

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P  
THE HON MRS JUSTICE SINCLAIR-HAYNES JA  
THE HON MISS JUSTICE P WILLIAMS JA**

**APPLICATION NO COA2023APP00268**

<b>BETWEEN</b>	<b>RICHARD REITZIN</b>	<b>APPLICANT</b>
<b>AND</b>	<b>THOMAS &amp; SONS DEVELOPERS LIMITED</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>JOSEPH THOMAS Snr</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Richard Reitzin instructed by Messrs Reitzin & Hernandez for the applicant**

**Seyon Hanson instructed by Beecher-Bravo Hanson & Associates for the respondents**

**31 January and 31 May 2024**

**Civil procedure — Application for permission to appeal — Application to strike out claim on the basis that there is no real prospect of success – Whether affidavit in support must state a belief to that effect — Application for stay of execution pending appeal — Civil Procedure Rules, 2002 r 15.5**

**BROOKS P**

[1] Mr Richard Reitzin has sued:

- a. Thomas and Sons Developers Limited ('the company');
- b. Mr Joseph Thomas Senior ('Mr Thomas');
- c. Mrs Jacqueline Thomas ('Mrs Thomas'); and
- d. Mr Jahkeem Thomas ('Jahkeem')

in the Supreme Court for damages for negligence. His claim arose from a collision between a motor vehicle ('the vehicle') owned by Mrs Thomas and being driven by

Jahkeem and a motorcycle owned and being driven by Mr Reitzin. His claim against the company averred that it was vicariously liable for Jahkeem's handling of the vehicle since he was an employee of the company and acting in the course of his employment when the collision occurred. Mr Reitzin's particulars of claim asserted that Mr Thomas is "[Mrs Thomas'] husband, the [company's] managing director and [Jahkeem's] father". The company and Mr Thomas (together 'the respondents') are the respondents to Mr Reitzin's application before this court.

[2] The respondents had applied to the Supreme Court to strike out Mr Reitzin's claim form and particulars of claim, against them, and for summary judgment in their favour. The bases for their application were that:

- a. neither was the owner of the vehicle;
- b. Jahkeem was neither the servant nor agent to either of them at the time of the collision;
- c. Jahkeem was not an officer of the company at the time of the collision;
- d. Mr Thomas cannot be liable for Jahkeem's driving merely because he is Jahkeem's father; and
- e. neither the company nor Mr Thomas ever accepted liability for Jahkeem's acts or omissions in respect of the collision.

[3] The application went for a hearing before a Master in Chambers at the Supreme Court. At the hearing, Mr Reitzin took a preliminary objection, asserting that Mr Thomas' affidavit in support of the application to strike out was fatally flawed in that it did not state that he believed that Mr Reitzin had no real prospect of succeeding on the claim.

[4] In his affidavit, Mr Thomas outlined the account he had received from Jahkeem about when and where the collision took place. He said that Jahkeem was on his own business when the collision occurred and was not an officer of the company at the time.

Mr Thomas also pointed out that neither he nor the company was the owner of the vehicle. The critical paragraph of his affidavit, para. 6, then stated:

“That based on the contents of the Defence filed on behalf of [the respondents] **I have been advised that [Mr Reitzin’s] claim has no real prospect of success against either of us**, and that summary judgment should properly be entered against him, and in favour of [the respondents], and I hereby apply for same.” (Emphasis supplied)

[5] The learned Master, among other orders, dismissed Mr Reitzin’s preliminary objection, set a date for the hearing of the application for summary judgment and refused his application for permission to appeal. Mr Reitzin has now renewed his application for permission to appeal. He asserts that the learned Master erred in rejecting the preliminary objection. He has also applied for a stay of the learned Master’s orders pending the hearing of this application and the appeal if the application for permission to appeal is granted.

[6] Although Mr Reitzin filed numerous proposed grounds of appeal, the issues that are raised by the proposed appeal are very narrow and were correctly identified in the judgment of the learned Master in **Richard Reitzin v Jacqueline Thomas & Sons Developers Limited [sic] and Others [2023] JMSC Civ 257**. They are:

- a. “[w]hether the application of [the respondents] should be dismissed on account of [Mr Thomas’s] failure to depone in his affidavit that he is advised and verily believe [sic] that [Mr Reitzin] has no real prospect of succeeding on the claim.”; and
- b. “[w]hether the application of [the respondents] should be dismissed on account of [Mr Thomas’s] failure to state or name the source by which he is advised that [Mr Reitzin] has no reasonable prospect of succeeding on the claim.”

Only the first of these requires an assessment at this stage. Mr Reitzin, as he did before the learned Master, appeared as counsel at the hearing of this application.

**Whether the application of [the respondents] should be dismissed on account of [Mr Thomas's] failure to depone in his affidavit that he is advised and verily believe [sic] that [Mr Reitzin] has no real prospect of succeeding on the claim**

[7] Mr Reitzin submitted that the learned Master, in ruling that there was no obligation for Mr Thomas to state that he believed that Mr Reitzin had no real prospect of success, was acting in contradiction of a judgment of this court, which required a deponent to stipulate a belief before summary judgment could be granted. Learned counsel relied on, among others, a statement in para. [14] of **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37, where it was said, in part, "[t]he applicant [for summary judgment] must assert that he believes that the respondent's case has no real prospect of success". He submitted that the learned Master did not have that liberty.

[8] In **ASE Metals NV v Exclusive Holiday of Elegance Limited** the court, at para. [14] seemed to require a statement of belief that "the respondent's case has no real prospect of success". The paragraph states:

"The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). **The applicant must assert that he believes that that [sic] the respondent's case has no real prospect of success.** In **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:

'...the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success...'"  
(Emphasis supplied)

[9] Mr Hanson, for the respondents, submitted that the learned Master was entitled to rule as she did. He submitted that she made a distinction between matters of opinion and matters of fact and found that on matters of opinion, such as whether Mr Reitzin had a real prospect of success in his claim against the respondents, there was no need for Mr Thomas to have given an expression of belief.

[10] Mr Hanson also pointed out that, unlike England and Wales, rule 15.5 of the Civil Procedure Rules ('CPR') of this country does not require a statement of belief.

[11] The court may wish to re-examine its stance on this issue as taken in **ASE Metals NV v Exclusive Holiday of Elegance Limited**, but at this point, the learned Master has acted in contravention of that stance. As a result, Mr Reitzin should be granted leave to appeal, on the basis that his proposed appeal has a real prospect of success.

[12] On that finding, it is unnecessary to dilate on the second issue raised by Mr Reitzin.

[13] In the circumstances of the learned Master's departure from this court's stance, the justice of the case requires that the learned Master's orders be stayed pending the determination of the appeal.

#### **SINCLAIR-HAYNES JA**

[14] I have read, in draft, the judgment of my learned brother Brooks P and agree.

#### **P WILLIAMS JA**

[15] I too, have read the draft judgment of my brother Brooks P and agree.

#### **BROOKS P**

#### **ORDER**

1. The application for permission to appeal is granted.
2. The applicant shall file and serve his notice and grounds of appeal on or before 14 June 2024.
3. The application for stay of execution of the orders of the learned Master, made on 9 November 2023, pending the determination of the appeal, is granted on condition that the applicant complies with order 2 hereof.
4. Costs of the application shall be costs in the appeal.