

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA**

APPLICATION NO COA2025APP00002

BETWEEN	DEBBY-ANN JAMES-SALMON	APPLICANT
AND	GREGORY PAUL SALMON	RESPONDENT

**Christopher Dunkley and Ms Rianna Scott instructed by Phillipson Partners
for the applicant**

Leroy Equiano for the respondent

10 and 14 November 2025

**Civil Procedure – Application for permission to appeal – Application for
mesne profit by former owner of property – Standing to pursue claim for
mesne profit – Whether threshold for permission to appeal satisfied – Rule
1.8(7) of the Court of Appeal Rules, 2002**

MCDONALD-BISHOP P

[1] Before the court is a notice of application filed on 3 January 2025 by Debby-Ann Nicola James Salmon ('the applicant'), seeking leave to appeal and a stay of execution of the decision of Lindo J ('the learned judge'), made in the Matrimonial Division of the Supreme Court on 20 December 2024. The learned judge refused the applicant's application, filed on 28 February 2024, which sought payment of the rentable value of a property that had previously been jointly owned by the applicant and Gregory Paul Salmon, the respondent, as well as mesne profit concerning the said property.

Background

[2] The circumstances that led to the filing of the application and the learned judge's decision are as follows.

[3] The applicant and respondent jointly owned property located in Yallahs in the parish of Saint Thomas, as husband and wife, up until 15 August 2023, when the property was sold to a third-party purchaser ('the purchaser'). The sale of the property followed a consent order made in the Supreme Court on 13 April 2021, in the context of proceedings for dissolution of marriage. The parties had agreed, among other things, that the property be valued and sold, with the net proceeds to be divided equally between them. The sale was completed on 15 August 2023, and the Duplicate Certificate of Title was endorsed in the purchaser's name.

[4] The respondent remained in exclusive occupation of the property from April 2020 to August 2023, before the property was sold to the purchaser ('the pre-sale period'), and from August 2023 to February 2024, after the sale ('the post-sale period'). His reasons for remaining in possession during the post-sale period were that he had not yet received the appropriate confirmation that the sale had been completed, an accounting for the proceeds of sale, or any notice of the date on which his portion of the proceeds would have been disbursed to him.

[5] This state of affairs led the applicant to file the notice of application in the Supreme Court, seeking declarations and orders that:

- (1) the respondent is liable to the applicant for his exclusive occupation of the property during the pre-sale period;
- (2) both the applicant and respondent are liable to the purchaser for the respondent's exclusive occupation during the post-sale period;

(3) the respondent pays the applicant half of the rentable value of the property for his occupation during the pre-sale period at the rate of \$45,000.00 per month, totalling \$1,800,000.00; and

(4) the respondent pays the purchaser mesne profit for his exclusive occupation of the property during the post-sale period at the rate of \$75,000.00 monthly, totalling \$525,000.00.

[6] This court was not provided with a copy of the learned judge's sealed formal order refusing the application. However, there is no dispute between the parties that the learned judge dismissed the application in its entirety, ordered costs against the respondent, and refused the applicant's oral application for leave to appeal her orders.

The notice of application for leave to appeal and stay of execution

[7] Having been refused permission to appeal by the learned judge, the applicant renewed her application before this court, as she was entitled to do, pursuant to rule 1.8(1) of the Court of Appeal Rules, 2002 ('CAR'). The notice of application for permission to appeal sets out seven grounds of challenge to the learned judge's refusal of the relief sought in the court below.

[8] At the hearing of the application, counsel for the applicant, Mr Christopher Dunkley, abandoned the aspects of the application related to the learned judge's refusal of the declarations sought in the court below (orders 1 and 2 in the notice of application), and the refusal of the order for the respondent to pay half of the rentable value of the property for the pre-sale period (order 3 in the notice of application). Therefore, the applicant only sought leave to appeal against the learned judge's refusal of the application for mesne profit to be paid to the purchaser for the post-sale period (order 4 in the applicant's notice of application).

[9] Mr Dunkley also indicated that he would not pursue the application for a stay of execution. He was correct to do so because the learned judge's refusal of the applicant's application was not an executory order which was amenable to being

stayed. Therefore, a refusal of the application for a stay was inevitable (see **Norman Washington Manley Bowen v Shahine Robinson et al** [2010] JMCA App 27).

[10] Against that background, the scope of the court's deliberation on the application for permission to appeal is narrow. The question to be determined is whether permission should be granted to appeal the learned judge's refusal to order the respondent to pay mesne profit to the purchaser for the post-sale period.

Analysis and findings

[11] To obtain permission to appeal, the applicant must demonstrate that the proposed appeal against the learned judge's decision has a real and not fanciful chance of success (see rule 1.8(7) of the CAR and **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and another** [2015] JMCA App 27A at para. [21]).

[12] The starting point for assessing whether the appeal has a real chance of success is the learned judge's reasons for the decision. The learned judge orally delivered her reasons for refusing the application in the court below and did not reduce them to writing. However, the reasons for the learned judge's decision are gleaned from a combined reading of para. 17 of the affidavit filed by the respondent in objection to the notice of application for leave to appeal, and the grounds stated in the notice of the application for leave to appeal and stay of execution. There is no issue taken with the respondent's record of the learned judge's reasons for the decision.

[13] The essence of the learned judge's reasoning, as gleaned from those documents on the court's record, is that, during the post-sale period, the purchaser was the owner of the property and not the applicant. The applicant lacked the requisite standing to advance a claim for mesne profit, as she was not the owner of the property and therefore had not been deprived of possession of it. The purchaser (who was not a party to the application or the underlying matrimonial proceedings) would have been the proper party to make such a claim. Accordingly, the request for mesne profit could not be granted.

[14] Mr Dunkley, for the applicant, contended that the learned judge was mistaken in her conclusion because the request for mesne profit was made on the basis that the applicant had paid money to the purchaser as compensation for potential liability (or liability) in damages for breach of contract due to the respondent's continued occupation of the land in the post-sale period. The money the applicant claims to have paid to the purchaser was intended to compensate the purchaser for having to rent other premises due to being unable to take possession of the property. Therefore, by pursuing the application for mesne profit, the applicant aimed to recover from the respondent the funds she had paid to the purchaser.

[15] Essentially, counsel's argument is that the applicant was seeking compensation from the respondent after indemnifying him against his liability to the purchaser. She would have been obliged to do so because, as a joint owner, she was liable to the purchaser for breach of her obligation as a vendor to deliver vacant possession of the property, due to the respondent's occupation after the sale. The applicant, thus, had a duty to mitigate the risk of a potential claim from the purchaser for breach of the sale agreement regarding the purchaser's entitlement to vacant possession. Therefore, the claim for mesne profit was made to prevent unjust enrichment of the respondent at the applicant's expense. Not claiming mesne profit would mean the respondent could receive his share of the sale proceeds without contributing to the mesne profit to which the purchaser was entitled. These are all factors the learned judge wrongly failed to consider.

[16] I find these submissions entirely without merit. Firstly, the exact terms of the notice of application filed in the court below cannot be interpreted as an attempt by the applicant to recover money on an indemnity basis from the respondent, or to prevent the respondent's unjust enrichment at her expense. By its wording, order 4 in the notice of application sought explicitly for the respondent to **"pay the Purchaser mesne profits for his exclusive occupation of the [property]"** (emphasis added). If the learned judge had granted the requested order, it would have been the purchaser, not the applicant, who would have been required to be compensated. A

straightforward reading of the notice of application does not support an interpretation that it was an attempt by the applicant to recover funds paid to mitigate the respondent's and her liability to the purchaser, or to prevent the respondent from being unjustly enriched at her expense.

[17] An examination of the evidence supporting the notice of application reinforces the conclusion regarding the true purpose of the applicant's application. There was no evidence that the applicant had paid any money to the purchaser in mitigation to support the purported claim for compensation. The applicant did not provide any or sufficient evidence to support the application. The only affidavits submitted in support were from one of the applicant's attorneys at law in the court below. Those affidavits were filed with and after the notice of application was lodged. In those affidavits, there was no evidence to substantiate the assertion that the applicant had indeed spent funds to compensate the purchaser for the monthly rent of \$75,000.00 that the purchaser had to pay. The payment, according to Mr Dunkley, was intended to reduce the applicant's liability for damages arising from the respondent's exclusive occupation of the property after the sale was completed.

[18] To overcome this evidentiary obstacle, Mr Dunkley argued that the evidence demonstrating the applicant paid money to the purchaser was contained in affidavits created prior to the application in the court below. The law clearly states that an affidavit sworn before an application is inadmissible and cannot be relied on unless the party has effectively incorporated it into evidence through a properly sworn affidavit made after the proceedings began, or the respondent has waived the irregularity by responding to it (see, for example, **Bobette Smalling v Dawn Satterswaite** [2020] JMCA App 15).

[19] The only earlier affidavit incorporated into the evidence supporting the notice of application was an affidavit of urgency filed by the applicant's attorney-at-law on 6 October 2023 (see para. 3 of the Affidavit of Tiffany C Sinclair filed on 28 February 2024 in support of the notice of application for court orders). The 6 October 2023

affidavit does not contain any evidence of payment by the applicant, and there is no indication in the notice of application or the affidavits filed by the applicant in support of the application that any other affidavits which pre-dated the notice of application had been incorporated into the evidence before the learned judge or that the respondent had responded to them.

[20] When the application is interpreted according to its terms as well as within the context of the evidence that was properly before the learned judge, the application clearly was for the respondent to pay mesne profit to the purchaser, not for recovering money the applicant paid to the respondent or preventing unjust enrichment at the applicant's expense. From that perspective, the learned judge would have been required to examine the applicant's standing to make the application on behalf of the purchaser. This is because the applicant was claiming to seek relief on behalf of the purchaser, who was not a party to the proceedings. Based on this, the learned judge correctly directed her attention to whether the applicant could claim mesne profit from the respondent on behalf of the purchaser.

[21] Mesne profits are usually recoverable by the person who is entitled to the possession of land against a trespasser. An action for mesne profits concerns restitution for actual damage suffered or incurred due to being out of possession of land, or for the recovery of the open market value of the premises for the period of the trespasser's occupation (see **Office and Secretarial Holdings Limited v Data Key Processors Jamaica Limited**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 41/1990, judgment delivered on 27 September 1991, at page 7, citing Halsbury's Laws of England, 4th Edition, Volume 27 at para. 255).

[22] In the instant case, the person who gained entitlement to possession of the property during the post-sale period was the purchaser. The purchaser would have been the proper party in an action to recover mesne profit from the respondent for being kept out of possession of the property. Therefore, the applicant, who was the vendor in the sale of the property, could not claim mesne profit, although counsel on

her behalf maintained in oral submissions that she had expended funds to “compensate” the purchaser for the period the respondent remained in the property, after the completion of the sale. As already indicated, this submission lacks an evidentiary basis and, therefore, must be rejected by this court.

[23] In the circumstances, the applicant would have needed proper authority to pursue the application on the purchaser’s behalf, as her agent. No evidence of any such agency relationship was presented to the learned judge. Furthermore, the applicant has not cited any authority that demonstrates the learned judge was wrong in concluding that she lacked the necessary standing to claim mesne profit on behalf of the purchaser and owner of the property. Therefore, the applicant has not demonstrated that the appeal against the judge’s finding on her legal standing to seek an order under proposed order 4 of the notice of application has any prospect of success.

[24] It is also noted that because there is no formal record of the learned judge’s reasons for her decision, if leave to appeal were granted, this court would be entitled to examine the application that was before the learned judge afresh while conducting a full rehearing by virtue of rule 1.16(1) of the CAR (see, for example, **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 at para. [45] and **Old National Bank v t/a Old National Wealth Management (Personal Representative in the Estate of Raymond John Ryan) v Al Socrates Jobson and others** [2024] JMCA Civ 14). During the rehearing, the court would be permitted to review the entire application filed in the court below, rather than just the issue of the applicant’s standing to claim mesne profit.

[25] Against this background, even if the claim for mesne profit aligned with Mr Dunkley’s characterisation of it, the applicant would still need to provide evidence that she paid the money as claimed, and that the respondent’s unjust enrichment occurred at her expense. As previously explained, no such evidence was presented to the learned judge. Consequently, even if the applicant had the necessary standing, the application would still have failed. In the premises, granting leave to appeal would be pointless in

these circumstances, as the application in the court below was entirely unmeritorious and bound to fail. This is another reason to conclude that the proposed appeal is hopeless.

Conclusion

[26] For all the preceding reasons, I conclude that the applicant has failed to demonstrate that the proposed appeal against the learned judge's refusal to order the respondents to pay her mesne profit for the post-sale period has any chance of success. Accordingly, the applicant has not satisfied the threshold requirements for the grant of permission to appeal, and so the application must be refused.

[27] Considering the applicant's decision not to pursue the application for a stay of execution of the orders of the learned judge, it follows that a stay of execution must also be refused.

[28] Accordingly, the following orders should be made the final orders of the court:

1. The application filed on 3 January 2025, for permission to appeal the decision of Lindo J made on 20 December 2024, and for a stay of the said decision, is refused.
2. Costs of the application for permission to appeal to the respondent to be agreed or taxed.

FOSTER-PUSEY JA

[29] I have read, in draft, the judgment of McDonald-Bishop P. I agree with her reasoning and conclusion and have nothing to add.

DUNBAR-GREEN JA

[30] I, too, have read, in draft, the judgment of McDonald-Bishop P. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP P

ORDER

1. The application filed on 3 January 2025, for permission to appeal the decision of Lindo J made on 20 December 2024, and for a stay of execution of the said decision, is refused.
2. Costs of the application for permission to appeal to the respondent to be agreed or taxed.