

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S2-22-934-2008

BETWEEN

ASNI BINTI ANUAR

.....PLAINTIFF

AND

**AIRTIME MANAGEMENT &
PROGRAMMING SDN BHD**

.....DEFENDANT

GROUND OF JUDGMENT

This is the application by the Defendant to strike out the Plaintiff's Writ and Statement of Claim under 0 18 r 19 (1) (b) and/or (d) RHC 1980.

Background Facts:

In January 2008, Xfresh FM, ran a promotion in which the radio station offered listeners "one million" if a listener could point to any foreign music played on the station. Xfresh FM is a 100% local music station and its license conditions require that it plays only local music.

The internal guidelines of AMP, a company in charge of the management of the abovementioned radio station, provides that a song is of local content if inter alia, it is sung by a Malaysian citizen. The internal guidelines defines local content music as where:

- (a) 60% of the composition is done by a Malaysian, or
- (b) either recording and/ or mixing is done in a local studio, or
- (c) the singer/ composer/ lyricist is a Malaysian

AMP classifies the music as local music if anyone of the above requirements is met. This definition has been adopted by AMP in meeting its license conditions with The Malaysian Communications and Multimedia Commission ("MCMC").

The Plaintiff alleges that Xfresh FM aired a foreign song entitled "My Heart" on or about 20.2.2008.

The song, was in fact performed by two Malaysian singers in a local talent search programme, also known as Akademi Fantasia-

5. It was this version of the song that was aired on Xfresh FM on the said day.

Dissatisfied with the explanation given by the Defendant, the Plaintiff issued a Letter of Demand marked as Exhibit AMP-I before instituting this claim.

The Court's Findings

Whether there was a breach by the Defendant of the Guidelines by MCMC

This involves a plain construction of the internal guidelines from MCMC as to what amounts to local music content which is:

- (a) 60% of the composition is done by a Malaysian, or
- (b) either recording and/ or mixing is done in a local studio, or
- (c) the singer/composer/lyricist is a Malaysian.

On the facts adduced, the song which is the subject of dispute as to whether it falls under "local music content", was sung by two Malaysian singers in a local talent search programme known as Akademi Fantasia-5.

I am of the view that the said song which was sung by the two Malaysian singers falls under limb (c) of the internal guidelines of MCMC. So long as the singer or the composer or the lyricists is a Malaysian, it falls under "local music content". In this case, the song "My Heart" which was not disputed to be sung by Malaysian singers which was aired on 20.2.2008, falls under the definition of local music content.

Whether there is a binding contract

Prayer (9) of the Statement of claim prays for RM 1 million as promised payment. On the face of the pleadings, it is not clear whether the Plaintiff's basis is founded on a breach of a concluded contract. This is because in legal terms, a "promise" to be enforceable requires the existence of a binding contract.

To determine whether there is a concluded binding contract, it is pertinent to look at the words which was aired, which the Plaintiff alleged had brought this effect. The words said was;

"dia orang cakap kalau tiada lagu-lagu antarabangsa, radio kita orang mesti tak popular", "Bagus sangat ke lagu-lagu macam ini?" "Ingat...1 Juta tau, kalau kila orang putarkan lagu-lagu macam ini ... ", "xfresh fm 100% muzik Malaysia".

To determine whether there is a contract, there must be clear terms of the intent of the parties to enter into a legal binding relationship, clear as to the subject matter and there must be consideration. There must be also be a firm offer and a firm communication of the acceptance of the offer, i.e a meeting of the mind upon a common purpose. Refer to the case of ***Malayan Flour Mills Bhd v Saw Eng Chee (Administrator of the Estate of saw Cheng Chor, Deceased) & Anor*** [1997] 1 MLJ 763.

An offer is the willingness to enter into a contract on specified terms , made with the intention that it is to be binding as soon as it is accepted by the person to whom it is addressed. An agreement is void if it lacks certainty/clarity.

In our present case, I am of the view that the promotion was not clear as to :

- whether the words “1 juta” was meant to be monetary or is it in tangible goods;
- What is the duration of the so called “offer”;
- Which caller is entitled to the “1 juta”- whether the 1st caller or the 2nd caller and so on, or whether all the callers would be entitled to the “1 Juta”.

Therefore, the promotion was too vague and too broad a term to be enforced, so that it was impossible to say on which terms the parties intended to contract. (Refer to **G.Scammell & Nephwe Ltd v H.C. and J.G. Ouston** [1941] AC 251). Therefore it does not give rise to a legal relationship between the parties.

Since the words in the promotion does not give rise to any legal relationship between the parties, the promotion was a mere “puff” and not an offer capable of acceptance. Misrepresentation as to a mere puff will not give rise to a remedy. (Refer to **Thomas Witter Ltd v TBP Industries Ltd** [1996] 2 AER 575)

Therefore on the above reasons, I allowed the application of the Defendant in Enclosure 7 with costs.

Datin Zabariah Mohd Yusof

Tarikh : 5.6.2009

Bagi Pihak Plaintiff : Encik Adnan Seman

Tetuan Adnan Seman & Associates

Bagi Pihak Defendant : Cik Shanti Mogan

Tetuan Shearn Delamore & Co