THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2007

CLAIM NO. AXAHCV/2006/0006

BETWEEN:

WHALDAMA BROOKS (aka "Ras B"))

IWANDAI-I JAHSENTE- I HOWARD GUMBS

Claimants

AND

KENNETH BROOKS,
STEPHENSON ROGERS
STEDKENVIC RADIO CORPORATION LIMITED
HEARTBEAT RADIO (HBR) FM 107.5 LTD.

Defendants

APPEARANCES:

Mr. Clyde Williams and Ms. Ricki Camacho for the Claimants
Mr. D. Michael Bourne and Ms. Tara Carter for the Defendants.

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Date: 2007: 24th 25th 26th September
2008: 25th January

JUDGMENT

[1] **GEORGE-CREQUE, J.:** This dispute concerns, principally, the ownership of Heart Beat Radio ("HBR"), a considerably popular radio broadcasting station operating in Anguilla on air wave frequency band 107.5 FM. HBR operates from a building located at Sugar Hill, Anguilla and has been operated since in and around July 2000 by the Claimants. Prior thereto, HBR was operated by the Third Defendant ("Stedkenvic"), an Anguillian company

of which the First and Second Defendants are shareholders and directors. The other shareholders and directors of Stedkenvic are Mr. Ethelbert Edwards and Mr. Victor Nickeo (aka ""Mello Cello"). It is common ground that the change in the operators of HBR from the Third Defendant came about as the result of discussions between the parties sometime in June, 2000. The agreement resulting from these discussions, as is invariably the case regarding oral contracts, is at the centre of this dispute. The Claimants contend that they acquired HBR by purchase from the Defendants, whereas the Defendants contend that the Claimants were merely permitted to operate HBR on certain terms and conditions. It is common ground that Stedkenvic was issued and still holds the licence granted by the Government of Anguilla pursuant to the Telecommunications Act[1] to operate HBR on this radio frequency.

[2] Prior to 2nd October, 2006, HBR was not a corporate entity. However, on 2nd October, 2006, the Defendants caused a company by the name of Heartbeat Radio (HBR) FM 107.5 Ltd. to be incorporated. On the first day of trial, application was made by counsel on behalf of the Claimants to add this corporate entity as the 4th Defendant. This was not resisted as counsel for the Defendants confirmed that the directors and shareholders of this newly formed company, save for Mr. Nickeo, were the same as for Stedkenvic. An order for joinder was accordingly made.

[3] **The relief claimed**

The Claimants seek as against the Defendants; inter alia, a declaration that they are the sole owners of HBR including its trademark and any other intellectual property and other property and documents, ancillary injunctive relief, in essence, restraining the Defendants from interfering with the operations of HBR, damages for trespass to personal property of the Claimants, and damages for unlawful interference with the business operations of HBR. At the commencement of trial they also asked that the Defendants transfer the 4th Defendant to the Claimants by executing the necessary documents and transmitting them to the registered agent of HBR.

[1] Cap.203

The Defendants have counterclaimed in which they assert their right to ownership of HBR and its related trademarks and other intellectual property and also seek the sum of EC$234,000.00 as commission they allege as due and owing by the Claimants from August, 2003 to October, 2006 in respect of the Claimants' operation of HBR.

The Background

[4] The following chronology of events is gleaned from facts which are not in issue between the parties, or otherwise, are to be treated as findings of fact made on the evidence.

(a) The First and Second Claimants, also known as "Ras B" and "Iwandai-I" respectively, had been friends since 1962. They were both members of a band in the 1970's called "Roots and Herbs". They both worked at Radio Anguilla, another radio station in Anguilla, for over 19 years. Ras B ceased working at Radio Anguilla in 2000. Iwandai-I resigned his position at Radio Anguilla also in 2000 to pursue a career in politics. He was unsuccessful in his electoral bid.

(b) In 2000, Abner Brooks (aka "DJ Hammer") who had also worked at Radio Anguilla, made Iwandai-I aware of the possibility of operating HBR. Iwandai-I in turn made Ras B aware of this possibility.

(c) In June 2000, a meeting ("the June 2000 Meeting") was arranged by DJ Hammer between the owners of Stedkenvic and the Claimants along with DJ Hammer and took place at the HBR studios. The building comprising the HBR studios is owned by one Gloria Brooks, the wife of the First Defendant.

(d) The operation of HBR by the Claimants was discussed and mention was made of at least a debt outstanding in respect of HBR. This was a loan which had been taken out by Ethelbert Edwards at Caribbean Commercial Bank (Anguilla) Ltd ("CCB") used for outfitting HBR with equipment.

(e) It was agreed that the Claimants would assume the responsibility for that loan ("the CCB Loan"). Subsequently, around August, 2000, Ras B and Mr. Edwards visited CCB where Mr. Edwards was removed as principal borrower and replaced by Ras B. Mr. Edwards however, remained liable in respect of the CCB Loan as co-signer. Further, the CCB Loan remained secured by real property owned by Mr. Edwards.

(f) Following the June 2000 Meeting, the Claimants were given control of the operations of HBR. At that time the initial equipment for HBR's operation consisted of an antenna, a radio transmitter, mixing board, two cassette decks, two CD players, two turntables and two microphones. There were also two radio towers. The list of original equipment as agreed, save and except for two luxo microphone books, appears at page 94 part 3 of the Trial Bundle. The bulk of this equipment was faulty and gave poor audio quality and poor reception. The Claimants relocated the erected radio tower, built a house for the transmitter and eventually replaced the transmitter. Other equipment to replace the faulty equipment as well as additional equipment was also purchased over time. Two additional telephone lines were installed as well as fax and internet media.

(g) The operation of HBR became a full time activity. Marketing was carried out and over time a number of advertisers and sponsors for HBR's radio programs were acquired. Over the years with the Claimants in operation, HBR's popularity grew. DJ Hammer was also engaged in the operations of HBR until he resigned in February, 2006 citing differences which had developed as between him and the Claimants. On his resignation he demanded from the Claimants and was paid the sum of EC$50,000.00.

(h) By August, 2004, the CCB Loan which stood in the region of EC $29,000 at the time it was assumed by the Claimants in 2000, was paid off in full from income earned by the Claimants in HBR's operation. Payments were made from a joint bank account at CCB in the names of the Claimants. The Claimants employed additional staff, the total number of which is now six. Four are paid employees. The Claimants do not draw a monthly salary in respect of their services but receive money on an 'as needed' basis to subsist. Prior to the Claimants' assumption of operation there were no employees.

(i) Sometime around 2003, an arrangement was arrived at to pay Mr. Nickeo who was owed a balance of US$2,500.00 in respect of the radio transmitter used by HBR. The Claimants paid this sum over a period of months although the Claimants say they were not made aware of this debt at the June 2000 Meeting.

(j) In October, 2005, the Claimants received a letter from Stedkenvic exhibited to the Defence as **KB 8.** In this letter, reference was made to a lease agreement of 1st July, 2000, in respect of HBR. It also said that the operators had a grace period of 36 months during which time all outstanding debts including loans and monies to Stedkenvic creditors were to be paid and requested a meeting with the Claimants.

(k) A meeting took place in early November, 2005 between the parties. Nothing was accomplished as each side asserted ownership of HBR.

(l) In January, 2006, the Claimants also paid Mr. Rogers some EC$9,380.00 by way of repayment to him of monies spent by him in the operations of HBR. This sum was, in fact, repayment in respect of the sum of approximately US$3,500.00 paid by Mr. Rogers towards the CCB Loan and was the only payment made on account of the CCB Loan at the time of the June 2000 Meeting.

(m) On 31st March, 2006, Stedkenvic sent a letter to the Claimants requesting an accounting as well as payment of a 10% commission or EC$6,000 per month. By this time DJ Hammer had already parted company with the Claimants. The Claimants ignored this letter.

(n) In June, 2006, Gloria Brooks was paid by the Claimants the sum of EC$10,000 for rental of the building from which HBR is operated.

(o) Also in June, 2006, the First Defendant was given a cheque also in the sum of EC$10,000. This cheque was refused and returned to the Claimants along with a letter from the First Defendant admonishing them for not complying with the terms of the letter of 31st March, 2006, and accusing the Claimants of "***trying to steal the station from its owners."*** He ended his letter by stating thus: ***"You have chosen to ignore the letter. I have just about had it with your foot dragging attitudes. I have no recourse but to take drastic action for Heart Beat Radio."***

(p) On 31st August, 2006, Cube Credit Services Limited wrote to the Claimants on behalf of Stedkenvic wherein a claim in the sum of EC$284,000 was made as being the Claimants' indebtedness to Stedkenvic being unpaid commission from January 2001 to that date, at the rate of EC$6,000 monthly. An initial lump sum payment of EC$142,000 was demanded to be paid by 29th September, 2006 with

arrangements being made for payment of the balance in the sum of EC$18,000 monthly as from 28th October, 2006. The Claimants ignored this letter also.

(q) On 1st October, 2006, things came to a head. The Claimants discovered that they were locked out of the HBR studios. A bar had been placed over the door and the lock had been changed. The First Defendant admitted to barring the premises, changing the lock and with the assistance of the Second Defendant to also removing some of the equipment used in HBR's operation. Notices had also been placed on the door and wall of the premises to the effect that the Claimants had been relieved of their duties and HBR closed until further notice.

(r) The Claimants also discovered that apart from various items of radio and broadcasting equipment removed, some files had also been removed and that some telecommunication services had been cut. The result of this action was that the operation of HBR including its broadcasting came to a halt. This action was said to be taken on behalf of Stedkenvic.

(s) On 2nd October, 2006, the Defendants or representatives of Stedkenvic caused a company by the name HBR (107.5 fm) Ltd. to be incorporated.

(t) On 5th October, 2006, the Claimants commenced this action and sought on an urgent basis interim injunctive relief which was granted by the court on 6th October, 2006.

(u) On 6th October, 2006, Stedkenvic which had been dissolved as from July, 2006 was revived.

(v) On 9th October, 2006, Stedkenvic made application to register "HBR" as a trademark. This application has, by consent, been stayed pending the outcome of this case.

(w) The Claimants were able to return to virtually full operation following on the interim relief granted by the court on 10th October, 2006.

The Issues

[5] The issues for the court's determination, having been agreed, may be stated as follows:

(1) Whether the parties in the meeting in and around June 2000 agreed for the purchase of HBR by the Claimants in consideration of the Claimants assuming the

financial debts of HBR or whether it was agreed that HBR be leased to the Claimants on the following terms:

(a) The payment of all outstanding debts of HBR in 36 months of the July 1, 2000 commencement of operations of HBR by the Claimants; and

(b) Thereafter, payment of the sum of EC$6,000.00 as a monthly commission or 10% of HBR's revenues, whichever is greater to Stedkenvic.

This aspect of the matter essentially requires findings of fact. It is to be noted however, that although not pleaded, the Defendants in their skeletal arguments and in oral legal submissions now also contend, in essence, that if indeed their was such a sale of HBR then such sale is unenforceable based upon the legal impossibility of Stedkenvic's ability to transfer the telecommunications licence to the Claimants which was necessary for the lawful operations of HBR by the Claimants. It is not disputed that the Claimants have at all material times operated HBR pursuant to the telecommunications licence issued to Stedkenvic and that the Claimants paid for the licence annually in the name of Stedkenvic. It is also common ground that the Claimants did not acquire and do not own or control Stedkenvic. These are matters which would have been known to the Defendants at least from the time this dispute arose but nowhere in the Defence is this pleaded in the alternative or otherwise. Furthermore, no relief has been sought based upon the unenforceability of such agreement. CPR 10.5(1) states that ***'The Defence must set out all the facts on which the defendant relies to dispute the Claim.'*** The consequence of such failure is that the defendant may not at trial rely on any such allegation not so set out and which could have been so set out in the Defence save with the court's permission given in the circumstances as required by CPR 10 .7 Under the rules of court in operation prior to CPR 2000, a party was specifically required to plead any matter or any fact showing illegality or which if not specifically pleaded might take the opposite party by surprise. Given the overriding objective of CPR 2000 which seeks to safeguard against trial by ambush, I do not consider that CPR 10 is any less strict than what appertained prior but rather that the broad language used is intended to capture even those areas which may have hitherto fore been borderline.

The Agreement

[6] I now turn to consider those issues on which findings of fact are required. Both sides agree that at the June 2000 Meeting, an agreement was reached for the operation of HBR by the Claimants and they so took over operations as a result of that agreement. They disagree as to the terms and purport of the agreement or, put another way, they disagree as to what in fact was the agreement arrived at.

Claimants' evidence

[7] Iwandai-I in his evidence stated, in essence, that:

(a) at the meeting during the discussions when mention was made of Mr. Edward's indebtedness to CCB he stated that ***"if we take the debt we take the radio station."***

(b) the CCB Loan was the only one mentioned and that he was aware of at the time.

(c) there was no discussion at any time for a lease arrangement or for payment of any commission by them to the individual defendants or to Stedkenvic in respect of HBR.

(d) Apart from the CCB Loan, sometime after being approached by Hammer in 2003, and told of a debt due to Mr. Nickeo in respect of the radio transmitter used by HBR, Mr. Nickeo was paid the sum of US$2,500.00 over a period of months, in respect thereof .

(d) In and around January 2006, Mr. Brooks approached him and stated that monies were owed to Mr. Rogers in the approximate sum of EC$9,000.00 spent by him in the operations of HBR. Mr. Rogers was then also paid.

(e) A sum of EC$10,000.00 was also paid to Gloria Brooks in June 2006 as rental for the premises from which HBR is operated.

(f) In June 2006, Mr. Brooks had approached him and requested some money pointing out that all the other shareholders of Stedkenvic had gotten money and so a cheque of EC$10,000 was proffered to him.

8] In cross-examination, he admitted that notwithstanding he was only made aware of the CCB Loan at the time of the June 2000 meeting, he paid off Mr. Nickeo, Mr. Rogers

and proffered a payment of EC$10,000.00 to Mr. Brooks even though Mr. Brooks was not owed any money. He stated that his proffered payment to Mr. Brooks was just his goodwill. In further cross-examination he stated ***" I was to assume all the debts of HBR that were given at the .. June 2000 meeting. …. The debt that we agreed in June 2000 was the CCB debt. Subsequently they submitted other debts and we paid those debts".***

[9] Ras B in his evidence stated, in essence, that:

(a) after being approached by DJ Hammer about taking over HBR, this prospect appealed to him given his radio experience having worked at Radio Anguilla.

(a) At the June 2000, Meeting a general discussion first took place concerning different views about radio and then he and Iwandai-I were shown around the station and shown the existing radio equipment at the time.

(c) Someone mentioned the CCB Loan owed by Mr. Edwards in respect of a loan taken out by him and used to acquire equipment for HBR and that the debt was approximately US$11,000.00. At this point, Iwandai I stated that if they were going to take over the financial indebtedness of HBR then they were going to take over the radio station and own it.

At paragraph 9 of his witness statement he said: ***"It was agreed in the meeting that we would assume all the financial debts of HBR as the consideration for its(HBR) purchase."*** He also went on to state that:

(d) there were no discussions about a lease arrangement for HBR during that meeting or any discussions about payment of a commission to the Defendants pertaining to the operation of HBR.

(e) He went with Mr. Edwards to CCB to sign the paperwork required for them to assume the CCB debt. He was replaced on the loan documents as the principal debtor and Mr. Edwards as the co-signer as the security for the loan was land owned by Mr. Edwards.

(f) The loan was fully repaid around August, 2004.

(g) They also paid the yearly telecommunications licence renewal fee to the Government of Anguilla since 2001.

(h) Throughout 2001 to 2006 they developed and marketed HBR as a brand. They also purchased additional equipment. Hammer assisted with ordering some of

the equipment. At paragraph 17 he stated: ***" We spear headed all the marketing and public relations necessary to create a brand known as HBR and to make the radio a profitable going concern,"*** and at paragraph 19: **"*When we took over HBR there were no existing radio programs. We did not inherit a client list. There were no advertisers, no contracts for advertisers. We had to build HBR."***

(i) it was in October, 2005 that by letter from Stedkenvic it was raised for the first time that HBR had been leased to the Claimants as from July 2000.

(j) at a subsequent meeting in November, 2005, when they asserted ownership, the Defendants walked out.

[10] Ras B also gave evidence of the events which followed the chronology of which I now summarize:

(a) **January, 2006** - DJ Hammer informed Iwandai I that Mr. Rogers was owed money in the sum of EC$9, 380.00 for sums spent in the operations of HBR. This sum was paid. .

(b) **February, 2006** - DJ Hammer resigned from working at HBR by letter dated 7th February, 2006. A demand was also made therein for payment of the sum of EC$50,000.00 for his services in respect of HBR. This sum was paid.

(c) **March, 2006** - a further letter from Stedkenvic dated March 31st, 2006 was received. This letter requested that the Claimants prepare financial reports and accounts in respect of HBR's operations and also a payment of 10% commission. They did not respond to this letter nor did they comply with the requests made therein.

(d) **August, 2006** - a letter dated August 31st , 2006, was received from Cube Credit Services Ltd. acting on behalf of Stedkenvic in which it was asserted that they owed to Stedkenvic the sum of EC$284,000.00 being unpaid commission as from January 2001 to August 31st, 2006. It also contained a request for payment of a monthly sum of EC$18,000.00 ($6,000.00 of which was said to be commission) commencing as at 28th October, 2006. They did not respond to this letter nor complied with the demands made therein.

(e) **October, 2006** - they were locked out of the premises housing HBR. They saw the notices posted to the effect that they were relieved of their duties and that

HBR was closed until further notice. The notices were signed by Kenneth Brooks. On gaining entry to the premises they discovered that various items and radio equipment which was later itemized and appearing as Schedule 1 to the Claim as well as documents containing their financial and client information were missing.

(f) From 1st to 7th October, 2006, they were unable to operate HBR. The documentation was not returned until 10th October. Some telecommunication lines which had been disconnected were restored by10th October, but the main telephone line was not reconnected until late October/ early November, 2006.

[11] In cross-examination, he accepted that:

(a) they were not given any receipts in respect of the original equipment nor were they given any transfer documents in respect of that equipment.

(b) The electricity supply to the premises used by HBR was in the name of Kenneth Brooks; so was one telephone connection although they had applied for and installed two additional lines.

(c) They had not applied for a radio licence in respect of HBR and there was never any transfer of the radio licence in respect of HBR to him or either of them.

(d) They had applied for and obtained radio licenses for additional frequencies, namely, 97.7 and 107.3. These are in the name of Supreme Sound Radio.

Defendants' evidence

[12] The First Defendant, Kenneth Brooks in his evidence stated in essence that:

(a) from sometime in an around 1980, having visited Canada and listening to a radio station called CHUM FM, he got the inspiration to set up a commercial radio station. He spoke to his friend Stephen Rogers about this venture. It was to be a part time project given the limited time as well as finance available for the project.

(b) in 1986, Ethelbert "Teddy" Edwards and Victor Nickeo joined into the venture. Stedkenvic was incorporated on 21st July 1986 as the vehicle for the venture.

(c) Application was made for a radio licence and approval in principle was given in 1998.

(d) The building which formerly housed his father-in-law's shop was converted into two studios. Bathroom facilities were installed and electrical wiring of the building carried out. A tower was acquired from monies earned by him and Mr. Rogers. By the time outfitting of the building for HBR had been completed he had expended a sum in excess of US$19, 650.00 of his own money.

(e) Further funds were needed to move the project forward. A loan was required. Scotiabank Anguilla was approached, but this was unsuccessful. Mr. Edwards, however, was able to secure a loan from CCB for about US$13,160.00. This sum was not sufficient. Some equipment was acquired from St. Maarten and some was purchased from Mr. Nickeo who at that time was associated with a station called ZJF. The purchase agreement between Mr. Nickeo and Stedkenvic was exhibited as KB5.

(f) It was Mr. Nickeo's suggestion to call the station "HBR". And from sometime in 1997 they began operating the station as a commercial entity broadcasting to the Anguillian public on 107.5MHZ as HBR.

(g) DJ Hammer approached him around June 2000 regarding his interest along with the Claimants' in operating HBR. A meeting took place. Mr. Edwards spoke of his loan from CCB having to be repaid by the operators.

(h) He (Mr. Brooks) indicated that no lease payments would be expected until the loan repayment period had expired and the Claimants were to go ahead and operate the station until a suitable lease agreement was drawn up.

(i) Control was turned over as of 1st July 2000. He was unconcerned about the tardiness of formalizing the arrangements as DJ Hammer was known personally to him. However, by 2005 he had become concerned as communication about the station's operations became more sporadic.

Mr. Brooks then relates a series of events following which is not dissimilar in substance to that related by the Claimants: At paragraph 28 of his witness statement he stated thus: ***"When Stephenson Rogers informed me that the deadline set by Cube had passed and Cube had received neither an offer of payment nor any money, I formed the opinion that our inaction was working against us and that I needed to act quickly to protect the property of the company, those***

assets that belonged to me personally and our proprietary interest in HBR" Mr. Brooks further stated that:

(j) On 1st October, 2006, he and Mr. Rogers, packed up some of the equipment changed the locks to the premises and left the Station with HBR playing looped music from a computer.

(k) The Claimants broke the door and stopped the looped music with the result that HBR went off the air as from 1st October, until 7th October, 2006.

(l) He also instructed Cable and Wireless to disconnect the telecommunication lines.

[13] In Cross examination, he said that:

(a) Hammer would inform him every week as to the progress of the Station.

(b) He couldn't recall if the equipment he packed up and took away from the Station was different to the list called Schedule 1 produced by the Claimants.

(c) He did not form the plan to lock down the station until just about the time that he was closing his radio program the evening prior to 1st October. However he accepted that the opinion he formed at paragraph 28 of his witness statement was formed around 29th September.

(d) He had no discussions with anyone in Stedkenvic about closing down the station but did discuss this with Stephenson Rogers just before closing time and closing down the Station.

(e) He issued a press release which stated that the owners of Stedkenvic had taken the action to close down the station but in fact it was just him and Mr.Rogers, who assisted him in so doing, who took the action.

[14] Also during cross examination skillfully conducted by counsel for the Claimants, Mr. Brooks contradicted admissions he made in his Defence. He denied taking the file of commercial announcements even though he admitted same in paragraph 50 of his Defence. Also, he said there was one meeting in June 2000 whereas at paragraph 27 of his Defence he spoke of a supplemental meeting at which he said the Claimants were

informed of the fact that Mr. Edwards had paid down $3,500.00 towards the CCB Loan. Later when faced with his Defence he then said there were two meetings, and when faced with his witness statement conceded that he had only spoken of one meeting therein. He also said that there was no resolution by Stedkenvic to close down HBR, nor was there any decision of the shareholders of Stedkenvic to do so. Notwithstanding that he refuted that Stedkenvic and its owners did not have sufficient financial resources to take HBR forward. He conceded that just before the June 2000 Meeting he learnt that the CCB Loan was not being serviced and that as at June, 2000 only $3,500.00 had been paid on the loan since its inception in 1997. Up to 2000, they were unable to pay Mr. Nickeo the balance of $2,500.00 owing to him. It is the Claimants who paid off this balance to Mr. Nickeo. He said he was unaware that Stedkenvic sought outside investment in trying to develop HBR but admitted that Mr. Edwards was in trouble in respect of the CCB Loan.

[15] Ethelbert Edwards in his evidence also tells the story of how HBR came about. He stated, however, that advertising contracts were sought and one first such advertiser was the Anguilla Lottery Gaming Company. This contract was exhibited. He ran a program on HBR between 20.00 hrs and 06:00hrs. He remained involved in the programming even after the Claimants took over. He said that from HBR's early days there was a large listening audience both in Anguilla and St. Maarten. He related that:

(a) In June 2000, Stehpenson Rogers came to him and told him of the Claimants' and Abner (DJ Hammer)Brook's desire to lease the Station.

(b) A meeting took place between the parties and in that meeting he informed the Claimants and DJ Hammer of the CCB Loan and of the fact that there were other creditors, namely, certain directors and of the utilities contracted for by the Stedkenvic.

(c) It was mentioned by Kenneth Brooks at the meeting that Stedknevic would receive no remuneration during the grace period of thirty-six months which was to allow for repayment of Stedkenvic's debts.

(d) At no time was there any discussion of ceding ownership or any part thereof in HBR to the Claimants because he allowed his house to stand as collateral and

this was on the basis that Stedkenvic maintained ownership of HBR and its equipment.

(e) The Claimants assumed responsibility for all utility bills, repairs to equipment, and servicing of debts to the directors such as Mr. Rogers and Mr. Nickeo.

[16] In cross examination, he admitted that:

(a) there were discussions about closing down HBR which took place before he left the island between him and Mr. Brooks. He could not recall speaking to Mr. Nickeo and Mr. Rogers about it.

(b) There was only one meeting with the Defendants in 2000 and says that at that meeting the Claimants knew of the monies owed to Mr. Nickeo and also the monies owed to Mr. Rogers. All the creditors were then discussed.

(c) The CCB Loan was not being serviced due to financial problems and search was on for people to come in and operate the station but outside investors were not being sought. This is contrary to what Mr. Rogers stated at paragraph 6 of his witness statement.

(d) Mr. Rogers paid the $3,500.00 in respect of the CCB Loan thus the debt due to him in respect of this sum.

(e) These various debts were in respect of monies which the shareholders had invested in HBR.

[17] The evidence of Stephenson Rogers relates a history consistent with that related by Mr. Brooks and Mr. Edwards as to the evolution of HBR. He also said in essence that:

(a) DJ Hammmer approached him and discussed with him the leasing of HBR.

(b) HBR at that time was not being operated on a twenty-four hour basis. Mr. Nickeo ran the station for a couple hours per day.

(c) At the June 2000 Meeting it was pointed out that Stedknevic did not have the staff to make HBR operational on a full time basis.

(d) It was agreed that the Claimants would lease HBR on the condition that they assumed all the debts of Stedkenvic, specifically those of its directors and the CCB Loan.

(e) After thirty-six months had passed Kenneth Brooks informed that the CCB Loan had not yet been paid off and so further time was allowed to the Claimants for making payments.

(f) By 2005 however, he had become concerned by the lack of any payments by the Claimants. He received, in due course, payment in respect of his debt and then encouraged the other directors to pursue the Claimants in respect of the outstanding lease payments.

Mr. Rogers also then related a series of events commencing from the letter sent to the Claimants by Stedkenvic in October, 2005, culminating in the letter from Cube Credit Services of 31st August, 2006 on behalf of Stedkenvic to the Claimants and the actions of 1st October, 2006. At paragraph 21 of his witness statement he said thus: ***"Acting in my own self interest and as a director of the Third Defendant we acted to secure the property of the Third Defendant on 1st October, 2006 by packing up equipment and changing the studio locks."***

[18] Abner 'DJ Hammer' Brooks in his evidence indicated that he brought the Claimants as a group together and interested in operating HBR as it was his idea. He considered himself as a full partner with the Claimants. They dispute this. I am not called upon to make such a finding and to my mind it is only relevant in the exercise of assessing the evidence as a whole. He admittedly resigned by letter dated 7th February, 2006. That letter also shows that the relationship between the Claimants and Hammer had gone sour by that time. He also stated, in essence, that:

(a) the agreement reached in the June 2000 Meeting was for a lease with the Claimants assuming all the debts of HBR with lease payments commencing after the debts were paid off in full;

(b) all of the debts were made known to him and the Claimants in the June 2000 Meeting.

He estimated that the station earned around EC$17,000.00 in total revenue per month and could not say why the Claimants failed to pay the agreed lease payments.

[19] In cross-examination he said that:

(a) he copied his letter of resignation to the Board of Stedkenvic and told Mr. Brooks about a week before of his intention to resign;

(b) He was not aware of Mr. Brooks and Mr. Rogers' actions in closing down the station on 1st October, 2006 but did air a pre-recorded press statement on his station "Klass FM" that HBR had been closed, the Monday following.

(c) There was only one meeting between Stedkenvic owners, Claimants and himself which was in June 2000.

(d) He did not discuss anything about the operations of HBR with Mr. Nickeo, Mr. Rogers or Mr. Brooks. This is contrary to the statements made by Mr. Brooks to the effect that DJ Hammer kept them apprised of the happenings of HBR on a weekly basis.

(e) It was a surprise to him when they closed down HBR.

(f) The radio tower which was there at the time was replaced with a bigger tower and thus what was stated in paragraph 26 of his witness statement about raising the existing tower was not true.

Assessment of the evidence

[20] The oral agreement as pleaded by the Claimants at paragraph 7 is that the Defendants orally agreed to relinquish their ownership of HBR in consideration of the Claimants assuming the indebtedness and financial responsibilities of HBR. The Defendants deny this and at paragraphs 12 to 17 they set out what they say was the agreement. As I have already stated, determining what were the terms of the oral agreement reached is a question of fact. It is well settled law that in construing a written contract it is not legitimate to use as an aid in so doing, anything said or done by the parties after it was made. Otherwise the result may be that ***"the contract meant one thing the day it was signed but by reason of subsequent events meant something different a month or a year later"***[2] With regard to an oral contract it is quite appropriate and, in my view, a matter of commonsense, when seeking to arrive at a determination as to what the parties in fact agreed at the relevant time, that regard may be had to the subsequent conduct by way of things said or done by the parties as an aid in so doing. This principle is affirmed in the case of **Brian Royle Maggs t/a BM Builders (a Firm)-v- Guy Anthony Stayner Marsh, Marsh Jewlery Co.**

[2] Whitworth Street Estates Ltd. –v- Miller [1970] AC p er Lord Reid at pg. 603

Ltd. [3]**.** At paragraph 26 of her judgment, Lady Justice Smith formulated the principle in this way: ***" In my judgment, it is clear that the principle set out in Miller's case does not apply to an oral contract. Determining an oral contract is a question of fact. Establishing the facts will ….usually depend upon the recollection of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose recollection is right. It is not surprising to me that the editor of Lewison should observe that there is nothing in the authorities to prevent the court from looking at post contract actions of the parties. As a matter of principle, I can see every reason why such evidence should be received"***

[21] It is also urged that the court takes judicial notice of the fact that in this jurisdiction, as in other Caribbean islands with relatively small communities and personal acquaintances, it is notorious that agreements among laymen are arrived at with little or no formalities. It is also trite law that the court, as far as possible, seeks to give effect to the intentions of the parties as far as that intent can be ascertained rather than be the destroyer of bargains. The lack of formalities is self evident in the case at bar. For example, the parties treated HBR to all intents and purposes as an entity when in fact HBR was no more than the name given to the radio station which was the business venture undertaken by Stedkenvic. The debts to be assumed were treated as debts of HBR, when in fact the debts spoken of are associated with the operation of HBR but in reality were debts either of Stedkenvic, as in the case of the debt due to Mr. Nickeo, or personal debts of one or the other of the shareholders or directors of Stedkenvic. In some instances, the impression given was that HBR was the business of the individual shareholders and directors rather than Stedknevic's.

[22] Some confusion is also evident in the Defendants' case as pleaded. At paragraph 19 of their Defence, save for denying that the security for the loan was a parcel of land, admitted paragraph 9 of the Amended Statement of Claim which, in essence, speaks of the Claimants assuming the indebtedness of HBR in reliance upon the oral agreement. This then impliedly admits paragraph 7 of the Amended Statement of Claim which pleads the

[3] [2006] EWCA Civ 1058, 2006 WL 1783257

terms of the oral agreement. However, paragraph 12 of the Defence expressly denies paragraph 7 of the Amended Statement of Claim and in paragraphs 14 to 17 they set out their version of what was discussed and agreed. I consider that the expressed denial coupled with the fact they have put forward a different version of what was agreed should prevail over what appears to be an implied admission running expressly contrary to the entire tenor of their pleaded case. In this regard I reject counsel for the Claimant's submission that the Defendants have admitted that the agreement reached was for the purchase of HBR by the Claimants on assumption of HBR's debts by them. In some instances, the Defendants speak of lease payments and in other instances they speak of commissions based on station revenues. There were also inconsistencies in some parts of the evidence led by the Defendants to which I have already alluded. Notwithstanding this confusion and the apparent inconsistencies, it is the court's duty in doing justice as between the parties to determine what weight should be placed thereon in the overall assessment of the evidence.

[23] One term certain in respect of the agreement reached is that the Claimants were to assume the debt or debts associated with HBR. Less clear is whether this was in consideration of the purchase of HBR by the Claimants or whether this was in consideration of the Defendants granting the Claimants the right to operate HBR under some form of lease type or other operational arrangement providing for lease or commission payments. I must confess to experiencing some difficulty with the position as contended for by each side. With regard to the Claimants' position, I accept that certain conduct of both the Claimants and the Defendants appear to be inconsistent with a purchase which I now summarize:

(a) Prior to attending the meeting there was no discussion or apparently any thoughts of purchasing or a sale of HBR on either side.

(b) The Claimants on their case say they were made aware of one debt and they made no efforts to determine the entire debt profile of HBR in respect of their acquisition but yet then and there, they agreed to assume the debt as consideration for the purchase. Later, over the years they are told of various debts

of which they were not previously aware and they simply accept them and pay them.

(c) They were given no receipts or inventory in respect of the equipment present, and no warranties given;

(d) There were no discussions regarding the rental of the physical premises housing HBR. The physical premises are owned by Mrs. Gloria Brooks wife of the First Defendant. If it was a purchase by the Claimants it is strange that there were no discussions with her regarding the terms on which the premises would be occupied by the Claimants. There is no assertion by the Claimants (nor could there be) that they also acquired the physical premises by way of sale.

(e) Curiously, it appears that no rents were paid in respect of the premises until June 2006. This was after the parties had already met and were at odds as to who owned HBR and when the Defendants were becoming more agitated with the Claimants. No reason was given as to why payments had not been made before. Further, there is no evidence as to how the rental rate was calculated or the period covered but merely a bald statement of the fact that EC$10,000 was tendered to her as rent in respect of the building. There is no suggestion by either side that rental of the premises was even considered or discussed at the June 2000 Meeting.

(f) No transfers of any kind were made in respect of any equipment.

(g) All utilities necessary for HBR's operation has remained registered to the Defendants.

(h) Most importantly, the radio licence which permits radio broadcast as HBR on the 107.5 FM frequency has remained licensed to Stedknevic. No steps have been taken by the Claimants to obtain in their names a licence for the operation of HBR on this frequency. What transpired is that the Claimants, in similar manner as assuming and maintaining payments of all utility bills, have also paid for the annual renewal of Stedkenvic's radio licence. The Claimants do not assert that they acquired Stedkenvic even though, on the evidence, Stedkenvic carried out no other business and was formed for the specific purpose of operating HBR.

(i) Also of significance is the fact that Ethelbert Edwards, rather than being released from the CCB Loan became co-signer thereof. Notwithstanding the fact that Ras B had become the principal debtor, Mr. Edwards was still liable in respect of the CCB Loan. Furthermore, his property remained charged as security. This is borne out by the loan application signed by the First Claimant and Mr. Edwards. If the agreement was for a sale why would Mr. Edwards remain liable on the CCB Loan having divested himself of his interest in HBR?

(j) Noteworthy is also the promissory note signed by the First Claimant and Mr. Edwards, in respect of the CCB Loan. It refers to them both as "DBA Heart Beat Radio".

[24] Counsel for the Claimants on the other hand submitted that even though it is likely that both sides came to the June 2000 Meeting with different ideas or positions, at the end of the meeting Iwandai-I's offer of a purchase of HBR in exchange for assuming the debts was accepted. He further prays in aid the level of informality in the conduct of business in Anguilla which he says would make the matters referred to above as conduct not inconsistent with the Claimants' contention of a buy out of HBR.

[25] On the Defendants' case, notwithstanding inconsistencies in other matters, they have all remained consistent in respect of two matters which, in my view, are critical on the evidence, namely:

(a) The Agreement involved the leasing or the granting of permission to the Claimants to operate HBR; and

(b) The Claimants were to assume the debts of HBR.

However, very little regarding the terms of the lease arrangement specifically with regard to the term or the amount of lease payments appear to have been discussed. At paragraphs 5, 16 and 17 of the Defence it was specifically pleaded in essence that pursuant to an oral understanding, the Claimants and Hammer were given permission to operate and upgrade HBR on the conditions that they assume all the existing debts of HBR, pay those debts within 36 months (which would be treated as receipts to Stedkenvic) and pay Stedkenvic thereafter a monthly commission of EC$6000.00 or 10% of monthly

station revenues whichever is greater. It must be taken, having regard to the evidence, that the June 2000 Meeting is the one and only meeting at which agreement was reached. There is no mention by any party as to the Lease terms discussed save that a lease arrangement was contemplated and that during the period when the CCB Loan was to be repaid there would be no lease payments. There is no indication that there is any discussion much less agreement as to what the lease payment sum would be. Mr. Brooks at paragraph 15 of his witness statement stated thus: ***"The Meeting took place in June 2000 in the front room of the HBR building. I chaired the meeting as then Managing Director of the Third Defendant. Stephenson Roger who supported the Lease opened the meeting. Ethelbert Edwards spelt out to the prospective operators that the station had a loan from Caribbean Commercial Bank (Anguilla) Ltd. which in the event of the operation going forward would have to be paid by the operator. I later indicated that we would not expect any lease payments until after the loan repayment period had expired. There was no objection to this from the other side."*** At Paragraph 16 he went on to say this: ***"During the meeting it was agreed to permit Abner Brooks Jr. and the … Claimants to go ahead and operate the station until a suitable lease agreement was drawn up and signed by both parties."*** Mr. Edwards at paragraph 14 of his witness statement sets out his version of what was discussed at the meeting. Suffice it to say that he said much regarding the various debts which the Claimants were to assume and nothing regarding the terms of a lease arrangement. Mr. Rogers at paragraphs 10 of his witness statement also speaks of the June 2000 Meeting and had this to say: ***" … since the intention was for Heart Beat Radio to generate revenue, … the .. Claimants were told that we had no objections to leasing them the station once certain stipulated conditions were met."*** At paragraphs 11 and 12 he goes on to speak of assuming all the debts associated with HBR and of being told that after the expiry of 36 months that repayment on the loan had not been finished. He does not speak of any discussion or agreement regarding the lease payment amount. DJ Hammer in his witness statement at paragraphs 12 and 13 had this to say- at 12: ***"Stephenson Rogers led the meeting off by stating he had understood we had an interest in operating the station. Ethelbert Edwards laid out the financial state of the station and all debts that the station had incurred up until then. One of the directors … said that anyone wanting to operate Heart Beat radio would also have to assume responsibility for the utilities.*** At 13: ***There were no objections from either.. Claimant or I and it was agreed that we would pay the Third Defendant a monthly lease payment after the Third Defendant's debts were paid in full...."*** Here also there is an absence of the sum discussed or agreed in respect of such lease

payments. I can only conclude that there was no sum discussed or agreed at the June 2000 Meeting regarding lease payments to be made by the Claimants to the Respondents.

[26] The lack of discussion or agreement regarding a stipulated sum as lease payments becomes clearly evident on a review of the correspondence sent by or on behalf of Stedkenvic. In their first letter to the Claimants dated 13th October, 2005, some five years after the Claimants' operation of HBR, reference is made to a lease agreement of July 1st, 2000 and to a grace period of 36 months to pay all outstanding debts. Mention is also made of the fact that the Claimants had not presented any statements regarding the grace period and position regarding payment of all outstanding debts. The letter also requested a meeting to discuss those matters as well as a new lease. No mention is made of any commissions or lease payments which by 2005, on the basis of the grace period allowed, would have been due. This, in my view, is not surprising given that the Defendants by now must have appreciated that no lease payment sum or commission had been agreed and that no lease or lease agreement had been signed. The next letter dated 31st March, 2006 sought to address this. It states in part as follows: "***We would like to make reference to the fact you were given the authority to proceed with operations of Heart Beat Radio FM 107.5 on July 1st 2000. Until such time the proper lease document can be prepared and signed by both parties. To date this has not been done. In order to remedy this situation and normalize our relationship we are requesting the following be done by your group:***

1. ……

2. ….

3. Stedkenvic Radio Corp to be paid a 10% commission on the gross earnings of the station or EC$ 6,000.00 per month whichever is greater.

4. That a draft lease be submitted…. for discussion… ."

This figure appears to have been plucked out of the air. There is no indication as to the basis for the claim for a commission at the rate claimed or precisely the period in respect of which the commission is claimed. There is no evidence supporting this rate as having been discussed or agreed to at the June 2000 Meeting. No mention is made of lease payments. The request for a commission seemingly appears for the first time in March 2006. The further letter dated June 30th, 2006[4] from Stedkenvic then sets about

[4] KB10

specifying the period for which commission is claimed based upon the letter of March 2006 and to calculate the commission. It states that July to December 2000 is free; 31 months from January 2001 to July 2003 at EC$2,000.00 per month totalling EC$62,000.00 and thereafter at EC$6,000.00 per month up to June, 2006 totalling EC$210,000.00. No basis is given for the rate of $2,000.00 per month claimed in respect of January 2001 to July 2003. Furthermore, this is contrary to what is stated in the letter of March 31st aforesaid which speaks of a 36-month grace period and also the evidence as given by the Defendants. The matter then becomes more muddled in the next letter which followed on August 31st 2006[5] from Cube Credit Services Ltd. on behalf of Stedkenvic. This letter is at odds with the previous two letters in that a monthly commission of EC$6,000.00 as from January, 2001 is therein claimed. This letter is also devoid of particulars regarding the basis for this sum, save for a vague reference to the effect that this was agreed between the parties. Nothing is said as to when this was agreed. I conclude, therefore, that there were no discussions or any agreement as to payment of commission by the Claimants to the Third or any of the Defendants.

[27] Being mindful of the lack of contractual formalities, and considering all the evidence in the round, I am quite satisfied on a balance of probabilities that the Defendants never intended nor did they agree to transfer ownership of HBR to the Claimants. I find the position to be as stated by Mr. Brooks in his evidence when he said that it was agreed to permit the Claimants to go ahead and operate the station until a suitable lease agreement was drawn up. I am also satisfied that one of the terms agreed was that the Claimants would assume the debts associated with HBR and that until the CCB Loan had been repaid over a 36 month period called the grace period, that no payments whether called commissions or lease payments would be required to be paid by the Claimants to Stedkenvic during that period. What was left to be finalized was the lease including what rate of payment the Claimants were required to make in respect thereof after the expiration of the grace period. This conclusion accords with the factual and surrounding circumstances taking into account the conduct of the parties having regard to the factors to which I have alluded above. As it turned out, despite the Defendants' belated efforts to

[5] WB6

finalize the lease arrangement, this never occurred. Accordingly, on the Defendants' case, conversely, I am not satisfied that the Defendants are entitled to commission or lease payments by whatever name called in the sum as claimed, such rate having not been agreed at all. That said, this is not to be taken to mean that Stedkenvic may not be entitled to some reasonable sum in respect of the use and operation of HBR by the Claimants for the period following after the grace period

The nature of the Agreement

[28] This leaves the agreement as one being no more than that as amply articulated by Mr. Brooks to which I have already referred. Notwithstanding that they spoke of a lease arrangement, in my view the agreement arrived at bears closer analogy to a tenancy at will. The Claimants were permitted to operate and develop HBR meanwhile pending the finalization of a suitable lease agreement. Tenancies at will may be created either expressly or by implication in certain situations; for example where a tenant takes possession under a void lease or under a mere agreement for a lease and has not yet paid rent, or where a person is allowed to occupy premises rent free and for an indefinite period. It is accepted that the Claimants paid all of the debts associated with HBR. This arrangement has continued uninterrupted as from 1st July, until 1st October, 2006, when the Claimants were barred from the premises of HBR's operations by the First and Second Defendants. Nothing further has been agreed. I am mindful of the fact that my finding in this regard is not completely on all fours with the Defendants' pleaded case, but none the less is a finding open to the court on the said pleadings and is the conclusion to which I have been led having regard to the totality of the evidence. I also bear in mind the overriding objective of CPR as well as section 19 of the Supreme Court Act[6] which says, in essence, that the court may, in every cause or matter, grant such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim so that as far as possible all matters in controversy may be completely and finally determined.

[6] Esatern Caribbean Supreme Court (Anguilla) Act R.S.A. c. E15

[29] The matter however, does not end here. In the meantime it is accepted that under the Claimants' operation, HBR has become a viable venture with full time employees, various sponsors, and serves a wide broadcasting public. In my view, this is to the mutual benefit of the parties. It is also not disputed that the Claimants purchased new equipment, installed a new radio tower, housed the transmitter, and generally improved the quality of HBR's broadcast. On the other hand, it is not disputed that the name and call sign HBR, 107.5 FM originated with the Defendants. They did operate public broadcasts albeit on a limited basis using the said call sign and frequency. Further, it is not disputed that Stedkenvic was specifically incorporated for undertaking this venture. Stedkenvic applied for and obtained the requisite governmental radio licence to operate the venture known as HBR on the 107.5 FM frequency. The name HBR 107.5 FM was in use and duly licensed for use by Stedkenvic from at least by 1998 as a broadcasting station the business known as HBR 107.5 merely continued and no doubt became more improved and revenue generating under the operations of the Claimants. Stedkenvic however, still holds the radio licence pursuant to which HBR is operated. The Claimants do not hold nor is there any evidence that they ever applied for such licence.

The lock down of HBR

[30] The Defendants must be taken to have been aware of and content with the various improvements to HBR's operations made by the Claimants. This state of affairs had gone on for five years before any steps whatsoever were attempted to put in place a suitable lease agreement as contemplated. Mr. Brooks in fact still conducted his radio program at the station on a regular basis and lives next door. He said he was kept apprised of its operations by DJ Hammer although DJ Hammer says this is not the case. Interestingly though, DJ Hammer copied his letter of resignation to the board of Stedkenvic and informed Mr. Brooks, prior to so doing, of his intended resignation. On the night prior to or on October 1st 2006, Mr. Brooks acknowledges that he was the last person conducting a program at the station. Mr. Rogers was also there and that he with the assistance of Mr. Rogers, packed up equipment and changed the locks to the premises when they were leaving at the close of his radio program. The List of items set out in Schedule 1 to the claim as representing the items of equipment and other items taken away is not seriously

disputed by the First Defendant. I accordingly hold that these items were removed by the First and Second Defendants and that the same are owned by the Claimants. I am also satisfied on the evidence that this action was taken with a view to interrupting the Claimants' operation of HBR, and was prompted by the fact that the Claimants had ignored their claims for commission payments and for finalizing a lease agreement. Mr. Brooks and Mr. Rogers both spoke of feeling it necessary to act so as to protect their interest and property and HBR. It was clearly open to the Defendants to take legal action against the Claimants to recover HBR. Instead, they chose to do this by locking out the Claimants and taking away equipment and other items which has been shown not to be equipment and items belonging to the Defendants. An original equipment list, save for two luxo microphone books, is agreed and appears at Part 3 page 94 of the trial bundle. Mr. Brooks also admitted to disconnecting the telephone and internet services. This action was taken without any notice whatsoever being given to the Claimants. It bears note that in Stedkenvic's March, 2006 letter to the Claimants it spoke of Stedkenvic' s intent to give 90 days notice in the event no lease agreement was agreed for the Claimants to close down operations. There is no evidence that such notice was ever given despite the failure to achieve a lease agreement. The Defendants also posted notices to the effect that the Claimants were relieved of their duties and also caused to be issued a press release with respect of HBR's cessation of operations. The result was that HBR was effectively out of operation until around 10th October, 2006. Iwandai-I at paragraph 42 of his witness statement stated that they lost approximately EC$8,008.99 from not being able to broadcast. This was not challenged by the Defendants at trial.

The lawfulness of the actions taken

[31] Apart from the fact that the Claimants paid off the debts associated with HBR as agreed, the Defendants allowed and knew that the Claimants had further developed HBR into a viable commercial venture. Indeed the evidence suggests that this is what was expected with regard to the Claimants' taking over of operations. It must be taken that the Defendants must have had full knowledge of the new radio tower constructed and the housing erected in respect of the radio transmitter as well as additional or new equipment at the HBR studios. Mr. Brooks still carried on a radio program in the

evenings. Given these circumstances, I am of the opinion that the contractual relations between the parties could only have been brought to an end upon reasonable notice being given. No notice was given by the Defendants and thus the actions of the First and Second Defendants purporting to act on behalf of the Third Defendant, which on the evidence they were clearly not authorized by the Third Defendant to do, constituted an unlawful interference with the business of the Claimants rendering the First and Second Defendants liable in damages. In **Lonrho PLC-v- Fayed and Others**[7] Lord Bridge of Harwich at page 465 of his judgment stated thus: ***Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is the fact of their concerted action for the illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further protect their own interests; it is sufficient to make their action tortious that the means used were unlawful"*** Having so found I do not consider that I need arrive at a finding on issue of conspiracy to injure being the alternative cause of action pleaded by the Claimants.

Conclusion

[32] For the reasons given above:

(1) The Declaration sought by the Claimants set out at paragraph 1 of the Amended Claim is refused. The relief seeking transfer of the Fourth Defendant to the Claimants is also refused.

(2) It is declared that the Claimants are the owners of all radio and other equipment, compact discs, and other items including all the items listed in Schedule 1 annexed to the Claim and all radio and other equipment including the existing radio tower, save for the equipment listed and referred to as the agreed original list of equipment appearing at Part 3 pg 94 of the Trial Bundle (the two luxo microphone books excepted).

(3) It is declared that the Claimants are the owners of all documents kept at HBR and unlawfully removed by the First and Second Defendants on or about the 1st October, 2006 and all documents remaining at the premises.

[7] [1992] AC 448

(4) Pending the effective termination of the contractual relationship as currently existing between the Claimants and the Defendants, the Defendants whether by themselves their servants or agents are restrained from:

(a) entering or using the premises of HBR located at Sugar Hill, Anguilla without the express permission of the Claimants; and

(b) obstructing or otherwise interfering with the broadcasts of HBR in any manner whatsoever.

(5) Damages for trespass to the personal property of the Claimants and for unlawful interference with the Claimants' business operations of HBR are awarded in the sum of EC$ 8,009.00.

[33] On the Defendant's counterclaim:

(1) Paragraphs 1 and 2 of the relief sought in the Defendants' counterclaim is refused.

(2) It is declared that the Third Defendant is the owner of:

(a) HBR together with all intellectual property in respect of HBR.

(b) All radio and other equipment as specified in the List referred to as the original list of equipment as agreed and appearing at Part 3 page 94 of the Trial Bundle (save and except the two luxo microphone books).

(3) The declaratory relief sought at paragraph 4 of the counterclaim is refused.

Costs

[34] This was left for the court's determination on the claim and counterclaim. The general rule is that the unsuccessful party pays the costs of the successful party. Neither party has succeeded on the entirety of their claim. I do consider, however, that the crux of the issues between the parties was the ownership of HBR. In this the Claimants have failed. The Defendants on the other hand have failed in their claim for sum of EC$234,000.00 claimed in respect of commission payments from the Claimants. Applying the provisions of CPR 65.5(2)(b)(i) and (iii) it appears to be that orders to the effect that the unsuccessful party pays the cost pertaining to those matters on which the other party succeeded creates a negligible difference in respect of such costs. Accordingly, in the

exercise of my discretion I consider this a fit case in which the proper order is no order as to costs; and I so order.

Janice M. George-Creque
High Court Judge