

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 108/2010**

**APPLICATION NOS 200 & 203/2010**

<b>BETWEEN</b>	<b>DIAMOND PROPERTY DEVELOPMENT COMPANY LIMITED</b>	<b>APPLICANT</b>
<b>AND</b>	<b>SURREY PAVING &amp; AGGREGATE COMPANY LIMITED</b>	<b>RESPONDENT</b>

**Abraham Dabdoub and Miss Gillian Mullings instructed by Mullings & Company  
for the applicant**

**Emile Leiba & Miss Teri-Ann Lawson instructed by DunnCox for the respondent**

**7 & 10 December 2010**

**IN CHAMBERS**

**HARRIS, JA**

[1] Two applications were before me. The first is an application for a stay of execution of the judgment of McDonald Bishop, J in which she refused to set aside a default judgment entered against the applicant, a charging order as well as an order for the sale of property known as Bengal and Red Valley,

Discovery Bay, Saint Ann registered at Volume 1058 Folio 593. The second is an application for an extension of time to file record of appeal.

[2] It is necessary to make reference to the factual circumstances giving rise to the applications. The applicant, on 15 February 2002, entered into an agreement with a company called Jose Cartellone Construcciones Civeles S.A. to lease to them a right to mine limestone from the above-mentioned property, which is owned by the applicant. Upon the expiration of the lease, the applicant entered into a written agreement with the respondent, for the purchase of all the equipment owned by Jose Cartellone Construcciones Civeles S.A. for the sum of US\$1,566,000.00 on behalf of the respondent. This sum was forwarded to the applicant by the respondent but the applicant failed to acquire the equipment and did not return the money. Subsequently, a director of the applicant, transferred 10,000 of the applicant's shares to the respondent and a share certificate was duly issued to the respondent.

[3] The respondent made several demands for payment of the money but to no avail. Consequently, the respondent, on 26 September 2008 initiated proceedings against the applicant seeking, among other things, the recovery of the money. The applicant was duly served with the claim form but failed to file an acknowledgment of service. On 22 October 2008, a request for judgment for the sum of \$1,566,000.00 in default of acknowledgment of service was filed by the respondent. A default judgment against the applicant was entered on 22

October 2008. On 18 February 2009, the respondent obtained a charging order and an order for the sale of the property.

[4] The respondent subsequently entered into an agreement with a Saint Lucian company, Bengal Development Company, for the sale of the property to it. The sale was completed and an instrument of transfer was executed by the Registrar of the Supreme Court on behalf of the applicant. Subsequently, on 11 June 2009, the applicant filed an acknowledgment of service, a without notice application for a stay of execution of the default judgment and for the setting aside of the judgment.

[5] On 14 September 2009 the applicant filed the following amended notice of application, seeking the following orders:

- "1. That there be a stay of Execution of the Judgment entered herein on the 22<sup>nd</sup> of October 2008 and/or that there be (sic) a Stay of execution of the Order for the Sale granted herein with respect to the property registered at Volume 1058 Folio 593.
2. That the order for sale made herein on the 18<sup>th</sup> of February 2009 be set aside.
3. In the alternative to 2 herein a declaration that the said order for sale made by this Honourable Court on the 18<sup>th</sup> day February 2009 has lapsed and no longer binds the property registered at Volume 1058 Folio 593.

4. That the Default judgment entered against the Defendant herein be set aside.
5. That the Defendant have leave to file and serve their Defence within fourteen (14) days of the date of the hearing of this application.
6. Such and/or other orders as this Honourable Court deems just under the circumstances."

[6] In support of the application, in essence, it was contended by the applicant that the shares were transferred to the respondent in satisfaction of the debt. This was refuted by the respondent, which contended that the share certificate was issued as a security for the repayment of the sum given to the applicant.

[7] The applicant having conceded that the judgment had been properly entered, the learned judge, gave consideration to the amended application and on 9 September 2010, she ordered as follows:

"(1) The defendant's application as contained in its Further Amended Notice of Application for Court Orders filed on March 12, 2010, for stay of execution and /or the setting aside of the default judgment entered on October 22, 2008, the charging order granted on February 3, 2009 and the order for sale of land granted on February 18, 2009, IS DENIED.

(2) it is HEREBY DECLARED that the order for sale of land dated February 18, 2009 has not lapsed but it no longer binds the property in respect of which it was made.

(3) The costs of the application to the claimant to be agreed or taxed.

(4) Leave to appeal granted."

[8] A notice of appeal was filed on 20 September 2010. Although leave to appeal was granted in the court below, the submissions of counsel for the applicant seemed to have been predicated on the premise that there is an appeal before the court emanating from a final order. This gives rise to the question as to whether the judge's decision was final or one which did not directly decide the substantive issue in the claim brought by the respondent. If the decision was final, then the matter would fall under rule 1.1 (1) (c) of the Court of Appeal Rules and the applicant would have 42 days within which to lodge an appeal. If the order was one which did not directly decide the substantive issue in the court below it would then fall within the purview of a procedural appeal and the time for filing an appeal would be seven days.

[9] Rule 1.1 (8) of the Court of Appeal Rules defines a procedural appeal as follows:

"'procedural appeal' means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes-

“(a) any such decision made during the course of the trial or final hearing of the proceedings;

(b) ...

(c) ...

(d) ...

(e) ...”

Rule 1.11 (1) (a) of the rules stipulates that the a notice of a procedural appeal must be filed and served within seven days of the date of the decision against which the appeal is made.

[10] Did the orders of the learned judge directly dispose of the substantive issue? The orders originated from a judgment in default of an acknowledgement of service. Such a judgment is not conclusive. Lord Walker, in the course of his judgment in **Vehicles & Supplies Limited & Another v Financial Institutions Services Ltd** [2005] UKPC 24, speaking to the effect of a default judgment, at para 22 said:

“A judgment in default of appearance ... is also lacking in finality, so long as it is liable to be set aside.”

[11] The critical test in determining the finality of an order is whether it finally disposes of the rights of the parties. In **Bozson v Altrincham Urban District Council**

[1903] 1KB 547 at 548 Lord Alverston CJ propounded the test to be as follows:

“It seems to me that the real test in determining this question ought to be this: Does the judgment

or order, as made, finally dispose of the rights of the parties? ...If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

[12] The nature of the application or proceedings from which a judgment or order emanates is the relevant consideration and not the nature of the order which was ultimately made - see **Salter Rex & Co v Ghosh** [1971] 2 All ER 865; **Salaman v Warner & Others** [1891] 1QB 734; **White v Brunton** [1984] 2 All ER 606; and **Strachan v Gleaner Company Ltd & Another** SCCA No 54/1997 delivered on 18 December 1998.

[13] The judgment obtained by the respondent was by way of default and would have been susceptible to being set aside. Evidently, this would establish an absence of its conclusiveness. Although the applicant unsuccessfully attempted to set aside the judgment, it remained lacking in finality. The action brought by the respondent was not decided on its merits. Consequently, the orders of McDonald Bishop J did not substantively decide the issues in the claim and must therefore be treated as giving rise to a procedural appeal.

[14] As indicated, the orders of McDonald Bishop were delivered 9 September 2010. The notice of appeal filed by the applicant on 20 September, 2010 was clearly filed outside of the prescribed time. Leave to appeal was granted in the court below but no application had been made for an extension of time for the filing of the notice of appeal. This being so, the purported notice of appeal

cannot stand. Accordingly, there is no appeal before this court which would empower me to entertain applications.

[15] It is of worth to mention that in an affidavit sworn on 3 December 2010 by Jamie Chang, a director of the respondent, he exhibited a copy of a duplicate certificate of title showing that Bengal Development Company is now the registered proprietor of the property. The property, the applicant's sole asset which formed the subject matter of the charging order and the order for sale, has been sold and transferred to a third party. Clearly, the judgment has already been executed. Even if the notice of appeal had been properly filed, and the circumstances warranted a stay, the ordering of a stay would have amounted to a fruitless undertaking.

[16] The applications are refused with costs to the respondent to be agreed or taxed.