

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 40/2005**

**APPLICATION NO 173/2015**

<b>BETWEEN</b>	<b>LEROY JOHNSON</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>AND</b>	<b>L F G J GENERAL CONTRACTING COMPANY</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>AND</b>	<b>FALCON CREST LIMITED</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>AND</b>	<b>LEONARD C ALOI</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>VICTOR MARKHAM</b>	<b>2<sup>ND</sup> RESPONDENT</b>

Romain Tulloch and Andrew Graham instructed by Bishop & Partners for the applicants

Ms Carol Davis for the 1<sup>st</sup> respondent

2<sup>nd</sup> respondent unrepresented

**29 September 2015**

**IN CHAMBERS**

**BROOKS JA**

[1] This is an application by Mr Leroy Johnson and his companies, LFGJ General Contracting Company (LFGJ) and Falcon Crest Limited (Falcon Crest) (hereinafter called the applicants) for an order, among other things, mandating the National Water

Commission (NWC) to reconnect the water supply to hotel premises operated by Falcon

Crest. The supply had been disconnected by the NWC at the behest of a party who is said to have purchased the property under powers of sale contained in a mortgage. The applicants assert that the sale was in breach of an order of stay of execution issued by this court. The issues are, firstly, whether a stay of execution is in fact in place and secondly, whether this court could properly make the order sought without the NWC being a party to the application.

[2] It is necessary to set out a brief background to put the application in context.

[3] LFGJ was at all material times the registered proprietor of the premises which are located at Lot 5, Point, Ocho Rios in the parish of Saint Ann. The property is used to house the hotel operated by Falcon Crest. Mr Leroy Johnson is the principal and chief financier for both LFGJ and Falcon Crest.

[4] In or about April 1994, Mr Johnson executed a mortgage of the property on behalf of the LFGJ. Mr Leonard Aloï was the mortgagee. The mortgage was used as security for a loan in the sum of US\$1,081,853.00.

[5] Differences arose between Mr Johnson and Mr Aloï. As a result of the dispute the applicants filed against Mr Aloï and another party contesting the validity of the mortgage transaction. Mr Aloï counterclaimed. The matters were tried before McCalla J (as she then was). At the end of the trial it was ordered, among other things:

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On the applicants' claim:

That an account be taken by the Registrar of the Supreme Court to determine what amount, if any, is due by the applicants to Mr Aloï.

On Mr Aloï's counterclaim:

A declaration that the loan agreements, lease, mortgage, debenture and securities are valid and enforceable to the extent which might be found to be due and owing to Mr Aloï.

[6] The registrar of the Supreme Court was entrusted by the court to carry out the accounting and to make a report. The registrar conducted the exercise and found that US\$318,729.00, with interest on US\$54,406.00, was due to Mr Aloï.

[7] The applicants were dissatisfied with the report and they appealed, asking for it to be rejected. Campbell J heard the appeal and upheld the registrar's ruling concerning the sums that were due to Mr Aloï. The applicants further appealed to this court.

[8] As part of the proceedings in this court, the applicants sought to stay the execution of the order of Campbell J. The application was heard by Harrison P on 15 June 2006. The learned president made the following order:

"Stay of execution granted – re order of Campbell J until appeal. A further condition is that the [applicants] pay into an account in the names of the parties in a commercial bank

agreed on by the parties the sum of US\$200,000 within thirty (30) days hereof - pending the appeal."

[9] Despite extensions of time being granted to them, the applicants were unable to satisfy the condition. They secured the payment of US\$100,000.00. It was paid on their behalf by Ms Lucille Rodney. This was done in September 2006. Not being able to secure the rest of the required sum, the applicants, by notice of application for court orders filed on 8 March 2007, applied to have the monies released to Ms Rodney.

[10] The application to release the funds was supported by an affidavit by Mr Johnson. Mr Johnson deposed that the payment by Ms Rodney "was intended as a refundable payment by the said Lucille Rodney to satisfy the condition of the stay" (paragraph 6 of his affidavit sworn to on 8 March 2007). Mr Johnson asserted that "no other funds were forthcoming and the conditions of the stay of execution were never fulfilled" (paragraph 7 of his affidavit sworn to on 8 March 2007).

[11] At that time, Mr Johnson concluded his affidavit with the following paragraph. It is telling for the purposes of the present application. He said:

**"That the Mortgagee is now in the process of selling the property under powers of sale.** I humbly ask that this Honourable Court to [sic] make an order that the funds paid into the [bank account pursuant to the order for the stay of execution] by Lucille Rodney be returned to the said Lucille Rodney as the purpose for which Lucille Rodney advanced the sum aforesaid has proved futile." (Emphasis supplied)

Mr Johnson was, therefore, aware of the efforts to sell the property and realised that he was unable to satisfy the condition that would bring the stay into effect.

[12] It is against that background that the applicants have made this application for an order directing the National Water Commission to reconnect water supply to hotel premises operated by Falcon Crest. They have also asked that Ms Carol Davis, the attorney-at-law representing Mr Aloï, be required to provide answers for "refusing to obey the order for stay of proceedings by facilitating a sale and transfer of the [applicants'] Hotel to a third party". According to Mr Johnson, at paragraph 44 of an affidavit filed on 24 September 2015, Ms Davis transferred the property to a third party "despite the clear Order of the Court of Appeal".

[13] In light of the fact that the condition for the stay was not fulfilled and the monies that were paid in, were withdrawn on the basis of the absence of compliance, Mr Johnson's application is strange indeed. There would, as a result of the non-compliance with the condition, have been no stay in place. There is, it is confirmed, no other order for a stay of execution. In light of the above, the applicants' application is without a sure foundation and must fail.

[14] Based on the finding made in the last paragraph, there is no need to consider the issue concerning the consequences of NWC having not been served with notice of this application.

### **Orders**

[15] Based on the above, the orders are as follows:

1. The application for an order to direct the National Water Commission to reconnect water supply to premises at Lot 5, Point, Ocho Rios in the parish of Saint Ann is refused.

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2. The application for an order that Ms Carol Davis provide answers for facilitating a sale and transfer of the said premises is refused.
  3. Costs to the respondents to be taxed if not agreed.