[2025] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2024CV00074

BETWEEN	**RICHARD R REITZIN**	**APPELLANT**
AND	**THOMAS & SONS DEVELOPERS LIMITED**	**1ST RESPONDENT**
AND	**JOSEPH THOMAS SNR**	**2ND RESPONDENT**

Written submissions filed by Reitzin & Hernandez for the appellant

Written submissions filed by Beecher-Bravo Hanson & Associates for the respondents

25 July 2025

Civil practice and procedure – Application for summary judgment and striking out – Whether affidavit in support must state the affiant's belief that the respondent's claim has no real prospect of success – Whether failure to swear to belief fatal to the application – Whether this court should revisit its ruling in ASE Metals NV v Exclusive Holiday of Elegance Limited [2013] JMCA Civ 37 – Whether an affiant's failure to depone to the source of his information and belief is fatal to an application for summary judgment – Civil Procedure Rules, 2002, part 15, rule 26.9, rule 30.3 – Court of Appeal Rules, 2002, rule 2.14

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MCDONALD-BISHOP P

[1] I have read, in draft, the judgment of Straw JA and I agree with her reasoning and conclusion.

STRAW JA

[2] This is a procedural appeal against a decision of Master T Dickens (Ag) ('the learned master'), made on 9 November 2023, by which she dismissed the appellant's preliminary objections to an application for summary judgment made against him by the respondents herein.

Background

[3] This appeal finds its genesis in a claim brought by the appellant, Richard Reitzin, against Mrs Jacqueline Thomas, Thomas & Sons Developers Limited ('the company'), Mr Joseph Thomas Snr and Mr Jahkeem Thomas, the first to fourth defendants to the claim, respectively. The claim concerns a motor vehicle accident that occurred on 30 October 2015, while the appellant was operating his Honda XR 125L motorcycle and Jahkeem Thomas was driving a 2004 Toyota Tundra pick-up truck. As a result of the collision, the appellant suffered injuries, loss and damage, which he alleges were the result of Jahkeem Thomas' negligence.

[4] Mrs Jacqueline Thomas, mother of Jahkeem Thomas, was the registered owner of the pick-up truck. The appellant also asserted in his claim that, at all material times, Jahkeem Thomas was acting in the course of his employment and was the servant and/or agent of Mrs Thomas, the company and Mr Thomas Snr (his father), thereby making them liable for his negligent acts and/or omissions.

[5] The company and Mr Thomas Snr are both represented by Beecher-Bravo Hanson and Associates and are represented separately from Mrs Thomas and Jahkeem Thomas. By their defence filed on 20 January 2021, the company and Mr Thomas Snr denied liability for the claim. The defence contended that neither party had any connection to the cause of action as they were not directly or indirectly involved with the accident. It was further asserted that at the time of the accident, Jahkeem Thomas was an adult and was driving the pick-up truck on personal business. Particularly, he was returning from a friend's house. As such, he was not acting as an agent of any of the other defendants and was not using the pick-up truck during the course of his employment with the

company, or carrying out any task on behalf of the other defendants or the company. Therefore, the proceedings against them should be struck out

The application for summary judgment and striking out

[6] In keeping with their defence, on 26 April 2022, a notice of application for court orders to strike out the claim form and particulars of claim and for summary judgment to be entered in favour of the company and Mr Thomas Snr, was filed. The application was made on six grounds as follows:

> "1. The [appellant] has no real prospect of succeeding on the claim;
>
> 2. The [respondents] have a total Defence to the claim as at no time did either of them own the Toyota Tundra bearing registration number 2811 EJ which was being driven by [Jahkeem Thomas] at the time of the accident with the [appellant], nor was the said vehicle being driven at the said time by [Jahkeem Thomas] as their servant and/or agent, or upon their direction either individually and/or jointly;
>
> 3. [Jahkeem Thomas] was not an officer of the [company] at the date of the accident on October 30, 2015, and cannot in law be held vicariously liable for his acts and/or omissions.
>
> 4. [Mr Thomas Snr] was at all material times the biological father of [Jahkeem Thomas], an adult, and had no connection with the accident, and cannot be held liable vicariously, or otherwise in his capacity as the father of [Jahkeem Thomas].
>
> 5. Neither the [company] nor [Mr Thomas Snr] have ever accepted liability for the acts and/or omissions of [Jahkeem Thomas] in respect of the accident with the [appellant].
>
> 6. That judicial time would be saved by the grant of an order striking out the [appellant's] claim form and particulars of claim, and granting summary judgment in favour of the [respondents]."

[7] This notice of application was supported by an affidavit of Mr Thomas Snr, and it was this affidavit that gave rise to the preliminary objections that were ultimately dismissed by the learned master.

[8] The full content of the affidavit is relevant to this court's consideration:

> "1) That I am a Businessman, the 3rd Defendant herein, and a Director of the [company] … and I am duly authorized to depone to this Affidavit on behalf of the [company] and myself, and my address for the purpose of this Affidavit is 2 Norbrook Acres Drive Kingston 8 in the parish of Saint Andrew.
>
> 2) That the contents of this Affidavit are from my personal knowledge, and are true to the best of my knowledge, information and belief, and where not from my personal knowledge are from the source/s stated where applicable which I believe to be true to the best of my information, knowledge and belief.
>
> 3) That at all material times I was father of Jahkeem Thomas the 4th Defendant herein, and at the date of the accident with the [appellant] on October 30, 2015 Jahkeem was an adult and he was driving the Toyota Tundra bearing registration number 2811 EJ on his personal business, and not as my servant and/or agent, or on my direction, and he has advised me and I do verily believe to be true, that at the time of the accident which was approximately 8:20 a.m. in the morning he was returning from a friend's house at which he had spent the night, and I had not spoken to him for that day prior to the accident, nor was I the owner of the Toyota Tundra being driven by Jahkeem.
>
> 4) That at the time of the accident [Jahkeem Thomas] was not an officer of the … company, nor did the … company own the Toyota Tundra, nor was [Jahkeem Thomas] engaged in any business for the company, as at the time as he was on his personal business, and I have been advised that in such circumstances the [company] would have no liability to the [appellant] for any loss, injuries or damage sustained as a result of the accident.
>
> 5) That my Attorney has by email requested that the [appellant] discontinue the claim against myself and the [company], however to date my Attorney has not received any Notice of Discontinuance, or an indication that the Claim will be discontinued against myself and the [company], and the Claimant has applied for summary judgment against [Jahkeem Thomas] solely.

> 6) That based on the contents of the Defence filed on behalf of myself and the [company] I have been advised that the [appellant'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 myself and the [company], and I hereby apply for same.
>
> 7) That in the circumstances I pray that this Honourable Court will grant the orders as prayed for in the Notice of Application for Court Orders, and strike out the Claimant's Claim Form and Particulars and enter summary judgment in favour of myself and the [company] as doing so would be in the interests of justice and would save valuable judicial time and costs."

The decision of the learned master

[9] By her judgment, the learned master indicated that at the hearing of the respondents' application, the appellant raised a preliminary objection to Mr Thomas Snr's affidavit. She detailed the appellant's submissions as follows:

> "[8] The [appellant] submitted that paragraph 6 of the affidavit of [Mr Thomas Snr] contains no statement of belief that the claimant has no real prospect of succeeding on the claim. The [appellant] argued that this is a fatal omission as it is a mandatory requirement under the rules and at common law for an applicant on an application for summary judgment against the claimant to state his belief that the claimant has no real prospect of succeeding on the claim. The [appellant] relied on the authority of **ASE Metals NV v Exclusive Holiday [of] Elegance Limited** [2013] JMCA Civ 37, in which Phillips JA [sic] applied the authority of **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472, at paragraphs 14 and 15.
>
> [9] The [appellant] further argued, that at paragraph 6 of his affidavit, [Mr Thomas Snr] merely deponed that he is advised that the [appellant] has no real prospect of succeeding on the claim but failed to give the source of this advice. The [appellant] submitted that [Mr Thomas Snr's] failure to state who advised him that the [appellant] has no real prospect of succeeding on the claim is fatal to the application and as such the application is to be dismissed. The [appellant] submitted

> that in this regard, the [respondents] are in breach of rule 30.3(2)(b) of the Civil Procedure Rules ('the CPR')."

[10] Faced with these contentions, the learned master identified two issues for her determination:

> "[12] Whether the application of the [respondents] should be dismissed on account of [Mr Thomas Snr's] failure to depone in his affidavit that he is advised and verily believe that the [appellant] has no real prospect of succeeding on the claim.
>
> [13] Whether the application of the [respondents] should be dismissed on account of [Mr Thomas Snr's] failure to depone in his affidavit who advised him that the [appellant] has no real prospect of succeeding on the claim."

[11] In resolving these issues in favour of the respondents, the learned master examined the rules applicable to summary judgment and the case of **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37 ('**ASE Metals**') and concluded that Brooks JA (as he then was) sought to outline the burden of proof on an application for summary judgment and did not seek to establish a mandatory requirement that an applicant must specifically state their lack of belief in a respondent's prospects of success. She found further that even if there was such a specific requirement, the requirement was met in this case when the affidavit is read as a whole.

[12] With respect to the second issue, she found that the failure to state the source of his advice that the respondent had no real prospect of succeeding was not fatal, as this was not a factual assertion, but rather a legal opinion.

[13] Arising from her findings, the learned master dismissed the appellant's preliminary objection, set a date for the hearing of the application for summary judgment, refused leave to appeal, and awarded costs on the preliminary objection to the respondents.

Leave to appeal

[14] The appellant sought and was granted leave to appeal by this court on 31 May 2024. In the judgment of **Richard Reitzin v Thomas & Sons Developers Limited**

and Joseph Thomas Snr [2024] JMCA App 20 ('the 2024 judgment'), this court reviewed para. [14] of **ASE Metals** and determined that:

> "[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."

[15] The court also granted a stay of execution of the orders of the learned master, pending the determination of the appeal. It is this appeal that we now consider and determine.

Grounds of appeal

[16] The appellant filed 22 grounds of appeal as follows:

> "a) The learned Master erred, as a matter of law, in failing to hold that the true issue before her was whether the respondents' application for summary judgment should be dismissed by reason of [Mr Thomas Snr's] failure to assert that he believed that the appellant had a [sic] no real prospect of succeeding on his claim.
>
> b) The learned Master erred, in law, in failing to appreciate that an applicant for summary judgment must assert that he believes that the respondent's case has no real prospect of success.
>
> c) The learned Master erred in holding that it is not necessary for an applicant for summary judgment to assert a belief that the respondent has no real prospect of success.
>
> d) The learned Master erred in holding that all that was necessary to succeed on an application for summary judgment was to demonstrate that the respondent had no real prospect of success.
>
> e) The learned Master failed to appreciate that she was not at liberty to decline to follow the principle of law enunciated by the Court of Appeal in **ASE Metals NV v Exclusive Holiday of Jamaica** [sic] **Limited** [2013] JMCA Civ 37 at [14] and

[15] and **Somerset Enterprises Limited & Lindeerth Powell v National Export Import Bank of Jamaica Limited** [2021] JMCA Civ 12 at [25].

f) The learned Master failed to appreciate that in his affidavit in support of the respondents' application for summary judgment, [Mr Thomas Snr] failed to assert that he believed that the appellant had no real prospect of success on his claim.

g) The learned Master erred in failing to appreciate that the receipt of advice from an unknown source reliant upon a non-evidential document is not the equivalent of holding a genuine belief based upon credible grounds.

h) The learned Master failed to appreciate that [Mr Thomas Snr's] failure to make the required assertion was fatal to the application for summary judgment.

i) The learned Master erred in holding that [Mr Thomas Snr's] introductory general assertion that the facts stated in his affidavit were true to the best of his knowledge, information and belief was capable of rendering his challenged statement compliant with the requirements laid down in **ASE Metals** and confirmed in **Somerset**.

j) The learned Master failed to appreciate that all affidavits are sworn statements of facts which the deponents [sic] knows, or believes, to be true - whether general introductory words are used or not - and that general, introductory statements cannot and do not serve any forensic purpose.

k) The learned Master failed to appreciate that [Mr Thomas Snr's] affidavit, taken as a whole, did not assert any belief that the appellant had no real prospect of success.

l) The learned Master erred in holding that it was permissible for a court to infer an assertion that the respondent to an application for summary judgment had no real prospect of success when it was not expressly stated.

m) The learned Master erred in holding that [Mr Thomas Snr's] statement in paragraph 6 of his affidavit, in which he asserted that he had received advice that based on his defence the appellant had no real prospect of success, was a statement of legal opinion and not a statement of fact and

that there was, therefore, no need for [Mr Thomas Snr] to have stated the source of his statement made on information and belief.

n) The learned Master erred in holding that because sources for certain statements on information and belief in paragraphs 3 and 4 were stated, it was not necessary to identify the source in relation to his factual assertions in paragraph 6.

o) The learned Master erred in that having held that [Mr Thomas Snr's] statement in paragraph 6 was a statement of legal opinion, the learned Master failed to rule it as inadmissible - as an opinion.

p) The learned Master erred in failing to appreciate that a deponent's assertion of a belief constitutes a statement of fact as to the deponent's state of mind.

q) The learned Master erred, as a matter of law, in failing to hold paragraph 6 of [Mr Thomas Snr's] affidavit to be inadmissible as not being probative of any matter of fact.

r) The learned Master erred in failing to allow the appellant a reasonable and proper opportunity to address her on the question of whether [Mr Thomas Snr's] statement in paragraph 6 was a statement of legal opinion rather than a statement of fact.

s) The learned Master failed to appreciate that the requirement that an applicant for summary judgment must assert that the respondent has no real prospect of success is a condition precedent to the exercise of the court's jurisdiction to hear and determine such an application.

t) The learned Master failed to appreciate that the required assertion acts as a gateway or filter to discourage and exclude applications where the applicant cannot or will not stake his credibility on his sworn averment that the respondent has no real prospect of success.

u) The learned Master failed to appreciate that paragraph 6 of [Mr Thomas Snr's] affidavit did not refer to his belief.

v) The learned Master erred, as a matter of law, in failing to hold paragraph 6 of [Mr Thomas Snr's] affidavit to be

> inadmissible, in any event, as not being probative of any matter of fact."

Submissions

On behalf of the appellant

[17] For the appellant, it was submitted that grounds of appeal (a) to (f), (h) and (u) were already resolved in the appellant's favour based on the 2024 judgment. Particularly, this court found that the learned master departed from the principle enunciated in **ASE Metals**. Concerning grounds (g), (q), (i), (j), and (k), it was submitted that these were resolved in favour of the appellant, implicitly from the 2024 judgment. The mere receipt of advice does not necessarily engender belief in that advice, and the deponent failed to state the source of the advice. Further, the general introductory assertion that the facts stated in the affidavit were true to the best of his knowledge, information, and belief was meaningless and did not cure the defect in para. 6 of the affidavit.

[18] With respect to grounds (l), (m) and (p), the submission was made that where an assertion is required and is capable of being made expressly, there is no room for a court to hold that the assertion can be inferred. This is especially so where an order is sought for summary judgment. Additionally, that an assertion of a belief by an applicant for summary judgment is "crucially, pregnant with a statement of fact as to the deponent's state of mind – which is as much a fact as the state of the deponent's digestion: **Edgington v Fitzmaurice** [1885] EWCA Civ 1 per Bowen, LJ". Thus, the deponent should state the source of his information.

[19] On ground (n), it was contended that the fact that some statements of information and belief indicate the source would not obviate the need for a deponent to state the source in relation to different, unrelated statements of fact.

[20] With respect to grounds (s) and (t), it was submitted that the requirement for an applicant for summary judgment to assert that the respondent has no real prospect of success serves a useful function for achieving the due administration of justice and is a condition precedent to the exercise of the court's jurisdiction. It acts as a filter to

discourage or exclude applications where the applicant is unwilling to stake his credibility on his sworn averment.

[21] As for grounds (o) and (r), it was submitted that as statements of opinion by laypersons are inadmissible, the learned master having found that para. 6 of Mr Thomas Snr's affidavit contained an opinion, it should have been struck out as inadmissible. Further, the learned master failed to afford the appellant a reasonable opportunity to address her on whether the statement was a legal opinion or a statement of fact. The case of **International Finance Trust Company Limited and another v New South Wales Crime Commission and others** [2009] HCA 49 was cited in support.

[22] Submissions were also made on this court's jurisdiction to reconsider its judgment in **ASE Metals**, noting that the court has the jurisdiction to embark on such a reconsideration. The case of **Commonwealth v Hospital Contribution Fund** [1982] HCA 13 was commended in this regard, specifically para. 6.

On behalf of the respondents

[23] The respondents addressed the grounds of appeal under three broad issues as follows:

> "i. Whether the Learned Master erred in failing to dismiss the application for summary judgment on the preliminary objection raised, prior to hearing the said application.
>
> ii. Whether the Learned Master had any further options available to her in the event she was in agreement with the point raised in the preliminary objection, other than dismissing the application for summary judgment, and if so whether the Court of Appeal is limited to dismissing the application in the event that it does not agree with the decision of the Master.
>
> iii. Whether Rule 26.9 is applicable to the alleged procedural breach."

[24] It was submitted that the issue with the affidavit is not the presence and/or absence of the assertion, but the procedural failure in not stating the source of the

deponent's information and belief. A distinction was made between **ASE Metals** and **Somerset Enterprises & Lindeerth Powell v National Export Import Bank of Jamaica Limited** [2021] JMCA Civ 12 ('**Somerset Enterprises**') noting that in those cases the applications for summary judgment were heard, whereas in the present case the application has not been heard, but rather a preliminary objection. As such, the options available to the learned master were different, thereby placing this case in a different category. The prematurity of the appellant's objection meant that a request could have been made for an adjournment to cure the procedural defect. It was urged that this court could also facilitate this in the event it disagrees with the approach of the learned master. Essentially, it was urged that disagreement with the decision of the learned master should not automatically result in a dismissal of the application for summary judgment. Rather, the court should make any order which in its opinion ought to have been made in the court below. The case of **Colliers International Property Consultants and another v Colliers Jordan Lee Jafaar SDN BHD** [2008] All ER (D) 50 (Jul) was cited in this regard, along with rule 2.14 of the Court of Appeal Rules, 2002 ('the CAR').

[25] The assertion was made alternatively that the requirements of **ASE Metals** were satisfied, as: (1) the deponent stated that he was advised that the appellant has no real prospect of success; (2) the statements in his affidavit were true to the best of his knowledge, information and belief; and (3) those assertions were made on credible grounds. Reference was made to rule 30.3 and part 15 of the Civil Procedure Rules, 2002 ('CPR') to highlight that these rules do not state any requirements for the contents of the affidavit in support of an application for summary judgment. Reference was also made to the orders sought on this appeal, which includes an order to dismiss the application to strike out the claim, which it is submitted is independent from the application for summary judgment. The case of **City Properties Limited v New Era Finance Limited** [2013] JMSC Civ 23 was cited.

[26] It was argued that, should the application for summary judgment be dismissed on a procedural point, the respondents can renew their application. Reliance was placed on the case of **June Chung v Shanique Cunningham** [2017] JMCA Civ 22.

[27] In response to the argument that para. 6 of the affidavit should be deemed inadmissible, it was pointed out that the appellant had filed an affidavit in response in which no issue was taken with the admissibility of the paragraph. Relying on the cases of **Sherrie Grant v Charles McLaughlin and another** [2019] JMCA Civ 4 and **Bobette Smalling v Dawn Satterswaite and others** [2020] JMCA App 15, it was urged that rule 26.9 of the CPR would apply to allow the respondents to rectify anything deemed to be a procedural breach.

Discussion

[28] The multiple grounds of appeal can be condensed into two major issues: (1) whether the learned master erred by failing to dismiss the respondents' application for summary judgment on the basis that Mr Thomas Snr failed to depone in his affidavit that he believed that the appellant had no real prospect of succeeding on the claim; and (2) whether the learned master erred in failing to dismiss the respondents' application on the basis that Mr Thomas Snr failed to depone in his affidavit the source of his information and belief.

Issue (1): Whether the learned master erred by failing to dismiss the respondents' application for summary judgment on the basis that Mr Thomas Snr failed to depone in his affidavit that he believed that the appellant had no real prospect of succeeding on the claim (grounds a, b, c, d, e, f, i, j, k, l, p, s, t, u)

[29] An important starting point is an examination of the rules relevant to applications for summary judgment. Rules 15.2, 15.5 and 15.6 of the CPR are instructive and provide as follows:

> "15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue."

"15.5 (1) The applicant must -

(a) file affidavit evidence in support with the application; and

(b) serve copies on each party against whom summary judgment is sought, not less than 14 days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must-

(a) file affidavit evidence; and

(b) serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing."

"15.6 (1) On hearing an application for summary judgment the court may –

(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit.

(2) Where summary judgment is given on a claim, the court may stay execution of that judgment until after the trial of any ancillary claim made by the defendant against whom summary judgment is given.

(3) Where the proceedings are not brought to an end the court must also treat the hearing as a case management conference."

[30] There is no requirement in rule 15.5 that specific words of belief must be contained within the affidavit in support of an application for summary judgment. In fact, rule 15.2 gives the court the authority and ultimate responsibility to enter summary judgment if it considers that the claimant or defendant has no real prospect of succeeding on the claim or an issue in the claim. However, in **ASE Metals** this court, after examining the law on

applications for summary judgment (at paras. [11] to [20]), stated at paras. [14] and [15]:

> "[14] 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...'
>
> [15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case 'which is better than merely arguable' (see paragraph 8 of **ED & F Man**). The defendant must show that he has 'a 'realistic' as opposed to a 'fanciful' prospect of success'." (Emphasis supplied)

[31] It is evident that those seemingly crucial words set out at para. [14] are absent from Mr Thomas Snr's affidavit. However, Brooks JA was ultimately concerned with the burden of proof to ground such an application. Indeed, he referred to the authority of **ED & F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472 ('**ED & F Man**') in that regard. In **ED & F Man**, the court was considering the distinction between the test to be applied for applications to set aside default judgments versus applications for summary judgment. To obtain a clearer understanding of this, it is deemed necessary to provide the full context of the quotation from **ED & F Man** stated above. In paras. 7 and 9 Potter LJ stated:

> "7. What is clear is that, in drafting the Civil Procedure Rules the draftsman adopted the phrase 'real prospect of successfully defending the claim' for the purposes of both CPR 13.1(1) [applications to set aside for default judgment] and 24.2 [applications for summary judgment] and, **subject to**

> **the question of burden of proof, may be taken to have contemplated a similar test under each rule**. …
>
> 9. In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former **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** whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under CPR 24.2." (Emphasis supplied)

[32] The emphasis is, therefore, on the burden of proof that is required for a party to establish the grounds for his belief and what must be established to discharge this burden. The rationale for the power given in part 15 of the CPR should also be kept at the forefront. Brooks JA referred to this at para. [20] of **ASE Metals**, which is set out here for expedience:

> "The rationale for the power given in part 15 is conveniently set out by Lord Woolf MR at page 94 of **Swain v Hillman** where he stated, in part:
>
> > 'It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. **In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice.** If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, **if a claim is bound to**

succeed, a claimant should know that as soon as possible.' (Emphasis supplied)"

[33] The absence of Mr Thomas Snr's assertion of his belief should not, therefore, be deemed to be so crucial as to result in a refusal of the application without an assessment by the learned master of the merits of the application. If credible grounds to sustain such an application are raised in the affidavit, the absence of the particular words required as set out in **ASE Metals** can be described as a defect of form and not substance. This accords with the approach adopted by the Privy Council in the matter of **Powell v Spence** [2021] UKPC 5, in which it was accepted that proceedings which were to have commenced by way of plaint, but were instead commenced using a document entitled "notice", did not serve to invalidate the proceedings, as the contents of the notice met the requirements for a plaint. The Privy Council found that the defects in the notice were matters of form only (see para. 34). This is particularly so in the context of this case, where the question of whether there is a claim with a real prospect of success was, ultimately one for the judge treating with the application. It is not merely a question of fact but one of law for the court, as it is the test to be applied by the court in summary judgment applications. Accordingly, the applicant's assertion of his belief regarding the test to be applied by the court is not one that is so material as to render the application for summary judgment fatal, if it is absent from the affidavit. The application, itself, carried an assertion that the claim had no real prospect of success as a ground for bringing it. The affidavit then sought to establish the grounds for that assertion by evidence of the facts on which the application is being advanced.

[34] Having considered the above, the position asserted by Brooks JA in **ASE Metals** requires clarification and so, in my opinion, this court should revisit the pronouncements in para. [14] in that case being relied on by the appellant. This court has the authority to depart from a previous decision if it is satisfied that the former decision was manifestly wrong and it is in the public interest that it should not be applied. Further, this power can only be exercised in a situation where the court is not bound by a previous decision of the Privy Council (see **Ralford Gordon v Angene Russell** [2012] JMCA App 6 at para.

[58]; **Collector of Taxes v Winston Lincoln** (1987) 24 JLR 232 and **Edward Gabbidon v Sagicor Bank Jamaica Limited** [2020] JMCA Civ 9 at para. [59]).

[35] In that regard, this court should, in my view, depart from the pronouncement of Brooks JA in para. [14] of **ASE Metals**, as it cannot be justly applied to this case, and it would not be in the public interest to apply it. I would hold that that any defect in an application for summary judgment, resulting solely from failure of the applicant to assert his or her belief that the impugned statement of case has no real prospect of success, should not be determinative of the application for summary judgment, as this would not be "consistent with the spirit of dealing with cases justly" (see para. [61] of **ASE Metals**). Furthermore, while not discounting any rationale for such assertion of belief in applications for summary judgments, the judge or master should be afforded some discretion to make an appropriate order so that any such defect can be cured, where necessary.

[36] It should also be open to the judge or master hearing the application to consider whether the contents of an affidavit are sufficient, without more, for the matter to move forward. In the case at bar, the learned master took note of the entire contents of the affidavit of Mr Thomas Snr. Having set out factual assertions relevant to the credible grounds from his own knowledge, information and belief (at paras. 2 to 5), he then asserted at para. 6 that he had been "advised that the [appellant's] claim has no real prospect of success".

[37] Since the judge or master is to determine whether the factual assertions give rise to credible grounds both factually and legally, I see no reason why the above contents should not be considered sufficient to meet the standard necessary for the grounding of any such application. The salient issue would be whether there are indeed credible grounds to substantiate the advice that was given to Mr Thomas Snr. In that regard, I am of the view that the learned master could not be said to have erred in how she ultimately determined this issue.

[38] The grounds of appeal giving rise to this issue, therefore, fail.

Issue (2): Whether the learned master erred in failing to dismiss the respondents' application on the basis that Mr Thomas Snr failed to depone in his affidavit the source of his information and belief (grounds g, h, m, n, o, q, r, v)

[39] The appellant has also complained that Mr Thomas Snr's affidavit did not state the source of his information and belief in accordance with rule 30.3 of the CPR. Rule 30.3(1) and (2) states:

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief –
>
> (a) where any of these Rules so allows; and
>
> (b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates -
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information and belief."

[40] At para. 2 of Mr Thomas Snr's affidavit, it is asserted:

> "That the contents of this Affidavit are from my personal knowledge, and are true to the best of my knowledge, information and belief, and where not from my personal knowledge are from the source/s stated where applicable which I believe to be true to the best of my information, knowledge and belief."

[41] He does not, however, assert the source of his information and belief as to who advised him that the appellant had no real prospect of success as required by rule 30.3.

The learned master concluded that since the issue was relevant to legal opinion as against facts, the omission was not fatal.

[42] I am of the view that the learned master cannot be faulted for her conclusion that the omission to state the source of the information and belief, in para. 6 of the impugned affidavit, is not fatal. Firstly, the failure to state the source of the information and belief is a breach of procedure. Rule 26.9 of the CPR grants the court a general power to rectify matters where there has been a procedural error. It states:

> "(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
>
> (4) The court may make such an order on or without an application by a party."

[43] In **ASE Metals**, ASE Metals NV ('ASE') had filed an application to strike out the defence of Exclusive Holiday of Elegance Limited ('Exclusive Holiday') or, in the alternative, summary judgment was sought. The application was refused in the court below. ASE appealed, challenging the learned judge's finding that Exclusive Holiday had raised several issues that should be determined at a trial. Exclusive Holiday filed a counter-notice asserting that the learned judge's decision was correct and could have been supported by other grounds, that is, by certain procedural defects in the affidavit evidence filed by ASE, which rendered that evidence inadmissible.

[44] In examining that issue, Brooks JA considered rule 26.9 of the CPR and differentiated between the contents of a document that were critical to the decision, compared to its compliance with procedural requirements. He concluded at para. [40] that "[t]his is not to minimise the importance of the requirement of the statute, but the issue of compliance may be considered less strictly than in a case where the contents of the document are in issue".

[45] Brooks JA stated how such a breach of part 30 of the CPR should be approached. At para. [47], he pointed out that part 30 does not stipulate any consequences for failure to comply with its rules. As such, "the court is entitled by rule 26.9 of the CPR to not only stipulate that the breach does not invalidate the [affidavit] but to make an order to rectify the breach". At para. [48], relying on **James Wyllie and Others v David West and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 120/2007, judgment delivered 13 August 2008, he stated that the procedural breach should not cause the deprivation of an otherwise deserving order.

[46] Brooks JA concluded at para. [49] that "ASE, on these principles should not have Mr Andries' affidavit and its exhibits excluded from consideration because of these technical breaches. It is entitled to have an order rectifying the situation and to have the affidavit and exhibits considered". I would echo the same sentiments in relation to the affidavit of Mr Thomas Snr. The learned master concluded that the procedural breach was not fatal. This is correct because it is a procedural deficiency that could have been rectified by an appropriate order for a supplemental affidavit of Mr Thomas Snr to be filed setting out the source of his information and belief (pursuant to rule 26.9(3) of the CPR), if that was considered necessary. She had the option to make an order "to put matters right" (rule 26.9(3) of the CPR) as the summary judgment application, in substance, had yet to be considered. Therefore, an appropriate order to rectify the breach could have been made, as the learned master had just concluded deliberations on the preliminary issue raised by the appellant. In those circumstances, she could have made an order for a supplemental affidavit to be filed, rectifying the defect, and for the summary judgment application to proceed.

[47] Secondly, and in any event, it is my view that the matters complained of by the appellant do not require that the application for summary judgment be dismissed or that a supplemental affidavit be filed setting out the source of the information and belief. The assertion in para. 6 of the affidavit of Mr Joseph Thomas Snr, in respect of which the complaint is made, would be an assertion regarding a question of law for the court. It would be an assertion of the legal test for summary judgment based on the advice given to the affiant by an undisclosed source. This assertion was not on any fact adduced for the truth of it but on a matter of law for the court. The assertion had no evidential value whatsoever. As a legal opinion on a question that is ultimately for the court, it would have been inadmissible and is liable to be struck from the affidavit. The learned master would have erred in her conclusion that, as a legal opinion, which she found it to be, it was admissible. That error, notwithstanding, the inclusion in the affidavit of what would have been advice on a legal issue is not fatal to the application.

[48] The respondents had already asserted in the application that the claim has no real prospect of success against them, and the grounds for this assertion. The assertion can be viewed as no more than the respondents' belief regarding the prospect of success of the claim, because ultimately, it is a question of law for the judge or master hearing the application to determine whether the claim has no real prospect of success, as alleged, based on the pleadings and evidence (meaning the facts) placed before the court.

[49] Furthermore, the appellant is in no way prejudiced by the procedural breach complained of or by the failure of the learned master to excise the offending paragraph from the affidavit. The paragraph does not invalidate either the application for summary judgment or the learned master's order. In the circumstances, the learned master's refusal to uphold the preliminary objection and dismiss the respondents' application for summary judgment is in keeping with the overriding objective. There is no justifiable basis for this court to interfere with the exercise of her discretion. The appeal also fails on this issue.

[50] In the light of the foregoing reasoning, I would propose that the appeal be dismissed with costs to the respondents.

V HARRIS JA

[51] I, too, have read, in draft, the judgment of Straw JA. I agree, and have nothing useful to add.

MCDONALD-BISHOP P

ORDER

1. The appeal is dismissed.

2. Orders (i) and (iv) of the decision of the learned master made on 9 November 2023 are affirmed.

3. The matter is remitted to the Supreme Court for a date to be set for the hearing of the respondents' application for summary judgment and/or striking out, as soon as possible.

4. Costs to the respondents to be agreed or taxed.