

THE EASTERN CARIBBEAN SUPREME COURT

SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV2013/0112

Between:

CHOICE FM LIMITED

Claimant

And

THE NEVIS ISLAND ADMINISTRATION

Defendant

Before:

Master Fidela Corbin Lincoln

Appearances:

Mrs. Angela Cozier for the Claimant

Mr. Theodore Hobson Q.C with Ms. Farida Hobson for the Defendant

2016: April 14

JUDGMENT

- [1] CORBIN LINCOLN M: The application before the court is an application by Choice FM Limited (“Choice”) for damages for breach of contract to be assessed following the entry of summary judgment for Choice.

Summary of Facts

- [2] Choice operates a radio station in Nevis. Choice and The Nevis Island Administration (“the NIA”) entered into a contract on 1st November 2011 for Choice to provide broadcast services to the NIA. By letter dated 19th February 2013 the NIA informed Choice that the

contract was being terminated with immediate effect. Choice commenced these proceedings against both the NIA and the Attorney General of St. Christopher and Nevis for breach of the contract.

[3] The relevant clauses of the contract state as follows:

- (1) The Administration engages Choice to carry live or via recording all broadcasts or as much as is reasonably possible of the broadcasts of the NIA , those of the Nevis Island Assembly and those of any department of the Administration which it is deemed appropriate for such broadcast. Reasonable notice of such live broadcast shall be given to Choice beforehand and wherever possible a schedule of assignments requiring both live and recorded programs shall be prepared and given to Choice at least one (1) week in advance.¹
- (2) As full and inclusive remuneration for all services to be rendered by Choice to the Administration hereunder the Administration agrees to pay to Choice and Choice Agrees to accept payment in the sum of \$12,500.00 per month.²
- (3) If for any reason Choice does not perform 100% of the services to be rendered in any one day /week/ month, it shall where appropriate within two (2) weeks of the end of the relevant period perform extra services such that the services it has not performed have been made up for, and thereon it shall be entitled to the payment agreed per month for its services.³
- (4) If Choice does not perform the services herein agreed to be performed over the space of two (2) consecutive months the Administration may give Choice time over which it may perform additional services to make up the shortfall and if it does not do so within the time allowed the Administration may terminate this agreement at

¹ Clause 1

² Clause 2

³ Clause 5

its discretion and Choice shall not be entitled to any payment corresponding to the period over which it was in default.⁴

(5) If the Administration refuses, or for any reason neglects to pay Choice for the services agreed to therein, if having faithfully performed the same, Choice shall be entitled to all its remedies at law and equity.⁵

(6) This agreement shall continue in force until terminated by the parties hereto in writing.⁶

[4] An application by the Attorney General for an order striking out the claim against the Attorney General was successful. Choice successfully applied for an order striking out the defence of the NIA and judgment was entered for Choice in an amount to be determined by the court.

Choice's Case

[5] Evidence for Choice was contained in an affidavit of Dwight Cozier, a director of Choice. Mr. Cozier's evidence, in summary, is that:

(1) The contract in issue was a contract which ran from year to year and which entailed the broadcasting of programmes for and on behalf the NIA.

(2) The contract was entered into between the NIA, acting through the Premier's Ministry, and Choice.

(3) Payment for the contract was provided for on a yearly basis in the budget estimates for the NIA, specifically in the budgetary allotment to the Premier's Ministry.⁷

⁴ Clause 6

⁵ Clause 7

⁶ Clause 11

- (4) By virtue of paragraph 11 of the contract between the parties the contract could only be terminated by agreement between the parties.
- (5) There was no agreement between the parties to terminate the contract.
- (6) Instead, on 19th February 2013, the NIA through the Premier's Ministry, summarily terminated the contact between the parties without cause.
- (7) When the NIA terminated the contract between the parties Choice had duly fulfilled its obligations under the contract.
- (8) Even after the contract was terminated without cause by the NIA, Choice continued to broadcast programmes on behalf of the NIA until in or around April 2013 - when the hosts of the broadcasts stopped coming to the radio station - in an effort to continue its performance of the contract, and remained at all times willing and able to continue to perform the contract between the parties until the end of the year 2013, as it had done during the course of 2012.
- (9) A breach in the contract was committed by the NIA without cause and contrary to the said contract.
- (10) Choice has been put to loss and damage as a result of the NIA's breach of the contract and is entitled to the fixed price of the contract for the year 2013 in the amount of \$150,000.00 since had the NIA not breached the contract Choice would have received that sum for the year 2013.

⁷ A document purporting to be a copy of the budget estimates for the year 2013 in relation to the Premier's Ministry is exhibited.

[6] Choice filed submissions in support of the application and submissions in reply to the NIA's submissions. Choice submits that the contract was a year to year contract and that the sum of \$150,000.00, representing payment for the entire year of 2013, is reasonable compensation.

[7] It is well established that the general rule is that any fact which needs to be proved by evidence of witnesses is to be proved at trial by oral evidence or at any other hearing by affidavit.⁸ Evidence should therefore not be contained in submissions. Choice's submissions are replete with assertions which should properly have been put before the court as evidence by way of affidavit.⁹ In assessing damages I shall only have regard to evidence properly before the court.

The NIA's Case

[8] Evidence for the NIA was given by way of an affidavit of Mr. Wakely Daniel, Permanent Secretary in the Premier's Ministry. Mr. Daniel's evidence, in summary is that:

(1) The assessment of damages should be related to the services rendered. The evidence of Mr. Cozier is that even after the contract was terminated without cause the claimant continued to broadcast programs on behalf of the defendant until in or around April 2013. *"The question is why? There is no record of any service in relation to the contract ever published by the Applicant after February 2013."*¹⁰

(2) The record shows that the claimant was paid \$12,500.00 monthly until 19th February 2013. Payments were made from November 2011 up until January 2013 when the contract was terminated.

⁸ CPR 29.2. This Rule is subject to any order of the court and any provision to the contrary in the Rules elsewhere.

⁹ Paragraphs 4,8,9,10,15,16,17,18 of the claimant's submissions filed on 26th February 2015.

¹⁰ Paragraph 11 of the affidavit of Mr. Daniel

(3) According to Mr. Cozier the court should award damages for the fixed price of the contract for the year 2013 in the amount of \$150,000 of public money even though the claimant has not given any service to the public since 19th February 2013.

(4) The court should award nominal damages.

[9] The NIA submits, in summary, that:

(1) It is clear that Choice did not give any service in connection with the agreement since the agreement was terminated by the NIA in February 2013.

(2) Choice is virtually claiming a “penalty” from the NIA in the form of damages for terminating the agreement.

(3) The agreement was clearly a month to month arrangement. All Choice could properly claim is the \$12,500.00 fee for the month of January 2013 that it has claimed in its statement of claim that it did not receive. No mention is made of any expenditure that it would have invested in performing the agreement. In this case Choice has not disclosed the expenditure it would have incurred in performing its side of the agreement.

The Contract

[10] I am unable to agree that the contract between the parties is a “year to year” or a “month to month contract”. The contract is silent on its duration and is therefore a contract of indefinite duration. It sets out criteria for *the defendant* to terminate the contract for non-performance and states that it “*shall continue in force until terminated by the parties hereto in writing.*”¹¹ Save for the limited right given to the defendant to terminate for non performance, the contract does not appear to permit termination except by mutual consent.

¹¹ Clause 11

[11] The terms of the contract to which the parties have saddled themselves have serious implications for both parties. One implication is that if Choice was performing the contract below a reasonable standard, the contract provides no express mechanism for the NIA to terminate the contract unilaterally for poor performance – as distinct from *non performance*. The contract also provides no mechanism whatsoever for Choice to unilaterally terminate the contract. Consequently, if for example, Choice's production costs increased or for some other commercial reason it wanted to bring the contract to an end there is no express provision in the contract which enables it to do so unilaterally. In my view, notwithstanding the limited provision for termination by the NIA for non performance, the contract between the parties is akin to a perpetual contract.

[12] It appears to me that had this matter proceeded to trial the court would have likely considered the issue of a perpetual contract. Perpetual contracts for the supply of goods or services continuously over an unlimited period for a fixed monthly or yearly payment have generally been construed narrowly by the court and, depending on the surrounding circumstances, a term implied that it can be terminated on reasonable notice.¹²

[13] The entry of judgment in default against the NIA means however that it has been determined that the NIA is liable for breach of the contract and issues such as :

(a) whether a term is to implied that that the contract is terminable upon reasonable notice; and

(b) if such a term is to be implied, whether the notice given by the NIA was reasonable in all the circumstances and therefore did not amount to a breach, are not issues which remain open for determination.

[14] While these issues are no longer open for determination, in assessing damages, it must be borne in mind that the contract is of no fixed duration and, as stated, is in my view akin to a perpetual contract.

¹² Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 3 All ER 769

Assessment

- [15] In discussing the various heads of losses which an award of damages for breach of contract seeks to address the learned authors of *Chitty on Contracts*¹³ state:

“It has been pointed out that the victim of a breach of contract has a number of interests which may be protected by an award of damages. First, he may have paid money or conferred some other benefit on the other party, and he will have an interest in recovering the money or the value of the benefits conferred. This has been termed the “restitution interest” and there is a very strong moral arguments for protecting it, as it represents both a loss to the claimant and a corresponding gain to the defendant. Secondly, the victim may have incurred expense or loss in reliance on the promised performance and which is wasted by the defendant’s breach. This is termed the “reliance interest” of the claimant; and it merits protection because it represents the extent to which the victim is left worse off than before the contract was made. Thirdly, the victim may have an “expectation interest”, i.e the gains or benefits which he expected to receive from the completion of the promised performance of all the party’s obligation but which were in the event prevented by the breach of contract committed by the latter... This essentially theoretical analysis is a useful tool of analysis and it has found its way into the English case law. However, it must be applied with some caution. First, the analysis is not exhaustive; damages may be awarded for kinds of loss which do not fit readily into any of the three categories. Secondly, the interest may overlap... Thirdly, it must be emphasized that contract damages are normally assessed on the “expectation” measure and do not protect the restitution interest or reliance interest as much.

- [16] In this case Choice has not pleaded or led any evidence of: (a) any money paid to the NIA which it is seeking to recover; or (b) expenses or losses incurred in reliance on the promised performance which were wasted by the NIA’s breach. In the circumstance, it

¹³ Volume 1, 31st ed; Sweet & Maxwell, 2012 ; pages 1768-1769, paragraph 26-019

appears to me that Choice is essentially seeking an award of damages for its “expectation” interest.

[17] It is now well established that an award of damages for this “expectation” interest is intended to put the injured party in the position, as far as money can do it, as he would have been if there had been no breach.¹⁴

[18] Choice contends that the sum of \$150,000.00, representing the fixed price of the contract for the year 2013 is reasonable compensation. Choice’s claim for this sum appears to be premised on its submission that the contract between the parties “*ran from year to year*”. I infer from Choice’s submission that because the contract “*ran from year to year*” the claimant would have expected to receive compensation for entire year of 2013 hence the claim for compensation for the entire year of 2013.

[19] In the case of breach of a contract of fixed duration the measure of damages would have likely been the amount the claimant would have earned for the duration of the term of the contract - subject of course to the duty to mitigate. In this case the contract between the parties has no fixed duration and, as stated, is in my view akin to a perpetual contract. Damages cannot however be awarded Choice into perpetuity and it must therefore be determined what damages are reasonable in all the circumstances.

[20] In determining what damages are reasonable I have had regard to all the circumstances including:

(1) Mr. Cozier’s evidence is that *at the time the contract was terminated* by the NIA, Choice had duly fulfilled its obligations under the contract. Mr. Cozier exhibited a document headed “List of Programmes Aired by CHOICE FM for the NEVIS ISLAND ADMINISTRATION” which contained a list of six (6) programmes. There is no evidence of when these programmes were broadcast but, based on Mr. Cozier exhibiting this document in support of his evidence that *at the time the contract was*

¹⁴ Livingstone v Rawyards Coal Co (1880) 5 App Cas 25; Banco de Portugal v Waterlow ([1932] AC 474).

terminated Choice had fulfilled all its obligations under the contract, I infer that the programmes exhibited were broadcast up to February 2013 when the NIA repudiated the contract.

- (2) It is well established that if a party to a contract repudiates it in the sense of making it clear to the other party that he refuses or will refuse to carry out his part of the contract, the innocent party may: (a) accept that repudiation and sue for damages for breach of contract; or (b) he may refuse to accept the repudiation and affirm the contract by performing his obligations under it.¹⁵ The evidence with respect to whether Choice broadcast anything for the NIA after February 2013 when the NIA repudiated the contract is disputed. Mr. Cozier's evidence, contained in his first affidavit, is that Choice continued to perform its obligations under the contract by broadcasting programmes on behalf of the NIA until April 2013 when the hosts stopped coming to the station. Mr. Daniel disputes this and states that there is no record of any service being provided by Choice under the contract after February 2013.¹⁶ Notwithstanding the challenge to this aspect of his evidence by Mr. Daniel, in his affidavit in reply Mr. Cozier merely repeats that the claimant continued to broadcast programmes until April 2013 but did not identify any programmes broadcast after February 2013 or provide any other evidence of Choice continuing to perform its obligations under the contract after February 2013. This is in stark contrast to his evidence identifying the programmes broadcast by Choice up to the time the NIA repudiated the contract in fulfillment of its obligations under the contract.
- (3) Based on the evidence before me, I do not accept on a balance of probabilities, that Choice continued to broadcast programmes for the NIA pursuant to the terms of the contract after the NIA repudiated the contract in February 2013.
- (4) Neither the pleadings nor the evidence disclose any actual pecuniary loss suffered by Choice as a result of the NIA's repudiation of the contract.

¹⁵ White and Carter Limited v McGregor [1961] 3 All ER 1178

¹⁶ paragraph 11 of the affidavit of Mr. Daniel

(5) Choice states that it *"remained at all times willing and able to continue to perform the contract between the parties until the end of the year 2013."* However, following receipt of the letter dated 19th February 2013 from the NIA repudiating the contract, Choice was aware or at least it was put on notice that the NIA did not intend to continue to honor the contract. While Choice, as the innocent party, is entitled not to accept the repudiation, it is under a duty to mitigate. The learned authors of *McGregor on Damages* state¹⁷

"The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss"

(6) Compensatory damages, unlike exemplary damages, are not intended to punish the wrongdoer.

[21] In all the circumstances I find that damages in the sum of \$37,500.00, equivalent to three (3) months payment under the contract, is reasonable compensation to Choice for the NIA's breach of the contract.

[22] The NIA shall pay prescribed costs to Choice.

Fidela Corbin Lincoln
Master

¹⁷ 19th edition, page 250, paragraph 9-004