

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANGUILLA

CLAIM NO: AXAHCV2021/0042

BETWEEN:

VANROY HODGE

Claimant

and

THE ANGUILLA AIR & SEAPORTS AUTHORITY

Defendant

Appearances:

Ms. Paulette E. Harrigan for the Claimant

Ms. Jean M. Dyer for the Defendant

2022: January 26;
March 23.

RULING

- [1] **GILL, M.:** On 30th September 2021, the defendant, the Anguilla Air & Sea Ports Authority (“AASPA”) filed an application pursuant to Rules 13.3(1) and/or 13.3(2) of the Civil Procedure Rules 2000 as amended (“CPR 2000”) to set aside judgment in default of acknowledgement of service entered on 10th September 2021 in favour of the claimant Vanroy Hodge (“Mr. Hodge”). The application seeks an order to deem the acknowledgement of service filed late properly filed, and an order permitting AASPA to file its defence.

Background

- [2] AASPA is a body corporate established under the provisions of the Anguilla Air and Sea Ports Authority Act (“the AASPA Act”).¹ Its main purpose and function is to manage the ports of Anguilla. One of these ports is the Clayton J. Lloyd International Airport (“CJLIA”).
- [3] By an agreement in writing dated the 5th day of March 2015 (“the 2015 contract”) made between AASPA and Mr. Hodge, the parties agreed to the employment of Mr. Hodge as AASPA’s Chief Executive Officer (“CEO”) under, among other things, the following terms and conditions:
- i. Mr. Hodge was to be paid a salary of EC\$215,004.00 per annum;
 - ii. On completion of each year of service Mr. Hodge was to be paid a gratuity at the rate of 15% of his basic salary up to the date of completion;
 - iii. Mr. Hodge was entitled to twenty-five (25) working days leave per year.

The agreement also contained the following terms:

- iv. AASPA could not terminate the agreement during the first five years of the agreement;
 - v. At any time after the expiration of five years from the commencement of the engagement, AASPA could determine the engagement by immediately paying Mr. Hodge five years’ salary in lieu of notice;
 - vi. If either party to the agreement terminated the engagement otherwise than in accordance with the agreement, the defaulting party would be liable to pay to the other party liquidated damages.
- [4] Mr. Hodge states that in pursuance of the said agreement, he entered into his employment with AASPA on 1st April 2015.
- [5] By letter dated 13th August 2016 (“the suspension letter”), Mr. Hodge wrote to the Air Safety Support International (ASSI), which regulates civil aviation in Anguilla, indicating that he was *“inclined to request a suspension of the aerodrome certificate until all the regulatory matters are closed, due to the unfortunate political and AASPA Board of*

¹ c. A57 of the Revised Statutes of Anguilla

Directors involvement in regulatory matters.” The Aerodrome Certificate issued to AASPA was subsequently restricted.

- [6] Subsequent to an investigation and disciplinary proceedings, by letter dated 21st October 2016 AASPA terminated Mr. Hodge’s employment, that is, within five years of the commencement of the agreement, without giving Mr. Hodge five years’ salary in lieu of notice.
- [7] By claim form and statement of claim filed on 23rd August 2021, Mr. Hodge seeks against AASPA damages for breach of contract in the sum of EC\$1,940,533.28, interest, costs and such further or other relief as the court may deem fit.
- [8] On 24th August 2021, AASPA was served with the claim form, statement of claim, notes for defendant, acknowledgement of service form, application to pay by instalments form, defence and counterclaim form and authorisation code form at its corporate office located at The Valley in the island of Anguilla.
- [9] AASPA failed to file an acknowledgement of service within the period stipulated for so doing by CPR 2000. The deadline for filing an acknowledgment of service was 9th September 2021.
- [10] Mr. Hodge pounced on the opportunity and on the following day, 10th September 2021, filed a request for judgment in default of acknowledgement of service, which was granted on even date for an amount to be decided by the court.
- [11] Thereafter, on 15th September 2021, AASPA filed an acknowledgement of service,
- [12] The default judgment was served on AASPA on 22nd September 2021. AASPA filed the instant application on 30th September 2021 seeking to set aside the default judgment.

Issue

- [13] The court must decide whether to exercise its discretion and set aside the judgment in default of acknowledgement entered against AASPA on 10th September 2021.

Law and analysis

[14] Part 13 of CPR 2000 prescribes the conditions that must be satisfied in setting aside or varying default judgment. CPR 13.3 reads as follows:

(1) *“If Rule 13.2 does not apply [dealing with cases where the court **must** set aside a default judgment] the court may set aside a judgment entered under Part 12 only if the defendant-*

(a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

(2) *In any event, the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.*

(3) *Where this rule gives the court power to set aside a judgment, the court may instead vary it.”*

[15] The requirements under CPR 13.3(1) are conjunctive. In **Kenrick Thomas v RBTT Bank Caribbean Limited**,² Barrow JA, as he then was, distinguished between CPR 2000 and the English Civil Procedure Rules and held that under CPR 2000, all three conditions must be satisfied before the court is permitted to set aside a default judgment.

[16] At paragraph 10 of the judgment, Barrow JA made it clear that the overriding objective is not to be used as a means of circumventing the consequences of failure to adhere to clear rules. His Lordship stated:

“The overriding objective, contained in Part 1 of CPR 2000, which requires the court to apply the rules so as to deal with cases justly, is often invoked to relieve against the hardship that a strict application of the rules may cause. This court has clarified that the overriding objective does not allow the court to ignore clear rules. The language that the rule makers chose to frame Part 13.3(1) was considered and deliberate; there is no possibility that its purport was unintended. Litigants and

² Civil Appeal No. 3 of 2005 (St. Vincent and the Grenadines), at paragraph 7; see also SKBHC VAP2020/0004 Lindsay F. P. Grant and Another v Tanzania Tobin Tanzil, delivered July 6, 2020, per Pereira CJ at paragraph 9

lawyers must now accept that CPR 2000 has gone significantly further than the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to the setting aside of default judgments which was an identified abuse that the new rules were intended to correct. The adherence to the timetable provided by the Rules of Court is essential to the orderly conduct of business and the importance of adherence is reflected in CPR 2000 imposing pre-conditions for setting aside a default judgment. If the pre-conditions are not satisfied the court has no jurisdiction to set aside. The rule makers ordained a policy regarding default judgments. It is as simple as that.”

- [17] Barrow JA made these pronouncements before the introduction of CPR 13.3(2) which somewhat relaxed the rigidity of CPR 13.3(1). Following on from this, the application of the amendment was discussed by Pereira CJ in the consolidated appeals of **Public Works Corporation v Matthew Nelson** and **Elton Darwton and Public Works Corporation v Matthew Nelson**³ where Her Ladyship stated:

“It is now well settled that, unlike the English CPR, the discretion granted under our CPR 13.3(1) is more limited than the broad discretion which is given under the English Rules. A failure to satisfy any one of the three conditions is fatal unless a defendant manages to bring himself within the rule 13.3(2) by demonstrating exceptional circumstances warranting the exercise of the discretion in his favour.”

CPR 13.3(1)(a) – Promptitude

- [18] Ms. Hodge has conceded, and the court is satisfied that the application made eight days after the default judgment was served on AASPA, is prompt. Therefore, AASPA has met the requirement under CPR 13.3(1)(a).

CPR 13.3(1)(b) - Good explanation

- [19] AASPA’s explanation for its failure to file the acknowledgement of service on time is set out in paragraphs 3 to 5 of the affidavit of Sherman Williams (“Mr. Williams”), AASPA’s current CEO. Mr. Hodge opposes this ground of the application procedurally and substantively. In light of the procedural objection, it is prudent to reproduce the said paragraphs verbatim as follows:

“3. AASPA was served with this claim on 24th August 2021. I, immediately, as is customary, informed AASPA’s long-standing attorney, Mr. Stanley Reid of the action. Mr. Reid took the position

³ DOMHCVAP2016/0007 and DOMHCVAP2016/0008, at paragraph 13

that he could not act for AASPA because he had carried out the investigations which resulted in the Claimant's (Mr. Hodge") termination and was thus conflicted. As soon as the Applicant became aware that Mr. Reid was conflicted and could not act for it, AASPA, through its Chair, Mrs. Cara Connor ("Mrs. Connor"), immediately sought to instruct Mrs. Keesha Carty and Ms. Tara Carter, who had advised it with regard to the matters which culminated in Mr. Hodge's termination, to represent it in this matter and put forward its defence. Mrs. Carty and Ms. Carter however eventually refused to act in this matter. Ms. Carter indicated she was working her way out of litigation, I am aware from discussions with Mrs. Connor that she was, despite her best efforts, only able to make contact with Mrs. Carty on 6th September 2021. Mrs. Carty was initially open to accepting the engagement but she eventually took the position that her health wouldn't permit her to do so. She recommended Ms. Jean M. Dyer ("Ms. Dyer") as an experienced litigator in this type of matter and more than competent other alternative counsel. AASPA through its Chair sought to contact Ms. Dyer via telephone but was unable to do so because Ms. Dyer was off island on vacation leave.

- 4** *AASPA experienced substantial difficulty in securing an alternative legal representative who was experienced and in whom its Board could repose confidence. AASPA was of the view that this was not problematic because its Chair was of the view that time did not run for the filing of its acknowledgement of service during the court's long vacation. However, on the evening of 14th September 2021, Mrs. Connor was alerted by Mr. Reid (who had seen the appointment of legal counsel in respect of this matter on the agenda for an upcoming AASPA board meeting) that the time was in fact running. AASPA accordingly filed its Acknowledgment of Service in person on the next day. I am advised by AASPA's counsel, Ms. Dyer and verily believe that AASPA's acknowledgement was filed seven (7) days after the deadline.*

- 5** *It follows, and I would respectfully ask the court, to find that AASPA's failure to acknowledge service within the fourteen (14) day period was not the result of any indifference on its part to the risk that judgment might be entered against it and came about in the circumstances outlined above."*

[20] Mr. Hodge submits that the affidavit of Mr. Williams sworn to and filed on 30th September 2021 is replete with hearsay evidence and the offending paragraphs should be struck out. Mr. Hodge contends that in paragraphs 3 and 4 above, the deponent purports to give evidence of conversations that took place between AASPA's chairperson Mrs. Cara

Connor and Mrs. Keesha Carty, Ms. Tara Carter and Mr. Stanley Reid, which is purely hearsay evidence, inadmissible and should be struck out accordingly. Mr. Hodge has no objection to the underlined portions of paragraphs 3 and 4 above. However, he posits that other paragraphs in the said affidavit and in a subsequent affidavit of Mr. Williams sworn to and filed on 12th November 2021 ought to be struck out as hearsay.

- [21] In answer to the objection to the alleged hearsay evidence contained in Mr. Williams' affidavits, AASPA directs the court to CPR 30.3(2)(b) which allows hearsay evidence in affidavits if certain criteria are met. CPR 30.3(2)(b) reads:

“An affidavit may contain statements of information and belief -

(b) if the affidavit is to be for use in an application for summary judgment or any procedural or interlocutory application, [as in this case] 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 and belief; and

(ii) the source of any matters of information and belief.”

- [22] In support of this submission, AASPA cites the case of **National Bank of Anguilla (Private Banking and Trust) Ltd (in administration) and another v. Chief Minister of Anguilla and another**⁴ in which our Court of Appeal stated, “Rule 30.3(2)(b) of the CPR codifies the procedure highlighted in *Re LJ Young Manufacturing Co. Ltd* by which an affiant may give probative evidence on the basis of his belief and information.”

- [23] AASPA points out that this longstanding principle existed even before CPR 2000 in relation to interlocutory proceedings⁵. It argued that Mr. Hodge's objection is therefore without merit since AASPA has complied with this procedure and that this court is entitled to consider and give probative weight to Mr. Williams' evidence in the determination of the interlocutory application at bar.

⁴ AXAHC VAP 2020/0001 at paragraph 104.

⁵ *Development Bank of St. Kitts-Nevis v. Osbert Chapman et al* SKBHCV 2012/00168 at paragraph 30.

Is AASPA in compliance with CPR 30.3(2)(b)?

[24] At paragraph 2 of both Mr. Williams' affidavits, he swore as follows:

"Save where the contrary appears, the contents of this Affidavit are within my personal knowledge and true. Where I state matters not within my personal knowledge, the content is true to the best of my knowledge, information and belief."

[25] AASPA's argument is that the evidence in paragraphs 3 and 4 of Mr. Williams' affidavit of 30th September 2021 is within his personal knowledge. Mr. Hodge urges upon the court that there is no indication in the affidavit as to whether the facts stated are within Mr. Williams' personal knowledge, or which are matters of his information and belief, and the source of such information and belief.

[26] It is clear from the evidence that Mr. Williams does not state how he came by the matters communicated to AASPA by Mrs. Keesha Carty, Ms. Tara Carter and Mr. Stanley Reid as regards paragraph 4. Was Mr. Williams privy to conversations held with these counsel? Was he informed by Mrs. Connor? Can the matters be deemed to be within his personal knowledge if, in fact, he was told about them by Mrs. Connor? Even if the matters can be said to be true to the best of Mr. Williams' information and belief, CPR 30.3(2) requires that the source be identified. On that basis, I am constrained to hold that AASPA has not complied with the aspect of the rule that mandates a revelation of the source of Mr. Williams' information and belief. Further, a blank statement of the matters being within a deponent's personal knowledge cannot suffice as compliance with the rule in the absence of evidence illustrating or outlining how this knowledge came about. In my view, the offending parts of paragraphs 3 and 4 relating to AASPA's explanation for the failure to file the acknowledgement of service on time ought to be struck out. That would leave the court without sufficient evidence of an explanation forcing the court to conclude that AASPA has not satisfied the requirement in CPR 13.3(1)(b).

[27] In the event that I am wrong on this point, and assuming that AASPA is in compliance with CPR 30.3(2), I will proceed to consider the substantive issue as to whether AASPA has given a good explanation.

Good explanation

- [28] The meaning of 'good explanation' under CPR 13.3 was explored in **Inteco Beteiligungs Ag v Sylmord Trade Inc.**⁶ Bannister J, at paragraph 15 of the judgment, had this to say:

"In my judgment, the expression 'good explanation' where it occurs in CPR 13.3(1), means an account of what has happened since the proceedings were served which satisfies the Court that the reason for the failure to acknowledge service or serve a defence is something other than mere indifference to the question whether or not the claimant obtains judgment. The explanation may be banal and yet be a good one for the purposes of CPR 13.3. Muddle, forgetfulness, an administrative mix up, are all capable of being good explanations, because each is capable of explaining that the failure to take the necessary steps was not the result of indifference to the risk that judgment might be entered."

- [29] The concept of "good explanation" was also examined in the case of **Emmerson International Corporation v Starlex Company Limited and Sunglet International Inc.**⁷, which involved an application for relief from sanctions. At paragraph 53 of the judgment, Blenman JA stated, "The question of what constitutes good explanation for the purpose of CPR 26.8(2) (b) is fact sensitive." Her Ladyship went on to adopt the pronouncements of Davis-White J [Ag.], as he then was, in **QVT Fund V LP et al v China Zenix Auto International Group et al** when he said:

"The quality of the explanation has to be viewed against all the circumstances and not simply by reference to the question of whether all was done that could have been done. A 'good explanation' is a universal standard, in the same way that the duty of care in negligence is, but what is required to discharge that standard will depend on the particular facts and circumstances."

- [30] At paragraph 54, Blenman JA restated the oft-quoted pronouncement of Lord Dyson in **Attorney General v Universal Projects Ltd** as follows:

"Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."

⁶ BVIHCM(COM) 120 of 2012

⁷ BVHCVMAP2018/0044, delivered March 11, 2019

[31] Our Court of Appeal has made numerous pronouncements on what does not amount to a good explanation. In **Michael Laudat and The Attorney General of the Commonwealth of Dominica v Danny Ambo**⁸ Edwards JA admonished:

“Finally, we wish to remind legal practitioners, particularly junior counsel, of the numerous decisions of this court which clearly establish that counsel do not have a good explanation which will excuse non-compliance with a rule or order, or practice direction where the explanation given for the delay is misapprehension of the law, mistake of the law by counsel, lack of diligence, volume of work, difficulty in communicating with client, pressure of work on a solicitor, impecuniosity of the client, secretarial incompetence or inadvertence.”

[32] As to the chairperson’s mistaken view that time for filing the acknowledgment of service did not run in the court vacation, AASPA notes the jurisprudence on misapprehension of the law. However, it submits that in all the circumstances of this case, and in particular, AASPA’s difficulty in securing alternative legal representation, ought to be considered collectively in determining whether AASPA has a good explanation. AASPA submits that this court ought to find on the evidence before it that it has provided a satisfactory explanation that it acted with the requisite seriousness necessitated by these proceedings as its misapprehension of the law was not the primary cause of its non-compliance.

[33] In **Alexandre Monchatre & Another v Freedom Limited** ⁹ legal proceedings were instituted against Freedom Limited. Freedom Limited failed to file an acknowledgment of service, and judgment in default was entered against it. In an attempt to set aside the default judgment, Freedom Limited averred that they had difficulties in finding legal representation when their attorneys of 15 years indicated that they were unable to represent the company due to the fact that they were the escrow holders for the deposit paid under the contract in dispute. Freedom Limited further alleged their difficulty in finding representation was further compounded by the fact that the principals of the company resided overseas and so it would have taken some time to repose confidence in another attorney who they would not have gotten the chance to meet and could only communicate

⁸ HCVAP 2010/016 at paragraph 14

⁹ ANUHCv 2015/0646

with via telephone or e-mail. In rejecting this explanation as being a good one for the purposes of setting aside the judgment in default, Master Glasgow, as he then was, stated:

“... it is nonetheless conceded by Freedom Limited that it had legal counsel who could have explained the imperative of filing a timely acknowledgment of service once it was served with the claim. If counsel could not advise Freedom Limited, the instructions on the forms that were served on Freedom Limited are not stated in obscure or incomprehensible fashion. The company was aware that it had 14 days to file an acknowledgment of service. That it harbored some diffidence or trepidation about reposing confidence in another lawyer may attract some sympathy in the circumstances but cannot remove the obligation to act with the requisite dispatch. If indeed Freedom Limited intended to strenuously maintain that it does not have an obligation to repay the purchasers, then I do not see any difficulty preventing the company from completing what is a fairly standard acknowledgment of service form and having the same filed while it sought to obtain further legal representatives;”¹⁰

[34] AASPA seeks to distinguish that case from the situation here. The learned master was of the view that even if allowance could be made for Freedom Limited’s difficulties, there was absence of evidence to show that the company made concerted efforts to retain alternative counsel.¹¹ AASPA says that in this case, there is cogent evidence of efforts it made to secure alternative legal representation. AASPA urges the court to find that it took the necessary steps to move the matter forward, showed an interest in defending the matter and that its actions do not demonstrate an indifference as to whether judgment was obtained against it.

[35] Mr. Hodge uses the same authority and applies the words of the learned master quoted above in support of his position that AASPA does not have a good explanation for their failure to file a timely acknowledgement of service. Mr. Hodge considers the action or non-action by AASPA’s chairperson as inexcusable oversight, especially as the said chairperson is an attorney-at-law of over 10 years’ standing, and the principal of her chambers. Cenac-Phulgence J addressed that point in **Glen Guiste v New India Assurance Co. (T & T) Ltd.**¹² where Her Ladyship opined:

¹⁰ Ibid at paragraph 33(b)

¹¹ Ibid at paragraph 33(c)

¹² SLUHCV2016/0171 at paragraph 22

“To my mind, it must be that a legal practitioner is to be held to an even greater standard than an ordinary litigant especially in a case where the result could lead to the setting aside of a judgment.”

[36] On the evidence before this court, I am of the view that the reasons proffered for AASPA's delay in filing an acknowledgement of service do not amount to a good explanation. Even if the evidence of Mr. Williams is accepted in spite of the hearsay objection, and can convince the court that AASPA, by its efforts to seek alternative counsel, was not indifferent to judgment being entered against it, this does not let it “off the hook” for the failure to perform the simple requirement of filing an acknowledgment of service which does not require legal expertise. The notes to the defendant in CPR 2000 are written in straightforward, uncomplicated language, deliberately so, to accommodate a defendant who, at the time of service of a claim, is not yet legally represented.

[37] To my mind, paragraph 4 of Mr. Williams' affidavit of 30th September 2021 provides the most damning evidence to the detriment of the application on this limb, CPR 13.3(1)(b). Paragraph 4 reveals AASPA's view of the difficulties in securing alternative counsel as not problematic because its Chair was under a mistake or misapprehension of the law that time for the filing of an acknowledgment of service did not run in the long vacation. The Chair was alerted and corrected by AASPA's usual counsel Mr. Reid on 14th September 2021. By that time, the deadline for the filing of an acknowledgment of service had passed. Therefore, at the time of the deadline, 9th September 2021, the Chair was operating with the understanding that time was not running. This mistake of law, in my view, supersedes what AASPA submits is the primary explanation for its breach, that of difficulty in securing alternative counsel. On the evidence, the main reason for the breach is the error of the Chair, an experienced legal practitioner. I consider this an inexcusable breach in the circumstances, coupled with the specific examples given by Edwards JA in **Michael Laudat v Danny Ambo**, that misapprehension of the law and mistake of the law by counsel do not amount to a good explanation for non-compliance with a rule. AASPA fails on this ground.

CPR 13.3(1)(c) - Real prospect of successfully defending the claim

- [38] AASPA is in breach of CPR 13.4, which provides that an affidavit in support of an application to set aside default judgment must exhibit a draft of the proposed defence. AASPA has not filed a draft defence. Therefore, Mr. Hodge submits that AASPA has not produced evidence to enable the court to exercise its discretion to discern whether it has a real prospect of defending the claim. He accuses AASPA of setting out its intended defence in submissions, which is improper.
- [39] AASPA refers to Mr. Hodge's submission on this point as a 'red herring', alleging that Mr. Hodge appears to be seemingly intent on avoiding a trial on the merits of his case. AASPA puts forward that its intended defence is detailed at paragraph 5 of the application (sub-headed "Exceptional circumstances") and at paragraphs 7 to 12 of the affidavit in support thereof. Therefore, it contends that the court is in a position to assess whether it has good prospects of successfully defending the claim at bar.
- [40] The court was faced with a similar situation in **Glen Guiste v New India Assurance Co. (T & T) Ltd**¹³ in that, a draft defence was not filed with the application to set aside default judgment. Instead, the affidavit simply referred to a defence filed almost two months out of time without an application for extension of time being made. Counsel for the applicant argued that since there was a defence on record, there was no need to exhibit it to the application, and that one must not be a slave to the rules. Cenac-Phulgence J stated (at paragraph 23), "That may be the case but the rules must not be flouted unnecessarily." The learned judge considered two "incompatible" submissions by counsel for the applicant in relation to the defence, but went on to consider the defence in relation to CPR 13.3(1)(c) in the event her analysis was incorrect.
- [41] In this case, there is no document called a defence or draft defence on record.
- [42] AASPA's intended defence is constructed in its written submissions from paragraphs 20 to 31 thereof. Heavy reliance is placed on the investigative report of Mr. Stanley Reid, SW-1, exhibited to Mr. Williams' affidavit in support of the application. In fact, the report is

¹³ SLUHCV2016/0171

introduced in paragraph 8 of the affidavit where he states, “There is now produced and shown to me a copy of Mr. Reid’s Report marked “S-W1” for identification.”

[43] In its submissions, under the sub-heading “AASPA’s intended defence”, AASPA states facts on which it intends to rely in its defence, heavily foot-noted with references to Exhibit SW1 and other exhibits, among other sources of information.

[44] AASPA submits that upon examination of all the evidence (and in particular Exhibits SW-1 and SW-2 together with paragraphs 7 to 11 of his affidavit in support and paragraphs 13 to 18 of Sherman Williams’ affidavit in reply), it is evident that AASPA has a more than arguable and/or fanciful case to this claim which arises from the termination of Mr. Hodge’s employment with AASPA. In short, AASPA’s intended defence as outlined in Mr. Williams’ affidavits is two-fold:-

- (i) that it had a right to summarily dismiss Mr. Hodge as his actions and conduct directly affected its ability to execute its purpose and function of managing the air and sea ports of Anguilla which is mandated by section 2(1) of the AASPA Act; and
- (ii) that there could be no maintainable claim for breach of contract as Mr. Hodge’s purported employment contract was in any case *ultra vires*.

[45] Can this defence be discerned from Mr. Williams’ affidavits? I have scrutinised both Mr. Williams’ affidavits which constitute AASPA’s evidence in this application. Whereas the affidavits and exhibits detail, among other things, the facts and circumstances culminating Mr. Hodge’s termination, Mr. Williams does not aver, in a manner to constitute a direct defence, that AASPA had a right to summarily dismiss Mr. Hodge or that he was not wrongfully terminated. Mr. Williams’ affidavit of 30th September 2021 contains, in one sub-paragraph, the allegation that Mr. Hodge’s purported employment contract was *ultra vires*.

[46] I summarise paragraphs 7 to 11 of Mr. Williams’ affidavit in support of the application as follows:

7. Mr. Hodge was summarily dismissed following an investigation into the circumstances surrounding and leading up to the “on notice” status of CJLIA and the restriction of CJLIA’s Aerodrome (Operating) Certificate;
8. The investigator, Mr. Reid, found that Mr. Hodge and others had fallen short of what was required and expected of them and he recommended that consideration be given to instituting legal proceedings against them. Mr. Reid’s report was marked SW-1 for identification.
9. Mr. Reid’s recommendation was accepted and a disciplinary hearing was held on 15th September 2016 when Mr. Hodge stood charged on 3 grounds of misconduct (spelled out).
10. AASPA’s Board found that Mr. Hodge was guilty of poor managerial performance and that his conduct amounted to gross misconduct, making it impossible for his employment to continue. A copy of the dismissal letter is marked SW-2 for identification.
11. The matters raised by the claim are of public interest and ought to be fully ventilated at trial.

[47] Paragraphs 13 to 18 of Mr. Williams’ affidavit in reply contain denials of several paragraphs of Mr. Hodge’s affidavit in opposition, and references to earlier paragraphs in the said affidavit in reply concerning Mr. Hodge’s employment capacity and accountability.

[48] CPR 13.4 (3) stipulates that the affidavit in support of an application to set aside default judgment must exhibit a draft defence, as opposed to an affidavit outlining the defence. AASPA’s failure to exhibit a draft or proposed defence to Mr. Williams’ affidavit in support of the application is a blatant disregard of CPR 13.4(3). Whereas affidavit evidence may reveal an intended defence, thus allowing the court to determine whether the defendant has a real prospect of successfully defending the claim, that approach ought not to be adopted by counsel or sanctioned by the court as a substitute for the clear requirement in the rule for a draft defence. The inclusion of this requirement in CPR 2000 must have been with the intention of the rule makers for a defendant, on an application to set aside, to

present to the court the precise statement of case of the defence on which the court can make a proper determination as to whether the defendant has shown a real prospect of successfully defending the claim. On the state of the affidavits before the court, I am not prepared to exercise the same level of or any tolerance as was extended for non-compliance with the evidential rules on the issue of “good explanation”. Therefore, in the absence of a draft defence, there is no proper evidence before the court on which I can make a determination of real prospect of successfully defending the claim. For the removal of doubt, I rule that the application fails in respect of CPR 13.3(1)(c) as a result of the breach in filing a draft defence as required by CPR 13.4(3).

[49] Based on the foregoing, AASPA has failed to satisfy the conjunctive requirements of CPR 13.3(1), and the default judgment cannot be set aside under that rule. In that event, AASPA is asking the court to invoke its powers under CPR 13.3(2) to rule that there are exceptional circumstances to set aside the default judgment.

Exceptional circumstances

[50] In the Court of Appeal decision in **Carl Baynes v Ed Meyer**,¹⁴ the exposition by Pereira CJ on exceptional circumstances is invaluable. At paragraph 26 of the judgment, Her Ladyship explained 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. I am in full agreement with the reasoning of Bannister J, as approved by this Court, that 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 CPR 13.3(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 to be deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. 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

¹⁴ ANUHCVP2015/0026

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.”

[51] The above reasoning of Pereira CJ was respectfully endorsed by the Privy Council.¹⁵

[52] AASPA submits that there are compelling reasons why it should be permitted to defend this claim. This position is grounded on two limbs:

- (i) AASPA’s limitation defence is a “knock out point” that will defeat Mr. Hodge’s claim; and
- (ii) There is a high degree of certainty that the claim will fail as it is not maintainable since the 2015 contract is *ultra vires* and is voidable at AASPA’s instance. It follows, AASPA states, that Mr. Hodge is not entitled to the relief that he seeks.

Is the claim maintainable as a matter of law?

[53] Under this head, AASPA repeats its submissions as for its position under CPR 13.3(1)(c) (real prospect of successfully defending the claim). I bear in mind the admonition of Pereira CJ in **Carl Baynes v Ed Meyer** that an exceptional circumstance is something more than showing that a defence has a real prospect of success. AASPA states that it is arguable that its intended defence demonstrates a high degree of certainty that Mr. Hodge’s claim, which AASPA alleges is premised on an *ultra vires* contract, will fail.

[54] AASPA maintains that the 2015 contract was negotiated and settled by its former chairperson and not by the Board as is required by the AASPA Act. It submits that the authority to appoint any officer, including the CEO vests solely in the Board by virtue of sections 10 and 11 of the AASPA Act, and could not be exercised by the former chairperson independent of the Board.

[55] In **Quorum Island (BVI) Limited v Virgin Islands Environmental Council & Another**,¹⁶ Rawlins CJ stated:

¹⁵ *Meyer v Baynes* [2019] UKPC 3, per Lord Kitchin at paragraph 12

“It is a primary tenet of the rule of law that a public authority must act or make decisions within the bounds of the power conferred on it by law. An authority that acts outside of that power, acts *ultra vires* its discretion or illegally. Illegality may result from doing that which is unauthorized by law or by refusing or omitting to do what the law mandates.”

[56] AASPA’s Board as a public authority is bound by the AASPA Act. Likewise, it is submitted that the Board’s former chairperson being a member of the Board was equally bound by the provisions of the AASPA Act and could only act within the confines thereof. It is AASPA’s case that its former chairperson was unauthorized by the AASPA Act to negotiate and settle the 2015 contract and therefore acted outside the scope of his powers. As such his actions were *ultra vires* thereby rendering the 2015 contract voidable at AASPA’s instance.

[57] AASPA cites the first instance decision in **Mariette Warrington v Dominica Broadcasting Corporation and the Attorney General** ¹⁷ as being useful in this regard. There, the learned judge found that no issue of breach of contract arose where the Board of Directors of the first defendant did not receive the advice of the Prime Minister as is required by the relevant Act to appoint her.

[58] Rawlins CJ in **Quorum Island (BVI) Limited**¹⁸ noted that “...in order to determine whether an administrative act or decision is illegal, the court, as the guardian of legality, must first construe the authorizing power, determine its terms, scope and purpose, and measure the decision or action against this”. AASPA submits that such an exercise ought only to be conducted at trial after all the evidence has been adduced and tested.

[59] AASPA maintains that this is an exceptional circumstance since Mr. Hodge would not be entitled to damages in the sum of EC\$1,940,533.28 which he seeks pursuant to the terms of the 2015 contract. AASPA submits that it is in the interests of justice that this issue be fully ventilated at a trial. It warns that it would be contrary to public policy for the default judgment to stand in such circumstances.

¹⁶ HCVAP 2009/021 at paragraph 30

¹⁷ DOMHCV2010/0021

¹⁸ HCVAP 2009/021 also at paragraph 30

- [60] Mr. Hodge's main submissions on this issue are in relation to his fundamental evidential objection dealt with earlier. In his affidavit in opposition, Mr. Hodge depones that he has been advised by his counsel that "the issue as to whether the contract was *ultra vires* null and void is not an exceptional circumstance entitling the Applicant to set aside the Default Judgment...".
- [61] Mr. Hodge submits that Mr. Williams' affidavit in support is wholly inadequate in that there is no evidence before the court to enable the court to exercise its discretion to discern whether there are compelling reasons to show that the contract was *ultra vires* null and void and setting out a case why the AASPA should be permitted to defend the proceedings in which the default judgment has been obtained. Mr. Hodge contends that there is no evidence before the court to show that the circumstances of the case are truly exceptional.
- [62] Mr. Williams, he states, formed no part of his employment or dismissal and has simply made a bald assertion that the 2015 contract was *ultra vires*. He submits that the investigative report exhibited is replete with hearsay and irrelevant evidence which has no probative value and is highly prejudicial.
- [63] Mr. Hodge posits that the court is left to speculate on the evidence justifying the claim that the contract was *ultra vires* and submits for the purposes of this issue, the evidence produced is unsatisfactory and the court should dismiss the application on this ground.
- [64] On this point, Mr. Hodge concludes that the defence raised is not an exceptional circumstance and that there is no basis for setting aside the judgment of Mr. Hodge under CPR 13.3(2) and that the application should be dismissed.
- [65] AASPA's breach of the rules by its failure to exhibit a draft defence has resulted in this court ruling that AASPA has not satisfied the requirement in CPR 13.3(1)(c). Under this head, however, I will consider the evidence of Mr. Williams that raises AASPA's *ultra vires* point under the sub-head "Exceptional circumstances". Paragraph 12 (iii) of his affidavit in support of the application reads as follows:

"Even if Mr. Hodge's claim were to succeed, he is not entitled to the quantum sought by him because his employment contract dated 5th March 2015 (which introduces an annual gratuity and mandatory payment of five (5) year's salary in lieu of notice) is ultra vires in that it was negotiated and executed by AASPA's then

Chairman who had no authority under sections 10 and 11 of the AASPA Act to do so.”

[66] A search for the **Mariette Warrington** case on the Eastern Caribbean Supreme Court’s website reveals that the Court of Appeal dismissed Ms. Warrington’s appeal maintaining that the failure of the Board to get the Prime Minister’s advice meant that any agreement the Board entered into for the appointment Ms. Warrington as manager would be void and unenforceable.¹⁹

[67] The search further reveals that Ms. Warrington successfully took her case to the Caribbean Court of Justice (“CCJ”), the final appellate court for the Commonwealth of Dominica.²⁰ In allowing the appeal, the CCJ engaged in a discourse on the meaning of “acting on the advice of the Prime Minister”, and pronounced:

“The good sense of the modern approach invites a similar conclusion, in the present case, that it is unlikely that it was the purpose of Parliament that a failure to obtain the formally conveyed advice of the Prime Minister to renew the appointment should result in its invalidity, if no purpose could be served by the consequence of invalidity. It is manifest, on the facts of this case, where the Prime Minister accepted the fact of Ms. Warrington continuing to perform as General Manager, that the failure to obtain the Prime Minister’s advice in a formal manner was a trifle. As stated, the Prime Minister’s approval and acquiescence amounted to retrospectively advising on the appointment. This Court is satisfied that Parliament did not intend such a trifling failure to result in the invalidity of the appointment.”²¹

[68] Earlier in the **Mariette Warrington** judgment, Mr. Justice Barrow expounded on what is AASPA’s contention as in **Quorum Island (BVI) Limited**. His Lordship opined:

“To decide whether invalidity is the consequence of non-compliance, it must first be considered what Parliament intended would be the consequence of failure to satisfy the requirement. A good first step in that process is to consider how integral to the exercise of the power is compliance with the requirement, and that analysis calls for an examination of the relevant provisions of the Broadcasting Act.”²²

[69] I remind myself that this is an application to set aside default judgment, and not a summary judgment or strike out application. By the default judgment, AASPA lost its opportunity to

¹⁹ DOMHCVAP2013/0007 at paragraph 50

²⁰ DMCV2018/001; [2018] CCJ 31 (AJ)

²¹ Ibid at paragraph 39, per Mr. Justice Barrow

²² Ibid at paragraph 30

ventilate the facts, law and issues raised by or emerging from the claim. By its very nature, this is the consequence of a default judgment. AASPA's verbatim submission in attempting to convince the court that Mr. Hodge's claim is not maintainable is that "it is arguable that AASPA's defence as outlined above and established by the evidence before this Court demonstrates a high degree of certainty that Mr. Hodge's claim which is premised on the ultra vires 2015 contract will fail". This is below the threshold laid down by Pereira CJ in **Carl Baynes v Ed Meyer** for the establishment of an exceptional circumstance. An arguable case as to whether Mr. Hodge's contract of employment was *ultra vires* does not equate to a demonstration of a high degree of certainty that Mr. Hodge's claim will fail. Accordingly, I rule that the *ultra vires point* submitted by AASPA is not an exceptional circumstance enabling the court to set aside the default judgment pursuant to CPR 13.3(2).

Limitation defence

[70] AASPA posits that Mr. Hodge's claim is statute-barred by the six-month period provided by section 1(1) of the Public Authorities Protection Act ²³ ("PAPA"). It is submitted that contrary to Mr. Hodge's assertion in his affidavit in opposition to the application, the six month period applies to this case. Section 1(1) of PAPA provides as follows:-

"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;" (*Emphasis added*)

[71] AASPA states that the act, neglect or default complained of by Mr. Hodge in his claim at bar is with respect to the termination of his employment by AASPA. It is AASPA's case that PAPA affords it protection in that Mr. Hodge's termination, and thus his claim, arose in the

²³ c. P115 of the Revised Statutes of Anguilla

execution of its public obligation owed to the public generally rather than out of a private obligation.²⁴

- [72] Mr. Hodge contends that this is not a case in which AASPA is entitled to the protection in section 1(1) of PAPA. Mr. Hodge's argument is that in order for PAPA to apply, AASPA has to claim that he was acting within his statutory or public duty when he issued the suspension letter. I am in agreement with AASPA's submission that this argument is misconceived. It is not Mr. Hodge who is seeking protection. To be afforded the protection in section 1(1) of PAPA, AASPA has to show that the termination of Mr. Hodge's employment was done in the pursuance or execution of a public duty or authority.

Was the breach of contract complained of by Mr. Hodge, the termination of his employment, an act, public duty or authority under section 1(1) of PAPA?

- [73] AASPA posits that pursuant to section 17(1)(d)(i) of the AASPA Act, it is under a statutory (and also a public) obligation to "manage and operate the ports **as appears to be best calculated to serve the public interest**". (*Emphasis added*) AASPA alleges that instead of providing technical guidance to AASPA or seeking and receiving direction/approval, Mr. Hodge unilaterally decided to send the suspension letter which was a policy decision that affected AASPA's management and operation of CJLIA. It argues that it is thus impossible to contend that in dismissing Mr. Hodge (whose actions and conduct directly affected its ability to execute its primary purpose and function of managing the air and sea ports of Anguilla) was somehow not acting in furtherance of its main statutory duty. AASPA submits that its actions in dismissing Mr. Hodge were done in execution of its main purpose and function. It argues that it could not effectively manage CJLIA with a CEO whose abilities, ethics and competencies came into question and whose conduct directly impacted AASPA's ability to execute its statutory and/or public function.

- [74] AASPA maintains that the evidence before this court establishes that Mr. Hodge was dismissed because his actions and conduct directly affected AASPA's ability to discharge its main statutory function. It relies on the decision of the Privy Council in **Duffus v**

²⁴ See *Edwards v Antigua Public Utilities* No. 298 of 1995 (Appealed – Civil Appeal No. 17 of 2000; and *Antigua Public Utilities Authority v Malcolm Alphonso Edwards*, Privy Council, Oct. 2, 2003)

National Water Commission.²⁵ In that case out of Jamaica, Mr. Duffus was employed by the National Water Commission (“NWC”), a statutory body established under the National Water Commission Act. NWC’s statutory function was to supervise the provision of water supply throughout Jamaica. Mr. Duffus brought an action for damages for breach of contract claiming he was unlawfully terminated. The learned judge at first instance found in his favour. The Court of Appeal allowed NWC’s appeal. The Privy Council dismissed Mr. Duffus’ appeal. At first instance, the learned trial judge rejected NWC’s defence that the claim was statute-barred pursuant to PAPA. He held that “the actions of [NWC] cannot be said to have been done in execution of the purpose of the [National Water Commission Act]”. Their Lordships found this “an astonishing conclusion” and adopted the position of the Court of Appeal that Mr. Duffus’ claim was statute-barred by virtue of section 2(1) of the PAPA of Jamaica. The cause of action for wrongful dismissal had accrued on 28th May 1990, the date of the termination letter and the action was commenced on 9th March 1992, almost two years later.

[75] AASPA applies the reasoning in **Duffus** and submits that it cannot be suggested that such steps, (involving the termination of Mr. Hodge) were taken otherwise than in the execution of AASPA’s statutory purposes. AASPA maintains that it is, in the circumstances of this case, afforded protection by PAPA in relation to its dismissal of Mr. Hodge. AASPA posits that its statutory duty under the AASPA Act is owed to all the public generally in Anguilla and concludes that AASPA is accordingly entitled to protection because it was acting under the AASPA Act and/or in direct execution of a public duty at the time of Mr. Hodge’s dismissal. This limitation defence, AASPA submits is an exceptional circumstance since it is a “knock-out punch” in relation to Mr. Hodge’s claim.

[76] AASPA is of the view that consideration of this issue requires full evidence that can only be adduced at trial. However, it urges the court to consider the merits of its case on this point and find that its conduct in terminating Mr. Hodge was integral to AASPA’s main purpose and function of managing the ports and as such within the very words of section 1(1) of PAPA.

²⁵ [2007] UKPC 35

[77] Mr. Hodge counters that a public authority is not protected by PAPA on every occasion that it is alleged to have caused harm to someone. He correctly states that the act complained of must be done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority. In the case of **The Attorney General of the Virgin Islands v Daphne Alves**,²⁶ Mitchell JA [Ag.], in dealing with the interpretation of the equivalent section of the British Virgin Islands PAPA, referred to an explanation of the mirroring section the 1893 UK legislation given in **Bradford Corporation v Myers**²⁷ by Lord Buckmaster LC as follows:

“In other words, it 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 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.”

[78] Mr. Hodge proffers that in light of the stringent effect that section 1(1) of PAPA has on the ordinary rights of individuals in bringing their claims, when applying the provision, the words in the section must be literally interpreted and not given an interpretation other than what the words state. In **Daphne Alves**,²⁸ Mitchell JA [Ag.] went on to quote Viscount Haldane in **Bradford Corporation** as follows:

“My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority.”

[79] The learned Justice of Appeal further took on board the following pronouncements of Lord Atkinson:

“One cannot find, therefore, the obligation or duty to deliver with reasonable care, for the breach of which the action is brought, except in the contract made with a particular individual, the respondent. The only duty owed by the appellants to him emerges from that contract, not from the statute. It is a duty owed to one man, not to the public. The negligence of the appellant’s servants complained of was not therefore, a neglect or default in the execution of any “public duty or authority”. It

²⁶ BVIHCVAP2011/0065 at paragraph 7

²⁷ [1916] 1 AC 242

²⁸ BVIHCV2011/0065 at paragraph 8

was a neglect or default in the discharge of a private duty due to one individual, and arising altogether out of that individual's contract with the public authority. Into this contract both the parties to it were free to enter or to abstain from entering.”

[80] In my view, AASPA's prevails on this point. On the authority of **Duffus**, the termination of Mr. Hodge's employment in the circumstances of this case can amount to an act done in the execution and purpose of the AASPA Act and can be construed as part of AASPA's statutory obligation to “manage and operate the ports as appears to be best calculated to serve the public interest”, and that AASPA's act of dismissing Mr. Hodge was done in direct pursuance of the provisions of the AASPA Act. Therefore, it appears that this is a case in which AASPA can be afforded the protection of a limitation defence under section 1(1) of PAPA.

[81] There is no dispute that Mr. Hodge's cause of action arose on 21st October 2016, the date of his termination letter. The claim was filed on 23rd August 2021, four years and ten months later. If AASPA is to be afforded the protection in section 1(1) of PAPA, the filing of the claim is well outside the six-month period stipulated for bringing an action against it.

[82] Taking heed of AASPA's contention that this court is not required to determine whether the claim is statute-barred, and being cautious not to engage in a mini-trial, it is evident that AASPA's intended limitation defence can succeed. I am of the view that this limitation defence is a “knock out point” constituting an exceptional circumstance warranting the setting aside of the default judgment. In the circumstances of this case, including the applicable law, which suggests that AASPA can be afforded the protection under section 1(1) of PAPA, it appears that AASPA can succeed on a limitation defence.

Conclusion

[83] In summary, I find that AASPA applied to the court to set aside the default judgment as soon as reasonably practicable after finding out that judgment in default had been entered, AASPA did not give a good explanation for the failure to file the defence on time and has not shown that it has a real prospect of successfully defending the claim. This means that the defendant has not satisfied the conjunctive requirements of CPR 13.3(1). However, AASPA has satisfied the court that there are exceptional circumstances to enable it to set aside the default judgment under CPR 13.3(2).

Order

[84] In light of the foregoing, it is hereby ordered as follows:

- 1) The application to set aside default judgment is granted.
- 2) The default judgment entered on 10th September 2021 is set aside.
- 3) The acknowledgement of service filed on 15th September 2021 is deemed properly filed.
- 4) AASPA shall file and serve its defence within 14 days of the date of this order.
- 5) Thereafter, the claim shall take its normal course in accordance with CPR 2000.
- 6) Given the nature of these proceedings, AASPA shall pay Mr. Hodge costs of the application in the sum of EC\$1,500.00.

[85] I thank both Counsel for their submissions in this matter.

Tamara Gill
Master

By the Court

Registrar