[2018] JMSC Civ. 194

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV05409

BETWEEN	**ATLANTIC HARDWARE PLUMBING COMPANY LIMITED**	**CLAIMANT**
AND	**GUARDSMAN LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Anthony Williams instructed by Usim Williams & Co for the Claimant

Mr. Walter Scott, QC and Ms. Anna Gracie instructed by Rattray, Patterson and Rattray for the Defendant

Heard: January 29 ,31, February 1- 2, March 16 and July 20, 2018

Civil Practice & Procedure– Negligence– Employer's liability – Vicarious liability – Liability of independent contractor

PALMER HAMILTON, J (AG)

BACKGROUND

[1] The matter concerns an action being brought by Atlantic Hardware & Plumbing Company Limited, the Claimant company, alleging that Guardsman Limited, the Defendant Company is to be held vicariously liable for the actions of Mr. Wayne Robinson. Mr. Wayne Robinson was at all material times a security guard who was engaged by the Defendant Company which provided security services to the Claimant Company.

[2] Mr. Robinson performed security duties at the Claimant's warehouse located at 2B Ashenheim Road, Kingston 11 in the parish of Kingston. The Claimant has alleged that due to Mr. Robinson's negligence which resulted in the pilfering of goods from its warehouse it suffered loss. By its Amended Claim Form the Claimant sought recovery of monies totaling Ninety-Two Million Seven Hundred and Nine Thousand Seven Hundred and Eighty-One Dollars and Forty-Eight Cents ($92,709,781.48). The theft was accounted to the Defendant's Company negligence in providing them with a security officer who was less than suitable for the required position.

THE CLAIMANT'S CASE

[3] Atlantic Hardware & Plumbing Company Limited stated that in or about February 2008, it had contracted the Defendant Company to provide unarmed security guard services for its business premises situated at 7A Ashenheim Road. It further contracted the Defendant Company to do similar business between February 2008 and September 2011 at its other warehouse located at 2B Ashenheim Road. The Defendant was engaged to provide security services to *"ensure that all goods leaving the warehouse were properly and thoroughly checked as well as the delivery of all items from the warehouse complied strictly with the purchase order in terms of quantity and stock ordered*."

[4] The Claimant in its Amended Particulars of Claim alleged that in breach of contract, Mr. Wayne Robinson *"conspired with others or by himself allowed or caused to be pilfered goods totaling Seventeen Million Four Hundred and Twenty-Nine Thousand Three Hundred and Eighty-Two Dollars and Sixteen Cents ($17,429,382.16)".* After tallying its losses which included the cost of goods, annual interest on cost of goods and initial profit and turnovers, the estimated losses amounted to Ninety-Two Million Seven Hundred and Nine Thousand Seven Hundred and Eighty-One Dollars and Forty-Eight Cents ($92,709,781.48).

[5] The Claimant attributed its loss to the failure and/or negligence of the Defendant to provide a safe system that would avoid the Claimant's goods from being pilfered

from the warehouse. It also alleged that the Defendant failed and/or was negligent in providing security services through a man who was the opposite of a *"scrupulous or honest or trustworthy person"*.

THE DEFENDANT'S CASE

[6] The Defendant's case is that *"on or around February 2008 and September 2009 the Claimant and the Defendant entered into an oral agreement for the Defendant to provide unarmed security guard service for goods leaving and entering the Claimant's warehouse and that Mr. Wayne Robinson, security contractor would be deployed to the said warehouse"*. It submitted, that Mr. Robinson was contracted as an independent security contractor (security guard) and was given standing orders to the following effect: -

> *"i. To control access an egress of vehicles and persons;*
>
> *ii. Searching all vehicles and persons entering and exiting the compound (including bags, containers and cases);*
>
> *iii. Ensuring all persons entering the compound have proper identification;*
>
> *iv. Logging all vehicles, visitors/contractors and deliveries in separate log books;*
>
> *v. Ensuring all outgoing deliveries have an accompanying invoice;*
>
> *vi. In the event of an irregularity, no matter how small it may seem, not to permit the vehicle or person to leave and call the relevant person(s) immediately;*
>
> *vii. All items i.e. laptops, cameras etc are to be declared upon entry to the compound and the relevant information is to be recorded and the signature of the employee in the requisite log book."*

[7] The Defendant maintained that the scope of Mr. Wayne Robinson's duties was changed and they were therefore, it is not liable to the Claimant for any of its alleged loss. They have not accepted that Mr. Robinson was an employee of the company but he was instead an independent security contractor.

ISSUES

[8] The central issue to be determined by the Court is whether the Defendant Company is vicariously liable in negligence for the tort committed by Mr. Wayne Robinson. The answer to this question will depend on whether Mr. Wayne Robinson is an independent contractor or employee of the Defendant Company? The resolution of these issues will determine who is liable for the losses suffered by the Claimant, if any.

[9] The Court was supplied and greatly assisted with written submissions by Learned Counsel appearing in the matter.

THE CLAIMANT'S SUBMISSIONS

[10] The Claimant sought to establish Mr. Wayne Robinson as a servant and/or agent of the Defendant Company so as to hold the company vicariously liable for the actions of Mr. Robinson. The Claimant relied on a modest sampling of cases such as: -

1. **Collin v Hertfordshire** (1947) KB 598;
2. **G.A. v Dale Roger McGregor and Judith McGregor and St. Regis Developments Inc.** 2003 ABQB 960.;
3. **Ready Mixed Concrete (South East Ltd. v Minister of Pensions and National Insurance** (1967) 2 QB 497;
4. **Market Investigations Ltd v Minister of Social Security** (1968) 3 All Rep 732;
5. **Harris v Hall** (1997) 34 K:R 190;
6. **Century Insurance Co. Ltd v Northern Ireland Road Transport Board** [1942] KBD 491;

7. **Plumb v Cobden Flour Mill** (1914) AC 62;

8. **Limpus v London General Omnibus Co.** (1862) 158 ER 993;

9. **Ruddiman & Co v Smith** (1889) 60 LT 708; and

10. **Salsbury v Woodland** (1969) 3 ALL ER 8631

[11] The Claimant concluded that Mr. Wayne Robinson: -

1. Was at all material times the servant and or agent of the Defendant;

2. Conspired with others during the course of his employment with the Defendant to steal the goods belonging to the Claimant;

3. Was not an independent contractor as the Defendant made him out to be merely juxtaposing the word "independent contractor" in his contract.

[12] the Claimant also concluded that: -

> *"1. The express prohibitions in the Standing Orders did not limit the sphere of Wayne Robinson's employment but merely sought to control his conduct within the scope of his employment.*
>
> *2. Guardsman was negligent in failing and or neglecting to provide a suitable, competent, proficient, honest, truthful employee in the person of Wayne Robinson who pilfered the Claimant's goods.*
>
> *3. The Claimant's goods were stolen during the contract working hours by Wayne Robinson.*
>
> *4. The Claimant's loss is supported by the Expert as well as the Witness Statement of Mr. Donald Fung.*
>
> *5. The Claimant need not prove that there were shrinkages as this did not arise on the evidence.*
>
> *6. The Claimant prove its losses in that the hardware items of a bulky nature totaling approximately Eighteen Million Dollars ($18,000,000.00) were stolen by Wayne Robinson…*

7. *Guardsman Limited is vicariously liable in negligence and breach of contract."*

THE DEFENDANT'S SUBMISSIONS

[13] The Defendant in its submissions covered the possibility of Mr. Wayne Robinson being an employee and what the extent of their liability would be if the Court was to accept that Mr. Wayne Robinson was in fact an employee. A plethora of cases were submitted on this point which demonstrated the need for an employer/employee relationship, and that the act committed is sufficiently connected to the agent's assigned tasks for the said act to be regarded as a materialization of the risks created by the employer. The case of **G.A. v Dale Roger McGregor and Judith McGregor and St. Regis Developments Inc** (supra) was also cited by the Defendant and used to buttress this position. It was averred by the Defendant Company that since none of these important markers have been satisfied, they cannot be held vicariously liable for the tortious acts of Mr. Wayne Robinson.

[14] The Defendant also submitted that the Claimant has wholly failed to adduce any documentary evidence at all to establish any losses within the context of the issues raised herein. The Court is devoid of any evidence to make a determination that the Claimant sustained a loss or the quantum of that loss and need not detain itself with any liability attributable to the Defendant.

[15] The Defendant relied on the following cases: -

1. **Heasmans v Clarity Cleaning Co Ltd** [1987] IRLR 286;
2. **Bazley v Curry** [1999] 2 S.C.R. 534;
3. **NWC v VRL Operations and Others** [2016] JMCA Civ 19**;**
4. **Limpus v London General Omnibus Co.** (supra);
5. **Salsbury v Woodland** (supra);

6. **Harris v Hall** (supra);

7. **Port Sweetenham Authority v T.W. Wu & Co**. [1979] AC 580;

8. **Lister v Helsey Hall** [2002] 1 AC 215;

9. **Clinton Bernard v the Attorney General of Jamaica** [2004] UKPC 47;

10. **Allan Campbell v National Fuels and Lubricants Ltd et al** (unreported) Supreme Court, Jamaica, C.L. 1999/C-262, judgment delivered on the 2nd day of November 2004; and

11. **Arden Clarke v Security Innovations Limited & Master C McNamee** [2016] JMSC Civ. 145.

LAW AND ANALYSIS

Whether Mr. Wayne Robinson is an employee or independent contractor of the Defendant Company

[16] The first issue that must be resolved is whether Mr. Wayne Robinson is an employee of the Defendant, thus making the Defendant Company ordinarily vicariously liable for his actions or, was he an independent contractor in which case the extent of liability would be different. In order to make this distinction, the courts have proposed a number of tests.

[17] The first and most traditional test is the control test. The control test refers to the different amount of controls exercisable over the manner in which the work was to be done. As pronounced by Lord Thankerton in **Short v J&W Henderson Ltd** (1946) 62 T.L.R. 427 at page 429, there are four (4) markers of a contract of service. They are: -

"1. the master's power of selection;

2. the payment of remuneration;

3. the master's right to control the method of doing the work;

4. the master's right of suspension or dismissal."

[18] Cook J at page 186 in the case of **Market Investigations Ltd. v Minister of Social Security** [1969] 2 Q.B. 173 stated that if by a contract of employment entered into between parties, a party does in fact acquire the right, through the terms of the document, to control the method of work (the how) of the other, then the contract would be regarded as a contract of service and the worker would be an employee.

[19] In the case of **Honeywell and Stein Ltd v Larkin Brothers Ltd**. [1934] 1 KB 191 at page196, Slesser LJ expressed: -

> *"The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other hand depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer while prescribing work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor."*

[20] In **WHPT Housing Association Ltd. v Secretary of State for Social Services** [1981] ICR 737, one of the issues in the case was whether an architect who was engaged was to be regarded as an employee or an independent contractor. The architect was engaged on what was termed a "freelance basis" to work for the appellants at an hourly rate. Despite a huge degree of supervision and control over his method of work and notwithstanding his almost total integration into the business, he was held to be an independent contractor. This was so because he had retained sole control over his hours of service, which was a big determining factor for the court. However, it must be noted that if the worker is under direct personal control or supervision of his employer, the prima facie inference is that he is employed as an employee and not a contractor. This position was buttressed in the case of **Smith v Martin** 2 K.B. 775.

[21] In my view, based on the standing orders given to Mr. Wayne Robinson, there were no clauses that could be likened to the Defendant Company telling Mr. Wayne Robinson how the work should be done. In my estimation, there was no

degree of control over how Mr. Wayne Robinson should carry out the assigned tasks nor was there any personal supervision effected by the Defendant Company.

[22] Mr. Wayne Robinson's supervisors were the mobile supervisors who would then report to Mr. David-Lee Wright, in his capacity as Area Manager for the Defendant Company. Mr. David-Lee Wright was asked in cross-examination how often he would get reports from these mobile supervisors and his answer was: -

> *"...The mobile supervisors would report to me on a daily basis after they had overseen the security guards". Mr. Wright himself would only visit the location of the warehouse "…once per month or more if necessary".*

[23] He also alluded to the fact that the mobile supervisors' duty was to ensure that the security guards had shown up for their posts and were carrying out their respective tasks. In the light of this, contrary to the pronouncements in **Smith v Martin** (supra), Mr. Wayne Robinson was not in fact under any *"direct personal control or supervision of his employer"* as the supervision, though daily, was not to dictate *how* the work should be done, but rather to ensure that the security guards had turned up to man their posts.

[24] However, as indicated at page 372 para 6-08 of **Clerk & Lindsell on Torts**, Sweet & Maxwell, 22nd edition, the absence of any realistic right of control over the method of doing the work is now rarely conclusive that the relationship is not one of employer and employee. The development of different working relationships saw the introduction of additional tests in order to take account of the changes in employment. Also, there were deficiencies in the distinction that were not reconciled when the "control approach" was taken.

[25] One other way to interpret the nature of the relationship is to examine the contract that was drafted to set the dealings between the worker and the employing party into motion. Usually, from the contract, the intention of the parties may be examined in order to decide whether the worker is being contracted to be an employee or an independent contractor. Though the content of the contract is a relevant consideration, it is not conclusive evidence. Except where there are

conflicting indications of the nature of the relationship, the intention of the parties will be treated as conclusive where the label attached to the relationship will be used to define the relationship.

[26] The Court have noted in the case of **Ferguson v Dawson & Partners (Contractors Ltd.)** [1976] 1 W.L.R. 1213 that where the only express term of the contract between the labourer and the defendant construction company was the defendant's direction that the work was to be classified as self-employed, the contract must be viewed holistically. On this holistic view of the contract, the contents revealed that the relationship that existed between the claimant and the construction company was actually one of employer/employee, despite the company adding a disclaimer that the agreement was for the worker to be classified as a self-employed (independent contractor) worker. The courts thought further that the single express term was just a tactic to gain tax and national insurance advantages, since he would not be liable to pay these for a worker who would be in fact an independent contractor.

[27] The contract between Mr. Wayne Robinson and Guardsman would have to be examined holistically before the nature of the relationship is determined. The contract dated the 28th of March 2008 that was exhibited made reference to the parties as "the Contractor" and "the Sub-Contractor". It noted that the services being provided by the sub-contractor was for the benefit of the third party (as opposed to their own benefit). Clause 11 of the said contract provides that: -

> *"11. The Sub-Contractor shall within (7) days of the commencement of this Agreement furnish the contractor with his/her valid Tax Registration Number and National Insurance Number"*

[28] This clause is reminiscent of an employer employee relationship since it is usually the responsibility of the employer to turnover such deductions (if made) to the relevant government authorities. However, clause 12(a) of the same contract provides: -

> *"The Sub Contractor shall be responsible for making all returns and payments including (but not limited to) those to the Commissioner of Income Tax and any*

> *and all N.I.S., N.H.T., Ed Tax and/or any other statutory payments that may result from consideration received by him/her herein and upon request by the Contractor shall forthwith provide evidence of such payment"*

[29] This clause, on the contrary, is reminiscent of the legal responsibilities that would be attached to an independent contractor. It is therefore my view that the contract taken as a whole does not disclose any intention to create an employer/employee relationship and as such, the relationship between the Defendant Company and Mr. Robinson could be aptly described as one between contractor and subcontractor.

[30] Another test that was developed to distinguish an employer/employee relationship is the organization test. The gist of this test was assessing whether the worker's work was part of the employer's organization and whether his work was coordinated by the employer, so that the employer controlled the "where" and "when", rather than the "how". However, it must be noted that this test is the least effective of tests as it has suffered from inherent flaws.

[31] This test was introduced by Denning LJ in the case of **Stevenson, Jordan and Harrison Ltd. v MacDonald** (supra) where he suggested: -

> *"One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."*

[32] The more modern approach is to take a multiple factor approach. This involves examining all aspects of the relationship that is often regarded as a complex undertaking. In the case of **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 Q.B. 497 MacKenna J held that a contract of service will be held to exist if: -

> *"a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master (though a limited or occasional power of delegation may not be inconsistent with a contract of service)*
>
> *b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master (mutuality of obligations and control over the*

> *employee are the minimum legal requirements for a contract of employment-* ***Montgomery v Johnson Underwood [2001] EWCA CIV 318***
>
> *c) the other provisions of the contract are consistent with its being a contract of service (but that an obligation to do work subject to the other party's control was not invariably a sufficient condition of a contract of service, and if the provisions of the contract as a whole were inconsistent with the contract being a contract of service, it was some other kind of contract and the person doing the work was not a servant)."*

[33] MacKenna J also held in this case that: -

> *"…the inference that parties under a contract were master and servant or otherwise was a conclusion of law dependent on the rights conferred and duties imposed by the contract and if the contractual rights and duties created the relationship of master and servant, a declaration by the parties that the relationship was otherwise was irrelevant."*

[34] In the application of this mixed approach, the question of whether or not one is an employee or independent contractor must be treated as a mixed question of fact and law. It will therefore require the court to take into account and give appropriate weight to each of the separate factors in the individual case.

[35] Cook J in **Market Investigations Ltd v Minister of Social Security** [1969] 2 Q.B. 173 suggested a rule of thumb in order to help on the assessment as to whether the contract is one of service as opposed to one for service. He noted that it would be useful to ask "*is the worker in business on his own account?"* and if the answer to this question is yes, then the worker will be held to be an independent contractor. In order to answer this question, Cook J has suggested a non-exhaustive list of factors that one must be taken into account such as whether the worker uses his own tools to perform the service, whether he hires his own help, what degree of financial risk he takes, what degree of responsibility for investment and management he has and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The Judicial Committee of the Privy Council approved this approach in the case of **Lee Ting Sang v Chung Chi Keung** [1990] 2 A.C. 374.

[36] On the basis of the foregoing discussion and taking into account the entirety of the circumstances, I find that Mr. Wayne Robinson was an independent contractor of the Defendant company.

Whether the Defendant Company is vicariously liable in negligence for the tort committed by Mr. Wayne Robinson.

[37] In the case of **Brown v Robinson & Anor** [2004] UKPC 56**,** a Jamaican case that went to the Judicial Committee of the Privy Council, their Lordships noted that: -

> *"A master is liable for the tortious act of his servant done in the course (or scope) of his employment. It is deemed to be so done if it is (a) a wrongful act authorised by the master or (b) it amounts to an unauthorised mode of performing an authorised act. Such latter acts to fix the master with liability must be sufficiently connected with the authorised act as to be a mode of doing it.* ***Poland v Parr (John) & Sons*** *[1927] 1 KB 236 at 240."*

[38] The applicable, relevant and essential test to establish the liability of the employer, once the employer/employee relationship has been confirmed, is the one pronounced by Lord Millet in the case of **Lister v Hesley Hall Ltd** (supra) where at paragraph 70, His Lordship proposed that the analysis could be reformulated to state that vicarious liability would be imposed on an employer where the unauthorized acts of employees, *"are so connected with acts which the employer has authorized that they may properly be regarded as being within the scope of his employment."* The Court of Appeal in this case had held prior, that the employer was not vicariously liable for the warden's acts, but the House of Lords unanimously reversed its decision. It broadened the ambit of the principle governing vicarious liability for intentional torts by emphasizing the focus that is required on the closeness of the connection between the tort and the individual tortfeasor's employment.

[39] The Court in the case of **Lister** had been confronted with an intentional tort. Intentional tort is the name given to actions that are deliberate acts of wrong and like the theft that is being alleged in the instant case Mr. Wayne Robinson had

committed an intentional I am guided by this case and in particular, its application of the close connection test.

[40] This close connection test has been adopted by subsequent cases such as **Dubai Aluminium Co Ltd v Salaam** [2003] 2 AC 366 and by the Judicial Committee of the Privy Council in their recent decision in **Bernard v Attorney General of Jamaica** [2004] UKPC 47. In the recent case of **Arden Clarke v Security Innovations Limited and Master C. Mcnamee** [2016] JMSC Civ 145 the Court had applied the six (6) principles that were coined by the then Sykes J in the case of **Allan Campbell v National Fuels & Lubricants Ltd. Et al** (unreported), Supreme Court, Jamaica, Suit No. C.L. 1999/C – 262, judgment delivered on the 2nd day of November, 2004 after taking into the account the decision of the Judicial Committee of the Privy Council in **Bernard v Attorney General of Jamaica** (supra).

[41] In **Allan Campbell v National Fuels & Lubricants Ltd. Et al** (supra) the court had to decide whether the employer was liable for fire damage caused to a building at a location to which his employee had diverted. He had gone there to unlawfully sell some of the petrol that should instead have been delivered to a particular petrol station. After doing an extensive review of the development of the law on vicarious liability, Justice Sykes (as he then was) noted six (6) principles to guide the application of the principle in Jamaica. His Lordship also noted that the list was not exhaustive and is as follows: -

> *"(a) what is the duty to the claimant that the employee broke and what is the duty of the employee to the employer, broadly defined;*
>
> *(b) whether there is a serious risk of the employee committing the kind of tort which he has in fact committed;*
>
> *(c) whether the employer's purpose can be achieved without such a risk;*
>
> *(d) whether the risk in question has been shown by experience or evidence to be inherent in the employer's activities;*
>
> *(e) whether the circumstances of the employee's job merely provided the opportunity for him to commit the tort. This would not be sufficient for liability;*

> *(f) whether the tort committed by the employee is closely connected with the employee's duties, looking at those duties broadly."*

[42] Sykes J had assessed the issue in **Allan Campbell v National Fuels & Lubricants Ltd. Et al** (supra) having regard to inherent risks in the business of gas distribution in order to properly assess the liability of torts that were committed by an employee in the scope of his duty. In essence, His Lordship's reasoning on this factor of "inherent risks" was that gas being wrongly delivered at a place it should not have been and fires breaking out during petrol distribution was an inherent risk in gas distribution business. Hence, when the claimant had diverted to the affected location and the damage was caused, he was still acting within the scope of his employment and the employer was therefore vicariously liable.

[43] Lord Millett in the case of **Lister v Hesley Hall Ltd** (supra) had also spoken on the issue of inherent risks and at paragraph 65 of his judgment, he opined that: -

> *"If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business."*

[44] The question to be asked is whether risk of theft is an inherent risk in the security service business. In my judgment, this is not an inherent risk of the business, therefore, when Mr. Wayne Robinson engaged in the pilfering of the Claimant's goods, he was not acting in the course of his employment and was in fact on a frolic of his own. Before finding that an employer should be held vicariously liable, the courts must ask whether looking at the matter in the entirety of the circumstances, is it just and reasonable to hold the employers vicariously liable. An application of the close connection test would negate the possibility of the Defendant Company being vicariously liable for the actions of Mr. Wayne Robinson, as the pilfering of goods could not be likened or held to be closely connected with his duty to secure the goods of the Claimant Company.

[45] On the basis of the forgoing, I find that Mr. Wayne Robinson is not an employee of the Defendant Company. Therefore, the Defendant cannot not be held to be vicariously liable for the tortious acts committed by him. In the alternative, if I am wrong on this and Mr. Wayne Robinson could in fact be regarded as an employee of the Defendant Company, then his actions, in any event, could not be held to have been done in the course of his employment as his tortious act would have failed the essential close connection test in order to establish the vicarious liability of the Defendant.

ORDERS & DISPOSITION

[46] My Orders are as follows: -

1. Judgment for the Defendant on the Amended Claim Form filed on the 14th day of January 2014.

2. Costs to the Defendant to be taxed, if not agreed.

3. Submissions on Special Costs Certificate to be filed and served by the 3rd day of August 2018.

SPECIAL COSTS CERTIFICATE

[47] On the 20th day of July, 2018 I delivered my oral decision in this matter. I invited the parties to make further submissions on the issue of a Special Costs Certificate being awarded to the successful party. My Order in this regard was: -

> *"3. Submissions on Special Costs Certificate to be and served by the 3rd day of August 2018."*

[48] To the date of this judgment, only the written submissions of the Claimant's on this issue have come to my attention. I will render my decision on this issue since no explanation has been provided by the Defendant as to its failure to comply with said Order.

[49] The Claimant submitted that no special costs certificate be granted as the issues involved in the instant case was fairly simple and straight forward. Learned Counsel Mr. Williams averred that although the Court ordered skeleton submissions and legal authorities, the simplicity of the case did not really require same and there was absolutely nothing complex about the legal issues to warrant a special costs certificate. The case of **Michael Distant and Catherine Distant-Minott v NICROJA Limited et al** (unreported), Supreme Court, Jamaica, Claim No. 2010HCV1276, judgment delivered on the 8th day of March 2011 was cited in support of his submissions.

[50] Mr. Williams proffered that a special cost certificate was granted in **Michael Distant and Catherine Distant-Minott v NICROJA Limited et al** (supra) because the court found that the applicant met all the requirements of Rule 64.12 of the CPR and placed special emphasis on the fact that the application involved areas of law which have been less traversed than most, including jurisdictional issue coupled with the fact that both counsel prepared extensively for the application. Learned Counsel indicated that this is not the same in the case at Bar.

[51] In considering the matter, the sole issue to be determined is whether the Defendant's Counsel are entitled to Special Costs Certificate, consequent on judgment being entered in favour of the Defendant.

[52] Rule 64.12 of the CPR states the following criteria regarding special costs certificates: -

> *(1) When making an order as to the costs of an application in chambers the court may grant a "special costs certificate".*
>
> *(2) In considering whether to grant a special costs certificate the court must take into account-*
>
> *(a) Whether the application was or was reasonably expected to be contested;*
>
> *(b) The complexity of the legal issues involved in the application; And*

(c) Whether the application reasonably required the citation of authorities and skeleton arguments.

(3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than-

(a) one attorney-at-law on the hearing of an application; or

(b) two attorneys-at-law at the trial, be allowed."

[53] I garner from this Rule that such certificates were being considered for applications in chambers. I also garner from paragraph 22 of the case of **Raziel Ofer v George Thomas and George Thomas & Col. Et al** [2012] JMSC Civ 184 that these criteria are cumulative in effect and must all be satisfied, with rule 64.12(2) being the threshold that must first be crossed.

[54] Although the cases relied on by Counsel for the Claimant are specific to applications for special costs certificates being made in chambers, this does not mean that the granting of such applications are limited to the applications being made in chambers. The rules address applications made in chambers however, it does not limit the making of the application to chambers matters only.

[55] After careful consideration of the issues arising from the matter herein, I do not find that the matter was a complex one that involved any novel points of law. Although the Court required legal submissions, this requirement was not premised on the factor that the matter was unique and involved issues arising out of uncharted waters. I do appreciate the fact that Counsel on both sides would have prepared extensively for the matter however, the issues herein were not sufficiently complex in which an order for special costs certificate would be deemed appropriate.

[56] Based on the reasoning set out above, it is my view that the matter does not deserve a grant of special cost certificate.