

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL 58/2008**

<b>BETWEEN</b>	<b>NATIONAL HOUSING TRUST</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>A N D</b>	<b>CAROL DORMAN</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>A N D</b>	<b>IVOR PEYNADO</b>	<b>RESPONDENT</b>

**PROCEDURAL APPEAL**

Written submissions by Livingston, Alexander & Levy, attorneys-at-law for and on behalf of the appellants.

**21 July 2008**

**MORRISON, J.A.**

1. This is a procedural appeal from the refusal by Cole-Smith J on 5 June 2008 of the defendants/appellants' application to strike out the respondent's claim against the 2<sup>nd</sup> defendant/appellant. The basis of the learned judge's decision was that "there are triable issues of fact and law which should be resolved by the trial judge".

2. The defendants/appellants, with the leave of Cole-Smith J, have filed a number of grounds of appeal, which may be paraphrased as follows: the judge erred in refusing to strike out the action against the 2<sup>nd</sup> defendant/appellant, an attorney-at-law, who was at all material times, a legal officer employed to the 1<sup>st</sup> defendant/appellant and against

whom the respondent has made no allegation of fraud, negligence, deceit or otherwise and with regard to whom the respondent has sought no remedy or relief.

3. The claim arises from the purported exercise by the 1<sup>st</sup> appellant, a mortgage lending institution, of a right of "set off" against funds due for disbursement to the respondent, acting on behalf of one client, in respect of funds said to be due to the 1<sup>st</sup> appellant from the respondent (on the basis of his professional undertaking), acting on behalf of another client in a separate transaction. The claim as set out in the Claim Form is against the defendants/appellants "jointly or severally" for the following declarations and orders:

- (1) A declaration that the purported "set off" by the First Defendant, contained in the letter dated May 2, 2007, was wrongful and unlawful.
- (2) A declaration that the First Defendant has no "right to set-off" to deduct Two Million Eight Hundred and Twenty Thousand Dollars (\$2,820,000.00) from the Three Million Dollars (\$3,000,000.00) due in the Susan Berryman sale to be applied on account of the Dotty Clarke/Claudette Smith sale in settlement of the obligation contained in my personal undertaking dated March 13, 2006.

(3) An order that the defendant repays to the Claimant the full amount of Two Million Eight Hundred and Twenty Thousand (\$2,820,000.00) that was wrongfully and unlawfully deducted in the Susan Berryman transaction and wrongfully and unlawfully applied to the Claudette Smith sale.

4. The Claim Form is supported by the detailed affidavit of the respondent, himself an attorney-at-law, setting out the history of the two transactions in issue, identifying the 2<sup>nd</sup> defendant/appellant as "a legal officer employed with the [1<sup>st</sup> defendant/appellant]" but attributing no blame of any kind whatsoever to the 2<sup>nd</sup> defendant/appellant for having brought about the state of affairs that has resulted in the filing of the suit.

5. In these circumstances, it appears to me that there is considerable merit in the defendants/appellants' contention that no cause of action has been raised against the 2<sup>nd</sup> defendant/appellant and that the claim against her is accordingly misconceived. This is, in my view a "clear and obvious" case in which the respondent's statement of case ought to have been struck out against the 2<sup>nd</sup> defendant/appellant as disclosing no cause of action against her (see Civil Procedure 2007, Volume 1 paras. 3.4.2 and 3.4.3; see also CPR 2002, part 26.3 (c ) and **Three Rivers District Council and others v Bank of England** [2001] 2 All ER 513, 542 - 543 per Lord Hope.)

6. The appeal is accordingly allowed and the following orders made:
- (i) That the claim against the 2<sup>nd</sup> defendant/appellant in Claim No. 00037/HCV 2008 is struck out.
  - (ii) That the 2<sup>nd</sup> defendant/appellant's costs in the procedural appeal and in the court below are to be paid by the respondent, to be taxed if not sooner agreed.