

**MALAYSIA
IN THE HIGH COURT IN KUALA LUMPUR
COMMERCIAL TRIAL NO: D5(IP)-22-1773-2006**

BETWEEN

ALEXANDER LESLEY PETERS

(I/C No: 600503-10-5971)

**(Berniaga di bawah nama dan gaya
FLATFISH STUDIO)**

(Company No: 001137548-P)

... PLAINTIFF

AND

1. RAYMUND GAGARIN A/L S JOSEPH

(I/C No: 610415-10-6199)

2. REVIVAL PRODUCTIONS SDN BHD

(Company No: 527326-M)

... DEFENDANT

**BEFORE THE HONOURABLE JUDGE
Y.A. DR. HAJI HAMID SULTAN BIN ABU BACKER**

IN OPEN COURT

JUDGMENT

This is my judgment in respect of the plaintiff's claim against the defendant for work done relating to musical works.

Brief facts

1. The plaintiff was given two song tracks by the 1st defendant representing the 2nd defendant to work on the two basic works ie, to arrange, produce and compose musical arrangement. The plaintiff by their own admission have agreed to do so without any charges on the impression that he would be working in collaboration to produce the

musical works and derive the benefits of the production as a collaborative effort. This did not materialize and in consequence ended in an invoice for RM55,700.00 being issued to the 2nd defendant. Upon receiving the invoice the defendants promptly wrote to the plaintiff that the work was given only to obtain a quote and did not give any approval to start work. The defendants' solicitor also confirmed by a letter to the plaintiff's solicitor that only a quote was asked for and asserted that the defendant is the copyright owner of the original works and the alleged "finished works" is merely a derivative work of the original works. In addition the plaintiff was informed that the defendants do not desire to utilise the embellishments and modifications to the original works.

2. The plaintiff in the submission says (i) the claim is for the invoiced sum for work done as commissioned by the defendants (ii) in consequence of non-payment, declaration is needed to preserve the proprietary in the copyright ownership on the derivative works (iii) plaintiff's case is premised on the fact that there was an agreement for work to be commissioned on a no fee basis initially but remuneration for work done was to be in the form of shared royalties from the derivative works.
3. And the learned counsel in a nut shell puts the plaintiff's case as follows:-

“Based on the Defendants’ conduct in earlier positively commenting and accepting the works in Kanaa Kanaa and later commissioning further work on Jiv Jaago with an ecstatic response, the defendants have encouraged the plaintiff and led the plaintiff to believe that the agreement was in tact and the plaintiff’s services was to continue. In refusing to honor the agreement by rejecting the work thereafter, on the pretext that the work was not up to expectation, and no work was commissioned for as no quotation was given and subsequently approaching another musician to work on Jiv Jaago, the defendants have clearly breached the agreement between the parties. In such a circumstance, the plaintiff is entitled to charge the defendants for work done.”

Preliminaries

4. 4 witnesses gave evidence for the plaintiff and 2 for the defendants.
5. The plaintiff had not shown in the pleadings or in evidence what the terms of the plaintiff’s engagement were. A concluded contract in any form and manner was never established. The plaintiff s case was based on supposition, belief and/or in the alternative a claim under Section 71 of Contract Act 1950. The criteria required to establish the work as a commissioned work pursuant to the copyright Act 1987 was also never established. The fact that the works had been given to obtain a quote had throughout the evidence, in my view, remained unchallenged. The very essential documents to weigh the plaintiff’s case are all found in exhibit P1. Exhibit P1 puts into light the facts of

the case, the dispute and there are sufficient admissions in the letters of the plaintiff to show that the plaintiff's case is not maintainable in law, as pleaded.

6. I have heard the evidence, read the documents, submission of the parties in detail. Both parties have adequately dealt with the issues and I do not wish to repeat the same. I am grateful to the counsels. I take the view the plaintiff's claim must be dismissed. My reasons *inter alia* are as follows:-

- a) There is no evidence to show that the plaintiff were commissioned to do the work as alleged by the plaintiff. How the quantum was arrived, stands as a mystery. I accept the evidence of the defendants that they only asked for quote. No reasonable businessman will want to provide service without a quote. The raising of the invoice was an afterthought and is not one for services done or payment for the commissioned works. The plaintiff's solicitor's letter itself does not reflect that the work was commissioned. I have set out the facts earlier and I do not wish to repeat the same.
- b) I do not see any relevance on the facts of the case to invoke section 71 of CA 1950. Section 71 asserts that a person enjoying benefit of non-gratuitous act must pay for it. [see *Pao On v. Lau Yiu Long* [1980] AC 614]. In the case of *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118, at page 120, Lord Upjohn, in delivering the judgment said:-

“That section is in terms identical with s.70 of the Indian Contract act upon which there is some authority to which their Lordships will later briefly refer.

It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under s. 71. the doing of the act or the delivery of the thing referred to in the section:-

- (1) Must be lawful,*
- (2) Must be done for another*
- (3) Must not be intended to be done gratuitously*
- (4) Must be such that the other person enjoys the benefit of the act or the delivery*

In their Lordships’ judgment these matters must be answered at the time that the act is done or the thing delivered and this, their Lordships think, is of fundamental importance ...”

I agree that the criteria set out to seek refugee under Section 71 was not established by the plaintiff according to law. I also find that the defendants’ evidence and submission are consistent with the defence case.

- c) The plaintiff in this case introduced the contents of a tape recorded conversation taken before trial and long after the suit was filed. The defendants’ objection that it should not be admissible has foundation in law. In any event, I take the view

that the contents of the conversation has no probative value, as it stands as self serving statement, engineered by the plaintiff and made after the commencement of the action. I also note that the plaintiff has used foul language. If the plaintiff at the material time of recording the conversation had the intention of using it in court and playing it in court, then I will have no hesitation to say that the conduct of the plaintiff will amount to contempt. As the defendants did not raise the objection I have not dealt with this issue. The plaintiff's solicitors ought to have advised the plaintiff that if such recording is produced in court the plaintiff may be cited for contempt. I do not see why the conversation should not be referred to the Attorney General Chambers for appropriate action.

7. For reasons stated above, except para (c), I dismiss the plaintiff's action with costs to the defendants. The plaintiff to pay a fixed sum of RM50,000.00 as costs to the defendants.

I hereby order so.

Y.A. DR. HAJI HAMID SULTAN BIN ABU BACKER
Judge
High Court (Commercial Division)
KUALA LUMPUR

Date: 16 OCTOBER 2009

For the Plaintiff - L K Chow (with YS Yip); M/s Josephine, L K Chow & Co

For the Defendant - Rajkumar (with L K Teh); M/s Law, Raj, Teh & Partners