EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO.: BVIHCV 2016/0319

BETWEEN

WAKEEM GUISHARD

Claimant

and

THE ATTORNEY GENERAL

Defendant

Appearances:
Jamal Smith for the claimant
Vareen Vanterpool for the defendant

2017: June 7
October 24

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[1] **GLASGOW, M:** The defendant/applicant, ('the Attorney General') has applied to set aside a default judgment obtained by the claimant/respondent ('Mr. Guishard') on 17th March 2017.

The relevant background

[2] The Attorney General has, in written submissions filed on April 4th 2017, helpfully assisted to set out the relevant factual matrix. The claim form and statement of claim were filed on 2nd December 2016. The same were served on the office of the Attorney General on 13th December 2016. There is some quarrel between the parties as to when the documents were indeed served. The Attorney General says that the documents were served on 8th December 2016 while Mr. Guishard asserts

that he served them on 13th December 2016. The parties seem to have moved on from this debate and the arguments proceeded on the basis that the claim was served on 13th December 2016. The discourse on this issue seemed pointless in any event since both sides agree that no defence was ever filed by the Attorney General. In fact the only documents in response to the claim filed by the Attorney General were an acknowledgment of service filed on 12th January 2017 and a request for an extension of time to file a defence filed on 3rd February 2017('the extension application'). It is agreed that the latter date was outside of the time to file the defence whether the claim was served on the 8th or 13th December 2016.

[3] On the 23rd December 2016 counsel in the Attorney General's office, Hakim Creque sent correspondence to Mr. Jamal Smith, counsel for Mr. Guishard informing him of the Attorney General's receipt of the claim form and other documents. The correspondence also informed counsel that crown counsel assigned to respond to the claim was out of office and that she would respond to the claim when she returned to office. It is also accepted by both sides that no acknowledgment of service or defence was filed on, before or after 23rd December 2016 when the letter was sent by Mr. Creque to Mr. Smith. As stated above, an acknowledgment of service was filed on 12th January 2017. This document was filed outside of the time to file the same and even outside of the time to file a defence since the date of service of the claim was 13th December 2016. Mr. Guishard's responded to the Attorney General's failure to file a defence by filing a request for judgment in default of defence on 13th January 2017.

[4] As recited above, the Attorney General filed the extension application on 3rd February 2017. When the court heard the extension application on 17th March 2017, it considered both the application and Mr. Guishard's request for a judgment in default of defence which had been filed previous to the extension application. The court found that a default judgment ought to be entered against the Attorney General on the basis that the request for default judgment was filed prior to the Attorney General's extension application. Judgment was therefore entered for Mr. Guishard with damages to be assessed. On 20th March 2017, the Attorney

General applied to set aside the default judgment ('the setting aside application'). The application was amended on 4th April 2017 to add an additional ground.

Grounds for the Attorney General's application

The Attorney General's first affidavit

[5] On 20th March 2017, the first affidavit in support of the setting aside application was filed by Mr. Creque, on behalf of the Attorney General. Counsel testifies that when the claim was received by the Attorney General's office on 13th December 2016 it was assigned to crown counsel, Ms. Vareen Vanterpool on 14th December 2016. He explains that internal record keeping moved the file through the record keeping process and then on to assigned counsel. I am not told in the affidavit how long this process ensued or when the file actually reached crown counsel's desk.

[6] Mr. Creque's affidavit indicates that on 23rd December 2016 he became aware of the claim when he asked to assist. I am not told what exactly the request for assistance entailed but the affidavit advises that a crown counsel assumes full conduct of a claim when it is assigned by the Attorney General except in cases where the assigned crown counsel seeks the assistance or participation of another crown counsel.

[7] Mr. Creque further explains that after the file was passed to him for his assistance, crown counsel Ms. Vanterpool informed him that she had fallen ill and was out of office from 16th December 2016 to 30th December 2016. She resumed her duties on 3rd January 2017. In an effort to assist counsel with the claim, Mr. Creque says he dispatched the 23rd December 2016 letter to Mr. Smith, the lawyer for Mr. Guishard in which he informed Mr. Smith that counsel assigned to the claim was out of office and that she would properly respond to the claim on her return.

[8] Mr. Creque also gives insight into the extent of his involvement at that point. He says that he did no more than send the letter to Mr. Smith since he[1]

> *did not receive instructions to act otherwise, including whether I should prepare an acknowledgment of service or not and so I did not proceed to pre-empt any action of assigned counsel by doing so. I verily believed that PCC Vantepool would have taken all appropriate actions relative to representing the Attorney General in this matter upon her return although I did not at that time have information on when she would have returned to Chambers*.

[9] The affidavit of Mr. Creque then summarizes what transpired on Ms. Vanterpool's return to office on 3rd January 2017. Ms. Vanterpool then reviewed the file for the first time and immediately commenced research on [2]

> *the legal matters arising in the claim and conjunctively she commenced the actions of obtaining necessary instructions from the police officers and crown prosecutors involved in order to construct the defendant's statement of defence.*

[10] The claim filed by Mr. Guishard is one for relief for alleged wrongful arrest, false imprisonment and malicious prosecution. Paragraphs 12 to 15 of Mr. Creque's affidavit outlines the history of the criminal proceedings against Mr. Guishard that commenced with police investigations in September 2010 and thereafter led to the arrest and prosecution of Mr. Guishard and others from May 2014 to May 2016. The court is told that Ms. Vanterpool was not tasked with the conduct of the criminal proceedings against Mr. Guishard. Accordingly she would have had to do extensive gathering of information and research in order to prepare to answer the claim brought by Mr. Guishard against the Attorney General. At paragraphs 15 and

[1] Para. 8 of the affidavit of Hakim Creque filed on 20th March 2017
[2] Ibid at para. 10

16 of his affidavit, Mr. Creque sought to provide some evidence as to why a defence was not filed when Ms. Vanterpool returned to office –

> *… while still researching this matter, PCC inadvertently missed the date for filing the defence …, but in an effort to indicate to the court and the claimant of the defendant's intention to defend, albeit outside of the time prescribed to file an acknowledgment of service and statement of defence Parts 9 and 10 of the Civil Procedure Rules 2000, PCC Vanterpool filed an acknowledgment of service on 12th January 2017, intending to file an application for an extension of time for filing an acknowledgment of service and the defence as soon as possible after that date.*
>
> *… PCC Vanterpool commenced but not completed **[sic]** the statement of defence of the defendant/applicant by 10 January 2017 but instead of applying for an extension of time to file the defence at that time, PCC Vanterpool thought it best to complete the work on the statement of defence so that the draft defence could be appended and considered upon a notice of application for an extension of time.*

[11] Mr. Creque then concludes the affidavit by imploring the court to find that the Attorney General has a defence with a realistic prospect of succeeding on the basis that the police were justified in their arrest and prosecution of Mr. Guishard.

The other affidavit filed by the Attorney General

[12] On 4th April 2017, Mr. Creque filed another affidavit on behalf of the Attorney General ('the further affidavit') in which he outlines additional reasons for the failure to file a defence. Mr. Creque's further evidence is that counsel considered that, given the nature of the matter, the defendant considered that an application

for an extension of time should be made to the court '*rather than seeking a consent order from the Respondent…'.*[3]

[13] The further affidavit also indicates that some deliberations ensued on the necessity of filing a draft defence. Counsel formed the view that the Attorney General was not in a position to file an application for an extension of time even after realizing that the deadline for filing a defence had passed as the draft defence had not been '*yet been fully constructed*'.[4] Counsel took the view that filing an acknowledgment of service out of time would '*…flag to the respondent and the court … the applicant's interest in the matter.*'[5]

[14] The further affidavit also expands on the assertion that the claim does not disclose grounds on which an action for wrongful arrest, false imprisonment and malicious prosecution can be maintained. It is said that *these 'significant deficiencies which will, due to established legal principles, cause this claim to be dismissed, amount to exceptional circumstances … for the purposes of rule 13.3(2) of the CPR.'*[6] Mr. Creque recounts the fact that the criminal proceedings against Mr. Guishard[7]

> *passed through two judicial filtering stages in assessing the evidence relative to the charge... namely the establishment of a prima facie case before the magistrate, and the passing of no case submission level before the High Court, in handing over the prosecutor's case to the Respondent to answer. These factors of themselves establish that there was a reasonable case before the courts for the respondent to answer*.

Mr. Guishard's evidence in response

[15] Mr. Guishard filed 2 affidavits in response, one on 28th March 2017 and the other on 4th May 2017.

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[3] Para. 2 of the affidavit of Hakim Creque filed on 4th April 2017.
[4] Ibid at para. 3
[5] Ibid
[6] Supra note 3 at para.5
[7] Ibid at para.5

Mr. Guishard's affidavit of 28th March 2017

[16] In this affidavit, Mr. Guishard recites receipt of the 23rd December 2016 letter from Mr. Creque. He complains that between the date of the letter and the deadline for filing an acknowledgment of service on 28th December 2016, he received no request for an extension of time to file a defence. He avers that he would not have objected to the same if it was requested. He points to the fact that the Attorney General only filed an acknowledgment of service on 12th January which was[8]

> *14 clear days after the deadline to file the acknowledgment of service and some 8 clear days after counsel with conduct of the matter for the defendant is alleged to have first become aware of the matter…*

[17] Mr. Guishard further states that he received no request from the Attorney General for an extension of time between 23rd December 2016 when the letter was sent from Mr. Creque and the deadline for filing a defence on 11th January 2017. Thereafter he filed the request for default judgment on 13th January 2017. Mr. Guishard also recites the history of the proceedings before the master which resulted in the grant of the default judgment.

[18] Mr. Guishard also complains that there is no proper accounting for what transpired when the claim was served on the Attorney General. Among his complaints are the fact that –

(1) Nothing is said about what happened to the claim when it was assigned to counsel Vanterpool on 14th December 2016. In particular no account is given of what if anything was done by assigned counsel before she proceeded on leave on 16th December 2016;

[8] Mr. Guishard's affidavit filed on 28th March 2017 at para. 6

(2) Counsel Vanterpool was away on leave from 28th December 2016 to 30th December 2016 but the nature of this second period of leave has not been identified. Mr. Guishard questions whether counsel Vanterpool was on scheduled leave and whether another crown counsel could have been assigned to assist with the claim;

(3) Mr. Guishard questions the veracity of the assertion in Mr. Creque's affidavit that counsel Vanterpool was off on sick leave since this was not indicated in the 23rd December 2016 letter from Mr. Creque to him. He also found it strange that the file was not assigned to any other counsel in the Attorney General's Chambers which has *'no fewer than 12 law officers'*[9] He expresses the view that it was sufficient that the Attorney General was aware of the claim by 23rd December 2016 and did not respond. He says that it was irrelevant whether crown counsel Vanterpool was aware of the claim;

(4) The statements about the resources of the crown on the criminal proceedings against Mr.Guishard were, in his opinion, 'unhelpful' since they do not explain[10]

> *What steps were taken from 3 January 2017 and 12 January 2017 when the Acknowledgment of Service was filed and whether at that point PCC Vanterpool would have known that she needed to make an application for extension of time, or at least request my agreement for an extension of time.*

(5) Mr. Guishard further complains that crown counsel did not seek his consent to an extension of time but instead filed an application for the same with the court. He says that Ms. Vanterrpool could have easily

[9] Supra, note 7 at para. 20
[10] Ibid

sought his consent to an extension of time but she chose to file an application on 3rd February 2017 which date was after the deadline for filing a defence. In all the circumstances he asked that the court refuse the request for the default judgment to be set aside.

Mr. Guishard's affidavit of 4th May 2017

[19] In the 4th May 2017 affidavit, Mr. Guishard responded to the Attorney General's further affidavit as follows –

(1) The Attorney General's assertion that the matter was not amenable to a consent order is incorrect. Indeed his lawyer Mr. Smith and senior crown counsel in the Attorney General's office had previously held discussions on the possibility of resolving the claim. He was therefore surprised when he received Mr. Creque's 23rd December 2016 letter. The receipt of the acknowledgment of service filed on 12th January 2017 was also surprising since he anticipated that the Attorney General would have requested his consent to an extension of time to file a defence and as such facilitate the settlement discussions;

(2) Mr. Guishard also comments on the Attorney General's assertion that exceptional circumstances exist in this claim due to the fact that the evidence against Mr. Guishard was subject to 2 stages of 'judicial filtering'. Mr. Guishard avers that this does not amount to exceptional circumstances for the purposes of CPR 13.3(2). Mr. Guishard then explains that the first part of the matter before the magistrate were *'merely a paper committal that operated as a simple rubber stamp of the prosecution's case as presented'.*[11] He further states that the hearing of an application before the criminal trial judge for the proceedings to be dismissed on the basis that there was no case to answer could not

[11] Mr. Guishard's affidavit of 4th May 2017 at para. 8

amount to a judicial filtering process of the evidence as the trial judge found that the case for the prosecution[12]

> *rose and fell on the believability of the Crown's key witness, Mr. Terrance Abdullah Charles, and as such it was not for the court to take away the function of the jury in that particular case*.

(3) Mr. Guishard also refutes the assertion that his statement of claim does not disclose *'proof of malice and failure to possess reasonable and probable cause'*[13].

Submissions on behalf of the Attorney General

[20] The Attorney General relies on CPR 13.3(1) and (2) to support the arguments that the default judgment ought to be set aside.[14] In the submissions filed on 4th April 2017, it is accepted that an applicant must fulfill the conjunctive requirements of CPR13.33 (1) if the court is to set aside a default judgment in accordance with this rule: **Kenrick Thomas v RBTT Bank Caribbean Ltd.** [15] It is argued that the Attorney General has met all the requirements of CPR 13.3(1) but that in any event, there are exceptional circumstances which dictate that the default judgment must be set aside in accordance with CPR 13.3(2).

[21] In respect of the submission that the provisions of CPR 13.3(1)(a) have been met, the Attorney General urges the court to find that the setting aside application was filed as soon as reasonably practicable after finding out that judgment had been entered. In this regard, it is noted that the learned master granted the default judgment on 17th March 2017. The setting aside application was filed on 20th March 2017 which was the next practical day for filing a document at the court

[12] Ibid at para.9
[13] Supra, note 10, at para. 10
[14] Submissions for the Attorney General were filed on 4th April 2017 and on 2nd June 2017
[15] GDAHCVAP No.3of 2005

office. The Attorney General further argues that the proper course was taken to immediately file the application even though 'a final judgment is outstanding'. I observe that there is some contest between the parties as to whether it was proper for the Attorney General to file the setting aside application before the master's order was sealed by the court and signed by the registrar (CPR 42.4(2)). The Attorney General accepts that the setting aside application was made before the sealed and signed copies were retrieved by Mr. Guishard and served on the Attorney General. However, it is submitted that[16]

> *A prudent party that finds itself faced with a regularly entered default judgment should always proceed to act promptly to make its application to set aside the default judgment, to be consistent with CPR 13.3(1)(a) and the Applicant considers that it has done so in this case.*

[22] In respect of CPR13.3(1)(b), it is submitted that the application meets the procedural requirement that an applicant for a setting order provide a good explanation for the failure to file an acknowledgment of service or a defence as the case may be. In this regard the Attorney General proffers the following as good reasons –

(1) The 2 week period of sick leave and annual leave of crown counsel Vanterpool during which time she was assigned the conduct of this claim without her knowledge;

(2) Ms. Vanterpool's difficulty in obtaining all the required instructions, records and information from various sources;

[16] Attorney General's submissions filed on 4th April 2017 at para. 15. The Attorney General relies **on Dipcon Engineering Services Ltd v Bowen & Anor** [2004] UKPC 18, **Alpine Bulk Transport Company Inc v Saudi Eagle Shipping Company Inc.** [1986] 2LLR 221, **Lunnun v Singh** (All England Official Transcripts (1997-2008**), Evans v Bartlam [1937] A.C 473**, **Strachan v The Gleaner Company Ltd & Anor** [2005] UKPC 33

(3) Ms. Vanterpool's[17]

> *mistaken view that an application to the court for an extension of time should attach the draft defence, which draft defence had been commenced but was not concluded by the due date of the Defence, being 10 January 2017*.

[23] The case of **Sylmord Trade Inc v Intec Beteilgungs AG**[18] presented as authority for the view that the reasons proffered by the Attorney General are adequate for the purposes of CPR 13.3(1)(b). In that case, the Court of Appeal approved the pronouncement of his Lordship Bannister J on what may amount to 'a good explanation' [19]–

> *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.*

[24] The Attorney submits that none of the conduct in this case demonstrates *'an indifference to the risk that judgment might be entered against the Applicant.'*[20] Indeed the Attorney General strenuously maintains that[21]

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[17] Supra, note 14 at para. 18
[18] Claim No: BVIHCM (COM) 120 of 2012; the Attorney General also relies on the case of **The Attorney General v Universal Projects Limited** [2011] UKPC 37
[19] **Sylmord Trade Inc v Intec Beteilgungs AG** Claim No: BVIHCM (COM) 120 of 2012 at para. 15
[20] Ibid at para.18
[21] Ibid at para.19

The present facts disclose that the Applicant took certain positive steps to prepare and construct its defence, but yet failed to meet the due date to file the Defence. Also, as to taking other steps, such as filing an application to extend time immediately before the expiration or shortly thereafter, the evidence is that Applicant reasoned (in mistake)that it was judicially preferred that a draft defence is attached to any such applications, and the Applicant needed to complete this before making such an application. The … evidence could demonstrate the Applicant's state of muddle or confusion perhaps but not "indifference" to the real risk of the entering of a default judgment.

[25] The Attorney General asserts that there are real prospects of successfully defending the claim as stipulated in CPR 13.3(2)(c). The law on wrongful arrest, false imprisonment and malicious prosecution as stated in the cases of **Margaret Joseph v The Attorney General and Raphael Hamilton**[22], **Dallison v Caffrey**[23] , **Albert August v Bertie Ferdinand and the Attorney General**[24] and **Williamson v Attorney General of Trinidad and Tobago**[25] is recited in support of this view. It is submitted that the draft defence attached to the setting aside application pleads that the criminal charges and case against Mr. Guishard proceeded on reasonable and probable grounds. The essence of the defence is that the charge and case against Mr. Guishard were based on the statement of one Mr. Terrance Charles which account '*was corroborated by other witnesses and reports'*. [26] The Attorney General refutes the complaint that the criminal proceedings against Mr. Guishard were conducted with malice as the sole or dominant purpose. The reason for this is said to be the 'judicial filtering' of the evidence against Mr. Guishard which includes the evidence of the witness Mr. Terrance Charles at both the levels of the magistrate and high court.

[22] GDAHCVAP 9 OF 2003
[23] [1964] 2AER 610
[24] SLUHCV 2008/0647
[25] [2014] UKPC 29
[26] Supra note at para. 32

[26] The Attorney General's submissions concludes with arguments that the *'strict approach to Rule 13.3(1) is tempered by Rule 13.3(2) is **[sic]** a proper case in which "exceptional circumstances" arise'.*[27] The Court of Appeal's instruction on what amounts to exceptional circumstances is recited in support of the view that the default judgment may be set aside due to exceptional circumstances. In the case of **Baynes v Meyer**[28]**,** Chief Justice, Dame Janice Pereira elucidated that[29]

> *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 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 being 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 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*

[27] Supra note 16 at para. 34
[28] ANUHCVAP2015/0026
[29] Baynes v Meyer ANUHCVAP2015/0026 at para. 26

sought or granted was not one available to the claimant. This list is not intended to be exhaustive

[27] In this regard, Mr. Guishard's statement of claim is said to be meritless and bound to fail for its failure to reveal –

(1) That the detective, Jomo Shortte '*had no reasonable grounds for suspecting that the Claimant had unlicensed fire arms and ammunition at his premises, wrongfully and without reasonable cause sought a search warrant against the Respondent;*[30]

(2) *Establish and prove that Detective Sergeant Laroque's decision to charge the Respondent was perverse and the arrest was wrongful;*[31]

(3) *That the charge which was brought by the Applicant was malicious and without reasonable cause.*[32]

[28] The court is also asked to consider that the criminal case against Mr. Guishard involved extensive investigative analysis, legal research and judicial action by the police, magistrate and high court. Mr. Gusihard's pleadings do not bear out any 'illegitimate or oblique' motive on the part of any of these individuals. The pleadings at their highest are said to contain averments of Mr. Guishard's involvement in another criminal case without establishing linkages with the police named in the claim form. Further, the pleadings that the main witness Mr. Terrance Charles concocted evidence to implicate Mr. Guishard do not amount to malice on the part of the police officers or show that the prosecution had any other motive than to bring Mr. Guishard to justice. The court is therefore asked to find that there are exceptional circumstances as the claim is doomed to fail[33].

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[30] Supra note 16 at para 37
[31] Ibid
[32] Ibid
[33] The Attorney General filed further and closing submissions on 2nd June 2017 but these further submissions were largely expansions on the previously filed submissions on the issues which sufficiently addressed the questions to be decided by the court.

The arguments for Mr. Guishard

[29] Mr. Guishard filed submissions on 24th March 2017 in which, among other things, he challenged the Attorney General's posture that the CPR 13.3(1) threshold has been met in order for the default judgment to be set aside.

[30] In respect of the assertion that the setting aside application was made as soon as practicable after the Attorney General became aware of the default judgment, Mr. Guishard argues that no default judgment has been entered to date. His view is that the learned master's order would first have to be sealed by the court and signed by the registrar pursuant to CPR 42.4. The sealed and signed order would then be served on the Attorney General. No order was entered before the 20th March 2017 when the Attorney General filed the setting aside application. The application is therefore premature and should be dismissed.

[31] In respect of whether there were good reasons for the Attorney General's failure to file an acknowledgment of service or defence within time, Mr. Guishard submits that there are no good reasons presented to the court. He contends that there is no evidence as to what transpired between 3rd January 2017 when Ms. Vanterpool returned to office and 11th January 2017, the deadline to file the defence or 3rd February 2017 when the extension application was filed. He submits that the Attorney General could have taken several procedural steps between those periods to avoid running afoul of the rules. He observes that having missed the procedural deadlines, the Attorney General took no other step but to file a belated acknowledgment of service. The court is asked to find that the Attorney General's office has no less than 12 law officers. It was inappropriate that no one in the office took up the claim filed by Mr. Giushard to ensure that the procedural deadlines were met.

[32] In further submissions filed on 11th May 2017, Mr. Guishard addressed the Attorney General's added ground of exceptional circumstances. With regards to

the evidence set out in Mr. Creque's 4th May 2017 affidavit in support of this ground, Mr. Guishard's contends that –

(1) If there was an intention to seek an extension of time, this was done way past the deadline for filing the defence. Such a 'blatant disregard' for the rules should not be countenanced as 'exceptional circumstances. The court is asked to consider the learning in **Marina Village Ltd v St. Kitts Urban Development Corporation**[34]**;**

(2) The mistaken belief that counsel needed to attach a draft defence to the extension application and the delay ensuing while counsel waited to complete the defence cannot amount to exceptional circumstances;

(3) The notion that there can be no claim for wrongful arrest, false imprisonment or malicious prosecution because underlying criminal proceedings have gone through 2 judicial filtering process cannot be supported on legal principles;

(4) At the magisterial level the quality or strength of the evidence against Mr. Guishard was not considered as it was a mere paper committal. At the high court level, the trial judge found that it was for the jury to decide on the credibility of the prosecution's main witness.

(5) The Attorney General misunderstands the sense in which malice is required for a claim of malicious prosecution. Malice in this case is the absence of reasonable conduct and the absence of a desire on the part of the prosecution to secure the ends of justice[35];

(6) The statement of claim recites the fact that after criminal proceedings against Mr. Guishard were dismissed on 24th April 2014, he brought a

[34] SKBHCVAP2105/0012

[35] Clerk and Lindsell on Torts, 21st Ed., Chap 12, paras. 16-52 to 16-59 is presented as authority for this proposition.

defamation claim against Media Expression Limited dba BVI News Online on 30th April 2014. About 7 days after the defamation claim was filed, the police obtained a search warrant to search his premises in relation to the murder of one Darren "Tiger" Hodge. Mr. Hodge's murder was committed 3 years prior to the search warrant. There was no reasonable basis to suspect that Mr. Guishard would have possession of a firearm or even the firearm which was allegedly used to commit Mr. Hodge's murder 3 years ago;

(7) The statement of claim also alleges that the search warrant produced nothing relevant to Mr. Hodge's murder. Notwithstanding, Mr. Guishard was interviewed by police for about an hour and then was charged with murder without any further evidence;

(8) Based on these averments Mr. Guishard's statement of claim has set out a case for the lack of reasonableness.

[33] In closing submissions filed on 2nd June 2017, Mr. Guishard points out that –

(1) The Attorney General's additional grounds for bringing the setting aside application were indicated and particularized in Mr. Creque's affidavit of 4th May 2017 and in the further submissions filed by the Attorney General. This was a clear violation of the rules and the learning that the grounds for bringing an application must be clearly stated in the notice of application[36];

(2) The case of **Public Works Corporation v Mathew Nelson**[37]and the Privy Council judgment in **The Attorney General v Universal Projects Limited**[38] are presented as authorities for the proposition that administrative difficulties cannot be used to demonstrate exceptional

[36] **Raymond Dupres v Clifford George et al SLUHCVAP 2005/0047** is presented as authority for this submission.
[37] **DOMHCVAP2016/0007**
[38] [2011] UKPC 37

circumstances pursuant to CPR 13.3(2). Mr. Giushard then repeats its arguments on the various alleged missteps made by the Attorney General and concludes by reiterating that there are no exceptional circumstances in this case.

Deliberation and ruling

[34] The setting aside application is filed pursuant to CPR 13.3(1) and (2) which read –

13.3(1) If Rule 13.2 does not apply, 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 same 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.

[35] Both sides rightly accept that in order for the court to make an order setting aside a default judgment pursuant to CPR 13.3(1), the Attorney General must satisfy all 3 of the conditions set out in that rule. The failure to meet any one or more of the stipulations of CPR 13.3(1) will result in a refusal of the application. See **Kenrick Thomas v RBTT Bank Caribbean Ltd.** If the Attorney General fails in the request to set aside the default judgment pursuant to CPR 13.3(1), the court may nonetheless set it aside if the Attorney General shows that there are exist exceptional circumstances for the court to do so. See CPR 13.3(2).

Can the default judgment be set aside pursuant to CPR 13.3(1)?

[36] The first issue to be considered is whether the Attorney General has brought this application as soon as reasonably practicable after finding out that the default judgment had been entered. The parties have debated whether the Attorney General has properly filed the application before the learned master's order was sealed by the court and signed by the registrar (CPR 42.4(2)). Mr. Guishard argues that the Attorney General has prematurely filed the application as the order has not been 'entered' in accordance with CPR 42.4(2). The Attorney General's response is that it would be prudent for a party to file the setting aside application as soon as possible after the order for default judgment is granted.

[37] I must confess that in spite of their forceful reasoning, both sides have ignored or misapplied the instructive provisions of the CPR. For instance CPR 42.2 says the following –

> *42.2 A party who is –*
>
> *(a) notified of the terms of the judgment or order by telephone, FAX or otherwise; or*
>
> *(b) present whether in person or by legal practitioner when the judgment was given or order was made; is bound by the terms of a judgment or order whether or not the judgment or order is served.*

[38] CPR 42.8 also lends aid –

> *42.8 A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date.*

[39] The Attorney General was represented before the learned master when the order for the default judgment was made. Indeed the order was made at the time the master was considering the extension application filed by the Attorney General.

Accordingly the Attorney General was aware of the court's order and was immediately bound by the same. It was therefore quite in order for the Attorney General to immediately file the setting aside application. The order for the default judgment was made on 17th March 2017 which was a Friday. The setting aside was filed on 20th March 2017 which the next business day on which the court office was open to receive documents. I find that the setting aside application was made as soon as reasonably practicable. The Attorney General has met the requisites of CPR 13.3(1)(a).

Is there a good explanation for failure to file a timely response to the claim?

[40] The evidence and submissions of the parties on this issue have been set out above and will not be repeated. Having considered the facts and law on this particular requirement of CPR 13.3(1)(b), I must agree with Mr. Guishard that the Attorney General has not met this requirement. I will adopt the guidelines stated in the cases of **Sylmord Trade Inc v Intec Beteilgungs AG, the Attorney General v Universal Projects Limited, Laudat v Ambo** and **Public Works Corporation v Mathew Nelson** as to what amounts to a good explanation. I have set out above Bannister J's elucidation which was approved by the Court of Appeal. In **Universal Projects Limited**, the Privy Council gave this exhortation on what may amount to a good explanation[39] –

> *if the explanation for the breach ie the failure to serve a defence … connotes real or substantial fault on the part of the defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. 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.*

[39] [2011] UKPC 37 at papra.23

[41] The Court of Appeal in the **Laudat** case also instructed that[40] –

> *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 …, 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*

[42] The Court of Appeal in the **Mathew Nelson** case was very clear in its admonition that '*the giving of a full and detailed explanation does not thereby make the explanation one that is good or, put differently, excusable.'*[41]

[43] In light of the learning in these cases I have found that the Attorney General has given detailed explanations to account for the actions taken in this case. However, I find those reasons to be inadequate in their efforts to demonstrate a good explanation for the failure to act more timeously in this case. I find the reasons lacking in that –

(1) They do not explain the reason why no action was taken by the Attorney General on the claim once it was clear that assigned counsel was not available to conduct the office's response to the claim. Indeed nothing is said about the claim after its assigning to Ms. Vanterpool until Mr. Creque was asked to 'assist' on 23rd December 2017. Clearly the fact that someone was asked to step in to lend a hand demonstrates that the Attorney General was aware of the claim and was equally aware of the need to respond;

(2) It is presumed that Mr. Creque would have read the papers before penning his 23rd December 2016 missive to Mr. Smith. The notes to

[40] **DCAHCVAP 2010/016** at para. 14
[41] **DOMHCVAP2016/0007** at para. 19

defendant ought to have indicated that something else was required beyond merely informing Mr. Smith that Ms. Vaneterpool was out of office and would address the claim on her return from leave. I would also assume that even if counsel did not read the papers before penning his letter (which I would find troubling), that he would be sufficiently conversant with the rules to be cognizant that there are stipulated timelines in the rules and the attendant consequences for non-adherence. I cannot see how merely sending the 23rd December 2016 without addressing any of the requirements of the rules, including seeking an extension of time to comply or filing an acknowledgement of service could be said to be an adequate response to the strictures of the rules. This action does not suggest muddle, forgetfulness or an administrative mix up. It exhibits a deliberate decision to disregard the imperatives of the rules in preference to a deferral to other counsel. This is not a case where a defendant failed or forgot to take action. The Attorney General's office took a definitive step to respond to the claim by sending the 23rd December 2016 letter which step did not advert to any of the necessary procedural steps. Such an approach cannot be accepted as forming a good explanation for the non-compliance with the rules;

(3) There is no proper explanation as to why it took Ms. Vanterpool from 3rd January 2017 when she returned to office to 3rd February 2017 to seek an extension of time to file the defence. Counsel's asserted misapprehension of the law on whether it was necessary to attach a draft defence to the extension application is not a good excuse. See the extract from the **Michael Laudat** case above. While on this issue I observe that Ms. Vanterpool filed an acknowledgment of service on 12th January 2017 which was some 9 days after she returned to office. There is no proper reason for this apparently indifferent attitude to the time limits in the rules. Counsel is said to have been engaged with gathering information to prepare the defence but this conduct does not

indicate that counsel exhibited any deference to or even considered the stipulations on time set out in the rules.

Does the defence have real prospects of succeeding?

[44] Having failed to satisfy the conditions of CPR 13.3(2)(b), the setting aside application must be dismissed. However for completeness I will say a short word on whether the defence has a real prospect of succeeding. The Attorney General's position is that Mr. Guishard was arrested and charged for murder following investigations and in particular the evidence received from a witness, Mr. Terrance Charles. The defence continues that the state had a reasonable basis to proceed against with criminal charges and prosecution against Mr. Guishard including the allegation that he was part of a gang that went to rob Mr. Hodge. Mr. Hodge was killed during that encounter. I find that these are not spurious averments and can form the basis of a successful defence if substantiated at trial. The defence therefore has a real prospect of succeeding at trial.

Can the default judgment be set aside due to exceptional circumstances?

[45] What may amount to exceptional circumstances has been clarified and elucidated by our court in recent cases so that the meaning of the term is not obscure. Her ladyship Dame Janice Pereira's clarification on the matter has been set out above.[42] The Attorney General is of the view that Mr. Guishard's pleadings are woefully deficient on the critical legal issues of whether there was any reasonable or probable basis for the charges brought against Mr. Guishard and the subsequent prosecution for the same. The Attorney General submits that the pleadings do not bear out the allegation of malice. The pleadings must therefore be set side on the grounds that the claim is bound to fail.

[42] See also **Public Works Corporation v Mathew Nelson** DCAHCVAP 2016/0007

[46] I must disagree with the Attorney General on this issue. Mr. Guishard's case is that the police and the prosecution had no reasonable or probable basis in law to pursue the criminal charges against him. His case is that he was involved in criminal proceedings sometime in January 2013 which ended in a dismissal for want of prosecution in April 2014. A few days after the case was dismissed he filed a claim against a local online newspaper for defamation regarding his conduct in the recently dismissed case. Shortly after filing the claim, it appears that the police obtained a warrant and came to his home to look for a firearm and ammunition in relation to a murder of one Darren Hodge which murder had occurred some 3 years ago in 2011. He never possessed any weapons or ammunition or was in any way involved with Mr. Hodge's murder. In fact all the police found at his home were a Coors Light Beer bottle and a cell phone.

[47] He further avers that after shortly after the search of his home, he was placed under arrest and taken to the Road Town Police Station where he was interviewed for several hours then charged with the offence of murder. He was held at the police station until he was remanded to Her Majesty's Prisons as Balsum Ghut where he remained on remand for 708 days. On the day that he was remanded to prisons by the magistrate, he was 'paraded' in front of the members of the public by the police with knowledge that there were reporters waiting to take photographs. Some of the reporters present were individuals who were embroiled in the defamation claim he had filed against the newspaper. The discretion of the police to charge him was therefore wrongly exercised and he was thereby falsely imprisoned for over 1 year, 11 months and 7 days.

[48] Mr. Guishard then gives an account of the 2 trials of the indictable charges against him including the fact that the matter was tried a second time because the first attempt ended in a mistrial. He was acquitted at the second trial. He complains that the prosecution relied solely on the evidence of Mr. Terrance Charles, who was convicted of murder in September 2011. The prosecution's case against him proceeded without reasonable and probable cause and with malice because –

(1) The police and prosecutor's ought to have known that the previous criminal proceedings in which he was involved were dismissed for want of prosecution in April 2014;

(2) The police and prosecutor were nonetheless intent on proceeding against him and obtained a search warrant of his home when there were no grounds to do so;

(3) When the police interviewed him and charged him, they ought to have known that 3 years on there was no fresh evidence in Mr. Hodge's murder case;

(4) The police paraded him in front of the public while on his way to court even though they knew that he had a defamation claim against members of the media. They did so to demonstrate that he had been charged with an offence and to pressure him to withdraw the defamation claim;

(5) The prosecution used improper means during his trial to seek to obtain a guilty verdict when it constantly interrupted his closing arguments before the jury;

(6) The prosecution knew or ought to have known of the distant familial ties between a co accused and a member of the jury. Notwithstanding this knowledge, the prosecutor caused the entire panel of jury to be dismissed in order to afford the police more time to conduct their investigations;

(7) During the second trial one of the officers admitted that he had only recently conducted new investigations including the search of the vehicle that was allegedly used to take Mr. Guishard and a co accused to Mr. Hodge's home. However the officer was aware of this information since September 2011;

(8) The police did not conduct proper investigation of Mr. Terrance Charles who told several lies in his police interview and admitted during the trial that he told those lies. Notwithstanding the police and the prosecution decided to proceed against Mr. Guishard;

(9) Mr. Terrance Charles concocted evidence to suggest that Mr. Guishard participated in Mr. Hodge's murder. The police and prosecutors knowingly and maliciously relied on those concoctions to arrest, charge and prosecute Mr. Guishard after they failed to obtain a conviction in the other matter which the magistrate dismissed for want of prosecution.

[49] The Attorney General's draft defence maintains vociferously that the police and prosecution acted with reason and on probable cause. The defence strongly objects to the averment that the state acted maliciously in the proceedings against Mr. Giushard. An equally expansive explanation of the state's actions is given in the draft defence. As her Ladyship Chief Justice Pereira helpfully stated in the **Carl Baynes** decision, finding exceptional circumstances is not an adventure into determining whether the claim has realistic prospects of succeeding. Additionally, the exercise is not to be disguised and utilized as a second opportunity for a defendant who has failed to satisfy the terms of CPR13.3 (1) to pursue the removal of the default judgment obtained by the diligent claimant. Her Ladyship explained that exceptional circumstances are said to arise where, among other things, the claim is demonstrably incapable of prevailing as a matter of law or it is bound to fail as such. Having examined Mr. Guishard's pleadings, I cannot agree that his claim is bound to fail as a matter of law or is demonstrably unsustainable. The Attorney General has presented another version of the state's actions including the fact that it believed that it had obtained credible and reliable evidence from Mr. Terrance Charles. The Attorney General also avers in very cogent manner that Mr. Guishard was arrested, charged and prosecuted based on the investigations and the evidence arising therefrom. There is nothing on Mr. Guishard's version of events or in the response filed by the Attorney General to suggest to me at this juncture that the claim must fail. The differing versions of what transpired must be tested at trial and the court will decide whether the police and the prosecutors acted with reason and without malice. The application must also fail on the grounds that there no exceptional circumstances that warrant the setting aside of the default judgment.

Final Order

[50] The following is the outcome of this application-

(1) The application to set aside the default judgment is dismissed;
(2) Mr. Guishard is awarded the sum of $1500.00;
(3) The court office is to list the matter during January 2018 for a case management of the assessment of damages proceedings.

[51] I thank counsel and the parties for their assistance and their patience.

Raulston LA Glasgow
High Court Master