[2018] JMSC CIV 199

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV03406

BETWEEN	**WAYNE LEWIS**	**CLAIMANT**
AND	**CVM TELEVISION LIMITED**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01776

BETWEEN	**WAYNE LEWIS**	**CLAIMANT/ RESPONDENT**
AND	**CVM TELEVISION LIMITED**	**DEFENDANT/ APPLICANT**

IN CHAMBERS

Mr. Andre Sheckleford instructed by Hart, Muirhead and Fatta for and on behalf of the Defendant/Applicant

Mr. Aon Stewart and Mr. Michael Howell instructed by Knight Junor & Samuels for and on behalf of the Claimant/Respondent

CIVIL PRACTICE & PROCEDURE – Striking out statement of case – Claim is frivolous, vexatious or otherwise an abuse of the process of the Court – Rule 26.3 (1) (b) of the CPR – Henderson v Henderson principle – Consolidation – Rule 26.1 (2) (b) of the CPR - Costs

Dates Heard: November 10, 2017 and August 17, 2018

PALMER HAMILTON, J.

BACKGROUND

[1] By way of a Claim Form filed on the 12th day of August, 2016 the Claimant sought the following Orders:

> *(1) Monies due and owing to the Claimant as per the employment contract between the parties;*
>
> *(2) For that in breach of the employment contract between the parties entered into on or about the 30th day of May, 2003 and the subsequently modified employment contract which took effect on the 1st day of February, 2004, the Defendant has wilfully refused and/or neglected to pay in full the sums agree, that is 10% on commission for services provided, by paying to the Claimant 2% on commission for services provided, from the date of commencement of the employment contract to June 2016 and continuing resulting in the Claimant suffering loss and damage and incurring expense;*
>
> *(3) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act;*
>
> *(4) Attorney costs;*
>
> *(5) Costs; and*
>
> *(6) Such further and/or other relief as this Honourable Court may deem fit.*

[2] The Claim Form was accompanied by a Particulars of Claim which was also filed on the 12th day of August, 2016. The Claimant was employed as a Sales Representative for the Defendant Company through an employment contract dated the 30th day of May, 2003 which was to take effect on the 2nd of June, 2003. The Claimant's duty was to sell airtime and spot advertisements, to include sponsorship of programmes carried by the Defendant Company. The Claimant was later presented with an amended contract of employment dated the 29th day of December, 2003 to take effect on the 1st day of February, 2004. The Defendant Company explained that the reason for the amendment was due to the company's recognition of changes that are necessary in order to regularize the structure to allow for equity and the opportunity for further growth. The contractual clause on

the remuneration package as it regards Direct Clients remained the same, with respect to the 10% commission payable on Production Sales collected between 0-30 days. The Claimant averred that the Defendant Company, in breach of the said employment contract, paid the Claimant 2% on said Production Sales from the date of commencement of the said contract to June, 2016 and continuing.

THE DEFENDANT COMPANY'S APPLICATION

[3] The Defendant Company filed a Notice of Application for Court Orders on the 16th day of March, 2017 seeking the following Orders:

(1) That the claim herein be struck out.

(2) That the costs of this application be costs in the application.

(3) That there be such further and/or other relief as may be just.

[4] The grounds on which the Defendant Company is seeking the following Orders are:

(1) Rule 26.3 (1) (b) allows the court to strike out a statement of case where the statement amounts to an abuse of process.

(2) In addition to this matter (2016HCV03406), the Claimant has concurrently brought another matter before the court (2016HCV01776); both against the Defendant.

(3) The cause of action in both matters are the same i.e. an alleged breach of the contract of employment by the Defendant.

(4) The same facts are being asserted to support the cause of actions, as are the remedies being sought in both matters.

(5) Bringing both these claims concurrently amounts to an abuse of process.

(6) The filing of this Claim 2016HCV04334 [sic] *is a misuse of the civil procedures and is manifestly prejudicial to the Defendant.*

[5] The Notice of Application was supported by the Affidavit of Sheldon Reid. In that Affidavit, Mr. Reid deposed that the cause of action in both matters, that is **Claim No. 2016HCV03406** and **Claim No. 2016HCV01776** are the same, both being for an alleged breach of the Claimant's contract of employment by the Defendant

Company. Furthermore, the same facts are being asserted to support the cause of action in both matters and both claims are seeking the same remedies. Mr. Reid deposed that the existence of the concurrent claim amounts to a misuse of the civil procedures and is manifestly prejudicial to the Defendant Company and amounts to an abuse of process.

[6] The Affidavit of Michael Howell was filed on the 17th day of October, 2017 in response to the Affidavit of Sheldon Reid. Mr. Howell stated that **Claim No. 2016HCV03406** is in fact the second of two claims that the Claimant has brought before this Court in respect of the same Defendant Company. He further stated that **Claim No. 2016HCV01776** was brought with Mr. Wayne Lewis and Mr. Herbert Dockery as joint Claimants seeking to restrain the Defendant Company from making certain deductions from their respective salaries. While **Claim No. 2016HCV03406** shows Mr. Wayne Lewis as the sole Claimant for breach of employment contract in which the Defendant Company failed or refused to pay the Claimant pursuant to the employment contract. Even though the cause of actions in both matters is a breach of the employment contract by the Defendant Company, the claims both disclose two separate and distinct breaches of different aspects of the Claimant's and Mr. Herbert Dockery's employment contract and cannot be regarded as the same. Mr. Howell further stated that it cannot be said that because this matter could have been raised in earlier proceedings, that the raising of it in later proceedings is necessarily abusive. Mr. Howell stated that the case at bar can hardly be regarded as prejudicial to the Defendant Company as on the contrary, the striking out of the Claimant's statement of case would be extremely prejudicial to the Claimant as the Defendant Company is in clear breach of its contractual obligations. Mr. Howell in his affidavit further deposed that the 2 matters may be consolidated or an order be made to have the 2 matters heard together to cure any risk of prejudice to the Defendant Company.

SUBMISSIONS

Submissions on behalf of the Defendant Company

[7] Learned Counsel for the Defendant Company submitted that the Claimant's/Respondent's statement of case ought to be struck out on the basis that it is an abuse of the process of the Court, in that it is a reproduction of other proceedings before the Court. Learned Counsel for the Defendant Company advanced their case on this point by relying on the rule of the Court's unwillingness to entertain duplicate proceedings which emanated from the case of **Henderson v Henderson** [1843] 3 Hare 100. Further reliance was placed on the words of Sir Thomas Bingham M.R. in **Barrow v Bankside Agency Limited and Others** [1996] 1 WLR 257 where he stated that:

> *The rule in* Henderson v. Henderson *(1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.*

Learned Counsel for the Defendant Company contended that the rule in **Henderson v Henderson** *(supra)* is therefore based on the rule of public policy, that a litigant ought not to be allowed to return to Court to plead a case which could have been put forward in the earlier litigation in the absence of special circumstances.

[8] Learned Counsel for the Defendant Company also relied on the House of Lords decision in **Johnson v Gore Wood & Co (a firm)** (2002) 2 AC 1, which gave rise to "the **Gore Wood** approach." Lord Bingham stated that:

> *…The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*

[9] Learned Counsel submitted that the pleadings of the Claimant in the instant case are encapsulated in the proceedings with **Claim No. 2016HCV01776**. It was further contended that **Claim No. 2016HCV01776** makes it clear that, for the Claimant in the case at bar, the contract in question is his contract with the Defendant Company and that the wrong he complains of is the removal of certain sums from his salary. In **Claim No. 2016HCV03406,** the Claimant is seeking monies which he claims are due and owing to him pursuant to the same employment contract with the Defendant Company, in that the Defendant Company is paying a commission less than that agreed upon. It is the Defendant Company's position that the claims overlap and the Claimant's claim in **Claim No. 2016HCV03406** falls within damages for breach of contract as sought in the earlier proceedings, that being **Claim No. 2016HCV01776.**

[10] Learned Counsel contended that there is a danger of inconsistent judgments and also a waste of resources within the Court system, in a situation where certain claims ought to be pursued in the same proceedings. Learned Counsel further

contended that these are all elements of the public policy related to the rule in **Henderson v Henderson** *(supra)*. Learned Counsel concluded by submitting that the Claimant's/Respondent's statement of case ought to be struck out with costs to the Defendant.

Submissions on behalf of the Claimant

[11] Learned Counsel for the Claimant contended that in deciding whether to strike out a statement of case, the critical question the Court asks is whether bringing the claim, in all the circumstances, amounts to an abuse of the process. Learned Counsel relied on the judgment of Harris J.A. in **Hon Gordon Stewart OJ, Christopher Zacca & Air Jamaica Requisition Group v Independent Radio Company Limited & Wilmot Perkins** [2012] JMCA Civ 2 at paragraph 32 who also relied on **Johnson v Gore Wood & Co (a firm)** (2001) 1 All ER 481 and **Fletcher & Company Limited v Billy Craig Investments Limited (In Receivership)** [2012] JMSC CIVIL 128 paragraph 151.

[12] Learned Counsel for the Claimant contended that the statement of case should not be struck out merely on the ground that this claim could have been brought in the first proceedings before the Court. It was also contended that the Claimant's conduct does not disclose any desire to abuse the process of the Court and that the Court should consider the merits of the Claimant's matter before slavishly acceding to the Defendant Company's orders to strike out the Claimant's statement of case. Learned Counsel for the Claimant adopted the approach of McDonald-Bishop J in **Fletcher & Company Limited v Billy Craig Investments Limited (In Receivership)** *(supra)* where she stated that:

> *In taking a broad merit based approach in my assessment of this case, I have borne in mind that the whole purpose of the court is to do justice and that shutting out a litigant, in the absence of clear and compelling reasons to do so, is inconsistent with such a responsibility. Legal history is replete with judicial warnings of the ned for caution in striking out a party's case on the basis of estoppel or abuse of process.*

[13] Learned Counsel for the Claimant submitted that the issue in **Claim No. 2016HCV03406** related to the ongoing breach of the Claimant's employment contract and there is no malice in the Claimant's pursuit of this matter. It was further submitted that the Claimant has a real prospect of defending this Claim as the Defendant Company was in clear breach of its contractual obligations to the Claimant. it was also submitted that in acceding to the Defendant Company's request to strike out the Claimant's case, the Court would be in effect shutting the Claimant out of the judicial process in the absence of clear and compelling reasons. Learned Counsel in relying on **Fletcher & Company Limited v Billy Craig Investments Limited (In Receivership)** *(supra)* where McDonald-Bishop J cited Drake J in **North West Water Ltd. v Binnie & Partners** [1990] 3 All ER 547, 551 contended that the Court should approach the striking out of the Claimant's case with caution as this is a drastic measure and one that debars the Claimant from putting forward his action.

[14] Learned Counsel for the Claimant proposed a solution of consolidating the claims or an Order that the matters should be tried together. Learned Counsel relied on the authority of **Hon Gordon Stewart OJ, Christopher Zacca & Air Jamaica Requisition Group v Independent Radio Company Limited & Wilmot Perkins** *(supra)* where it was held that in the circumstances of the case the drastic steps of striking out the appellants' statement of case should not have been taken by the Learned Judge and it was instead recommended that the matters could be consolidated or the two matters to be tried together could be adopted.

ISSUES

[15] The main issue for my contention is whether the Claimant's case ought to be struck out pursuant to Rule 26.3 (1) (b) of the Civil Procedure Rules, 2002 (as amended) (hereinafter referred to as 'the **CPR'**).

LAW & ANALYSIS

A. *Abuse of the process of the Court*

[16] The starting point is Rule 26.3 of the **CPR**, which gives the Court the power to strike out a statement of case or part of a statement of case if it appears to the Court, *"that the statement of case or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings."*

[17] Simmons J in **Shawna Williams v Garry Gilzene, Roderick Denton Reid, Morris Hill and Glenville Osbourne** [2012] JMSC CIVIL 72 cited Lord Diplock in the hallmark case of **Hunter v Chief Constable of the West Midlands Police and Others** (1982) A.C. 529, where he described abuse of process as the –

> *"misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.*

His lordship further stated:

> *"…the circumstances in which abuse of process can arise are very varied; It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power".*

[18] It has also been accepted in the case of **Her Majesty's Attorney General v Paul Evan John Barker** [2001] FLR 759 that abuse of process in another context may be explained as, *"…a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."*

[19] In **Johnson v Gore Wood & Co (a firm)** *(supra)*, Lord Bingham of Cornhill indicated that the approach to be adopted in assessing abuse of process should be a broad, merits-based judgment which takes into account the public and private interests involved, as well as the facts of the case. He also stated that it is not necessary before abuse is found, to identify any additional element, such as a

collateral attack on a previous decision, or dishonesty, and noted that the presence of these elements will make the later proceedings more 'obviously abusive.'

[20] In applying the considerations raised by the judges in the assessment of this point, it does not appear on the facts or the evidence presented that the Defendant Company has been prejudiced in any way which it would not have been but for the bringing of the second claim, that is **Claim No. 2016HCV03406** nor is there anything that point to the Claimant being vexatious resulting in an abuse of the process of the Court.

[21] The claim being brought in the **Claim No. 2016HCV03406** is a legitimate one, as the matter to be decided is that the Defendant Company honours its contractual obligations and pay the Claimant at the agreed rate as distinct from the earlier claim, that being **Claim No. 2016HCV01776**, where the Claimants are seeking to restrain the Defendant Company from carrying out any more acts of illegal deductions from their salaries to cover bad debts. The difference in the cause of actions acts as a mitigating factor to support the claims being brought in separate suits and against arguments of abuse of the court's processes.

B. *The claim being a reproduction of other proceedings before the Court*

[22] In **Barrow v Bankside Agency Limited and Others** [1996] 1 WLR 257 it was held that the rule which required parties to litigation to advance their whole case at the outset and that, in the absence of special circumstances, prevented them from returning to the Court to advance matters which might have been dealt with in earlier proceedings did not apply to a claim which could not have been dealt with on the first occasion. Sir Thomas Bingham M.R. and Saville L.J. highlighted some important markers for the circumstances in which successive suits would in fact be an abuse of the process of the Court. Sir Thomas Bingham M.R. asked questions such as whether the defendant is able to point to any prejudice it had suffered as a result of the claimant's course of action, which it would not have suffered anyway. Saville L.J. added considerations such as whether the claimant would have been

allowed to bring the claims together in the first place and whether the issues and facts are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

[23] **Claim No. 2016HCV01776** is a joint claim between the sole Claimant of the case at bar and Mr. Herbert Dockery, another affected employee. The Claimants were both seeking to restrain the Defendant from making *"certain deductions"* from their salaries to recover monies owed to the Defendant Company by delinquent clients of the Defendant Company. The Claimants' prayer in the Fixed Date Claim Form with **Claim No. 2016HCV01776** was initially for a declaration that the Claimants are entitled to their full salaries payable according to the terms of the contract of employment between the Claimants and the Defendant Company or alternatively, for the Defendant Company to be restrained and/or estopped from illegally deducting outstanding debts of delinquent clients of the Defendant Company from the salaries of the Claimants. The said Fixed Date Claim Form was amended to add to the prayer a request for damages for breach of contract, repayment of monies illegally deducted from the Claimant's salaries or alternatively damages for negligence, restitution for and by reason of unjust enrichment and a claim for interest pursuant to the **Law Reform (Miscellaneous Provisions) Act.** The case at bar was brought by Mr. Wayne Lewis as the only Claimant and concerned the recovery of monies owed to him as a result of a breach of the terms of the employment contract. This claim did not concern what had previously been claimed for except in relation to the issue of damages for breach of contract.

[24] The two claims, **Claim No. 2016HCV01776** and **Claim No. 2016HCV03406**, are related only to the extent that they are both pursuant to the contract of employment with the Defendant Company and contain a claim for damages for breach of contract. The factual causes in each instance of breach are different. **Claim No. 2016HCV01776** concerned a breach of contract in relation to a clause which was not a part of the contract of employment, that is, a provision for the deduction from employee remuneration for company clients who default in payment. On the other

hand, the case at bar being **Claim No. 2016HCV03406** was a breach of contract with regards to a term that was part of the contract of employment but was not performed to the terms of the clause. This is the payment of a 2% commission on sales for which a 10% commission is payable. The evidence does not disclose any breaches on the part of the Claimant with respect to the 10% commission payable on Production Sales collected between 0-30 days that would disqualify him from same.

[25] Therefore, the suits represent two different actions, albeit the same Defendant, and in one case the same Claimant. The evidence to be marshalled for both claims would be different as for **Claim No. 2016HCV01776** the Claimants would have to show evidence such as transactional receipts of the alleged illegal deductions. While in **Claim No. 2016HCV03406**, the sole Claimant would need to show proof of collections of monies for sales within the 0-30 days time frame as stipulated in the contract that would entitle him to his 10% commission.

C. *Complying with Rule 8.7 (3) of the CPR*

[26] Rule 8.7 (3) of the CPR states that:

> *A Claimant who is seeking interest must –*
>
> *(a) say so in the claim form, and*
>
> *(b) include in the claim form or particulars of claim details of –*
>
> *(i) the basis of the entitlement;*
>
> *(ii) the rate;*
>
> *(iii) the date from which it was claimed;*
>
> *(iv) the date to which it is claimed; and*
>
> *(v) where the claim is for a specified sum of money,*
>
> - *the total amount of interest claimed to the date of the claim; and*
> - *the daily rate at which interest will accrue after the date of the claim.*

[27] The Claimant's claim for interest pursuant to section 3 of the **Law Reform (Miscellaneous Provisions) Act** is a claim for statutory interest. Section 3 of **the Law Reform (Miscellaneous Provisions) Act** gives the Court the power to award interest on debts and damages. It gives the Court the discretion to award interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. I respectfully disagree with the position of Learned Counsel for the Defendant Company that the Claimant's claim is not in compliance with Rule 8.7 (3) of the **CPR**. In the absence of an interest rate in the instrument that is the subject of the dispute, a claim for statutory interest is sufficient to keep the claim as one for a specified sum.

[28] In the instant claim, the Claimant has not made any claims for interest outside of the statutory interest that is incidental to claims brought in the Court. There is no need for the Claimant to expressly state the rate of interest, as his claim for interest pursuant to the **Law Reform (Miscellaneous Provisions) Act** covers both the basis on which the interest is being claimed and the prescriptions of Rule 8.7 (3) of the **CPR**.

[29] The claimant in the case of **Dion Moss v Superintendent Reginald Grant & The Attorney General of Jamaica** [2017] JMCA Civ 13 brought a suit for the recovery of damages and losses incurred after his privately licensed airplane was seized and taken into custody by the narcotics police. The prayer in his claim included a claim for interest. Like the Claimant in the case at bar, there was nothing further to his claim for interest and even in the absence of the basis on which this interest was being claimed, the Learned Trial Judge awarded interest pursuant to the **Law Reform (Miscellaneous Provisions) Act** at 3% per annum for nine (9) years. One of the grounds of the appeal was that the Learned Trial Judge erred in awarding interest for nine (9) years. The Court of Appeal held that the judge erred in reducing the period of interest and made an Order that interest is to be awarded at the same rate per annum from the date of the service of the writ to the date of admission of liability, which was a period of about 15 years.

[30] Without more, the Claimant' seemingly bare claim for interest pursuant to the **Law Reform (Miscellaneous Provisions) Act** does not warrant an action for striking out as the Court would, as demonstrated in the above case, on their own award interest for the whole or part of the claim and for whatever period they see fit on the sum of money specified in the claim.

D. *Consolidating the claims*

[31] Learned Counsel for the Claimant submitted that one way to cure any prejudice to the Defendant Company would be to consolidate the two claims or an order by the Court that they be tried together. Rule 26.1 (2) (b) of the **CPR** notes that as part of the Court's general powers of management is the power to consolidate proceedings.

[32] In the case of **Dr. Sandra Williams-Phillips v University Hospital Board of Management** [2014] JMSC Civ. 117 Anderson J was dealing with an application for the consolidation of claims. One of the 2 claims was a claim for arrears of salary, arising out of the claimant's employment contract with the defendant, during the period of time while she was employed by the defendant as a sessional cardiologist. The other claim was a claim for damages for wrongful and/or unfair and/or unjustifiable dismissal and also a claim for a Declaration that the claimant be reinstated in her post as a sessional cardiologist with the defendant. The case provides some very useful points on the considerations of the Court when deciding whether claims should be consolidated. Anderson J noted at paragraph 10 that –

> *If therefore, two or more claims have previously been filed, but this court considers that the same can be conveniently disposed of together, then this court not only can, but should make a consolidation order.*

[33] Anderson J further noted that –

> *[11] Can these claims be conveniently disposed of together? One of these claims – Claim No. HCV 02166 of 2013 is a claim for damages for wrongful and/or unfair and/or unjustifiable dismissal. The other – Claim No. HCV 00103 of 2013 is a claim for arrears of net salary, for the period of January 1, 2009 to April 20, 2012 and*

> *is at its essence therefore, a claim for damages for breach of contract, wherein the total amount claimed, inclusive of court fees and attorney's fixed costs, is $9,100,410.34.*
>
> *[12] Whilst it is true that the parties to both claims are the same and that both claims pertain to same extent, to matters surrounding the employment contract as between the claimant (in both claims) and the defendant (in both claims), in and of itself, these two factors, even when considered by this court, collectively, would not necessarily require that the court conclude that it would be convenient for both claims to be disposed of together.*

[34] Anderson J also relied on the text of **Civil Procedure, Vol. 1** [2004] – commonly termed as, **'The White Book'**, specifically paragraph 3.1.10, which states that –

> *Under the former rules, consolidation of proceedings could be ordered where it appeared to the court (a) that some common question of law or fact arose in both or all of them, (b) that the rights to relief claimed were in respect of, or arose out of the same transactions or series of transactions, or (c) that for some other reason it was desirable to make an order for consolidation. These conditions reflected the fact that the main object of the consolidating power was to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Rule 3.1 (2) (g) contains no such confining conditions. But as the court, in exercising this power, must seek to give effect to the over-riding objective, the conditions stated in the former rules, are bound to remain important considerations.... Aspects of the overriding objective other than those concerned with cost and delay may also be engaged in the question, whether consolidation should be ordered (e.g. ensuring that the parties are on an equal footing and dealing with the case in ways which are proportionate). Upon investigation it may be recognized that the advantages sought to be achieved by an application for consolidation may be achieved by an order under rule 3.1 (2) (h) for the several claims to be tried on the same occasion and that an order for consolidation is neither desirable nor necessary.*

[35] The case of **Law Debenture Trust Corporation (Channel Islands) Limited v Lexington Insurance Company, JLT Risk Solutions Limited & Others** (2001) LTL 12/11/01 makes clear the notion that where there is minimal overlap, consolidation is inappropriate, as there is likely to be a stronger case for consolidation only where there is a strong overlap between two claims. In the case of **IXIS Corporate and Investment Bank v WestLB AG and Others** [2007] EWHC 1748 (Comm) there was a difference in the status of the applicant in the claims that were the subject of consolidation. The applicant was the claimant in

one claim and the defendant in the other and the other parties in the other two claims were different. Although the cases had some amount of overlap, the claims were at different stages in the Court's process and it was decided that it would neither be fair nor just to order consolidation.

[36] It is my judgment that **Claim No. 2016HCV01776** and **Claim No. 2016HCV03406** can and ought to be consolidated. Both claims concern matters surrounding the employment contract that Mr. Wayne Lewis and Mr. Herbert Dockery have with the Defendant Company. They also share similar issues of facts and law. As Anderson J noted, consolidation is likely to be convenient only where there is a strong overlap between two claims. In my view, there is a strong overlap between the 2 claims and would be fair and just to order consolidation.

[37] Learned Counsel for the Claimant relied on the case of **Hon Gordon Stewart OJ, Christopher Zacca & Air Jamaica Requisition Group v Independent Radio Company Limited & Wilmot Perkins** *(supra)* where the Court of Appeal in dealing with an appeal where the Learned Judge had struck out the statement of case, held that in the circumstances of the case where the second suit was brought ostensibly to cure a perceived defect in the pleadings in the first suit, striking out the statement of case was a drastic measure. Hibbert J (Ag) was of the view that the two claims could easily be consolidated and tried together. even though there was no evidence of a defect being cured in the case at bar. I am of the view that to strike out the case would be too drastic and in the interests of justice the two claims ought to be consolidated.

CONCLUSION

[38] In my judgment, **Claim No. 2016HCV03406** does not represent a reproduction of proceedings already before the Court and it is therefore not an abuse of the process of the court. To strike out the claim would result in prejudice to the Claimant that cannot be remedied, as the Claimant's right of access to the Courts would be taken away. The mere fact that the Claimant did not plead specifically

the rate at which he is claiming for interest, for what period and on what part of the specified sum does not render his claim void nor is there any merit in the Defendant Company's claim for the Claimant's statement of case to be struck out. It is therefore my judgment, that the Defendant Company's application ought to be dismissed and an Order to be made to consolidate proceedings.

COSTS

[39] Pursuant to section 47 of the **Judicature (Supreme Court) Act**, *"In the absence of express provisions to the contrary, the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court,"* and it is well recognized that the exercise of this discretion should be pursued in a judicious manner. The general rule relating to costs is contained in Part 64 of the **CPR** and it states that: *"If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party*." The aim in relation to costs is to make an order that reflects on the overall justice of the case.

[40] Learned Counsel for the Defendant Company submitted that it is the impetus of the application for striking out being superseded that brought about the consolidation of the matters and therefore, no order as to costs should be awarded. On the other hand, Learned Counsel for the Claimant submitted that the application was for the matter to be struck out and their response was in defence of the matter being struck out. Respectfully, I disagree with the submissions of Learned Counsel for the Defendant Company. An application was made by the Defendant Company to have the Claimant's statement of case struck out on the basis that it amounts to an abuse of the process of the Court. In response to the said application, the Claimant proposed that the matters be consolidated or an Order be made that the matters be tried together.

[41] I see no need to depart from the general rule relating to costs. The Defendant Company's application was dismissed and therefore they are the unsuccessful

party in this matter. It is my judgment, that costs awarded to the Claimant/Respondent.

ORDERS & DISPOSITION

[42] Having regard to the forgoing, these are my Orders:

(1) Notice of Application for Court Orders dated 15th March, 2017 and filed 16th March, 2017 is refused and dismissed.

(2) Costs to the Claimant/Respondent to be taxed if not agreed.

(3) Claim No. 2016HCV03406 is to be consolidated with Claim no. 2016HCV01776.

(4) Case Management Conference is scheduled for the 16th January, 2019 at 12 noon for 1 hour (to be dealt with Claim No. 2016HCV01776 alongside Claim No. 2016HCV03406).

(5) Pre-Trial Review is retained for the 21st September, 2021 at 11:00 a.m. for 1 hour.

(6) By and with consent, the parties are referred to mediation and time within which mediation is to be completed is extended to the 19th November, 2018.

(7) Claimant's/Respondent's Attorneys-at-Law to prepare, file and serve Orders made herein.