

Estate of Imorette Palmer (deceased)

Appellant

v.

**Cornerstone Investments & Finance
Company Ltd (Jamaica)**

Respondent

FROM

**THE COURT OF APPEAL OF
JAMAICA**

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON COSTS

Delivered the 5th November 2007

Present at the hearing:-

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

[Delivered by Lord Scott of Foscote]

1. In this judgement given on 16 July 2007 their Lordships allowed the appeal, set aside the order for costs made by the Court of Appeal, restored the orders that had been made by Reid J and made an order nisi that Cornerstone pay the costs of the appeal to the Board and the costs in the courts below but with liberty to Cornerstone to apply within 21 days for some other order as to costs to be made.

2. Cornerstone have now applied to the Board for such an order and have supported their applications by a written submission. The written submission relies on the old common law rule that a mortgagee who becomes party to legal proceedings in that capacity is entitled, subject to the power of the court to order otherwise, to add his costs to the mortgage debt and recover them out of the mortgaged property, relies also on Rule 64.5(1) of the Jamaica Civil Procedure Rules (2002), as amended, which states that a litigant may not recover the costs of proceedings from any other person except by virtue of a court order, a provision of the Rules or an agreement between the parties, and, thirdly, relies on Clause 1(1) of the mortgage deed of 19 November 1997 executed by the appellants, the mortgagors. Clause 1(1) contains a covenant by the appellants:

“On demand to pay to the mortgagees all costs charges and expenses incurred or to be incurred by the mortgagee from time to time in relation to these presents or any default under or the enforcement or protection of any rights of the mortgage under these presents”.

3. This written submission appears to overlook the fact, no doubt unpalatable to Cornerstone, that Clause 1(1) forms part of a mortgage deed that has been held by their Lordships, in confirmation of the orders made by Reid J at first instance, to be unenforceable against the appellants and Mrs Salter. The unenforceability extends not simply to the mortgage of No. 12 Airdrie Mews but also to the various supporting provisions, one of which is Clause 1(1). The question whether Cornerstone acted reasonably or unreasonably in resisting the relief sought by the appellants does not arise. This was contentious litigation in which the appellants have succeeded and Cornerstone has failed. There is no reason why costs should not follow the event and their Lordships will so order. The order nisi is to become absolute forthwith.