

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL JURISDICTION**

**CV NO. 1840 of 2014**

**BETWEEN**

**PATRICIA GIBBS**

**1<sup>ST</sup> CLAIMANT**

**SHIRLEY LINTON**

**2<sup>ND</sup> CLAIMANT**

**DONNYA CODRINGTON**

**(An infant, by his grandmother and  
next friend, Patricia Gibbs)**

**3<sup>RD</sup> CLAIMANT**

**DONIKO CODRINGTON**

**(An infant, by his grandmother and  
next friend, Patricia Gibbs)**

**4<sup>TH</sup> CLAIMANT**

**ZAVIER BRATHWAITE**

**(An infant, by his mother and next  
friend, Lisa Brathwaite)**

**5<sup>TH</sup> CLAIMANT**

**MAURICE FORDE**

**6<sup>TH</sup> CLAIMANT**

**MAURICE LINTON**

**7<sup>TH</sup> CLAIMANT**

**NICOLE CODRINGTON**

**8<sup>TH</sup> CLAIMANT**

**SHEILA CODRINGTON**

**9<sup>TH</sup> CLAIMANT**

**KRYSTLE CODRINGTON**

**10<sup>TH</sup> CLAIMANT**

**AND**

**THE ATTORNEY-GENERAL**

**1<sup>ST</sup> DEFENDANT**

**LEMUEL RAWLINS**

**2<sup>ND</sup> DEFENDANT**

**MAHY RIDLEY HAZZARD ENGINEERS LTD.**

**3<sup>RD</sup> DEFENDANT**

**JERRY EMTAGE**

**4<sup>TH</sup> DEFENDANT**

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.**

**2020: July 15**

**Mr. D. Comissiong, in association with Mrs. K. Turton and Mr. S. Thompson, for the Claimants.**

**Ms. D. Brathwaite Q.C., Deputy Solicitor General for the 1<sup>ST</sup> Defendant.**

**Mr. P. Pilgrim Q.C., for the 2<sup>ND</sup> Defendant.**

**Mr. L. Haynes Q.C., in association with Mrs. D. Haynes and Ms. F. Finisterre, for the 3<sup>RD</sup> Defendant.**

**Mrs. R. Nicholls of Clarke Gittens Farmer for the 4<sup>TH</sup> Defendant.**

## **DECISION**

### **Introduction**

[1] This is an application for the Court to exercise its discretionary power, under Part 13.3 of the Supreme Court (Civil Procedure) Rules, 2008, (“the CPR”), to set aside a regularly obtained default judgment.

## **Background**

- [2] The claim in this matter was filed in December 2014, seeking damages against the Defendants as a result of the deaths of five members of a family. These individuals perished after their apartment building at Arch Cot Terrace, Brittons Cross Road, St. Michael, collapsed into a subterranean cave on 26 August 2007.
- [3] On 04<sup>TH</sup> March 2016, this Court heard an application filed on 09 November 2015 requesting a default judgment against the Attorney-General (“the A-G”), as the 1<sup>ST</sup> Defendant, for his failure to file a defence. The Court granted the order on the basis that the A-G was in flagrant breach of the CPR. The time for the filing of the defence had expired in February 2015, and the A-G filed a defence but did not apply for leave to file the defence out of time. Therefore, the defence was not only out of time, but filed without the permission of the Court.
- [4] The A-G filed an application to set aside the default judgment on 17 March 2016. The application was supported by the affidavits of counsel for the A-G and Mr. Mark Cummins, the then Chief Town Planner.

## **The Legal Framework**

- [5] Part 13 of the CPR provides *inter alia* that:

“13.3 (1) The court may set aside or vary a judgment entered under Part 12 if the defendant has

a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has

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

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

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

13.4 (1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence”.

[6] Rule 13.3 of the CPR has a counterpart in Rule 13(3) of the Jamaica procedural rules. It has been observed that these rules which place:

“...‘real prospect of defending the claim’ in pole position in subsection (1), with the other two elements relating to promptitude of the application and good explanation for failure to acknowledge service or to defend, in subsection (2), thereby confirming the primacy of the requirement of a good defence as established in **Evans v. Bartlam**

[[1937] AC 473]”. (See Gilbert and Vanessa Kodilinye, “Commonwealth Caribbean Civil Procedure”, 4<sup>th</sup> ed. at p.64 and the cases mentioned at fn.28).

- [7] Although the real prospect of defending the claim is drafted as the primary requirement for convincing a court to set aside a default judgment, a failure to make an early application, or to tender a good reason for the failure to file a defence, may undermine the application. According to Sykes J, as he then was:

“...in the absence of some explanation for the failure to file the acknowledgement of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish somewhat. Similarly, if the application is quite late, then that would have a negative impact on successfully setting aside the judgment”. **(Saunders v. Green (2007) SC, Ja. No. 2005/2868, decision dated 27 February 2007).**

- [8] This Court takes additional guidance from the Court of Appeal of Jamaica. When giving consideration to the equivalent of Part 13.3 of our CPR, that Court opined that:

“Based on the provisions of the CPR and the relevant case law, the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the [defendant’s] failure to comply with the provisions of the rules as to the filing of a defence or an acknowledgement of

service, as the case may be, and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside”. (**Flexon Limited v. Michelle et al [2015] JMCA App 55** at para. [16], per McDonald-Bishop JA).

- [9] It should be noted that the Court is limited to a balancing of the three limbs in Part 13.3(1) and (2) of the CPR. There are no additional grounds, as for example, some other good reason, which is found in the English counterpart. (Rule 13.3 (1) (b)). The Court will evaluate the A-G’s application against the Part 13 criteria.

#### **Timing of Application**

- [10] The A-G’s application was filed within two weeks of the Court’s order granting the default judgment. Therefore it meets the requirement for filing as soon as reasonably practicable after the default judgment was entered. There is no evidence of unreasonable delay in that regard.

#### [11] **A Good Explanation**

Before considering the explanation tendered on behalf of the A-G, it would be useful to set out briefly the critical time frames which were not observed. The ten Claimants filed their joint claim on 12 December 2014. The relevant documents were served on the A-G on 06 January 2015. This was some seven plus years after the Arch Cot tragedy.

[12] The A-G filed and served an acknowledgement of service on 16 January 2015. The CPR required the filing and serving of the defence within 28 days of service of the documents on the A-G, that is, by 03 February 2015. This deadline passed without the filing of the defence.

[13] Counsel for the Claimants waited for nearly nine months before serving a notice on the A-G. The notice drew attention to the A-G's default, and called for the filing of the defence within 14 days, or no later than 30 October 2015. There is no evidence that counsel for the A-G ever sought the agreement of counsel for the Claimants to extend the time for the filing of the defence. The second deadline of 30 October also expired. And there was no application made to the Court to extend the time allowed for the filing of the A-G's defence.

[14] It was in these circumstances that the Claimants filed their application for a default judgment on 09 November 2015. In the meantime a defence was filed on behalf of the A-G, on 27 November 2015, without the permission of the Court. After hearing the parties, the Court granted the following order:

“Judgment is entered against the [A-G] for damages to be assessed and costs to be agreed or assessed on the ground that no defence has been filed or served by the [A-G] and that the costs of and occasioned by this application be the Claimants’ to be agreed or assessed”.

[15] Counsel for the A-G relied on paragraphs 13 to 21 of her affidavit filed on 17

March 2016, as providing a good explanation for the failure of the A-G to file a defence within the prescribed time. These paragraphs state that:

- “13. Claim No. 1840/2014 which was served on the [A-G] in January 2015 is not a simple claim.
14. It involves claims for damages made pursuant to the Accident (Compensation Reform) Act Cap. 193A and the Law Reform (Miscellaneous Provisions) Act Cap. 205.
15. Claim No. 1840/2014 involves ten (10) Claimants and four (4) Defendants. Three (3) of the Claimants are minors which raises its own peculiarities.
16. The exhibits submitted in support of the Claim include a Coroner’s Report and Verdict dated 29<sup>th</sup> December 2011. This document alone is comprised of ninety-seven (97) pages and four hundred and fifteen (415) paragraphs.
17. The Coroner’s Report and verdict is a very lengthy and detailed document. A proper review and analysis of it took a considerable amount of time.
18. The information received from the relevant Government Agency in respect of this Claim would have included things of a specialized and technical nature which would have required in depth questioning and understanding by Counsel for the [A-G] in order to prepare a proper defence to the allegations and claims raised in the [Claimants’] Statement of Case.

19. The volume of work within the [A-G's] Chambers as well as the staff constraints which the Chambers has been experiencing unfortunately contributed to the delay in the filing of the [A-G's] Defence.
20. I am informed and verily believe that it was never the intention of the [A-G] to be disrespectful to the Claimants or to the Honourable Court.
21. Despite valiant efforts made on behalf of the [A-G] a Defence was not filed within the deadline given by the Claimants in their Notice served 16<sup>th</sup> October 2015 on the [A-G]”.

[16] Counsel for the A-G relied on the complexity of the claim; the number of parties involved as Claimants and Defendants; the voluminous documentation that accompanied the claim; taking instructions of “a specialized and technical nature”; and the volume of work and staff constraints within the A-G’s Chambers.

[17] Volume of work and staff shortages have not impressed courts as good explanations for delay. In **The Attorney-General v. Universal Projects Limited** [2017] UKPC 37, the Privy Council opined that:

“...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 good and “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 breach is administrative inefficiency”. (At para. 23 of judgment; see also **Guiste v. New India Assurance Co. (T&T) Ltd., ECSC, HC St. Lucia, SLUHCV 2016/0171, decision dated 01 March 2017**, per Cenac-Phulgence J, at paras. [21] – [22]).

- [18] To be clear, the Court has no reason to doubt counsel’s statements about the volume of work and the staff shortages existing in Chambers at the critical time. This Court has personal knowledge of that ever present state of affairs, having toiled in the same Chambers. But, alas, these are not good reasons for failure to file a defence in time. The existence of a burgeoning work load and diminishing human resources is the responsibility of the state apparatus. These circumstances cannot be successfully prayed in aid against litigants who make claims against the state. (See para. 19 of **Universal Projects** judgment, *supra* at para. [17]).
- [19] With respect to the other explanations offered by counsel, it is a fact that there are ten Claimants and four Defendants. The issues raised in the claim pertain to allegations of nuisance, negligence and breach of statutory duty against the Defendants, both jointly and severally. Assuming lengthy discussions between counsel and the relevant Government agency, and the time required to assimilate the documentation, it was incumbent upon counsel to formally

request an extension of time to file the defence, either from counsel for the Claimants, or from the Court. There is no evidence whatsoever that this was ever done. And no explanation was offered to the Court for this oversight.

[20] The Court finds that it has not received a good explanation for the A-G's failure to file a timely defence.

### **A Real Prospect of Successfully Defending the Claim**

#### **(1) The Legal Principles**

[21] It was said in **Swain v. Hillman** that:

“The words “no real prospect of succeeding” do not need any amplification, they speak for themselves. The word “real” distinguishes fanciful prospects of success...they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success”. ([2017] 1 All ER 91 at 92 j, per Lord Woolf MR).

[22] Peter Gibson LJ adopted Lord Woolf's statement of law, and added that:

“I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in [**Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. Inc** [1986] 2 LLR 221] that the defence sought to be argued must carry some degree of conviction”. (In **ED&F Man Liquid Products Ltd v. Patel et al** [2003] EWCA Civ 472 at para.8; see also **Bee v. Johnson** [2007] RTR 9).

[23] Any consideration of a reasonable prospect of success should also bear in mind the following additional principles:

- (1) The burden of proof is on the defendant to show that he has a reasonable prospect of defending the claim. (See **ED&F Man**, supra para. [22] at para. 9).
- (2) The Court must ensure that it does not engage in a mini trial if there are significant differences between the parties with respect to issues of fact. (**Swain v. Hillman**, supra para. [20] at para. 95; **ED&F Man** at para. 10 of judgment). Peter Gibson LJ cautioned that this:

“...does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable”. (At para. 10 of judgment).

- (3) In the absence of cross-examination, a court is not entitled to reject any written evidence as being untrue, unless on the basis of all the evidence before the court it considers that the written evidence is simply incredible. (See **Wards Solicitors v. Hendawi [2018] EWHC 1907 (Ch)** at para.3; **Long v. Farrier & Co. [2004] BPIR 1218**, at paras. [57] – [61]; **Shierson v. Vlieland – Boddy [2005] 1WLR 3966 CA** at para. [56]; and **Coyne v. DRC Distribution Ltd. [2008] EWCH Civ. 488**, at para. [58]).

[24] Counsel for the A-G deposed in her affidavit that the proposed defence, and affidavit of Mark Cummins, present an arguable case and a defence that “carries some degree of conviction”. (Para. 24 of affidavit filed on 17 March 2016). The defence has two limbs, a limitation defence, and the response to the claims made against the A-G.

## (2) The Limitation Defence

[25] The A-G's opening gambit is that the claim is statute barred. Paragraph 1 of the draft defence submits that:

“The Claimants’ Claim is statute barred under section 3 of the Limitation (Public Authorities) Act Cap. 206 of the Laws of Barbados since the alleged losses incurred by the Claimants occurred if at all, on or before the 28<sup>th</sup> day of August 2007 which is more than three years before the issue of the Claim filed on the 12<sup>th</sup> day of December 2014 on the Claimants’ behalf”.

[26] The deaths are said to have occurred on 28<sup>th</sup> August 2007. But the claim was not filed until 12 December 2014. The Claimants anticipated that one or more of the Defendants would seek the protection of a limitation period. Therefore, the claim explains the delay in filing as follows:

“49. At the time of the deaths of the said deceaseds, the Claimants were unaware, and indeed were not in a position to know, whether the said deaths were attributable in whole or in part to an act or omission that constituted negligence, nuisance or breach of statutory duty on the part of the Defendants or any other persons or entities. However, in light of the sudden, violent and unnatural manner of the deaths of the said deceaseds, the deaths satisfied the definition of “unnatural death” contained in the Coroners Act, Chapter 113 of the Laws of Barbados, and therefore became the legitimate subject of a Coroner’s Inquest.

50. In or about the month of October 2010, the Coroner of Barbados commenced an Inquest

into the unnatural deaths of Donavere, Cassandra, Shaquille, Shaquanda and Yashiro, with a view to determining after what manner the deceased persons came to their deaths, and whether any person was criminally concerned in the cause of death.

51. The Coroner engaged in a 14 month Inquest that consisted of the summoning of witnesses; examining them on oath; and recording their evidence. Such evidence was taken from a wide variety of witnesses and experts, including professional geologists, engineers, a pathologist, search and rescue personnel, construction and excavation personnel, disaster management personnel, cave explorers and surveyors, residents of the Archcot and Culloden Road areas, the Chief Town Planner and the Second and Third Defendants among others.
  
52. The Coroner concluded her Inquest and issued her written Report and Verdict on the 29<sup>th</sup> December 2011. It is this document and the information contained therein that provided the Claimants with the information required for them to factually and reasonably come to the conclusion that the Town Planning Department/Chief Town Planner, the Second Defendant and the Third Defendant are liable for the deaths) of the deceaseds by virtue of the commission of acts of negligence, nuisance, and breach of duty on their part. A copy of the said Coroner's Report and Verdict is attached hereto and served herewith".

[27] Two other defendants have also pleaded that the action is statute barred. The

3<sup>RD</sup> Defendant relies on sections 20 and 22 of the Limitation of Actions Act,

Cap. 231 (‘the LAA’). (At para. 14 of defence filed on 02 March 2015). The 4<sup>TH</sup> Defendant refers to section 22 of the LAA. (At para. 22 of defence filed on 10 March 2015). The Court has not received any submissions from these defendants on this issue, and it is noted that they do not refer to the Limitation (Public Authorities) Act, Cap. 206 (‘the LPAA’).

[28] The Long Title to the LPAA describes this legislation as “An Act to generalise and amend the law relating to the limitation of actions in respect of persons acting in execution of statutory and other public duties and for matters connected therewith”. Section 3 (1) provides that:

“No action or other proceeding shall be brought 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 in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of 3 years from the date on which the cause of action accrued”.

[29] The Claimants are beneficiaries and dependants of the estates of the deceased individuals. Their claim is for damages under the Accident Compensation (Reform) Act (“Cap. 193A”), and the Law Reform (Miscellaneous Provisions) Act (“Cap. 205”), for the deaths that occurred at Arch Cot on 28 August 2007, “such deaths having been caused by the nuisance and/or negligence and/or breach of statutory duty by the Town Planning Department/Chief Town Planner”, and/or each of the other three defendants.

[30] The A-G is sued on behalf of the Crown in right of its government of Barbados, and he is therefore the representative of the Town Planning Department in this suit. (Para. 13 of statement of case). The Town Planning Department was established under the aegis of the Town and Country Planning Act, Cap. 240. The public duties of the Department include the processing of applications for the development of land in Barbados, and the grant or refusal of permission to develop land. (See Pt. IV of the Act). Thus, the Department is a public authority exercising public duties and authorities under its governing legislation.

[31] The limitation period in the LPAA is three years from the date on which the cause of action accrued. This period may be extended where a claimant is under a disability. (S.4 (1)). Disability is defined as infancy, unsound mind, or the serving of a sentence of imprisonment. (S. 2 (2)). However, the disability is not considered if an administrator or curator is appointed for the person under the disability. (S. 2 (2)).

[32] In order to benefit from a period of disability, a minor claimant has to prove that when the right of action accrued, he or she was not in the custody of a parent. (S.4 (5)). Parent is defined as including a father, mother, grandfather, grandmother, stepfather and stepmother. (S. 2 (1)). The Court notes that in this case a grandmother is suing on behalf of two of the minor children, and a

mother on behalf of the third child. Therefore, before it can be determined that the A-G is protected by the limitation period in the LPAA, the Court is required to make findings of fact in relation to the custody of the infant Claimants when their parents perished.

[33] The limitation period in the LPAA may also be extended where fraud or mistake is proved. (S.7). However, that inquiry does not appear to be relevant to this application.

[34] The critical question for this Court, in relation to the A-G's limitation defence, is whether the LPAA is the appropriate legislation to be applied here in the context of a determination of the relevant limitation period. The LPAA was enacted in 1955, approximately eleven years before the promulgation of the 1966 Barbados Constitution. It is therefore, an existing law saved by section 26 of the Constitution.

[35] As an existing law, the prevailing opinion until recently was that laws such as the LPAA are protected by the Constitution, even if they derogate from the Constitution. But this position is ripe for reassessment in the wake of the decision of the Caribbean Court of Justice ("the CCJ"), in **Nervais v. The Queen** and **Severin v. The Queen** [2018] CCJ 19 (AJ). The CCJ commented in these consolidated appeals from Barbados, that the savings law clause in the Barbados Constitution:

“... is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned”. (At para. [58] of judgment).

[36] The provisions of the LPAA, that permit an extension of the three year limitation period, are not as generous as the provisions in the LAA. The LAA provides the legislative framework for the application of limitation periods to actions brought under Caps. 193A and 205. There are sections in the LAA that allow the extension of the limitation period in relation to minor claimants. Indeed, the LAA gives a court the discretion to direct that the time limits should not be applied to the action. (Ss. 22 (5), 52 and 53). So that even though the basic limitation period is the same three years for the LPAA and Cap. 193A, a person claiming against a private defendant may have a better opportunity to extend the limitation period, given the combined effect of Cap. 193A and the LAA.

[37] A former Chief Justice considered that the provisions of the LPAA “are restrictive enough of the rights of the subject”. (Williams J, as he then was, in **Reid v. AG et al (1981) 16 Barb. LR 133** at 139). The LPAA discriminates in favour of public authorities. It does not provide for an extension of the

limitation period in circumstances where the knowledge of the cause of action becomes available after the expiration of the limitation period. The LAA permits such exceptions in relation to actions under Caps. 193A and 205. (ss.20(3)(a) and 22(4)(b)). The LPAA appears to impinge on sacred constitutional concepts such as access to justice, equality before the courts, equal protection of the law, and protection from discrimination. These concepts are fundamental to an independent democratic society. Looked at through the prism of the CCJ decision in **Nervais**, (supra at para. [35]), the LPAA may be open to a constitutional challenge.

[38] The reality for this application is that there is no constitutional motion before this Court pertaining to the LPAA. That said, there is a presumption of constitutionality applicable to the LPAA until declared otherwise by a court of competent jurisdiction.

[39] Some Commonwealth countries have long repealed legislation similar to the LPAA. For example, in England the Law Reform (Limitation of Action) Act, 1954, repealed the 1895 Public Authorities Protection Act. In the words of Lord Bridge of Harwich:

“ The philosophy which was once thought to justify the distinction between public and private defendants in this regard had fallen wholly into disrepute when the distinction was swept away in 1954, and, so far as I am aware, has never subsequently regained any reputable currency”.

(See **Arnold v. Central Electricity Generating Board [1988] 1AC 228** at 269 G-H).

But in 1955, the colonial legislature in Barbados embraced legislation that was rejected by the “mother country” in the previous year.

[40] Referring to similar legislation in Trinidad and Tobago, the Privy Council opined that:

“This statutory provision, it may be noted in passing, or its equivalent in the United Kingdom legislation, had a somewhat inglorious life. The (United Kingdom) Public Authorities Protection Act 1893 (56 & 57 Vict c 61), until its eventual repeal by the Law Reform (Limitation of Actions & etc) Act 1954, attracted judicial criticism, in respect of both content and drafting. Most actions against public authorities were actions for personal injuries arising out of accidents. It was seen as unfair that plaintiffs injured by a public authority should have a far shorter time in which to commence a claim than if they had been injured by someone in the private sector...The difficulties arising in the interpretation of the Act, and deciding which types of case fell within its scope and which did not, were repeatedly the subject of critical observations by the House of Lords...In the result the Act was always construed restrictively, lest ‘what was intended as a reasonable protection for a public authority would become an engine of oppression’ ”. (Per Lord Nicholls of Birkenhead in **Durity v. AG T&T[2003] 1AC 405** at para.20 of judgment).

[41] More recently, the Judicial Committee emphasized that statutory limitation periods, of the ilk of section 3 (1) of the LPAA, are to be construed restrictively. In **Alves v. AG BVI [2017] UKPC 42**, the Board confirmed that:

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

[42] Counsel for the Claimants submitted that the LPAA does not apply to fatal accident claims arising out of Caps. 193A and 205. (See Further Written Submissions filed on 06 January 2017 at para. 19). In support of this contention, counsel cited the cases of **British Electric Railway Company Limited v. Violet Gentile (1914) AC 1034; Venn v. Tedesco (1926) 2KB 227; and Union Steamship Company of New Zealand v. Mary Robin (1920) AC 654.**

[43] All three of the abovementioned cases were considered positively by the Eastern Caribbean Court of Appeal in **Hazeline Maynard et al v. The Saint Christopher And Nevis Solid Waste Management Corporation et al, SKBHCVAP 2015/0006, decision dated 01 October 2015.** The appellants in **Maynard** were the personal representatives of a deceased employee of the first respondent. It was alleged that he died as a result of a motor vehicle

accident caused by the negligent driving of the second respondent, who was also an employee of the first respondent. The personal representatives based their claim on legislation similar to Caps. 193A and 205.

[44] The first respondent was a body corporate established by statute. Its defence was that the action was statute barred pursuant to legislation similar to the LPAA of Barbados. It sought an order, via an interlocutory application, asking that the action be struck out as an abuse of process because it was statute barred.

[45] Speaking on behalf of the Court of Appeal, Dame Janice Pereira CJ found that the governing legislation of the first respondent expressly denied it the benefit of the public authorities protection legislation. (At para. [16] of judgment.). The learned Chief Justice also held that the question whether the respondents were exercising acts of a public or statutory nature at the time of the accident, had to be decided after a trial. In the absence of witness statements, or other affidavit evidence, a court was unable to make these critical findings of fact.

The court reasoned that:

“Whether or not this was so was a matter which could only be determined at trial on the evidence adduced and not at this stage. Accordingly...it was premature and thus not open to the learned master to conclude at the stage that the matter had reached, and without a shread of evidence, that at the time the accident occurred the nature of the function being carried out was garbage collection and that

the Deceased was injured in the course of the Corporation carrying out its public duty conferred by [statute]. On the state of the pleaded cases these were findings which could only be reached following a trial of the issues.” (Para. [17] of judgment; see also the Privy Council decision in **Gordon v. A-G (1997) 51 WIR 280**, 284 h-j per Lord Lloyd of Berwick).

[46] Having reached these conclusions, there was no necessity for the Court of Appeal in **Maynard** to consider whether the fatal accident claim was stymied by the limitation period in the public authorities protection legislation. However, the learned Chief Justice thought it prudent to address this issue. She reasoned that:

“Although my conclusion on the first issue would render this issue for all practical purposes moot, I nevertheless consider it useful to address this issue as there appears to be a dearth of authority in this jurisdiction dealing with the interplay between a claim brought against a public authority which may enjoy the time limitation protection...”. (Para. [18] of judgment).

[47] The learned Chief Justice concurred with the reasoning in the **Gentile** case, (supra at para. [42]), and held that it was applicable to any consideration of the fatal accidents legislation vis-à-vis the public authorities protection legislation. She opined thus:

“[24] What I derive from the **Gentile** decision is that the Board, although treating specifically with the [British Columbia legislation], was there expounding a principle of more general

application as it relates to the interplay between the [fatal accidents legislation] and limitation statutes such as was the [British Columbia legislation] but which is equally applicable to the [public authorities protection legislation] notwithstanding the difference in language. Both the [British Columbia legislation] and the [public authorities protection legislation] refer in substance to an action in the nature of an indemnity – in essence an action personal to the person damaged or injured by the wrongful act, neglect or default of the public authority...the claim under the [fatal accidents legislation] was not a claim devolving to the estate of the Deceased but was a new right of action vested in a class of persons therein set out, for their benefit under the [fatal accidents legislation], and to which the time limitation set under the [public authorities protection legislation] did not apply...

[25] ...the ratio in **Gentile** is equally applicable to the [public authorities protection legislation] as it was to the [British Columbia legislation]. I am satisfied that section 2 of the [public authorities protection legislation] is not applicable to the claim under the [fatal accidents legislation] and the action having been brought later than six months but less than twelve months after the accident and the death of the Deceased is maintainable”.

[48] The fatal accidents legislation referred to in **Maynard** (ie the Fatal Accidents Act, Cap. 23.10, Revised Laws of St. Christopher and Nevis 2009), is similar to our Cap. 139A. However, the **Maynard** decision does not necessarily put

an end to the A-G's limitation defence based on the LPAA.

[49] Mention must be made of the local Court of Appeal decision in **Lorde v. Transport Board, Civ. Ap. No. 8 of 1997, decision dated 17 June 1997**. It was held in **Lorde** that an action under Cap. 193A failed because the limitation period in the LPAA had expired. This Court is bound by the decision in **Lorde**. Counsel for the Claimants did not cite **Lorde**, and he advanced no arguments to persuade this Court that **Lorde** may be distinguished, or that it was wrongly decided.

[50] Neither Court of Appeal, in **Lorde** nor in **Maynard** made any statements that included the other branch of the joint action before them. This Court is referring to the companion action under Cap. 205. (The equivalent legislation that featured in **Maynard** is the Law Reform (Miscellaneous Provisions) Act, Cap. 5:08, Revised Laws of St. Christopher and Nevis 2009). The relevant questions are whether an action under this legislation is subject to the LPAA limitation period following **Lorde**; or whether the action escapes the LPAA by the application of the **Maynard** decision.

[51] Given the current statutory framework of the LAA, it may be argued that the limitation period in the LPAA was intended to apply to actions under Caps. 193A and 205. A pertinent observation is that the limitation period in the LPAA was initially one year. This was extended to three years by none other

than the LAA. (See s. 63 and the Schedule to the original LAA, Act 1977-11). Therefore, the reasonable inference is that in 1977, Parliament was fully cognisant of the LPAA, and did not intend that the LPAA should be repealed by the LAA.

[52] Additionally, section 61 of the LAA provides that

“This Act does not apply

- (a) to any action or arbitration for which a period of limitation is prescribed by or under any other enactment”.

Again, the reasonable inference is that Parliament intended to preserve the limitation periods, and their calculation, as found in other legislation such as the LPAA.

[53] Even if the Court assumed that the LPAA does not apply to actions under Caps. 193A or 205, there is another hurdle for the Claimants. Section 20(3) of the LAA provides that:

“When the person injured dies before the expiration of the period of limitation in sub-section (2), the period of limitation applicable in respect of the cause of action surviving for the benefit of his estate under section 2 of [Cap. 205] is three years from the later of the following dates

- (a) the date on which the personal representative of the deceased acquired knowledge of the cause of action; or
- (b) the date on which the deceased’s death occurred”.

[54] The Claimants are all relying on a limitation period that extends to 29 December 2011. That is the date on which the Coroner issued her report and verdict pertaining to the Arch Cot tragedy. But a critical pleading is missing from the claim. In order to rely on section 20(3) (a) of the LAA, there must be a personal representative appointed for the relevant estate. The Court sees no reference to any personal representative in the claim. There is no affidavit or witness statement from any personal representative that speaks to an acquired knowledge of the cause of action. Therefore, even if the Court held that section 20(3)(a) of the LAA was appropriate to the claim, no personal representative has been identified as yet. There are findings of fact that must await a trial of the claim.

[55] Similarly, in relation to Cap. 139A, section 22 of the LAA provides that:

“(3) The time limits prescribed in sections 6 to 20 shall not apply to an action under [Cap. 193A] in the case of fatal accidents.

(4) No action referred to in subsection (3) may be brought after the expiration of 3 years from

(a) the date of death; or

(b) the date of knowledge of the person for whose benefit the action is brought”.

[56] The Claimants have pleaded why they should be allowed to rely on section 22(4) (b) of the LAA. (See para. [26] supra). The Court can only determine

the efficacy of this part of the claim after a trial.

[57] The analysis of the A-G's limitation defence indicates that any determination by the Court requires myriad findings of fact. There are issues of law that require fulsome written and/or oral submissions from the relevant parties, and these are only possible after a trial. It will be recalled that two other defendants raised limitation points under the LAA, and they should also be heard. The Court is satisfied that on the limitation issue, and based on the pleadings thus far, the A-G has a real prospect of successfully defending the claim. There is a realistic prospect of success, with a defence that carries some degree of conviction.

### **(3) The General Defence**

[58] It will be recalled that the claim alleges nuisance, negligence, and breach of statutory duty. (See para. [29] supra). There is no allegation of nuisance against the A-G in the statement of case, and therefore no necessity for a response by the A-G. The particulars of negligence and breach of statutory duty against the Town Planning Department/Chief Town Planner are outlined at paragraphs 21, 25, 26, 28, 29, 30, 31, 38, 39 and 40 of the statement of case. (See para. 54 of statement of case). These paragraphs allege as follows:

“21. Negligently and in breach of the said Section 17 (3) of the Town and Country Planning Act the Chief Town Planner failed or neglected to place the said information [re application

826/11/68 filed on 04 November 1968] in the said [Town and Country Planning] Register.

...

25. The Chief Town Planner and/or his officers negligently failed to consult the said file [pertaining to application 826/11/68] or to make such enquiries or if they did consult the file or make any such inquiries of the residents they negligently failed to take cognisance of or to recognize or register the existence of a cave in the said area or areas.

26. The Chief Town Planner processed the said application [826/11/68] and negligently granted permission on 18 November 1968 without having taken into consideration the fact that there was a cave in existence on the said area of land and that safety considerations required be given to whether the building of houses or other structures should be permitted over the cave, and if so, whether special conditions should be attached to any such permission to build.

...

28. The Chief Town Planner processed the said application and negligently granted permission on 1<sup>st</sup> April 1982 without having taken into consideration the fact that there was a cave in existence on the area of land on which the said apartments were built and that safety considerations required that some special consideration be given to whether the building of apartments should be permitted over the cave, and if so, whether special conditions should be attached to any such permission to build. Furthermore, the Chief Town Planner

negligently granted permission to build the apartments without attaching any conditions designed to ensure that the construction over the cave would, in the prevailing circumstances, be safe and secure.

29. At all material times during the process of processing the Second Defendant's applications the Chief Town Planner negligently and in breach of statutory duty failed to refer to the said 18<sup>th</sup> of November 1968 grant of permission to Cyril Bruce Brooks and its stipulation that "no house or other structure shall be erected over the existing cave except with the approval of the Town and Country Planning Officer".
30. Alternatively, if the Chief Town Planner did refer to the said 18<sup>th</sup> November grant of permission, then he was negligent in not attaching special conditions to the permission granted to the Second Defendant that would have required the Second Defendant to carry out a geotechnical survey of the area of land including mapping of the cave, testing of the strength of the walls and roof of the cave and testing the suitability of the land to bear the proposed structure, as well as requiring the application of building techniques and features designed to accommodate the existence of a cave in or below the foundation of a building.
31. Furthermore, when the Second Defendant made his said application to the Chief Town Planner, he submitted a plan which showed a depression or sink hole on it. The Chief Town Planner was negligent in not recognizing that the existence of such a depression or sink hole on the Second Defendant's plan required the carrying out of a geotechnical survey to

determine the configuration and quality of the underground structures of the area of land.

...

38. The Town Planning Department, the Chief Town Planner and/or its/ his officers negligently failed to make such inquiries, or if they did make such inquiries, negligently failed to take cognisance of or register the existence of a cave.
39. The Chief Town Planner processed the said applications of Dean Straker and Cheleston Ridge Investments Ltd. [reference number 1035/04/02B] and negligently granted permission without having taken into consideration the fact that there was a cave in existence on or contiguous to the said lot of land as was evident from the said permission granted to Cyril Bruce Brooks on 18<sup>th</sup> November 1968, and that safety considerations required that some special consideration be given to whether the building of an office building should be permitted on or adjacent to the said cave, and if so, whether special conditions should be attached to any such permission to build.
40. The Town Planning Department, the Chief Town Planner and/or its/his officers negligently failed to refer back to the said permission of 18<sup>th</sup> November 1968 or to be guided by the information about the existence of a cave contained in the said permission of 18 November 1968”.

[59] The Claimants are contending that the Arch Cot deaths resulted from the negligence and breach of statutory duty of the Town Planning Department.

The case as pleaded against the A-G is that having granted permission in 1968 to Mr. Brooks to develop lands at Arch Cot, the Town and Country Planning office failed to enter the details of the permissions in its register as required by statute. One of the significant details that should have been recorded in the register was that “No house or other structure shall be erected over the existing cave except with the approval of the Town and Country Planning Officer”.

[60] Five acres of these lands were sold to the 2<sup>ND</sup> Defendant in July 1979. The 2<sup>ND</sup> Defendant applied for permission to subdivide the land into residential lots. He was granted permission without reference to the restriction about building over the existing cave. The Claimants are also of the belief that the Town Planning Department was under a duty to canvass residents of the area about their local knowledge of the cave.

[61] In November 1981, the 2<sup>ND</sup> Defendant sought permission, on behalf of Chesterlande Limited, to build apartments on two of the lots. These lots were directly above the cave at Arch Cot. Permission was granted without reference to the existing cave, or to any special requirements for building over a cave. The plan submitted by the 2<sup>ND</sup> Defendant is said to have indicated a depression or sinkhole. It is alleged that these features should have caused the Chief Town Planner to conduct a geotechnical survey of the area in order to determine the underground layout of the cave.

- [62] The planning permission granted to Dean Straker and Chelston Ridge Investment Ltd. in 2002, was in relation to lands that bordered the lots on which the 2<sup>ND</sup> Defendant constructed the apartment building. It is alleged that the Town Planning Department was negligent in not considering the condition in the Brooks planning permission, and by not including relevant conditions, pertaining to the subterranean structure, in the Straker planning permission.
- [63] The draft defence submitted on behalf of the A-G makes no admission with respect to the breach of statutory duty alleged by the Claimants. (See para. 7 of draft defence filed on 17 March 2016). Therefore, the Court is left to make findings of fact as to whether there was a statutory requirement for the relevant information from the Brooks planning permission to be placed in a register; and if so was the information entered in the register.
- [64] The draft defence places the onus on the 2<sup>ND</sup> Defendant to indicate all the topographical features of the land on the plan submitted with his applications for planning permission. (See also paras. 14 and 15 of the Cummins affidavit). All that the plan indicated was a depression on Lot 14 and a section of a quarry on Lot 15. Again, questions of fact arise for the determination of the Court. For example, did the 2<sup>ND</sup> Defendant have notice of the existence of a cave under any of the lands at Arch Cot for which planning permission was sought?
- [65] In this regard the Court notes that the Brooks application, permission,

conditions and plan are referred to in the Schedule to the conveyance from Brooks to Chelston Ridge Investments Inc dated 20 March 2000. (See Exhibit MC 9 attached to the draft defence). It will be a question of fact whether the conveyance to the 2<sup>ND</sup> Defendant makes a similar reference to the Brooks application. Another relevant question, if the 2<sup>ND</sup> Defendant had notice of the cave, would be whether that notice required him to survey and include the cave on any plan submitted with his applications.

[66] The A-G's draft defence further contends that the permissions granted to the 2<sup>ND</sup> Defendant related to lands that are separate and distinct from the parcel of land subject to the Brooks application and conditions. It is also alleged that the lands in the various applications are in different locations, and that in the absence of any mapping of the cave, the Town and Country Planning Department was under no obligation to engage in discussion with residents of Arch Cot and surrounding districts. This calls for findings of mixed law and fact, given that paragraphs 25 and 26 of the statement of case are denied. (See para. 20 of draft defence).

[67] The Cummins affidavit also submits that the lands comprising the Brooks permission and the lands formerly owned by the 2<sup>ND</sup> Defendant at Arch Cot are separated by a large quarry. (Para. 18)). He also contends that the lands purchased by Chelston Ridge Investments do not abut and abound the lands

on which the apartment building was constructed. (Para. 19). The Court is unable to ascertain the veracity of these statements at this time, given the quality of the various plans annexed to the draft defence. The relevant findings of fact would have to await a trial.

[68] Cummins contends that the Straker application did not require a geo-technical survey because there were no known cave challenges at the time. He states that there is no evidence or record to show that such surveys were conducted in Barbados in 1981. (Para. 20). Mr. Cummins would be considered as an expert witness, and his affidavit evidence is hotly contested by other experts. (See affidavit of Tony Gibbs dated 07 July 2016, and the joint report of Machel and Sass annexed to the Comissiong affidavit of 14 July 2016). The Court is unable to accept or discount any of the opposing positions of these experts without the benefit of an opportunity to assess their credibility at a trial, or unless one party concedes.

[69] The draft defence alleges that Chelston Ridge Investments had knowledge of the existence of a cave from a document which forms part of its root of title. The Court confirmed this fact from the relevant conveyance. (See para. [65] supra.) Construction work is also said to have started on the Chelston Ridge lands without prior notification to the Chief Town Planner, and in breach of condition 5 of its planning permission. (Paras. 40 and 41 of draft defence).

Was this a breach of duty by the 3<sup>RD</sup> or 4<sup>TH</sup> Defendants, and if so did it contribute to the loss of lives at Arch Cot?

[70] The issues raised in the claim are not limited to the actions of the Town Planning Department. The claim also suggests that the other three defendants contributed to the Arch Cot demise. It is for this reason that the A-G claims indemnities and contribution from the other defendants. (Para. 53 of draft defence).

[71] If the default judgment is confirmed by this Court, there is nothing to stop the Claimants from discontinuing their case against the 2<sup>ND</sup>, 3<sup>RD</sup>, and 4<sup>TH</sup> Defendants. The A-G would be left as it were “holding the bag”. There would be no determination of whether the remaining Defendants are responsible for the loss, and if so, to what extent.

[72] The claim also hints at the possibility of a *novus actus interveniens*. Paragraph 46 of the claim states that:

“On or about the 23<sup>rd</sup> of July 2007, the said Fourth Defendant and his agents, the Third Defendant acquired reliable information to the effect that the cave-like hole that they had opened up or had caused to be opened up on or about the 9<sup>th</sup> of July 2007 was a cave, and that the said cave extended under the foundation of the said Shalom Apartments”.

[73] The alleged conduct of the 3<sup>RD</sup> and 4<sup>TH</sup> Defendants is said to have occurred a full month prior to the collapse of the cave. Therefore, a pertinent question is

whether these Defendants were under a duty to notify the occupants and/or owner of the apartment building, and/or the Town Planning Department that the apartment building was precariously perched. And if there was such a duty, did the failure to communicate this information to any or all of these parties contribute directly to the Arch Cot deaths? Put another way, would the deaths have been avoided if the information was shared?

[74] One of the essential claims against the A-G and the other Defendants is negligence. Not only does the A-G deny negligence, but the draft defence raises issues of remoteness and foreseeability. The claim in negligence involves disputed factual issues, and in these circumstances “it is rare for a court to find there is no real defence once liability is denied”. (See Professor Stuart Sime, “A Practical Approach to Civil Procedure”, 22<sup>nd</sup> ed., 2019 at para. 24.24). The Court concedes that it is a complex claim involving many issues of mixed law and fact.

### **The Balance of Justice**

[75] This Court is satisfied that the A-G has a real prospect of successfully defending the claim. Additionally, there are “live issues which can only be settled by a trial judge deciding whom and what to believe”. (Per Brooks JA in **Wiggan v. AJAS Limited**, JA Sup. Ct. Civ. Ap. No. 129/2015, decision dated 10 June 2016, at para. [57]).

[76] This application was made in a reasonable time, but the A-G did not give a good explanation for the failure to file a defence. Was this failure so egregious that it should diminish or cancel any possibility of setting aside the default judgment? Counsel for the Claimants was prepared to wait almost nine months after the defence was due, before serving a notice on the A-G. The deadline for filing the defence was fixed by Counsel at 30 October 2015. The defence was filed nearly a month after this deadline, without communication to counsel, and without an application to the court requesting an extended deadline. But not so far outside the deadline to be considered egregious.

[77] The Court is required to consider the balance of justice in arriving at its decision, and it does so with reference to the overriding objective in the CPR.

In the words of my brother Alleyne J:

“The ultimate objective of the Court is to see that justice is done. Nothing in CPR 13.3 (2) derogates from the general obligation imposed on this Court by CPR 1.2 to seek to give effect to the overriding objective of the CPR when exercising any powers under them. CPR 1.1 (1) describes that objective as one of dealing with cases justly. CPR 1.1(2) identifies a number of further objectives which are included, so far as is practicable, in the notion of dealing justly with a case”. (In **Sandiford v. Barbados Port Inc., CV No. 285 of 2015, H. Ct. B’dos, decision dated 08 July 2020** at para. [11]).

[78] Counsel for the Claimants holds the view that they will suffer prejudice if the default judgment is set aside. He submitted that:

“...the Default Judgment obtained on the 4<sup>th</sup> day of March 2014 is something of value which the Claimants would lose if it is set aside by this Honourable Court. The Claimants have been suffering (without closure) from the loss of the deceased persons with which this matter is concerned for almost ten (10) years. If the Default Judgment is set aside, regardless of the outcome, they will have to suffer through an extended period in which no closure or true resolution is brought to the matter. In order to avoid injustice, the Claimants should not be deprived of it without good reason: **International Finance v. Utefrica Sprl [2001] All ER (D) 101**”.(Further Written Submissions filed on 16 January 2017 at para.38).

[79] After careful consideration of the requirement of Rule 13.3 (1) of the CPR, and the mandatory criteria in Rules 13.3 (2) (a) and (b) of the CPR, this Court concludes that the default judgment should be set aside. The Court appreciates the continued uncertainty faced by the Claimants. However, there would be a greater injustice to the A-G if the factual matrix of the Arch Cot tragedy was not determined by a court. If the limitation defences are not upheld, there should be a determination, based on that matrix, of the extent of the liability of all of the defendants.

[80] Allowing the status quo to remain would immediately expose the A-G to full responsibility to the Claimants for negligence and breach of statutory duty. Any possible liability of the other defendants would never be determined. Given the state of the pleadings, the cause of action under Cap. 205 is on a

shaky foundation. (See paras. [53] and [54] supra). And, in relation to the action under Cap. 193A, the limitation defence apart, a court has to determine the state of knowledge of each Claimant. (See paras. [55] and [56] supra). The Court is also persuaded that the limitation defence carries some degree of conviction.

### **Disposal**

[81] The default judgment entered on 04 March 2016 is set aside.

[82] An apology has been tendered to the parties, and it will become a part of the record.

[83] I will now hear the parties on the issue of costs.

**Sonia L. Richards**  
**Judge of the High Court**