

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVP2022/0001

BETWEEN:

VANROY HODGE

Appellant

and

THE ANGUILLA AIR & SEAPORTS AUTHORITY

Respondent

Before:

The Hon. Mde. Gertel Thom
The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Paulette Harrigan for the Appellant
Ms. Jean M. Dyer and Ms. Liska Hutchinson for the Respondent

2022: July 5;
2023: January 10.

Interlocutory appeal – Judgment in default of acknowledgement of service – Setting aside of default judgment by learned master - Rule 13.3(2) of the Civil Procedure Rules 2000 – Exceptional circumstances – 6-month limitation period for the institution of proceedings against any person for act done in execution of public duty – Section 1(1) of the Public Authorities Protection Act – Whether the limitation defence amounted to an exceptional circumstance warranting the setting aside of the default judgment – Appellate interference with learned master’s finding of facts – Whether learned master had sufficient evidence before her to conclude that AASPA could rely on limitation defence – Whether learned master erred in setting aside the default judgment

Mr. Vanroy Hodge (“Mr. Hodge”) was employed as the Chief Executive Officer (the “CEO”) of the Anguilla Air & Seaports Authority (the “AASPA”), a body corporate established under

the Anguilla Air and Sea Ports Authority Act (the "AASPA Act") to manage the ports of Anguilla including the Clayton J. Lloyd International Airport (the "Airport"). As CEO, it was Mr. Hodge's responsibility to manage AASPA and provide technical advice and guidance to its Board of Directors. Mr. Hodge was subsequently appointed Accountable Manager by the Air Safety Support International (the "ASSI"). On 21st April 2016, the chief operating officer of ASSI issued a warning letter (the "Warning Letter") to Mr. Hodge in relation to the Airport's Aerodrome Certificate ("the Aerodrome Certificate") issued by ASSI to AASPA. The Warning Letter referred to findings from an audit that revealed that the level of security at the aerodrome did not meet the required standards.

Mr. Hodge responded to the Warning Letter in writing and requested a suspension of the Aerodrome Certificate until all regulatory matters were closed (the "Suspension Letter"). The Aerodrome Certificate was subsequently restricted. Shortly thereafter, the correspondence between ASSI and Mr. Hodge came to the attention of AASPA's Board of Directors. The Board then placed Mr. Hodge on administrative leave to conduct a formal investigation into the matter. Following the investigation and subsequent institution of disciplinary proceedings against Mr. Hodge, being (i) his failure to perform his duties to the required standard; (ii) acting contrary to his duties as CEO of AASPA; and (iii) that he had communicated with ASSI on a policy matter without first providing technical advice to the Board, the Board determined that his actions in relation to the second and third charge amounted to gross misconduct and summarily terminated his employment on 21st October 2016.

Being aggrieved by his termination, Mr. Hodge brought a claim in the court below against AASPA seeking, *inter alia*, damages for the breach of his contract of employment. On 24th August 2021, AASPA was served with the claim and accompanying documents. AASPA however failed to file an acknowledgement of service within 14 days of such service. On 10th September 2021, Mr. Hodge applied for and obtained judgment in default of acknowledgement of service. On 15th September 2021, AASPA filed its acknowledgement of service. Thereafter, Mr. Hodge served AASPA with the default judgment on 22nd September 2021.

On 30th September 2021, AASPA applied *inter alia* to set aside the default judgment (the "Set Aside Application"). AASPA contended, *inter alia*, that its intended time limitation defence under section 1(1) of the Public Authorities Protection Act (the "PAPA") amounted to an exceptional circumstance as per CPR 13.3(2) warranting the setting aside of the default judgment. AASPA argued that Mr. Hodge's termination arose in the execution of its public obligation owed to the public generally since it had a statutory and public duty to operate the ports of Anguilla to serve the public interest. Mr. Hodge's decision to request a suspension of the Aerodrome Certificate adversely affected AASPA's ability to carry out its public duty. AASPA therefore argued that Mr. Hodge's termination was done in furtherance of its main statutory duty. Mr. Hodge countered that AASPA was not entitled to protection under section 1(1) of PAPA. He contended that for section (1)(1) of PAPA to apply, AASPA would have to show that he had acted within his statutory or public duty as CEO when he wrote the Suspension Letter.

In a written judgment dated 23rd March 2022, the learned master applied the meaning given to “exceptional circumstances” as stated by this Court in *Carl Baynes v Ed Meyer*. She found that AASPA’s termination of Mr. Hodge could be construed as part of its statutory obligation to manage and operate the ports to serve the public interest and could therefore amount to an act done in the execution of the purpose of AASPA’s statutory duties under section 17(1)(d)(i) of the AASPA Act. She further found that in these circumstances, AASPA could be afforded the protection of the limitation defence under section 1(1) of the PAPA and that the limitation defence amounted to an exceptional circumstance. Accordingly, the learned master set aside the default judgment entered against AASPA.

Being dissatisfied with the decision of the learned master, Mr. Hodge appealed advancing four grounds of appeal. The sole issue which arose for determination on appeal was whether the learned master erred in finding that AASPA could rely on the limitation defence under section 1(1) of PAPA and that it could amount to an exceptional circumstance under CPR 13.3(2) which warranted setting aside the default judgment. Mr. Hodge contended that there was no evidential basis to support the learned master’s finding that his termination could be construed as an exercise of AASPA’s statutory duty pursuant to the AASPA Act. He argued that the limitation defence was bound to fail and thus, no exceptional circumstance arose. AASPA countered that there was sufficient evidence before the learned master on which she could find that the limitation defence was potentially a knockout point. AASPA argued that the direct effect of the Suspension Letter was a suspension of the Aerodrome Certificate which hindered AASPA’s ability to discharge its statutory and public obligation under the AASPA Act. Mr. Hodge’s termination was therefore a direct step taken, in the execution of the AASPA Act, to ensure that AASPA’s public duties were carried out.

Held: dismissing the appeal and ordering the appellant to pay the respondent’s costs on the appeal being two-thirds of the costs awarded in the court below, that:

1. Section 1(1) of the PAPA must be construed restrictively. It only applies to public authorities, and not to all persons acting under statutory provisions. It does not apply to all actions performed by public authorities but only to those where the obligation sued upon is owed generally to the public or to a section of it. Where the obligation sued upon arises simply out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application. Consequently, for a public authority to rely on the limitation period set out in section 1(1), the act complained of must be an act done (i) in the direct execution of a statute; (ii) in the discharge of a public duty; (iii) in the exercise of a public authority; and (iv) the claim was instituted more than 6 months after the cause of action arose. The limitation defence is not a defence in relation to the merit of the case.

Alves v The Attorney General of the Virgin Islands [2017] UKPC 42 applied;
Bradford Corporation v Myers [1916] 1 A.C. 242 applied.

2. In determining whether section 1(1) of the PAPA was applicable, the question for the learned master was not whether Mr. Hodge was performing his duties as CEO of AASPA but or whether he was performing the duties of accountable manager of ASSI when he issued the suspension letter but whether AASPA in terminating Mr. Hodge's appointment was discharging a public duty.
3. An appellate court should not seek to interfere with findings of fact by a lower court unless there is no evidence to ground such a finding, or the lower court based the finding on a misunderstanding of the evidence, or the finding was one which no reasonable judge considering the evidence could have made. There was evidence adduced by AASPA in its affidavit, on which the learned master could have ground her findings that AASPA could rely on the limitation defence that the termination was done as part of its statutory duty to manage and operate the Airport. It was not in dispute that the claim was filed more than 6 months after Mr. Hodge's employment was terminated.

Henderson v Foxworth Investments Limited and another [2014] UKSC 41 applied; **Beacon Insurance Co Ltd. v Maharaj Bookstore Ltd** [2014] UKPC 21 applied; **Kwok Kin Kwok v Yao Juan** [2022] UKPC 52 applied.

4. What amounts to an exceptional circumstance under CPR 13.3(2) is not defined and must therefore be decided on a case-by-case basis. It must be a circumstance that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained. Such circumstances include where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or where the remedy sought or granted was not one available to the claimant.

Carl Baynes v Ed Meyer ANUHCVP2015/0026 (delivered 30th May 2016, unreported) followed.

5. The limitation defence under section 1(1) of the PAPA if successful would result in the claim being statute barred. Therefore, the learned master did not err in finding that it was an exceptional circumstance and on that basis exercised her discretion to set aside the default judgment. There being no error in principle in the exercise of her discretion, there is no basis to interfere with the decision.

Dufour and Others v Helenair Corporation Ltd. and Others (1996) 52 WIR. 188 applied; **Kwok Kin Kwok v Yao Juan** [2022] UKPC 52 applied.

JUDGMENT

- [1] **THOM JA:** This is an interlocutory appeal by Mr. Vanroy Hodge (“Mr. Hodge”) against the decision of the learned master dated 23rd March 2022, by which she granted the Anguilla Air & Seaports Authority’s (“AASPA”) application to set aside the judgment entered against it in default of acknowledgment of service. The learned master granted the application on the sole basis that there was an exceptional circumstance which warranted the setting aside of the default judgment under rule 13.3(2) of the **Civil Procedure Rules 2000** (the “CPR”). It is this finding which is at the heart of this appeal.

Background

- [2] Mr. Hodge was employed as the Chief Executive Officer (the “CEO”) of AASPA, a body corporate established under the **Anguilla Air and Sea Ports Authority Act**¹ (the “**AASPA Act**”). AASPA was primarily established to manage the ports of Anguilla including the Clayton J. Lloyd International Airport (the “Airport”).
- [3] As the CEO, Mr. Hodge’s principal responsibility was to manage AASPA and to provide technical advice and guidance to its Board of Directors on matters of policy. His contract of employment (the “Agreement”) specifically provided, in essence, that AASPA could only terminate the Agreement at any time after the expiration of five years from the commencement of the Agreement by immediately paying Mr. Hodge five years’ salary in lieu of notice. The Agreement further provided that if either party terminated the Agreement otherwise than in accordance with its terms, the defaulting party would be liable to pay the other party liquidated damages. AASPA disputes the validity of the Agreement.
- [4] Subsequent to his appointment, Mr. Hodge was nominated and appointed as the Accountable Manager by the Air Safety Support International (the “ASSI”), a wholly

¹ Chapter A57, Revised Laws of Anguilla 2014.

owned subsidiary company of the UK Civil Aviation Authority which was established to create uniformity in standards of aviation safety and security throughout the UK Territories and to provide a more cohesive system of civil aviation safety and security regulation, which included facilitating the licensing of personnel and the certification of aircrafts, airlines, airports and air traffic control. As Accountable Manager, Mr. Hodge was responsible for the management of operational standards and for ensuring compliance with relevant regulations in Anguilla. Mr. Hodge's appointment as Accountable Manager was based on his position as the CEO of AASPA.

[5] On 21st April 2016, the chief operating officer of ASSI, Mr. John Benyon, issued a warning letter (the "Warning Letter") to Mr. Hodge in relation to the Airport's Aerodrome Certificate (the "Aerodrome Certificate") issued by ASSI to AASPA. The Warning Letter was addressed to Mr. Hodge in his capacity as CEO. However, in the body of the Warning Letter, Mr. Benyon indicated that the letter was written to Mr. Hodge in his capacity as Accountable Manager for the Airport. The Warning Letter referred to findings from an audit that revealed that the level of security at the aerodrome did not meet the required standards and therefore, AASPA was placed 'on notice' that 'the aerodrome [was] at serious risk of having its certificate further restricted or revoked'.

[6] On 13th August 2016, Mr. Hodge responded to Mr. Benyon's letter. His response letter read in part:

"We will aim to close the remaining findings as soon as practicable and will do so well within the six-month period that has been granted. The original On Notice status effort shall be re-established, particularly following the Out Brief discussion with Mr. Smith and Mr. Rothwell last week. However, I am inclined to request a suspension of the aerodrome certificate until all regulatory matters are closed due to the unfortunate political and AASPA Board of Directors Involvement in regulatory matters. I believe that it is extremely important for me as Accountable Manager to focus on the agreed action with ASSI within the stipulated time and guidelines without undue influence." (the "Suspension Letter")

The Aerodrome Certificate was subsequently restricted.

- [7] Shortly thereafter, the correspondence between ASSI and Mr. Hodge came to the attention of the Board of Directors of AASPA. Following this discovery, by letter dated 16th August 2016, the Board placed Mr. Hodge on administrative leave in order to conduct a formal investigation into the matter. The said letter indicated that Mr. Hodge 'had acted without the knowledge or authority of the Board of AASPA' in issuing the letter of 13th August 2016 'to the detriment of AASPA and Anguilla'.
- [8] Following the investigation and subsequent institution of disciplinary proceedings against Mr. Hodge, by correspondence addressed to Mr. Hodge, AASPA summarily terminated his employment on 21st October 2016 (the "Termination Letter"). The Termination Letter informed Mr. Hodge of the findings of the Board in relation to three charges that were made against him, being: (a) in relation to the first charge that he had failed to perform his duties to the required standard thereby resulting in the failure to close the audit findings from the ASSI audit, that a notation would be made on his file about his poor managerial performance, (b) in relation to the second charge of acting contrary to his duties as CEO of AASPA and (c) the third charge that he had communicated with ASSI on a policy matter without first providing technical advice to the Board pursuant to section 10(3) of the **AASPA Act**. The Board determined that his actions amounted to gross misconduct and terminated his employment immediately pursuant to section 7(1)(d) of the **Fair Labour Standards Act**.² The Board further informed Mr. Hodge that the Agreement signed by himself and the Chairman of AASPA in 2014 and 2015 were not valid contracts of employment.
- [9] On 23rd August 2021, being aggrieved by his termination, Mr. Hodge brought a claim in the court below against AASPA seeking, among other things, damages in

² Chapter F15, Revised Laws of Anguilla 2014.

the sum of \$1,940,553.28 for breach of his contract of employment. On 24th August 2021, AASPA was served with the claim and accompanying documents at its corporate office. AASPA however failed to file an acknowledgement of service of the claim within 14 days of such service, as it was required to do pursuant to CPR 9.3(1).

- [10] On 10th September 2021, Mr. Hodge applied for and obtained judgment in default of acknowledgement of service. On 15th September 2021, five days after default judgment was entered, AASPA filed its acknowledgement of service. Thereafter, Mr. Hodge served AASPA with the default judgment on 22nd September 2021.

The Set Aside Application

- [11] On 30th September 2021, AASPA applied *inter alia* to set aside the default judgment under CPR 13.3(1) or alternatively under CPR 13.3(2) (the “Set Aside Application”).³ AASPA contended that the default judgment should be set aside under CPR 13.3(1) on the basis that it had satisfied the conjunctive requirements under the rule. Under CPR 13.3(2), AASPA contended that: (i) the claim for breach of contract was not maintainable as a matter of law since the former Chairman of AASPA had acted *ultra vires* thereby invalidating the Agreement and (ii) its intended time limitation defence under section 1(1) of the **Public Authorities Protection Act**⁴ (“the **PAPA**”) were exceptional circumstances which warranted the setting aside of the default judgment. AASPA argued that Mr. Hodge’s termination arose in the execution of its public obligation owed to the public generally rather than a private obligation. AASPA submitted that it had a statutory and public duty to operate the ports of Anguilla as best to serve the public interests. Therefore, Mr. Hodge’s unilateral policy decision in requesting a suspension of the Aerodrome Certificate had immensely affected AASPA’s ability to manage and operate the Airport. AASPA maintained that Mr. Hodge’s termination was done in

³ AASPA also sought an order deeming the acknowledgement of service filed on 15th September 2021, properly filed and for permission to file its defence.

⁴ Chapter P115, Revised Laws of Anguilla 2014.

furtherance of its main statutory duty to manage the Airport and ensure reliable service and access to the public.

[12] Mr. Hodge resisted the Set Aside Application on the basis that AASPA had failed to satisfy the conjunctive requirements of CPR 13.3(1). He further argued that AASPA was not entitled to protection under section 1(1) of **PAPA** given that it had terminated him from his post of CEO for having written the Suspension Letter in discharge of his duties as Accountable Manager. He contended that for section 1(1) of **PAPA** to apply, AASPA would have to show that he had acted within his statutory or public duty when he wrote the Suspension Letter. He therefore asserted that the limitation defence contained in **PAPA** did not apply and thus AASPA could not bring itself within the ambit of CPR 13.3(2). He argued that there was no exceptional circumstance in this case.

[13] In a written judgment delivered on 23rd March 2022, the master found that AASPA had failed to satisfy the conjunctive requirements of CPR 13.3(1). Upon considering CPR 13.3(2), the master applied the meaning given to “exceptional circumstances” as stated by this Court in **Carl Baynes v Ed Meyer**.⁵ She found that the respondent’s argument that Mr. Hodge’s contract of employment was invalid was not an exceptional circumstance as it did not demonstrate a high degree of certainty that Mr. Hodge’s claim would fail. However, in relation to the submission on the limitation defence under section 1(1) of **PAPA**, the master was satisfied that there was a compelling reason why AASPA should be permitted to defend the claim. She found that AASPA’s termination of Mr. Hodge could be construed as part of its statutory obligation to manage and operate the ports as appears to be best calculated to serve the public interest and could therefore amount to an act done in the execution of the purpose of AASPA’s statutory duties under section 17(1)(d)(i) of the **AASPA Act**. She further found that in these circumstances AASPA could be afforded the protection of the limitation defence

⁵ ANUHCVP2015/0026 (delivered 30th May 2016, unreported).

under section 1(1) of the **PAPA** and that the limitation defence amounted to an exceptional circumstance. Accordingly, the learned master set aside the default judgment entered against AASPA.

The Appeal

- [14] Mr. Hodge, being dissatisfied with the decision of the learned master, appealed to this Court advancing four grounds in his notice of appeal. There was no cross-appeal. Notwithstanding the four grounds of appeal, the sole issue which arises for determination is whether the learned master erred in finding that AASPA could rely on the limitation defence under section 1(1) of **PAPA** and that it could amount to a “knockout point” and therefore an exceptional circumstance under CPR 13.3(2) which warranted the setting aside of the default judgment. Put another way, whether the master wrongly concluded that AASPA could be afforded protection under **PAPA** and that would amount to an exceptional circumstance.

Submissions on behalf of Mr. Hodge

- [15] The thrust of Ms. Harrigan’s argument on behalf of Mr. Hodge is that there was no evidential basis to support the learned master’s finding that AASPA’s termination of Mr. Hodge could be construed as an exercise of AASPA’s statutory duty pursuant to the **AASPA Act**. She submits that this is so because the evidence does not show that Mr. Hodge was acting pursuant to any statutory duty under the **AASPA Act** or discharging his duties as CEO when he issued the Suspension Letter. Rather, the evidence before the learned master showed that Mr. Hodge was discharging his duties as Accountable Manager to report to ASSI on its audit findings. ASSI wrote to Mr. Hodge in relation to the audit findings in his capacity as Accountable Manager. The Suspension Letter was in response to ASSI’s letter. Therefore, AASPA could not avail itself of protection under section 1(1) of **PAPA**. In other words, the limitation defence is bound to fail and therefore it could not be a knockout point. Consequently, there was no exceptional circumstance to warrant the setting aside of the default judgment pursuant to CPR 13.3(2).

Submissions on behalf of the AASPA

- [16] Ms. Jean Dyer, counsel for the AASPA, submits that there was a sufficient evidential basis before the learned master on which she could find that the limitation defence was potentially a knockout point. She contends that the direct effect of the Suspension Letter was a suspension of the Aerodrome Certificate which in turn hindered AASPA's ability to discharge its statutory and public obligation under sections 16 and 17 of the **AASPA Act** which require AASPA to manage and operate the ports as appears best calculated to serve the public interest. She submits further that the termination of Mr. Hodge by the AASPA was a direct step taken, in the execution of the **AASPA Act**, to ensure that its mandate to manage and operate the ports of Anguilla, including the Airport, was well executed.

Discussion

- [17] Before turning to consider these submissions, it is useful to outline the applicable sections of **PAPA** and the **AASPA Act**.

Section 1(1) of PAPA

- [18] Section 1(1) reads:
- “Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect-
- (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage, within 6 months next after the ceasing thereof.”
- [19] The effect of section 1(1) of **PAPA** is that where proceedings are commenced against a public authority for an act which was done in pursuance or execution or intended execution of any statute, or a public duty or authority it must be brought within a six-month period from the date the act complained of occurred or in the

case of continuing damage after the date it ceased. Any action filed outside of the six-month time limit is not sustainable.

The AASPA Act

- [20] Section 10(3) of the **AASPA Act** provides for the appointment and responsibility of the Chief Executive Officer. It reads, in part:

“(1) The Board shall, at such remuneration and on such terms and conditions as it considers appropriate, appoint a Chief Executive Officer of the Authority, who shall be a full-time officer of the Authority and shall not engage in any other trade, profession, occupation or business without the consent of the Board.

....

“(3) Under the direction of the Board, the Chief Executive Officer is responsible for—

(a) the management of the Authority; and

(b) providing technical advice and guidance to the Board on matters of policy.”

(Emphasis added)

- [21] Section 13(1) of the **AASPA Act** empowers the Board of AASPA with exclusive authority over its officers and employees, including powers of appointment. It provides:

“... the Board has final authority in respect to the appointment, termination, promotion or discipline of its officers or employees.”

- [22] In so far as is relevant to this appeal, section 16 of the **AASPA Act** underscores the powers and duties of the AASPA as follows:

“Powers and duties of the Authority

16. The objects of the Authority are to engage in activities such as to—

(a) manage and operate the ports of Anguilla, and related facilities in such a manner that the public has access to services that are reliable, efficient, safe and economic ...”

- [23] Section 17(1)(d)(i) of the **AASPA Act** empowers the AASPA to do all things necessary for, or ancillary or incidental to, the carrying out of its objects. It reads:

“General powers of Authority [AASPA]

17 (1) In addition to the other powers conferred upon the Authority in this Act and the regulations, the Authority has the power to do all things necessary for, or ancillary or incidental to, the carrying out of its objects, including the

power to—

(d) in particular and without prejudice to the generality of the provisions of paragraphs (a), (b) and (c), it is the duty of the Authority to—

(i) manage and operate the ports as appears to be best calculated to serve the public interest.” (Emphasis added)

Whether the master erred in setting aside the default judgment on the basis that the limitation defence under section 1(1) of the PAPA Act amounted to an exceptional circumstance under CPR 13.3(2)

[24] In **Baynes v Meyer**, the Chief Justice outlined the approach which should be adopted in determining what amounts to an exceptional circumstance under CPR 13.3(2) as follows:

“What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis... it must be ‘one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained’. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). ... For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a ‘knock out point’ in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive...”

This approach has been adopted and followed by this Court in several cases. It was also endorsed by the Privy Council in **Meyer v Baynes**.⁶

⁶ [2019] UKPC 3.

[25] Based on the above principles, a defaulting defendant who relies on CPR 13.3(2) must demonstrate that there are compelling reasons why it should be permitted another opportunity to defend the claim brought against it. In this case, AASPA contends that there was sufficient evidence before the learned master that AASPA could rely on the limitation defence under section 1(1) of **PAPA** and this defence would be a “knockout point” for Mr. Hodge’s claim.

[26] The principles which should guide a court in determining whether section 1(1) of the **PAPA** could be deployed by a public authority were outlined by the House of Lords in the **Bradford Corporation v Myers**⁷ where the House considered a like provision. Bradford Corporation was authorised by an Act of Parliament to carry on the undertaking of a gas company. They were bound to supply gas to the inhabitants of the district and were also empowered to sell the coke produced in the manufacture of the gas. The Corporation contracted to sell and deliver a ton of coke to the respondent. By negligence of their agent, the coke was shot through the respondent’s shop window. Being aggrieved, the respondent commenced an action in negligence against the Corporation, more than 6 months after. The Corporation pleaded the limitation defence as a bar to an action in negligence. In construing a like provision as section 1(1) of the **PAPA**, Lord Buckmaster L.C. stated:

“[I]t is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act [complained of] is one which is either an act in the direct execution of a statute or in the discharge of a public duty or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public...It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply.”

The House of Lords found that the act complained of was not an act done in direct execution of a statute or in discharge of a public duty or the exercise of a public authority and therefore the Corporation could not rely on the limitation defence.

⁷ [1916] 1 A.C. 242.

[27] Mr. Hodge relied on the Privy Council decision in **Balteano Duffus v National Water Commission**,⁸ However, while the equivalent provision of the Jamaica Public Authorities Protection Act was an issue before the Board, the Board did not fully analyse the provisions, as the Board agreed with the Court of Appeal that Mr. Duffus' case was unmeritorious, the contract having contained provision for his employment to be terminated on reasonable notice being given and such notice was given. The Board also found that since the act complained of were steps taken by the Commission to improve the efficiency of the discharge by the Commission of its statutory functions and were taken in execution of its statutory purposes the appellant's claim was unmeritorious. Lord Scott stated:

"The trial judge rejected the defence that the action was statute barred pursuant to the Public Authorities Protection Act. He did so because "the actions of the [Commission] cannot be said to have been done in execution of the purpose of the [National Water Commission Act]". Their Lordships find this an astonishing conclusion. The abolition of the post of Director, Corporate Planning, was expressed to be done "to rationalize the operations" of the Commission. The chairman's letter [to Mr. Duffus] ... said that "This rationalisation exercise makes it necessary for some posts to be abolished or made redundant and for some employees to be retired". No suggestion was made at trial that this had not been the reason why the post of Director, Corporate Planning, had been abolished and why Mr Duffus had been required to take early retirement. And how can it be suggested that steps taken to improve the efficiency of the discharge by the Commission of its statutory functions are taken otherwise than in execution of its statutory purposes?"

[28] More recently, the Privy Council considered like provisions in section 2 of the Virgin Islands Public Authorities Protection Act (the "Virgin Islands PAPA") in **Alves v The Attorney General of the Virgin Islands**.⁹ Ms. Alves was a nurse at the Hospital which was owned by the Government but managed by a Board whose members were appointed by the Governor. She suffered injuries to her back while attending to a patient at the hospital. She filed her claim for damages after the expiration of the one-year period stated in section 2. The Attorney

⁸ [2007] UKPC 35.

⁹ [2017] UKPC 42.

General contended that her claim was barred pursuant to section 2. The judge in the lower court rejected the Attorney General's contention but his decision was overturned by this Court. On appeal to the Privy Council, the Board considered the ambit of section 2 of the Virgin Islands PAPA. After referring to several previous decisions and affirming the principles in **Bradford Corporation**, the Privy Council stated as follows:

“35. [T]he essential test lies in the difference between a public duty owed to the public generally and private duty incurred in the course of acting under statutory functions...

36. By contrast, where there is a general common law or statutory duty of the kind which is the same for a public authority as it would be for a non-public person or company, there is no reason for a much-abbreviated limitation period, indeed every reason why the period should be no different for a public body defendant as for anyone else. The duties of an employer to his employees, or of a transport undertaker to his passengers, or of any contractor to his contractual counterparty, are classic examples of particular duties. They may of course arise in the course of performing public functions, but they are not public duties owed generally to the world or to a section of the public.

37. Despite the potentially wide words of PAPA, it must, as has consistently been held, be construed restrictively. It only applies to public authorities, and not to all persons acting under statutory provision. It does not apply to all actions performed by public authorities but only to those where the obligation sued upon is owed generally to the public or to a section of it. Where the obligation sued upon arises simply out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application.”

[29] Applying the above principles, the question is not whether Mr. Hodge in issuing the Suspension Letter was performing duties as CEO of AASPA or his functions as Accountable Manager of ASSI as contended by Ms. Harrigan. Rather, the issue is whether there was evidence on which AASPA who was seeking to rely on section 1 of **PAPA** to show it was exercising its statutory functions in fulfilling its duty to the public. AASPA adduced affidavit evidence in support of its application. It also referred to the statutory provisions in section 17(1)(d) which required AASPA to manage and operate the ports in Anguilla which included the

Airport as appears best to serve the public interest. AASPA relied on the affidavit evidence of Mr. Sherman Williams its CEO. The evidence relied on is outlined in paragraph 12 of the affidavit. It reads in part as follows:

“(i) There is a limitation defence that will defeat Mr. Hodge’s claim. It is my understanding that section 1(1) of the Public Authorities Protection Act R.S.A. sP115 precludes Mr. Hodge from bringing this action as it has not been instituted within six months after the cause of action arose. I understand from Ms. Dyer that Mr. Hodge’s cause of action arose on 21st October 2016 when his employment with AASPA was terminated. This termination was necessitated by Mr. Hodge’s gross misconduct (as detailed above) in amongst things requesting the suspension of the CJLIA. As such the action complained of in this claim are integral to the main purpose and function of AASPA.”

Paragraphs 7 – 10 of the affidavit address the issue of misconduct relating to Mr. Hodge’s managerial duties. It must be noted that Mr. Hodge does not deny that he issued the Suspension Letter, nor was it contended that the Suspension Letter did not lead to the operation at the Airport being affected which in turn impacted the service to the public. Mr. Hodge’s contention is that in issuing the Suspension Letter, he was performing his functions as Accountable Manager.

[30] The learned master considered in detail the evidence and the submissions of both sides and reminded herself at paragraph 82 of her judgement that she was not required to determine at this stage whether the limitation defence would succeed, and the claim deemed statute barred. Rather, she acknowledged that she was required to determine whether it was a defence which AASPA could rely on and whether if successful it would amount to a “knockout point” and therefore there was an exceptional circumstance on which basis she could exercise her discretion. Her approach cannot be faulted.

[31] In my view, there was evidence adduced by AASPA in its affidavit on which the learned master could make her findings. All that was required to be put before the learned master was evidence to show there was an exceptional circumstance and evidence that showed that AASPA was discharging its statutory duty to the public

pursuant to section 17 of the **AASPA Act**. AASPA did so in the affidavit evidence that was before the learned master, bearing in mind the learned master was not required to determine that the limitation defence would be successful but only that there was a high degree of certainty as explained in **Baynes v Meyer**.

- [32] Section 17(1) of the **AASPA Act** states in clear terms that AASPA has a public duty to manage the ports including the Airport in the best interest of the public. Section 10 shows that the CEO is a central figure in the management of the AASPA and he provides technical advice to the board of AASPA. This statutory provision was incorporated into the terms of Mr. Hodge's employment contract.
- [33] From the evidence of AASPA it cannot be said that there was no evidence before the learned master on which the master could find that AASPA could rely on the limitation defence that the termination was done as part of the management and operation of the port which could be construed as the discharge of a public duty owed to the general public and not a private duty incurred in the course of a statutory function or pursuant to a contractual provision.
- [34] The Privy Council and UK Supreme Court have on several occasions (including in **Henderson v Foxworth Investments Limited and another**,¹⁰ **Beacon Insurance Co Ltd. v Maharaj Bookstore Ltd**¹¹ and most recently in **Kwok Kin Kwok v Yao Juan**)¹² cautioned that an appellate court should not seek to interfere with findings of fact by a lower court unless there is no evidence to ground such finding, or the court based the finding on a misunderstanding of the evidence, or the finding was one which no reasonable judge considering the evidence could have made. This approach applies irrespective of whether the appeal is against findings of primary facts, evaluation of facts or inferences to be drawn from those findings of fact. Applying these principles, having regard to the affidavit evidence that was before

¹⁰ [2014] UKSC 41.

¹¹ [2014] UKPC 21.

¹² [2022] UKPC 52.

the learned master it was open to her to make the findings which she made and there is no basis to interfere with her findings. Similarly, the Privy Council has cautioned that an appellate court should be slow to interfere with the exercise of discretion by a lower court unless the exercise of discretion was an error of principle and as a result was plainly wrong. It cannot be disputed that the limitation defence if successful would result in the claim being statute barred. The limitation defence therefore amounted to an exceptional circumstance on which the learned master could set aside the default judgment. The learned master in so exercising her discretion did not err in principle and as a result was plainly wrong. There was therefore no basis to interfere with her exercise of discretion in setting aside the default judgment.

Conclusion

- [35] For the reasons outlined above, the appeal is dismissed. The appellant shall pay the respondent the costs of this appeal in the sum of two-thirds of the costs awarded in the court below.

I concur.
Vicki-Ann Ellis
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar