

FEDERATION OF ST CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

CLAIM NO NEVHCV2013/122

BETWEEN:

CHOICE FM LIMITED

Claimant

AND

1. THE NEVIS ISLAND ADMINISTRATION

2. ATTORNEY GENERAL OF ST CHRISTOPHER AND NEVIS

Defendants

Appearances:

Mrs Angela Cozier for the Claimant

Ms Kerry Anne Amrit holding for Mr Theodore Hobson QC and Ms Farida Hobson for the
First named Defendant

Ms Alethea Gumbs for the Second named Defendant

Considered on the written representations submitted by:

Mrs Angela Cozier for the Claimant

Mr Theodore Hobson QC for the 1st Defendant

Mr Jason Hamilton and Ms Alethea Gumbs for the 2nd Defendant

.....
2014: February 17; March 18; October 20
.....

DECISION

INTRODUCTORY

- [1] **LANNS, MASTER:** In this case, the Claimant, Choice FM Limited (Choice FM) has sued the Defendants, the Nevis Island Administration (NIA) and the Attorney General of St Christopher and Nevis (the AG) for terminating an Agreement made between the NIA and Choice FM.
- [2] The Agreement was entered into between the NIA on 1st November 2011 for the provision of broadcast services at a consideration of EC\$12,500 per month. It was terminated on 19th February 2013 after a change of government. The signatories to the Agreement were Mr Ashley Farrell for and on behalf of the NIA, and Mr Arthur Gilbert, for and on behalf of Choice FM. Both signatures were witnessed by Mr Herman Liburd who, at the time, was the Legal Adviser to the NIA, and one of the shareholders of Choice FM.
- [3] The material terms of the Agreement are set out below:
1. By Clause 1, the NIA engaged Choice FM, and Choice FM accepted the engagement to carry live, or via recording, all broadcasts, or as much as reasonably possible of the broadcasts of the NIA, those of the NIA and those of any department of the Administration which it is deemed appropriate for such broadcast. The NIA was required to give Choice FM reasonable notice of each live broadcast, and a schedule of assignments requiring both live and recorded programs was to be prepared and given to Choice FM at least one week in advance.
 2. By Clause 2, the NIA agreed to pay to Choice FM, and Choice FM agreed to accept payments in the sum of \$12,500.00 per month.
 3. By Clause 6, Choice FM would not be entitled to payment if it did not, or refused to perform its obligations under the contract.
 4. By Clause 7, the NIA and Choice FM agreed that "if the Administration refuses, or for any reason neglects to pay Choice FM for any services agreed to, if having faithfully performed the same, Choice FM shall be entitled to all the remedies at law and equity including withholding from the Administration any intellectual or other property belonging to the Administration, which it may be holding for the purposes of performing the services, and may hold the same until the question of its entitlement to payment has been finally settled."
 4. By Clause 11, the Agreement was to continue in force until terminated by the parties in writing.

THE STATEMENTS OF CASE

- [4] By Claim Form filed on 24th October 2013, Choice FM claims against the NIA and the AG payment of the amount of \$150,000.00 representing the contract sum for the year 2013, general damages for breach of contract, statutory interest and costs.
- [5] In its Statement of Claim, Choice FM alleges that on 31st January 2013, the NIA first refused to honour its obligations under the contract by refusing to pay the contract sum of \$12,500.00 for the month of January 2013, and that, by letter dated 19th February 2013, Mr Chesley Manners, Permanent Secretary in the Premier's Ministry wrote to Choice FM informing that the NIA had terminated payments under the contract with immediate effect. Choice FM alleges that this action was in breach of Clause 11 which required the contract to continue in force until terminated in writing.
- [6] Choice FM avers that it continued to faithfully allow all of the broadcasts of the NIA to air, until hosts acting on behalf of NIA were ordered to discontinue their broadcasts. It says that despite repeated demands for payment through letters to Permanent Secretary Mr Manners and to Mr Wakely Daniel, Principal Assistant Secretary in the Premier's Ministry, the NIA has refused to respond to those demands.
- [7] By way of Defence, the NIA has denied the claim, contending that the alleged contract was achieved by undue influence and other vitiating elements. It says that Choice FM is virtually the broadcasting arm of the Nevis Reformation Party (NRP) of which all the members of the Cabinet were members at the time the Agreement was executed.
- [8] The NIA also say that: there is no record that Cabinet authorised Mr Farrell to execute the contract; that at the time of the Agreement, certain officers of the Cabinet were shareholders and a Director of Choice; that the alleged contract does not disclose any recognizable benefit to the NIA, but entered into for the benefit of Choice FM; that on becoming aware of the voidable nature of the contract, the NIA decided to repudiate it by terminating it.
- [9] The AG has also defended the Claim, and has disputed it on the following grounds:
1. He neither admits nor denies paragraphs 1, 2 and 3 of the Statement of Claim as they are not within his knowledge and he puts the Claimant to strict proof
 2. He admits that he is the Attorney General for the Federation of Saint Christopher and Nevis and that, pursuant to sections 13 (2) of the Crown Proceedings Act (Cap 5.06) he is a party who is to be named in matters brought against the State and or the Crown.

3. He denies that this is a matter involving the State or the Crown and as such the AG is improperly joined.
4. He avers that the parties to the contract are the NIA and Choice FM.
5. He neither admits nor denies paragraphs 5 through 21 of the Statement of Claim as the matters therein are not within his knowledge and he puts Choice FM to strict proof thereof.
6. He asserts that he was not privy to any communication with the NIA and Choice FM concerning the contract in question and that any information regarding the contract is not within his knowledge.
7. The AG as representative of the State ought not to be named in this matter as this claim is against the NIA and not the Federation of Saint Christopher and Nevis, and this claim involves matters which are in the exclusive jurisdiction of the NIA.
8. In accordance with the Constitution of the Federation of Saint Christopher and Nevis (1983) there is a legislature for the Island of Nevis which is styled the Nevis Island Legislature. The Constitution grants power to the Nevis Island Legislature to make laws for the peace and good governance of the Island of Nevis with respect to specific matters.
9. The power to enter into contracts such as the contract in question falls exclusively within the jurisdiction of the NIA and this power also falls under the purview of section 106 of the Constitution as a matter pertaining to education of the public through the media on matters relating to Nevis and its administration.
10. Any payments made in relation to the said contract were a charge as against the Nevis Island Administration Consolidated Fund, and not the Federal Government Consolidated Fund. The Federal Government gave no responsibility either as a direct party to the alleged contract or as a guarantor to the funds of the said contract.
11. Further and or in the alternative, in so far as Choice FM at paragraph 12 of the Statement of Claim states that on the 19th February 2013, Mr Chesley Manners, Permanent Secretary in the Premier's Ministry wrote to Choice FM informing it that NIA had terminated payments under the contract with immediate effect, this constitutes notice to Choice FM that the NIA terminated the contract.

12. Choice FM is not entitled to the monies, damages, interest and costs claimed.

13. Save as is expressly admitted, the AG denies each and every allegation set out in the Statement of Claim as if the same had been set forth separately and traversed serialim

Case Management Conference

[10] The matter came up for first Case Management Conference on 13th January 2014, whereupon it was observed that there was on file an application by Choice FM to strike out the Defence filed by the NIA.

[11] The Case Management Conference, and the Application to strike were adjourned for hearing on 17th February 2014 to allow new Counsel representing the NIA to peruse the file. Meanwhile, directions were given in respect of the hearing of the Application to strike.

[12] When the matter came back before me on the 17th February 2014, there was on file an Application by the AG for summary judgment; further or alternatively, for an order striking out the Statement of Claim as against the AG. Directions were issued in relation to that Application and the parties complied. It follows that there are two applications pending before me for determination – one by Choice FM to strike out the Defence filed by the NIA; the other by the AG for summary judgment; and or to strike out the Claim as against him.

[13] The parties have filed written submissions in compliance with court order, and they were content to have the matter determined on the written representations submitted by them.

[14] I think it would be prudent to consider first the application by the AG to strike out the claim against him. If the application to strike fails, the court can consider the application for summary judgment, as the test is wider than that for an strike out application. If the application to strike succeeds, it brings an end to the proceedings as against the AG and the claim against the NIA and can go forward, subject to the outcome of Choice FM's Application to strike out NIA's Defence

THE APPLICATION BY THE AG

[15] By Notice of Application filed on 14th January 2014, the AG applies to the Court for an order for summary judgment. Further or alternatively, the AG asks for an order that the Statement of Claim be struck out as against him.

- [16] The grounds of the application to strike are that the Statement of Case does not disclose any reasonable ground for bringing the claim as against the AG; 2) The AG was never a party to the alleged contract whether expressly or implicitly and as such no cause of action exists against the AG in contract as pleaded or at all.
- [17] The Application is supported by the Affidavit of Mr Jason Hamilton, the Learned Attorney General. In it, Mr Hamilton reproduces the averments made in paragraphs 3 to 10 of his Defence. No need to repeat them.
- [18] In his written submissions, the AG has also repeated the averments in his supporting Affidavit, adding, however, a definition of the term 'government contract'. According to Mr Hamilton, a government contract of the NIA is defined as "means any contract made with the Administration or with a department of the Administration or with an officer of the Administration contracting as such." No authority was cited for this definition.
- [19] In his further submissions, Mr Hamilton contends that to allow the statement of claim to continue against the AG would tantamount to an abuse of the process of the court, where there was no privity of contract between Choice FM and the AG; and thus the Statement of case ought to be struck out against the AG as it does not disclose any reasonable ground for bringing or defending the claim; and or is likely to obstruct the just disposal of the proceedings, and, in light of the exclusive jurisdiction vested in the NIA under the Constitution.
- [20] It was the further submission of Mr Hamilton that even if it can be argued that the AG ought to be joined as a party pursuant to the Crown Proceedings Act Cap 5.06 (which it is submitted is not the case), the court is empowered under CPR 19.3 (1) to remove parties from claims, and the instant claim is one such claim where the AG can be removed, or where the claim can be struck out as against him.
- [21] Mr Hamilton pointed to the court's power to strike out as conferred by CPR 26.3 (b) and (c), and urged the court to grant the orders sought by the AG.
- [22] In resisting the AG's Application to strike, learned Counsel for Choice FM (Mrs Cozier) relies on the Affidavit in Reply of Mr Dwight Cozier, a director of Choice FM. Mr Cozier has deposed, among other things that:
- (i) The AG is joined in the proceedings in his statutory capacity as the government officer in whose name proceedings against the Crown are instituted by virtue of the Crown Proceedings Act;
 - (ii) The NIA is part of the State of St Christopher and Nevis which is understood to be the Crown under the terms of the Constitution;

- (iii) The Crown Proceedings Act mandates that civil proceedings against the Crown be instituted against the Attorney General, and thus he, (Mr Cozier) believes the AG is correctly named as a party to the Claim as against the NIA;
- (iv) Choice FM makes no claim against the Federal Consolidated Fund; or against the Federal government; the AG is a party to the proceedings solely to conform with the provisions of the Crown Proceedings Act;
- (v) It matters not whether there has been any communication between Choice FM, the NIA and the AG, as it is evident from the Claim and Statement of Claim that there is no breach of contract pleaded against the AG and that the breach of contract is pleaded against the NIA.
- (vi) In light of the Crown Proceedings Act, which mandates that civil proceedings against the Crown be instituted against the AG, the AG is correctly named as a party to the claim against the NIA.
- (vii) It does not matter that the subject of the claim involves matters that are in the jurisdiction of the NIA because the Act mandates that the AG be joined in the proceedings in which the Crown is a party.
- (viii) It is true that the power to enter into contracts such as the contract in question falls exclusively within the jurisdiction of the NIA, this fact cannot prevent the applicability of the Crown Proceedings Act in a claim of this nature.
- (ix) Choice FM has made no claim against the Federal Consolidated Fund; nor against the Federal Government; the AG is a party solely to conform with the provisions of the Crown Proceedings Act.

[23] In his concluding paragraph, Mr Cozier urges the court to dismiss the AG's Notice of Application with costs to Choice FM.

[24] As can be seen, the Affidavits are replete with legal arguments, inferences and conclusions, which are impermissible in Affidavits. However, as no challenges have been raised, I make no further comment

[25] As regards the application to strike, Mrs Cozier has submitted that Mr Hamilton has given no reason to strike out the claim as against the AG, and this is contrary to CPR 11.7(1) (a) which

states that an application must state briefly, the grounds on which the applicant is seeking the order.

ISSUE

- [26] The issue which falls for determination is whether, in view of the matters alleged in the Claim Form and Statement of Claim and in the Affidavits, the Statement of Claim should be struck out as against the AG for disclosing no reasonable ground for bringing or defending the claim; or for abuse of process of the court.
- [27] A corollary issue is whether, in view of the provisions of section 13 (2) of the Crown Proceedings Act Cap 5.06; and the exclusive jurisdiction given to the NIA under sections 25 and 100 of the Constitution; the AG should be struck out as a party as being improperly and or unnecessarily joined in the proceedings.

THE APPLICABLE RULES AND PRINCIPLES

- [28] The relevant Rules are CPR 26.3 (1) (b) and (c). Rule 26.3 (1) (b) enables the court to strike out a statement of case or part thereof if it does not disclose any reasonable ground for bringing or defending the claim. Rule 26.3 (1) (c) gives the court the same power where the statement of case or part thereof is an abuse of the process of the court, or likely to obstruct the just disposal of the proceedings.
- [29] It is well recognized in the OECS cases, and further afield, that an application to strike under the CPR 2000 is a summary procedure which is limited to plain and obvious cases, where there is no point in having a trial: "This summary procedure should only be used in clear and obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed, or in some other way is an abuse of the process of the court."
- (Per Sir Dennis Byron in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al** (Civil Appeal No 20A of 1997))
- [30] The reason for proceeding cautiously is that the exercise of this jurisdiction deprives a party of his right to a trial, and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information.

(Per Saunders JA in **Hector v. Joseph** - Dominica Civil Appeal No 6 of 2003).

- [31] The principles in the cases cited above were approved, reiterated and extended by the Hon Mde Ola Mae Edwards J.A. in *Citco Global Custody NV v Y2K Finance*, BVI Civil Appeal No 22 of 2009:

"[13] On hearing an application made pursuant to CPR 26.3 (1) (b) the trial judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny."

"[14] Among the governing principles stated in *Blackstone's Civil Practice 2009*, the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its rights to a fair trial, and the ability to strengthen its case through the process of disclosure and other court procedures such as requests for information, and the cross-examination of witnesses, often change the complexion of a case. Also, before using CPR 26.3 (1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application, must be exercised in accordance with the overriding objective in dealing with cases justly."

- [32] Notwithstanding the applicable principles as stated above, there is also authority for the view that there are those cases which, as pleaded, do not stand any chance of success, and that it would work a similar injustice and an abuse of the court's processes to have the party opposite expend resources to defend the action when it is plain and obvious the claim cannot succeed.
- [33] The court must therefore be persuaded that a party is unable to prove allegations made against a party, or that the statement of case is incurably bad; that it discloses no reasonable ground for bringing or defending a case, and has no real prospects of succeeding at trial.

DISCUSSION AND DECISION

Disclosing no reasonable ground for bringing or defending the claim

- [34] A statement of claim is required to contain a cause of action or grounds against a Defendant. If it does not, it is liable to be struck out.

- [35] A Claim Form must, among other things include a short description of the nature of the claim, specifying any remedy sought (CPR 8.6). And CPR 8.7 provides that a claimant must, include in the Claim Form or Statement of Claim a statement of all the facts on which the claimant relies. The statement must be as short as possible, but must identify any document that the claimant considers to be necessary to his or her case.
- [36] In relation to the AG, is the NIA's claim deficient in any way?
- [37] Contrary to what is deposed by Mr Cozier at paragraph 5 of his Affidavit in reply to the AG's Application, a perusal of the Claim Form reveals that it does in fact make a claim in contract against both the NIA and the AG. The Claim Form reads in part: "The Claimant CHOICE FM LIMITED ... claims against the Defendants the NEVIS ISLAND ADMINISTRATION and the ATTORNEY GENERAL OF THE FEDERATION OF ST CHRISTOPHER AND NEVIS in his statutory capacity as the Government's Officer in whose name proceedings against the Crown are instituted by virtue of the Crown Proceedings Act Cap 5.06 ... payment of the amount of \$150,000.00 ECC representing the contract sum for 2013 in terms of the contract between the parties entered into on the 1st November 2011 for the provision of broadcast services provided by the Claimant to the Defendants ..."
- [38] A claim is also made against both Defendants for general damages for breach of contract ..."
- [39] Significantly, the Statement of Claim presents and particularises allegations against the NIA alone. It does not present any allegations or particulars of the claim for breach of contract against the AG. There is no nexus or link to the contract which is said to have been entered into between "the parties" and claimed to be breached by the NIA and the AG. For instance, it has not been averred that the AG authorised or approved the contract, or guaranteed the contract funds for the purpose of sharing any governmental liability, or for the purpose of enforcing any judgment obtained by Choice FM against the NIA. It merely says that "The Second Defendant is the Attorney General of the Federation of St Christopher and Nevis, and is joined in that capacity, and in whose name proceedings against the Crown are instituted by virtue of the Crown Proceedings Act. ..." It is my view that in a claim of this nature, and given the way the claim form is worded, that is not sufficient. The AG cannot provide a proper or fulsome response to the factual allegations made in relation to the claim for payment of the money claimed or for breach of contract. In the circumstances, the AG deserves to have the proceedings brought to an end against it, thus furthering the overriding objective of achieving expedition and saving expense.
- [40] In spite of the apparent deficiency, the AG has filed a Defence acknowledging that he is the Attorney General. He admits that he is a party who is to be named in matters brought against the Crown pursuant to section 13 (2) of the Crown Proceedings Act. However, he denies that the matter involves the State or the Crown, and has averred that the AG is improperly joined. He pleads that he was not privy to the subject contract and had no knowledge or notice of it.
- [41] When one looks at the way the Claim Form is formulated or drafted, one might find that it would have been preferable for Choice FM to have claimed payment of the amount of \$150,000, and breach of contract etc.

against the NIA alone; and thereafter, in a separate paragraph set out the capacity in which the AG is joined. Since the claims for payment and breach of contract et al are made against, both Defendants, and since no facts are alleged or adduced in the Statement of Claim to support the claim as against the AG for payment of the amount of \$150,000, or the allegation of breach of contract, the Claim Form and Statement of Claim must be struck out as against the AG.

[42] In the exercise of my discretion and of my case management powers, I am satisfied, that the case as pleaded, do not stand any chance of success, as against the AG, and that it would work an injustice and an abuse of the court's processes to have the AG expend resources to defend the action, when it is plain and obvious that the claim, as pleaded cannot succeed against him, because it does not disclose any reasonable ground for bringing or defending it.

[43] Having ruled as I have, it is not necessary to determine the issue as to whether the AG is improperly joined. However, in the event I am found to be wrong in the view I have taken, I will go on to consider whether the AG should be struck out as a party to the proceedings as being improperly or unnecessarily joined in the proceedings. This calls for an examination of the Crown Proceedings Act Cap 5.06, which in turn calls for an enquiry as to who is the Crown.

THE CROWN PROCEEDINGS ACT

[44] At common law, actions against the Crown had to be brought by what is known as a Petition as of right and various other writs and information which are merely of historical interest. The common law idea was clearly to discourage the individual from obtaining a remedy against the Crown. Indeed, the Courts were the Courts of the Sovereign who could do no wrong. However, the Crown Proceedings Act passed in England and received in St Kitts and Nevis changed that approach, and allowed the individual to institute proceedings against the Crown to much the same extent and in the same manner as he can institute proceedings against another individual.

[45] Related to and bolstering the foregoing idea behind the Crown Proceedings Act is the point made by Her Ladyship George-Creque J.A. (as she then was) in **Richard Frederick v Comptroller of Customs HCVAP 2008/037** : "[T]he object of the Crown Proceedings Act was to provide for the institution and maintenance of actions by and against the Crown in much the same way as between subjects in respect of liabilities arising in contract or tort or like actions committed by its servants or officers. The purpose was to take away the immunity from suit previously enjoyed to a large degree by the Crown and thereby rendering the Crown liable in respect of the acts of its officers. ..."

[46] Given the legislative background of the Crown Proceedings Act, the mischief it was intended to cure, can it be said that the AG is improperly joined for the purposes of these proceedings?

[47] Section 13 of the Crown Proceedings Act addresses parties to proceedings.

[48] Sub-section 1 states that civil proceedings by the Crown may be instituted by the Attorney General. (Emphasis added). Sub-section 2 stipulates that civil proceedings against the Crown shall be instituted against the Attorney-General. (Emphasis again added).

- [49] There is no dispute that the proceedings herein are "civil proceedings" as defined in the Crown Proceedings Act. But there seems to be a dispute as to who or what is in fact the Crown. Mrs. Cozier takes the position that the NIA is "a component of the Crown". Mr Hamilton on the other hand seems to be not of the view that the NIA is the Crown, or a component of the Crown. Who then is 'the Crown'?

WHO IS THE CROWN?

- [50] The Crown Proceedings Act may very well provide a definition of the expression 'the Crown' but neither counsel has presented me with the complete definition section of the Act. And the Interpretation Act has not been cited or presented to see what assistance if any, may be derived from it.
- [51] However, Mrs Cozier has asserted, (without citing the authority), that "Crown "includes Parliament, government ministers and civil servants. Counsel has further asserted that core central government departments fall within the definition of 'the Crown'. According to Mrs Cozier, on occasion, non-departmental public bodies, office holders, commissioners and regulators may be considered as the Crown if statutes bringing them into existence confer Crown status upon them.
- [52] Mr Hamilton has not offered a definition of the term 'the Crown'.
- [53] My own research has pointed me to two definitions of the term 'the Crown' which are not inconsistent with the meaning provided by Mrs Cozier:

- (a) "The Crown is a convenient term in constitutional law for the collectivity that now comprises the Sovereign in her governmental capacity, ministers, civil servants and the armed forces. ..."

(See **The Barbuda Council v Antigua Aggregates Limited and Sandco Limited**), Antigua and Barbuda High Court Civil Appeal No 11 of 2005 at paragraph 10; Judgment delivered by Rawlins JA, 14th May 2007)

- (b) "The Crown is, very broadly the central government, and other public authorities – largely local authorities with public corporations existing in an uncanny halfworld."

(Carol Harlow in the text **Compensation and Government Torts**; London: Sweet & Maxwell, 1982.

Is the NIA 'the Crown'?

- [54] In **The Barbuda Counsel** case, Rawlins JA alluded to the difficulty that is sometimes experienced in determining whether, and in what circumstances a person or body may be regarded as the Crown. His Lordship reflected on the complexity of the considerations and principles on which a decision will hinge as to

whether a body is a Crown body. This case is no exception. It admits of difficulties and complexities, especially in light of the provisions of certain sections of the Constitution to which Counsel have alluded to buttress their respective position. I will attempt to review those sections to see whether they provide any useful insight as to whether the NIA can be regarded as 'the Crown' or an arm of 'the Crown', or a "component of the Crown" (as Mrs Cozier puts it), so as to require or necessitate the inclusion of the AG as a party to the action herein. In this regard, one cannot ignore the fact that there has been no reported case in St Kitts and Nevis (as far as I can tell) which has made a decision on the meaning and effect of those provisions in the context of the issue as to who is the Crown, or whether the Constitution has implicitly conferred Crown status on the NIA.

THE CONSTITUTION

- [55] Chapter X of the Saint Christopher and Nevis Constitution is devoted to the Island of Nevis. Section 100 of the 1983 Constitution states that there shall be a legislature for the island of Nevis which shall be styled the Nevis Island Legislature and shall consist of an Assembly styled the Nevis Island Assembly.
- [56] Section 102.—(1) creates the Nevis Island Administration which consists of "a Premier; and two other members, or not less than two, nor more than such greater number of members as the Nevis Island legislature may prescribe, who shall be appointed by the Governor-General."
- [57] Section 102.—(5) states that the functions of the NIA shall be to advise the Governor-General in the government of the island of Nevis and the Administration shall be collectively responsible to the Assembly for any advice given to the Governor-General by or under the general authority of the Administration and for all things done under the general authority of any member of the Administration in the execution of his office.
- [58] Section 103.—(1) empowers the NIA to make laws for the peace, order and good government of the island of Nevis with respect to specified matters, including education.
- [59] Section 106.—(1) addresses the responsibilities of the NIA. This section states that the NIA shall have exclusive responsibility for the administration within Nevis, of the following matters: (a) airports and seaports; (b) education; (c) extracting and processing of minerals; (d) fisheries; (e) health and welfare; (f) labour; (g) land and buildings vested in the Crown and specifically appropriated to the use of the Government; and (h) licensing of imports into and exports out of Saint Christopher and Nevis.
- [60] Section 108.—(1) addresses Finance: It provides in part: "All revenues or other moneys raised or received by the Administration... shall be paid into a fund styled the Nevis Island Consolidated Fund
- [61] What emerges from the foregoing sections is that the Constitution confers to the NIA, a substantial measure of autonomy and or control over its internal affairs while preserving its position as a component part of the State or the Federation. Indeed, section 1 of the Constitution provides that our two islands shall be a sovereign Federal State which may be styled "Saint Christopher and Nevis"; or "Saint Kitts and Nevis"; or the Federation of Saint Christopher and Nevis"; or "the Federation of Saint Kitts and Nevis"

- [62] The same Constitution vests executive power in the Queen and the Governor General in her behalf, acting on the advice of the Cabinet. And legislative power is vested in a single chamber legislature known as the National Assembly which, together with the Queen constitutes Parliament.
- [63] What is important for our purposes is that the NIA is vested with administrative and legislative powers. Significantly, the NIA is vested with full responsibility in relation to certain listed matters including education, which, it has been suggested is wide enough to include and embrace educating the public by the dissemination, (by appropriate methods) of information pertaining to the programmes of the NIA. Also of great significance is the fact that the NIA is given power to legislate in the conduct of Nevis affairs and it is entitled to collect and retain the proceeds of any taxes, fees dues rates or other charges.
- [64] So, within the federal framework, though not expressly stated, the NIA must be considered as an arm of the Federal Government and hence, a component of the Crown.
- [65] I do not think it necessary to delve too far to find that the NIA is an arm of the central government, or a component of the Crown.
- [66] That being said, if the NIA is taken to be an arm of the Crown, why is it necessary, in a case such as this one, to join the NIA as a party to the proceedings when the Crown Proceedings Act mandates that civil proceedings against the Crown shall (not may) be instituted against the AG. And since the AG has conceded that he is a party who is to be named in matters brought against the Crown pursuant to section 13 (2) of the Crown Proceedings Act. why delve any further into any academic exercise as to whether the AG is improperly joined?
- [67] This court is well aware that here in St Kitts and Nevis and elsewhere, it has nearly always been the practice to join the AG along with a servant or public officer or government minister or ministry, as parties to proceedings brought in tort/contract against the State, despite the mandatory nature of section 13(2) of the Crown Proceedings Act. In some cases, however, Defendants have successfully challenged their joinder on the basis of the Crown Proceedings Act. However, as far as I can tell there has never been an application to remove the AG as a party on the ground that he is improperly joined based on certain provisions of the Constitution. For what it is worth, I will cite three cases where Defendants, other than the AG have successfully challenged their joinder.

1. **Monica Ross v The Minister of Agriculture et al**, Claim No 255 of 2001 [St Vincent and the Grenadines]. Ross's case was grounded in contract. There, pending before the court were three applications, one of which was the joint application of the Minister of Agriculture, Lands and Fisheries and the Permanent Secretary, Ministry of Foreign Affairs, Trade and Commerce that they be removed from the claim as defendants, on the ground that they are not proper parties, and that the proper party is the Attorney General. Webster, J [Ag], after considering Section 15 of the Crown Proceedings Act of St Vincent and the Grenadines, (which is equivalent to Section 13 (2) of the Crown Proceeding Act of St Kitts, stated thus:

"The meaning of section 15 ... is clear. In civil proceedings against the Crown, the Attorney General is the property party. The application to strike out the names of the First and Second Defendants [is] therefore granted"

2. **Peter Clarke v The Attorney General et al.** Claim No 475 of 1999. In that case, three police officers, while purporting to discharge their responsibilities in connection with the execution of a Warrant, arrested Mr Clarke and took him to the Central Police Station in St Lucia. Mr Clarke brought suit against the 3 police officers, the Commissioner of Police, the Attorney General and one Mr Dariah, claiming damages for assault, and false and wrongful imprisonment. The Attorney General applied to the Court for an order that the Commissioner of Police be struck out as a party to the action on the ground that he is not a proper party. Edwards J (as she then was), considered the relevant sections of the Police Ordinance, and the case law, and concluded that

"13. Police officers ... do not carry out their duties for the Commissioner of Police but for the State."

"20. In the absence of any allegations ... that the Commissioner was personally involved, or that he approved or directed the 3 police officers to do the wrongful acts alleged in the pleadings, I conclude that the Commissioner of Police was improperly joined as a defendant."

3. **Gregory Bowen and the Attorney General of Grenada v Dipcon Engineering Services Limited Grenada**, Civil Appeal No 12 of 2005, delivered May 2006. This was an appeal from the decision of the Master refusing, for lack of jurisdiction, an application by Mr Bowen to be removed from the claim as a defendant in his personal capacity. Mr Bowen was sued as one of 3 defendants for terminating an agreement made between the former government and the respondent, after a change of government. It was the submission of counsel for Mr Bowen that the language of Section 14 of the Crown Proceedings Act is mandatory and hence, any judgment obtained contrary to its terms is bad in law, and a defendant who is affected, is entitled to have the judgment set aside ex debito justitiae a nullity. Gordon JA with whom the full court agreed) considered the case of **Strachan v The Gleaner Company et al** – 2005 [UKPC] 33, RSC 1970 and CPR 13 and concluded and held that

"The Master did have the jurisdiction to grant the application if, in the exercise of his discretion, he felt that this was the proper course in the interest of justice.

However, he did not exercise his discretion, and so I am of the view that this court, being in as good a position as the learned Master, can exercise its discretion and grant the application for the removal of the appellant as a defendant in suit No 1 of 1996."

- [68] I am not of the view that the instant case can be seen on the same footing as the three cases cited above, given its peculiar facts, and given the relevant provisions of the Constitution. Additionally, the issues raised by Mr Hamilton regarding joining of the AG, did not arise in those cases, and therefore those cases are not legal precedents to be adopted in a case of this nature, founded in contract, entered into between Choice FM and the NIA - a component of the Crown. The Constitution is the supreme law of Saint Kitts and Nevis. The Crown Proceedings Act predates the 1983 Constitution, and must yield to it, if it is inconsistent with any of the provisions of the Constitution. Existing laws are to be construed with such modification, qualification and exceptions as may be necessary to bring them into conformity with the constitution. Indeed, in *M v Home Office* [1993] 3 All ER 537, Lord Woolf stated that the language of the Crown Proceeding Act does not generally apply to all high court proceedings. Perhaps this is one such proceeding to which the Act is inapplicable.
- [69] However, I do not intend to venture much further into the complex issues arising in the AG's application. I would however venture to re-emphasize that, in my opinion, the NIA was created by the Constitution as an organ of government for the island of Nevis. The Constitution invests the NIA with a high level of autonomy. It performs functions that are uniquely governmental. In my judgment, it was not necessary, for the purposes of this case, to join the AG to the proceedings. I am of the view that the NIA can stand on its own for the purposes of these proceedings. Indeed, it is well known that actions by and against the NIA alone are commonplace. In this case, it is readily apparent that the NIA entered into the contract on its own volition, without the input of the AG, and has terminated the contract of its own volition without input of, or notice to the AG.
- [70] Now, if it is accepted that the NIA is a component of the Crown, then, the Crown Proceedings Act applies, and the proper Defendant to cite is the AG. If the NIA is not the Crown, or a component of the Crown, then it must of necessity be regarded as a private entity, which would make it liable for any wrongful act, e.g. for any breach of the contract allegedly entered into with Choice FM, and there is no need for the AG to be joined.
- [71] In the final analysis, despite the provisions of Section 13 (2) of the Act, I am not of the view that it was necessary to join the AG as a party in this case, absent his own involvement in the decision taken to enter into the contract, the breach of which is alleged, and damages sought., and given the unique status of the NIA within the Federal framework
- [72] As to whether the AG was improperly joined, I make no finding. In any event, as I have already struck out the claim as against the AG for the reasons given; it is irrelevant for me to make such a finding. Suffice it to say that a reading of the CPR 8.5 states that a claim will not fail because a person was added as a party to proceedings who should not have been added. This is to be read in conjunction with CPR 19.3 which gives the court a discretion to remove a party on or without an application.

DISPOSTION OF THE APPLICATION BY THE AG

[73] For all the above reasons, I make the following orders:

1. The application by the Attorney General for an order striking out the claim against him is granted.
2. The Claim Form and Statement of Claim are struck out as against the Attorney General as disclosing no reasonable ground for bringing or defending the claim against it.
3. Costs of the application is awarded to the AG in the sum of \$1000.00.

CONSIDERATION OF THE APPLICATION BY CHOICE FM

[74] By Notice of Application filed 12th December 2013, the Claimant, Choice FM, applies to the court for the following orders:

1. That the Defence filed by the NIA be struck out on the following grounds
 - (a) that it does not disclose any reasonable ground for defending the claim; or
 - (b) that the Defence filed by the NIA be struck out as an abuse of process of the court;
 - (c) that the Defence filed by the NIA be struck out as it lacks particulars as required by, and contrary to Rule 10.5 of the CPR; or alternatively
 - (d) that permission be granted to Choice FM to Reply to the Defence if necessary within 14 days of an Order in this application pursuant to CPR 10.9 as amended.

[75] Curiously, having set out the grounds on which the Defence should be struck out; Counsel went on to state in a separate paragraph; "The grounds of the application are ... " There then follow a repetition of the contents of the Claim, a chronology of the actions taken by the NIA prior to the application herein, and legal commentary, arguments and conclusions, consisting of five pages.

[76] Mr Dwight Cozier swore to an affidavit in support of the Application in which he dissected and sought to analyse NIA's Defence, and concluded that; (a) "none of the paragraphs or sub-paragraphs discloses any reasonable case put forward in the Defence of the Claim brought by Choice FM; (b) the Defence is hopelessly flawed and has no chance of successfully defending the Claim; (c) The Defence cannot be amended, as any proper Defence to the Claim would mean a complete re-writing of the entire Defence which is not permitted. Again, Mr Cozier's Affidavit is replete with legal arguments, inferences and conclusions, which are impermissible in Affidavits.

- [77] The NIA has not filed any responding or counter affidavit, although afforded the opportunity to do so. However, it filed skeleton arguments/submissions and authorities, and Choice FM replied.

THE ISSUE

- [78] The main issue which falls for determination is whether the Defence filed by the NIA should, at the pleading stage be struck out as disclosing no reasonable ground for defending the Claim

THE APPLICABLE PRINCIPLES

- [79] In the application by the AG, I alluded to the rules and principles governing an application to strike. It is not necessary for me to rehearse them. (See paragraphs [28-33] above).

THE SUBMISSIONS

Mrs Cozier's submissions

- [80] Mrs Cozier has prefaced her submissions with a recap of the assertions and contentions in the NIA's Defence. Then Counsel regurgitated the analysis, opinions and conclusions advanced by Mr Cozier in his supporting Affidavit.. and came to the same conclusions as Mr Cozier did.

- [81] Counsel next examined the rule pertaining to striking out, and went on to submit that the court, in considering whether or not it should strike out the Defence, should be guided by the dicta of Lord Justice May in the case of *Perdy v Cambran* [1999] All ER (D) 1518, CA:

"When the court is considering ... whether or not it is just ... to strike out a claim, [or Defence] it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed."

"Under the new procedural code of the CPR, the court takes into account all relevant circumstances and in deciding what order to make, make a broad judgment after considering all the possibilities. There are no hard and fast theoretical circumstances in which the court will strike or decline to do so. The decision depends on the justice, in all circumstances of the individual case. ... It is necessary to concentrate on the intrinsic justice of a particular case in light of the overriding objective"

- [82] However, Mrs Cozier recognizes and accepts that the discretion to strike is to be used sparingly because the exercise of the jurisdiction deprives a party of his right to a trial, and his right to strengthen his case through the process of disclosure and other court processes such as requests for further information. Mrs Cozier also accepts that striking out is to be limited to plain and obvious cases. As far as Mrs Cozier is concerned, it is plain and obvious that there is no point in having a trial, as there are no serious issues to be tried, and no serious matters of law to be considered. In light of all of this, the court is left with no option but to strike out the Defence, argued Counsel. In her concluding submissions, counsel posited that the only real reason for the NIA to file such a Defence is to waste the court's time and to obstruct the course of

justice. Counsel therefore urged upon the court that it should strike out the Defence and award costs against the NIA.

Submissions of Mr Hobson, QC

[83] Learned QC prefaced his submissions with a reproduction of the entire contents of the Statement of Claim as filed by Choice FM, as well as a reproduction of the contents of the Defence as filed by the NIA. Learned QC has also reproduced the entire contents of the Application filed by Choice FM.

[84] Mr Hobson QC next presented his submissions, the thrust of which is:

- (1) The NIA has followed the guidelines set out in CPR 10.5 for the drafting of a Defence;
- (2) The NIA has neither denied or admit the main allegations in the Statement of Claim and it has set out the grounds on which it relies to dispute the Claim;
- (3) The Defence has asserted that the contract was obtained by undue influence, and has laid the ground for that assertion;
- (4) The NIA has challenged the authority of Mr Farrell as Cabinet Secretary, to execute a contract when he is not an Accounting Officer of the NIA, and not even a Civil Servant;
- (5) The NIA has asserted that there was no consensus ad idem or a genuine meeting of minds for the common good.
- (6) The Defence has raised undue influence. Undue influence in a contract is more than a concept. It creates a vitiating element in a contract and thus renders the contract voidable. Undue influence is a powerful instrument to nullify corrupt or unfair contracts.
- (7) The NIA has not breached any of the stipulations set out in CPR 26.3 (2). That rule is directed to a Statement of Claim and not a Defence.
- (8) The Defendant must have his day in court. The NIA accepts that the court's discretion to strike must be used sparingly, as it has always been true that examination and cross examination of witnesses often change the complexion of a case.
- (9) The NIA has a very strong case to confront and the court ought to dismiss the application with costs to the NIA

THE REPLYING SUBMISSIONS

[85] The Replying submissions are lengthy. In addition to their 34 paragraphs extending over 7 pages, they incorporate two attachments consisting of 23 pages. A reading of the Reply reveals that it

contains a blend of a Reply to the Defence put forward by the NIA, and the submissions in opposition made on behalf of the NIA

- [86] In the reply submissions, Mrs Cozier pointed to the failure of Choice FM to file any affidavit evidence, with the result, she states, that the Application by Choice FM stands unopposed.
- [87] Counsel also pointed out that the NIA has made no attempt to amend the Defence, or to respond to the submissions in support of Choice FM's Application. Mrs Cozier then discussed the Defendant's duty to set out its case, followed by a discourse on the issue of undue influence raised in paragraph 4 of the Defence
- [88] In the end, Mrs Cozier submitted that it is not enough for the NIA to say that it must be given its day in court, having been brought there, and so to flout the provisions of the rules by not properly setting out its pleadings within the parameters of the rules by an amendment. This is contrary to the overriding objective, Counsel contended. As to learned QC's acceptance that the discretion of the court to strike out a statement of case should be used sparingly, Mrs Cozier has countered that that does not mean that the court, in the exercise of its discretion, and in keeping with the overriding objective to deal with cases fairly, should not strike out a statement of case as an abuse of the process of the court on the ground that it has no prospect of success.

DISCUSSION AND DECISION

- [89] There is an obligation on both a claimant and a defendant to set out all the facts on which they wish to rely. In relation to a Claimant, the Claimant must include in the Claim Form or in the Statement of Claim a statement of all the facts on which the Claimant relies. (CPR 8.7 (1))
- [90] In relation to a Defendant, the comparable provision states: the Defendant must set out all the facts on which it relies to dispute the claim (CPR10.5 (1)).
- [91] Neither a Claimant nor a Defendant may rely on any allegation or factual argument which is not set out in their statement of case, but which could have been set out there unless the court gives permission or the parties agree. (CPR 8.7A and 10.7)
- [92] NIA's Defence is based primarily on the equitable doctrine/concept of undue influence.
- [93] As a general proposition, a party may set aside a transaction where that party was induced to enter into it by another's undue influence of which there are two types, actual and presumed. Undue influence is presumed for certain relationships of trust and confidence, or it may be presumed for any de facto relationship of reposed trust and confidence. Where a complainant relies upon a presumption of undue influence, the court must look to the nature of the relationship and determine whether the potential for domination exists as a matter of fact, or whether it may be presumed. (See: **Royal Bank of Scotland v Etridge** [2001] UKHL 44).
- [94] Actual influence is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal right against the other. (per Mitchell J.A. in **Hilda Elizabeth Stouff**, HCVAP 2010/016).

- [95] If a contract is obtained by undue influence, the document is invalid and no contract has been formed. Within the conceptual framework of contract law; no contract can be formed unless there has been a "meeting of minds" of independent bargaining individuals. If a contract is obtained through the use of undue influence, there has never been an actual meeting of minds of two bargaining parties.

(See: Undue Influence in Contract and Probate Law; Abraham Nievod, Ph.D. J.D., San Francisco, California)

- [95] Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The courts usually require two elements to be proven in a case of undue influence involving a contract: 1) a special relationship between the parties based on confidence and trust; and 2) improper influence or persuasion of the weaker party by the stronger.

- [96] The pleaded Defence of the NIA is, in my view, quite remarkable. It is extremely concise, consisting of 5 short paragraphs and six short sub-paragraphs. The Defence contains mere non-admissions, (save for paragraphs 4, 9, 16, 17, 18, and 19 of the Statement of Claim which are admitted), and a denial of paragraph 21 of the Statement of Claim. Paragraph 21 is the prayer containing the reliefs being sought by Choice FM. As regard the non-admissions, the NIA does not admit that there was an Agreement between the parties. Nor does it admit that Choice FM fulfilled its obligations under the said Agreement. Further, it does not admit that the NIA has since 31st January 2013 refused to continue to honour the Agreement between the parties. These averments are inconsistent with paragraph 4 (f) of the Defence where the NIA avers that "The Defendant, on becoming aware of the voidable nature of the alleged contract, sought to repudiate it by terminating any contract with the Claimant or any of its agencies in relation to the terms of the alleged contract.."

- [97] The NIA was required to say why it does not admit the allegations/averments in 14 of the 21 paragraphs of the Statement of Claim. It has failed to do so in breach of CPR 10.5 (3) (c). It does not even ask Choice FM to prove anything as it was required to do under the rules.

- [98] NIA's main defence is contained in paragraph 4 of the Defence. In paragraph 4 of its Defence, the NIA has denied that Choice FM is entitled to the reliefs sought, and has put forward the reason for such denial. The gravamen of the reason for the denial is the allegation that the contract was procured by undue influence. Then in sub-paragraphs (a - f) the NIA set out general and unparticularised allegations concerning a) the relationship between Choice FM and the Nevis Reformation Party (NRP); b) the lack of authority on the part of Mr Ashley Farrell, former Secretary of the Cabinet to execute the contract ; c) the alleged ownership of shares in Choice FM by certain members of the Cabinet; d) the allegation that the contract was entered into for the sole benefit of Choice FM.; the assertion that the contract does not disclose any benefit to the NIA; e) the averment that on becoming aware of the voidable nature of the contract, the NIA sought to repudiate it by terminating it. Paragraph 5 merely pleads that the two minds were not ad idem without going any further to state the facts and circumstances relevant to that assertion.

- [99] The Defence, although purporting to show the basis for undue influence, has not given the particulars showing how the alleged influence took place, or who was the party in domination; in what way the contract was disadvantageous to NIA and beneficial to Choice FM.
- [100] To successfully raise a defence of undue influence, requires the NIA to show a number of things that on the pleadings have not been demonstrated. The NIA has not pleaded any facts or particulars of a special relationship between the parties based on confidence and trust; nor has it pleaded any facts or particulars of improper influence or persuasion of the weaker party to the stronger. It is not enough to merely give "reasons" for the denial of paragraph 21 of the Statement of Claim. By virtue of CPR 10.1 (4) (b), if the NIA intends to prove a different version of events from that given by Choice FM, the NIA must go on to set out in the Defence its own version of events. It has not done so. Additionally, the NIA was required to identify in, or annex to the Defence any document which is considered to be necessary to the Defence. No documents have been identified or annexed.
- [101] Ms Shemica Maloney has given the Certificate of Truth on the instruction of the NIA. In it, Ms Maloney states: "The 1st Defendant believes that the facts stated in the Defence are true." The truth is, there are no or no sufficient facts to ground a Defence of undue influence. Failure to state the facts, would result in NIA not being able to rely on them at trial unless permission is granted by the court, or unless the parties agree. This is the effect of CPR 10.7.
- [102] The House of Lords in the case of **Three Rivers District Council v Bank of England [No 3]** [2001] **UKHL16**, confirmed the well settled principle that allegations of dishonesty, improper conduct, fraud, misconduct must be pleaded and particulars given. Undue influence has been described as a species of fraud. It must be not only be pleaded. It must be particularised. This has not been done. The Defence is vague, insubstantial, and devoid of any factual or evidential background to substantiate the allegations of undue influence or mistake as to the intentions of the parties.
- [103] Clearly, the NIA's Defence is in breach of relevant rules and principles and it is these breaches that have triggered the application to strike out.
- [104] When Choice FM applied to strike out the NIA's Defence, this constituted a challenge to the said Defence. It was therefore open to the NIA, after being served with the application and the submissions, to amend the Defence to include facts and particulars of those facts. Having not taken any steps to amend the Defence or to seek leave to amend it; or to file a Counterclaim, even though this may very well have been an option open to the NIA; it is reasonable to conclude that the NIA is content to rely on its case as pleaded and is bound by those pleadings.

[105] While I agree with Mr Hobson QC that undue influence is a powerful instrument to nullify corrupt or unfair contracts, I do not agree that it is a viable or proper Defence to the Statement of Claim herein. NIA is not the complainant here; it is Choice FM. NIA has not filed a Counterclaim. Normally, it is a Defendant who is accused of abusing the influence he acquired in the parties' relationship. In my judgment, in the circumstances of this case, undue influence is not a proper defence. The crucial distinction that must be made is that this is not a case where a Claimant is alleging undue influence as against a Defendant. In any event, even if it can be assumed that undue influence is a viable defence in the context of this case, it must be properly pleaded to mark out the parameters of the case that is being advanced for the NIA, to enable Choice FM to properly reply to it. That is the basic purpose of pleadings. . (See **East Caribbean Flour Mills Limited v Ormiston Ken Boyea, Saint Vincent and the Grenadines Civil Appeal No 12 of 2006.**

[106] I think it is significant that the NIA has contended that Mr Farrell had no authority from Cabinet to execute the contract on behalf of the NIA. He did not expressly plead that Mr Farrell's signature was procured by undue influence exerted over him. But he seems to be challenging the validity of Mr Farrell's signature on the basis that he did not act authoritatively on behalf of the NIA to execute the contract. My short comment, if comment were necessary, is that Mr Farrell signed "on behalf of the Administration by authority of the Administration". The NIA is collectively responsible for, and is bound by, all things done by or under the authority of any member of the NIA in the execution of his office (See section 102 (5) of the Constitution of St Christopher and Nevis) .

[107] If Mr. Farrell was not authorised to execute the Agreement in question, then he opens up himself to personal liability, which may arise by reason of his lack of authority, in which case the NIA's remedy lies in an action for impropriety or misconduct (or whatever the case may be). The reality is, Mr Farrell is not a party to these proceedings. Neither is the NRP whose alleged political affiliation with members of Choice FM the Defence has referred, to hinge the assertion of undue influence. If the NIA was of the view that there was something improper or unlawful in the execution or formation of the contract, there is a proper legal course under the law to redress the unlawfulness or impropriety. The NIA cannot chose to ventilate that alleged unlawfulness in its Defence to the claim for payment under the contract.

[108] In the meantime, it is my view, that the NIA is bound by the signature of Mr Farrell, the former secretary of the "Cabinet" who, along with the Legal Adviser Mr Herman Liburd would normally be expected to be present in "Cabinet". This is a claim for breach of contract to recover the amount of \$150,000 allegedly due and owing under the contract. It seems rather odd for the NIA to answer the Claim in the way it has with a vague Defence of undue influence, and several non-admissions without more.

- [109] As mentioned before, a statement of case is liable to be struck out if it discloses no reasonable ground for bringing or defending the claim. It is the law that striking out is limited to plain and obvious cases, where it is clear on its face, that the claim or defence has no realistic prospect of success. I am mindful too, that it is considered draconian to strike out at the pleading stage. With that in mind, my initial inclination was to make an order that unless the NIA take the required step to amend the Defence by a specified date, its statement of case will be struck out. But I doubt whether this approach would further the overriding objective of dealing with cases expeditiously, saving expense, and the need to allot resources to other cases. I doubt too, whether the Defence can benefit from an amendment, since Mr Hobson QC does not find anything wrong with the Defence. One must also not lose sight of the fact that NIA has conceded that it has terminated the contract. Indeed, Clause 12 of the contract permits either side to terminate it. And, implicitly, the NIA has invoked that Clause and has effectively terminated the contract on 19th February 2013. The only issue which seem to arise is that of quantum.
- [110] Mrs Cozier painstakingly took the court through the Defence to emphasize the paucity of facts and lack of particulars, and non-compliance with relevant rules; and urged that the Defence as pleaded does not disclose any reasonable ground for defending the allegation of breach of contract. She drew the court's attention to the elements, principles and tests applicable to the concept of undue influence.
- [111] Learned Queen's Counsel was adamant that the NIA has followed the relevant rules, and has posited that the Defence does disclose a reasonable ground for defending the claim. I am unable to agree with that position. Mr Hobson QC cited **Chitty on Contracts** for his submission that undue influence is a proper remedy and stressed that the NIA must have its day in court. However, in my opinion, on the face of the bare allegations, it cannot be said that any issue as to liability for breach of contract has been raised on the Defence that needs to be ventilated at trial. To my mind, the warning given by Saunders J.A. in **Bank of Bermuda Ltd v Pentium**, BVI Civil Appeal No 14 of 2003 is apt: "A judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the court that it will succeed in defeating the claim brought by the claimant."
- [112] Looking at the Defence in its totality, on the face of it, it is plain and obvious to me, that it is unlikely to meet with any degree of success, and that it is an appropriate one for striking out. under CPR 26.3(1) (b) and (c) as it does not disclose any reasonable ground for defending the claim for breach of contract, for the provision of broadcasting services., and is likely to obstruct the just disposal of the proceedings.
- [113] It obviously follows that I prefer and accept, the submissions of Counsel for Choice FM that the NIA's Defence lacks material facts and particulars of those facts; and that the Defence raises no serious live issue of fact for trial in relation to the claim for breach of contract; and has disclosed no reasonable ground

for defending the claim. I would therefore accede to the Application to strike out the Defence, and enter judgment for Choice FM in an amount to be decided by the Court on assessment.

CONCLUSION

[114] I therefore order that

1. The Application by Choice FM to strike out the Defence is granted.
2. The Defence filed by the NIA on the 27th November 2013 be and the same is hereby struck out as disclosing no reasonable ground for defending the claim, and is likely to obstruct the just disposal of the proceedings.
3. There will be judgment for Choice FM in an amount to be decided by the Court on assessment.
4. The Claimant, Choice FM shall file and serve an application for directions on the assessment within 14 days of the date of delivery of this judgment., unless a consent order is sooner filed.
5. The NIA must pay Choice FM costs of this Application summarily assessed in the sum of \$1000.00.

[115] The court is grateful to Counsel for their helpful submissions..



PEARLETTA E. LANNIS

Master