] Justice Binnie added, at paragraph 33:

> [33] … issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. …

[633] In *Angle*, the Court made clear that issue estoppel would not obtain "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment" (255). The Court stated that an issue alleged to create issue estoppel must have been fundamental to the previous decision (255). In Lange, at page 12, the author states that a plea of *res judicata* must "distinctly plead facts sufficient to show that the question raised in the second proceeding was absolutely adjudicated upon in the first proceeding." See also *Van Rassel*, per McLachlin J., who stated that issue estoppel "applies only in circumstances where it is clear from the facts that the question has already been decided" (238). Likewise, in *Confederation*, the court stated that "the precedential value of a judgment may be questioned if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (para. 24) and that the "record and the alleged facts that the precedent relied on by the applicant actually concern *the entire dispute* that it should normally resolve, and that it provides a *complete, certain, and final* solution to the dispute" (emphasis in original, at para. 27).

The Cook 2017 Application and the Cook 2019 Appeal

[634] As explained above, *Cook 2017* application was initiated by J-3, a mechanic's lien holder, and Mr. Cook, a mortgagee. J-3 and Mr. Cook applied to the Court to recover their respective claims from the proceeds of sale of Kenmount Terrace, despite the fact that their claims were registered after several other

encumbrances against Kenmount Terrace had been registered. The problem for Mr. Cook and J-3 was that if their claims were not determined to be in priority to several other encumbrances, there would not be sufficient funds remaining from the proceeds of sale to pay them. Patrick Street, the mortgagee that initiated the sale by power of sale of Kenmount Terrace because of 11368's default on 708519, was the first respondent. 11368, the beneficial owner of Kenmount Terrace, was the second respondent.

[635] In considering this priorities question, the Judge disallowed from the accounting five directions to pay, an $800,000.00 bonus associated with a mortgage, and mortgage 759678 for up to $4,000,000.00. The Judge's disallowance of the directions to pay and the bonus, which were registered in priority to the J-3 and Cook claims, was upheld by this Court, and is not in issue in this Appeal. Mortgage 759678 was also registered before the J-3 and Cook claims. However, the Judge disallowed mortgage 759678 from the accounting in the course in deciding that the Cook and J-3 claims could be paid, and that disallowance was also upheld by this Court in the context of the *Cook 2017* decision. That disallowance was put in issue on this appeal by 11368.

The Parties

[636] Although Patrick Street and 11368 were involved in *Cook 2017*, their roles were different than they were in *Cook 2020* and are on appeal. The "vexed" parties in *Cook 2017* were Mr. Cook, J-3, and Patrick Street as the mortgagee of mortgage 708519 and the holder of encumbrances on Kenmount Terrace. In my view, 11368, as the mortgagor of mortgage 708519, was not vexed in *Cook 2017* in relation to 11368's entitlement to the surplus; 11368 was not an encumbrancer and its entitlement to the surplus was not an issue in the case.

Were the Issues the Same?

[637] The issues in *Cook 2017* (*Cook 2019 Appeal*) and Cook 2020 were not the same. In *Cook 2017*, Patrick Street as mortgagee of mortgage 759678 was defending the priority of mortgage 759678 in the accounting of the sale proceeds vis-á-vis the claims of Mr. Cook and J-3; in *Cook 2020*, Patrick Street was defending its right, vis-á-vis 11368, to ever have mortgage 759678 paid from the sale proceeds of Kenmount Terrace. Even the Judge appreciated that the issue in

Cook 2020 was different, as shown by his comments during the hearing, his decision in *Cook 2020* and his comments referenced in paragraph 586 above.

[638] The contest in *Cook 2017* was for the express purpose of Mr. Cook and J-3 having their claims paid from the sale proceeds. The J-3 and Cook claims would only be paid if they were held to be in priority to the several other claims against Kenmount Terrace. Determining the priority of their claims such that there would be money to pay them was the purpose of Mr. Cook's and J-3's applications, and the Judge's order was specifically limited to ordering the Cook and J-3 claims paid in priority to mortgage 759678. The Judge did not do a full accounting of the proceeds of sale of Kenmount Terrace; he stopped once he determined that the claims of J-3 and Cook could be paid. Neither his Order nor his decision said anything about the surplus remaining from the power of sale.

[639] *Cook 2020* was about disbursing the surplus remaining from the sale proceeds after the payments were made in accordance with *Cook 2019 Appeal*; it was about whether Patrick Street could *ever* recover under the valid and registered mortgage 759678 from the proceeds of sale. The fact that 11368 took a self-interested position supporting Cook and J-3 in *Cook 2017* does not mean that 11368 was vexed a second time in *Cook 2020* or that the issue in *Cook 2017* and *Cook 2020* respecting mortgage 759678 was the same. 11368 never put its interest in the residue in issue in *Cook 2017*, and the Judge did not decide it. In my view, the issues in the two applications were different, as the parties and the Judge recognized.

Was the removal of mortgage 759678 from the accounting fundamental to determining the priority of the J-3 and Cook claims?

[640] Further, the Judge's removal of mortgage 759678 from the accounting in *Cook 2017* was incidental to his ordering that the J-3 and Cook claims be paid. This is because once the $800,000.00 bonus and the directions to pay were removed from the accounting, there were sufficient funds available to pay the Cook and J-3 claims as well as mortgage 759678. Therefore, it cannot be said that the removal of mortgage 759678 from the accounting was fundamental, or essential, to the Judge's order in *Cook 2017* that the Cook and J-3 claims be paid. Rather, the removal of mortgage 759678 from the accounting could be said to be an incidental, or collateral ruling to the Judge's order (*Angle*, at para. 255).

Finality

[641] This Court's ruling in *Cook 2019 Appeal* "*that there should be no payment under the $4,000,000 mortgage in priority to the J-3 Consulting lien or the Cook mortgages*" also confirms that the question decided in *Cook 2017* was that the claims of Mr. Cook and J-3 would be paid in priority to mortgage 759678 (emphasis added, at para. 63). *Cook 2019 Appeal* did not decide distribution of the balance of the proceeds of sale from Kenmount Terrace; that matter was not addressed.

[642] As noted above, Patrick Street could well have decided not to appeal *Cook 2019 Appeal* because *Cook 2019 Appeal* did not decide distribution of balance of the proceeds of sale of Kenmount Terrace or that mortgage 759678 would never be paid. To my mind, this is a very reasonable interpretation of the *Cook 2019 Appeal* ruling that *no payment would be made to Patrick Street in priority to the J-3 and Cook claims*, and that distribution of the balance of proceeds of sale remained unadjudicated.

[643] In my view, the issues in *Cook 2017* and *Cook 2020* were not the same. Moreover, deference to a finding of insufficient evidence is not a proper basis on which to invoke the doctrine of issue estoppel. A judge not being satisfied of an amount owing on a mortgage, whether the judge misapprehended the evidence or not, is neither a legal ruling nor a finding of fact that no money was owing under the mortgage.

[644] 11368 disagreed with the above interpretation and initiated further litigation. The matter was argued and decided, and it is that decision which must be decided in this appeal. As noted above, Patrick Street has an appeal as of right to this Court respecting the Judge's decision in *Cook 2020*. The principle of finality within the doctrine of issue estoppel cannot properly obtain when an appeal as of right lies to this Court.

[645] My colleagues decisions in this matter assume a clarity in *Cook 2017* and *Cook 2019 Appeal* that is simply not present. If it were so clear that the surplus

question was decided in *Cook 2019 Appeal*, I am left to wonder why 11368 did not seek enforcement of the judgment or an order for contempt.

[646] In my view, the conditions for invoking issue estoppel would not have been met.

Exercise of Discretion

[647] The basis on which mortgage 759678 was discharged with impunity in *Cook 2020* was because Patrick Street provided no analysis of "what amount, if any, may have been owing to it under [mortgage 759678]" (*Cook 2020*, at para. 24). Aside from the fact that the Judge's simple transfer of his reason for decision in *Cook 2017* to his decision in *Cook 2020* leaves the impression that the matter was not properly or fully adjudicated (*Danyluk*, at para. 80), I am of the view, as stated above, that the Judge erred in concluding that mortgage 759678 was not proved to be payable from the proceeds of sale of Kenmount Terrace. While the evidence in *Cook 2017* and *Cook 2020* was the same, its import and meaning, properly considered and appreciated, changed. To my mind, correct consideration and appreciation of the evidence is akin to a change in the circumstances and/or evidence that "fundamentally shifts the parameters of the debate" (*Confederation*, at para. 24). I would consider this factor in exercising my discretion not to apply the doctrine of issue estoppel.

[648] Further, even if Patrick Street's choice to not appeal *Cook 2019 Appeal* to the Supreme Court of Canada were regarded as making *Cook 2019 Appeal* a final decision respecting the surplus, I would consider it a factor in the exercise of discretion to not invoke issue estoppel.

[649] An appeal of a civil case to the Supreme Court of Canada is not as of right; leave is required. Simply, put, it is a long shot. In this regard, I note Justice Binnie's comments at paragraph 74 of *Danyluk* to the effect that failing to apply to the Supreme Court of Canada is a factor to consider in whether to exercise discretion not to apply the doctrine. I also note the comments of George F. Curtis in "Stare Decises at Common Law in Canada" (1978) 12:1 UBC L Rev. 1 at 6-8. In particular, the author states at page 6:

> The burden of time and costs, on both litigants and their professional advisors, to carry an appeal to distant Ottawa is heavy. Hence, in situations where a modification of

> previous doctrine appears called for, it may be thought best to set matters right without putting the parties to further expense and trouble. That these considerations have weight with the Canadian appeal courts is borne out by some extra-curial observations of Freedman C.J.M. He states: "If the court is bound against its will, how will the law be changed and brought into line with what the court thinks it should be? …"

As noted above, *Cook 2019 Appeal* could reasonably be considered as not having decided the surplus such that attempts to further appeal would not be indicated.

[650] In balancing the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case, as Justice Binnie stated at paragraph 33 in *Danyluk*, I would come down firmly on the side of ensuring that justice was done on the basis of the facts and the law pertaining to this appeal and the parties in this particular case. In my view, sacrificing justice for finality in this situation would only compound a tarnished image of the justice system, and bring it further into disrepute, as Green C.J.N.L. so aptly put it in *Guardian* (para. 145).

Abuse of Process

[651] I do not regard Patrick Street's maintenance of its position that mortgage 759678 is payable from the proceeds of sale of Kenmount Terrace as an abuse of this Court's process.

[652] Abuse of process is a serious determination. It was not raised by 11368 in the pleadings, in argument, or referred to by 11368 or the Judge in *Cook 2020*. Accordingly, Patrick Street did not have any opportunity to address it. Patrick Street argued its appeal on one basis, and is having it decided on a basis which was not even alluded to and of which it was not notified. In my view, this is contrary to law.

[653] An appellate court's ability to raise a new issue on appeal was comprehensively dealt with by the Supreme Court of Canada in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689. In *Mian*, the Court stated at paragraph 35:

> [35] In summary, an appellate court will be found to have raised a new issue when the issue was not raised by the parties, cannot reasonably be said to stem from the issues as framed by the parties, and therefore would require that the parties be given notice of the issue in order to make informed submissions. Issues that form the backdrop of appellate litigation will typically not be "new issues" under this definition. Exercising

> the jurisdiction to ask questions during the oral hearing will not constitute raising a new issue, unless, in doing so, the appellate court provides a new basis for reviewing the decision under appeal for error.

[654] In *Mian*, the Court identified "party presentation", which means the Court must "respect the strategic choices made by parties in framing the issues", and "ensuring justice is done…according to law" as the competing considerations in deciding appeals (paras. 38-40) .

[655] The Court ruled that while courts have the discretion to raise new issues, it is a discretion that should be exercised "only in rare circumstances", and, "when failing to do so would risk an injustice" (para. 41). In this regard, factors like jurisdiction, whether the record is sufficient to determine the issue, and whether there is procedural prejudice inform the determination (paras. 50-52).

[656] The Supreme Court of Canda made it abundantly clear that parties must be given notification of, and an opportunity to respond to, an appellate court's new issue (para. 54). (See also *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paras. 50-51). In this regard I note that this Court's decision in *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, leave to appeal to SCC refused, 31336 (4 May 2006), to which my colleague O'Brien J.A. refers, decided the case on the basis of the law pertinent to the appeal as argued, and that its comments respecting abuse of process were obiter. Accordingly, it is not authority for deciding a case on the basis of abuse of process without notice to the parties, and even if it were, it has been overtaken by *Mian*.

[657] In this case abuse of process appears for the first time in my colleagues' decisions. This Court did not raise abuse of process during or after the appeal hearing, or give the parties notice of it or an opportunity to respond to it. Accordingly, I fail to see how abuse of process can be relied on to decide this appeal.

[658] Characterizing Patrick Street's exercise of its right to appeal *Cook 2020* as abusing the process of the Court is based on the notion that Patrick Street ought to have accepted that this Court in *Cook 2019 Appeal* decided that the surplus belonged to 11368, and paid it over to 11368 forthwith. Again, this interpretation of *Cook 2019 Appeal* assumes a clarity in *Cook 2019 Appeal* that is simply not

present. Moreover, Patrick Street had no opportunity to augment the record so as to enable a sufficient record to defend itself against such an indictment.

[659] As explained above, Patrick Street accepted this Court's rulings in *Cook 2019 Appeal* respecting the directions to pay and the $800,000.00 bonus, and accepted that the claims of J-3 and Cook would be paid in priority to mortgage 759678. Reasonable interpretation of the *Cook 2019 Appeal* left open the question that mortgage 759678 could be paid from the proceeds of sale. Neither the Judge in *Cook 2017* or this Court in *Cook 2019 Appeal* decided otherwise.

[660] 11368 then brought a new application to have the distribution of the remaining proceeds of sale decided. The Judge did not see this issue as having been previously decided, and he considered it. He decided in favour of 11368 on the basis of his reasoning in *Cook 2017* - that he was not satisfied of the money owing on mortgage 759678. Patrick Street appeals that decision *as of right*. Ruling that Patrick Street's exercise of its right to appeal in this situation is an abuse of the Court's process, is a bridge way too far.

[661] Accordingly, in my view, neither res judicata nor abuse of process are bases on which to dismiss Patrick Street's appeal. In this regard, I add that neither of my colleagues has addressed the grounds of Patrick Street's appeal or 11368's response to it. This leaves the legal issue in *Cook 2020* unadjudicated, which in my view, undermines respect for and confidence in the judicial system.

ISSUE 2: Did the applications Judge err in ordering Patrick Street to pay 18% interest on the Cheeke Mortgage?

[662] Patrick Street appeals the Judge's order that 18% per annum interest be paid on the Cheeke mortgage from February 2016. As noted above, that Patrick Street does not appeal the Judge's order that Patrick Street pay the Cheeke mortgage; it is only the interest payment that is appealed.

[663] Patrick Street acknowledges that the Cheeke mortgage provides that 18% interest be paid until the mortgage is discharged. However, Patrick Street asserts that the interest rate on an outstanding mortgage changes from the rate agreed to in the mortgage contract to the rate of pre-judgment interest provided for in the the *Judgment Interest Act* upon the initiation of power of sale proceedings. Patrick Street provides no authority for this position.

[664] 11368 responds, saying that interest is payable according to the terms of the Cheeke mortgage contract. The contract provides that the mortgage attracts 18% interest per annum until payment.

[665] Orsborn J. considered this issue in *Montreal Trust Co. of Canada v. R M Holdings Ltd.*, 2001 CanLII 33841 (NL SC), rev'd in part on other grounds 2002 NFCA 29. Justice Orsborn ordered that interest payable on the mortgage in that case was payable at the contracted rate until the mortgage was paid. While the term of the Cheeke mortgage specifying the interest payable differs in wording from the term in the applicable mortgage in *Montreal Trust*, it is not so different that Justice Orsborn's analysis would not apply. As well, I have been shown no jurisprudence or legislation that supports Patrick Street's argument. Neither do I see any other error in the Judge's decision.

[666] Accordingly, I accept 11368's argument, and conclude that the Judge made no error in ordering that 18% interest per annum is payable to date on the Cheeke mortgage.

CONCLUSION

[667] On my analysis, I would have allowed Patrick Street Holdings Limited's appeal respecting payment of the $4,000,000.00 mortgage 759678, but dismissed its appeal respecting the interest owing on the Cheeke mortgage. Accordingly, I would have ordered the following:

1. First, the Cheeke mortgage plus interest, to be calculated as outlined by the Judge in *Cook 2020*, be paid to Infini-T Holdings Inc.;

2. Second, $4,000,000.00 from the proceeds of sale of Kenmount Terrace be paid to Patrick Street Holdings Limited to be applied against the balance owing on mortgage 608132; and

3. Third, any funds remaining be paid to 11368 as the mortgagor of mortgage 708519 in accordance with established law.

[668] As Patrick Street Holdings Limited has been largely successful on this appeal, I would have reversed the costs order in the Court below and ordered

11368 to pay 85% of Column 3 costs to Patrick Street Holdings Limited in both matters.

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L.R. Hoegg J.