

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 088/1986

BETWEEN	HYACINTH LEWIS	PLAINTIFF
A N D	(Administratrix of the Estate of Edward Anthony Lewis (dec'd))	
A N D	RALPH HOLNESS	FIRST DEFENDANT
A N D	YVONNE STEWART	SECOND DEFENDANT

Mrs. Pamela Benka-Coker instructed by W. Earl Witter for the Plaintiff.

Michael Hylton instructed by Myers, Fletcher and Gordon, Manton and Hart for the first-named defendant.

HEARING on 29th, 30th, 31st May, 1989 and 19th February, 1990.

JUDGMENT

BINGHAM J:

Edward 'Bim' Lewis according to the evidence died in 1976. He had been for a period in excess of some thirty years an actor who in conjunction with Aston 'Bam' Wynter, the other member of this famous team, which as comedians had brought joy and laughter to a wide cross-section of the Jamaican society.

In the 1950's the plaintiff then Hyacinth Clover joined the team which then became known as 'Bim', 'Bam' and 'Clover'.

For those of us who were fortunate to attend the Christmas morning and other holidays shows put on by various impresarios such as the late Vere Johns, the performances put on by these persons were marked out for its originality of style and content and was noteworthy for its mass appeal. By the time of his death, Edwin 'Bim' Lewis had not only made his mark as an actor of immense talent but had also established himself as a Playwright of a number of works among which, and this is a common ground, included "The Gun Court Affair", a work acknowledged without question as the most successful play ever staged in this country. The matter now falling for determination however, is not concerned with the late Edwin Lewis or this play but with another of his works, "The Bald Head Rooster", the author-ship of which on the pleadings has been called into question. Although the defence pleaded by both the first and second-named defendant that the play, "The Village Rooster" was an adaptation of that work, there is no issue as to the fact that both "The Bald Head Rooster" and "The Village Rooster" were both publicly performed by Edwin Lewis Productions, a company founded by the late Edwin 'Bim' Lewis.

The present claim has been launched by the plaintiff, Hyacinth 'Clover' Lewis, in her capacity as the Administratrix of the Estate of the late Edwin 'Bim' Lewis and is in respect of an alleged breach of the copyright of the work "The Bald Head Rooster". In so far as the first-named defendant operating as Ralph Holness Productions sought to stage a Play entitled .. "The Dangerous Rooster" in which by virtue of paragraph 5 of his defence he alleged that:-

"5. The Dangerous Rooster is an adaptation of "The Village Rooster" and was also written by Yvonne Stewart." (first defendant)

In the light of the allegations in the pleadings, as there is no issue that the original work was "The Bald Head Rooster" and that "The Village Rooster" and the "Dangerous Rooster", are both adaptations of this work; all that remains for determination therefore, on the pleadings are two issues namely:-

1. Who authored the work, "The Bald Head Rooster?"
2. If the plaintiff's contention is correct, then what damages ought to flow from the defendant's breach of the copyright to this work?

As the evidence emerged during the hearing the matter resolved itself mainly as to an issue as to damages in the light of the following:-

1. The original script of the play, "The Bald Head Rooster" was tendered in evidence from the custody of Mrs. Hyacinth Lewis, the wife and the Administratrix of the estate of Edwin 'Bim' Lewis.
2. A copy of the programme of the dramatized work "The Village Rooster" (Exhibit 4) acknowledged the authorship of Edwin 'Bim' Lewis as being the person who wrote the script.
3. The plaintiff in her evidence admitted that when the work, "The Village Rooster" was first staged in 1981, following her late husband's death, the second-named defendant had assisted her in making alterations to the original script of "The Bald Head Rooster" by including a yard scene in place of a scene in which a Band had originally appeared. This occurred when the original script was being altered to be staged by the plaintiff as "The Village Rooster" by Edwin Lewis Productions. The plaintiff was, however, careful to mention that although this scene was written by the second-named defendant, as to the content, however, she contended that the ideas came from her as she told her (second-named defendant) what to write.
4. It is of further significance that nowhere in script of "The Bald Head Rooster", "The Village Rooster", and "The Dangerous Rooster", the works relating to which on the pleadings it is common ground that the two last mentioned are both adaptations of the original, is there any mention made that the second-named defendant, Yvonne Stewart authored the original work. Had this been so, it would be inconceivable that her claim to such authorship would not have been asserted or acknowledged when the work was first performed as "The Bald Head Rooster" in 1971 or later on when it was performed under the title "The Village Rooster", in 1981. On both of these

4. occasions, it was staged by Edwin Lewis Productions and in a copy of the programme of the performance put on at the Ward Theatre on 3th April, 1981 as "The Village Rooster" (Exhibit 4), under the subheading "Production Personnel" it was acknowledged that the late Edwin 'Bim' Lewis authored the script. It is noteworthy that the second-named defendant who it is being contended by the defence authored the original script, appeared in both plays; as an actress in "The Bald Head Rooster", and "The Village Rooster" when it was staged by Edwin Lewis Productions. A copy of the poster and the programme (Exhibits 3 and 4) acknowledges this fact, but nowhere is there any mention of her name in the capacity as the author of either of the scripts of these two productions.

The second-named defendant under whose umbrella the first-named defendant sought to shelter is no longer with us, the unfortunate victim of a gunman's bullet. She, therefore, was not available to give evidence seeking to justify the allegations to which she laid claim in her defence.

The weight of the documentary evidence contained in the Exhibits admitted into evidence at the hearing pointed unequivocally and inferentially to the fact that "The Dangerous Rooster" was an adaptation of the work "The Village Rooster", which work was in substance 'the original work'. "The Bald Head Rooster", a work acknowledged on the documentary evidence to be written by the late Edwin 'Bim' Lewis.

It was not the least surprising, therefore, that when faced with the clear inference as to who was the author of the original work from which "The Dangerous Rooster" was adapted, the first-named defendant, RALP Holness while testifying capitulated under cross-examination and said that "he did not know who wrote the play." The following dialogue which emerged from his testimony under cross-examination is most revealing:-

"Q: I am putting it to you that the script of  
"The Village Rooster" belongs to Mrs. Lewis?

A: It belongs to ----- (pause). I tell you the truth. I don't know who it belongs to. I know that "The Dangerous Rooster" belongs to Yvonne Stewart.

Q: I suggest to you that the script of "The Dangerous Rooster" belongs to Mrs. Lewis?

A: No mam. I know that it belongs to Yvonne Stewart. She is the one who wrote it in the form that it is.

Q: I am suggesting to you that substantially the

Q: three plays referred to are one and the same?

A: I don't agree.

Q: I am suggesting to you that Yvonne Stewart did not write "The Dangerous Rooster?"

A: I see her write sometimes.

Q: Do you know where the original script of "The Dangerous Rooster" is?

A: She did have it.

Q: Do you know if any typewritten scripts were made of "The Dangerous Rooster?"

A: I think that Mr. Hylton would have one (referring to Defence Counsel). The one I had is mislaid.

(Emphasis supplied).

It was the earlier evidence of Mrs. Lewis that the first-named defendant had come to her after he had severed his connections with Edwin Lewis Productions in 1983 and had told her that "she had two very good plays sitting on", (referring to "The Village Rooster" and "The Gun Court Affair"), and requesting her permission to stage them. This permission was refused. The response of the first defendant was that "he intended to stage them "over his dead body." In the light of this evidence it is clear that the first defendant not only knew in whom the proprietary interest in these plays resided but by the evidence referred to above, demonstrated a lack of credibility on his part which stamped his demeanour as being someone who by his answers appeared to be searching desperately for some plausible reason bordering on ignorance along with an apparent motive aimed at mitigating the obvious folly of his actions in staging the particular works against the wishes of the plaintiff.

In conclusion, in so far as the issue of liability falls to be determined therefore, the plaintiff must succeed. Her testimony, as to the question of authorship is further supported in almost every material particular by:-

1. The documentary evidence.
2. The prevaricating testimony of the first-named defendant which when examined took the defence's case no higher than his obvious pretence as to being ignorant as to who authored the play

"The Village Rooster".

As there is no issue that the work "The Village Rooster" was an adaptation of the original work "The Bald Head Rooster" and that "The Dangerous Rooster" was adapted from "The Village Rooster", this is in my opinion <sup>is</sup> sufficient to establish the breach alleged in the Statement of Claim. What one has here is an attempt by the defendants at passing off as an original work the play in issue by altering parts of that work, which when examined, the work <sup>nevertheless</sup> still retained the form of the original work. As the learned editor of 3rd Edition of Halsbury's Laws of England Volume 8, paragraph 776 stated:-

"776. In a case where the use of the plaintiff's work is established, the test for determining whether a work is a copy or a reproduction of another is whether it comes so near the original as to suggest that original to the mind of every person seeing it, the facts that a work complained of does suggest the original is not sufficient to enable the plaintiff to succeed in his action for the similarity may be due to the fact that both works are derived from a common source or that the similarity rests in the idea of the work and not in its form. The onus is on the plaintiff to show that the defendant in making his work has appropriated the labours of the plaintiff."

When the three scripts of the relevant plays are examined it is beyond question that all are derived from a common source.

As there is no challenge being made as to the fact that the original work was "The Bald Head Rooster" and that this work was first staged by Edwin Lewis Productions in 1971 and that "The Village Rooster" was an adaptation of that play, one may safely conclude that the two latter plays were in substance that original work with certain adaptations and modifications.

As the defence sought to contend that the second-named defendant authored the original work, once that contention failed, on the basis of the evidence presented by the plaintiff and added to this the cogency of the unchallenged documentary evidence the plaintiff's claim must succeed.

#### Damages

This brings me now to what in my opinion was the difficult issue in the matter, namely that of damages. This has been made so because, regrettably there was no conscious attempt made by either side to adduce the quality and kind of evidence which would have assisted the Court to make a proper assessment in the matter. Apart from <sup>the</sup> self-serving evidence adduced from the defendants side as to the revenue realised from two of the performances staged of the work and this from

what amounted to an admitted twenty three performances, this was another of those cases in which the observation made by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel [1948] 64 TLR 177 at 178 was of some relevance:-

"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak throw them at the head of the Court saying, 'this is what I have lost. I ask you to give me those damages.' They have to prove it."

One has to bear in mind, nevertheless, that this is one of those claims in which the measure of damages to a large extent falls to be determined as a matter of conjecture.

As to the damages which flow from this head of the claim, in so far as the evidence has emerged, the two main issues of fact which fall for determination are:

1. The number of performances staged of the work.
2. The net profit resulting from the gross revenue intake from these performances.

The question of exemplary damages has also been canvassed, but for obvious reasons, in my opinion such damages do not arise. On the basis of the evidence this area of the claim can properly be considered in the area of aggravated Damages.

In so far as the first issue is concerned, apart from the initial performance staged at the Ward Theatre at which a tape recording of the work was done by the witness Glen Witter and direct evidence adduced by him as to the level of attendance of patrons there was no such evidence led in support of the remainder of the claim in relation to the measure of damages as it related to the <sup>other</sup> performances at the Ward Theatre as well as those put on at the eight venues in rural parish towns.

It is of significance, however, that as to the issue, there was only a slight variation in the testimony which emerged from both sides. Based upon the evidence of advertisements in the press, the plaintiff sought to establish that there were some twenty four performances staged between November 6, 1985 and onwards into 1986 and these at some nine different venues. The first-named defendant, Ralph Holness on the other hand, admitted to having staged some twenty three performances of the work. He further admitted that he obtained no permission from the plaintiff to stage the work, but acted on the advice of his Attorneys-at-Law in so doing.

In so far as the law applicable in relation to the two main issues referred to, the observations of Horridge J, in Fenning Film Service vs. Wolverhampton Cinemas [1914] 3 K.B. 1171 at 1174 and Peterson J. in Bird vs Keene [1918] 2 CH 281 at 286 do offer some assistance:-

Horridge J. "the damages must necessarily be to a large extent a matter of conjecture."

The Learned Judge applied the dictum of Lord Esher M.R. in Exchange Telegraph Co. vs. Gregory [1896] 1 QB 147, 153 C.A.

The above observations of the Learned Judge is applicable to the instant case as:

1. There is no direct evidence coming from the plaintiff or her witness as to what the net profits were in respect of these performances.
2. There is equally no direct evidence coming from the defendant as to the actual profits realised from the staging of the twenty three performances which he has admitted. All the first-named defendant has done is to tender in evidence a statement in relation to two performances (Exhibit 8) prepared after the writ was filed, and to ask Court to accept that as a guide to be restored to in determining the net profits in relation to the other performances staged of the work.

The Learned Editor of Mayne and McGregor on Damages 12th Edition at paragraph 974 in laying down the test to be applied and resorted to in claims of this nature in determining the measure of damages has said that it is:-

"The amount by which the value of the copyright is diminished as a chose in action. The principal head of damages being the loss of profits caused by the diversion of customers to the defendant. To this may be added any sum assessed as reasonable in relation to the extent to which there has been injury to the reputation of the original."

In this regard Learned Counsel for the plaintiff has in my opinion correctly submitted that on a comparison of the original script with the work performed by the second-named defendant as "The Dangerous Rooster" has from the language introduced into parts of this work, downgraded the original in such a manner as to damage the reputation of the late author thereby affecting the value of the property which the plaintiff now has in the copyright of the work. This latter aspect of the claim can in my view be more properly examined under the head of aggravated damages at a later stage.

In the light of the above observations, therefore, in so far as to determining a reasonable sum to be awarded to the plaintiff under the head of Damages for loss of profits the evidence falls into two areas namely:-

1. The evidence as to the fact that, and this <sup>is</sup> ~~is not~~ controverted the twelve performances at the Ward Theatre were well attended.

There are issues of fact, however, as to:-

- a. The seating capacity at this theatre.
- b. The fee chargeable for entry.
- c. Having regard to the total revenue intake from these performances, the sums properly deductible for expenses in determining the actual profits realised from the venture.

The evidence given by Glen Witter, in support of the plaintiff's case is that the seating capacity at the Ward Theatre is some one thousand persons. The defendant, Ralph Holness, on the other hand, contended that the proper figure was Nine Hundred patrons. As Glen Witter was only present at the performance on the Opening night, one at which he stated the theatre was filled to capacity, and in the light of the demeanour of these two witnesses, there being no issue as to the fact that at the opening performance, there was a full house, I am minded to accept the testimony given by the first-named defendant as to the capacity of the Theatre and that the sum of twelve dollars was the entrance fee. This is further borne out by the contents of the poster (Exhibit 7).

I would also accept the defendant, Holness' estimate in determining the attendance in relation to the other eleven performances.

When these sums are quantified, the gross revenue resulting would amount to \$1,18,800.

As to the amount to be deducted as expenses the formula applied by the defendant, Holness, as being two-thirds of the gross takings strikes me as more reasonable and what would be in keeping with the norm in staging such a production rather than the figure of <sup>one quarter</sup>  $\frac{1}{4}$  of the gross takings advanced by Glen Witter.

When this sum is reduced by  $\frac{2}{3}$  this would result in an amount of \$39,600 being arrived at as the profit accruing from these twelve performances.

The overall situation in relation to the total number of performances actually staged by the first-named defendant Ralph Holness is further supported by his evidence under cross examination. He at first asserted that there were only nine performances staged at the Ward Theatre as against the twelve which

which was being contended by Glen Witter in his evidence. When the rest of Holness' evidence is examined, while at first admitting that the total number of performances staged was nineteen, he later under cross examination admitted that this figure was some twenty three performances. As the only direct evidence from the plaintiff's side as to the number of performances staged, based upon evidence of Glen Witter was that in relation to one performance at the Ward Theatre on the opening night, the only other admissible evidence of the total number of performances of the work was that which emerged from the testimony of the first-named defendant Holness. When this testimony is examined under cross examination the following crucial account emerged:-

Q: How many times did you stage the "Dangerous Rooster?"

A: I know of twenty three performances.

As it is the uncontroverted evidence of the first-named defendant that one of the two performances scheduled for Linstead, was cancelled on account of inclement weather, there was in effect, therefore, no factual issue left to be determined, as to the number of performances actually staged of the work. The defendant's evidence would now <sup>virtually</sup> coincide with the evidence of Glen Witter as to the number of performances he saw advertised which although capable of affording some evidence as to the number of performances staged, was not, when weighed and tested, evidence of the truth of the facts stated or evidence upon which one could act in determining the number of performances in fact staged. This lacuna in the plaintiff's case, however was supplied by the admission which emerged from the first-named defendant's testimony by way of cross examination previously referred to.

As regards the evidence which emerged from both sides as to the rural performances, <sup>on</sup> the evidence both as to admissibility as well as to its cogency it <sup>was</sup> clearly in the defendant's favour, as here again there is no direct evidence emerging from the plaintiff and her witness, Glen Witter. Based upon this evidence one would now be considering what was in effect some eleven rural performances given the account of the first-named defendant.

These performances as to the venues and the number of shows were as follows:-

1. Yallahs Primary School - 1
2. Linstead All-age School - 1

3.	Mannings High School	-	2
4.	Capri Theatre	-	1
5.	Delmar Theatre	-	1
6.	Odeon Theatre (Mandeville)	-	1
7.	Palladium Theatre	-	2
8.	Americana Hotel	-	<u>2</u>
			11

Based upon the first-named defendant's account as to the takings from the two performances put on at the Yallahs Primary School and the Linstead All Age School of which a supporting statement was submitted in evidence (Exhibit 8) and when his estimate of average attendance at the other seven venues is examined and quantified, the gross takings arrived at amounts to \$89,550. When the two-thirds deduction formula for expenses is applied to this sum, this would result in the sum realised as profit as being \$29,833.33c which would round off at a sum of say \$29,800.

Under the heading of damages awarded for loss of profits, I would therefore, make an award of \$69,400.

One ought to mention in passing before leaving this first head of damages that there was some evidence which emerged from the testimony of the first-named defendant as to the usual formula applicable in the trade for fixing fees chargeable for use of the copyright to a work to be performed in the Theatre. There was the suggestion that a sum based upon 10% of the gross takings was the usual charge. This, however, is in my opinion of no relevance to the issues which fall for determination in this case as it presupposes a situation in which the producer of the particular work has actually sought and obtained permission from the owner of the copyright before the work is performed. This is clearly not the case here. The first-named defendant Ralph Holness, under cross examination has admitted that in staging the work in question he obtained no permission from the plaintiff who is the Administratrix of the Estate of the late author Edwin 'Bin' Lewis and the person in whom the property in the said work was vested. Moreover, an examination of the pleadings made it clear and beyond question that no such issue arose.

This brings me finally, therefore, to the question as to whether in the light of the evidence as to the defendant 'Holness' conduct and the manner in which the work was plagiarised and this in a way which when examined

not merely smacks of vulgarity but which when compared with the original work does in my opinion do violence to the author's style. When to this is added the fact that the work was put on by the defendant, Ralph Holness without the permission of the plaintiff and in defiance of her refusal of permission to stage the work when it was requested, a case for aggravated damages in my opinion clearly made out.

Peterson J. in Birn Brothers Limited vs. Keene and Company Limited [1918] 2 C.H. 281 at 286 an action for breach of copyright relating to Christmas cards - the defendant's having reprinted the plaintiff's cards and sold them at a lower price on the market to the public which included some of the plaintiff's own customers. The Learned Judge in reviewing on appeal an award made by the learned Master for injury to trade which can in this case be equated with a possible award for injury to the reputation of the author had this to say:

pg. 286. "Objection was also taken to the sum of £210. assessed by the Master for injury to trade on the ground that it was excessive and it was suggested by Counsel that 40s would be ample. Before the Master the plaintiff asked for £700 while the defendant suggested that £50 would be sufficient. Now this was an extensive and deliberate piracy and it was directed to what the defendants themselves admit was a substantial number of the plaintiff's customers and I have no doubt that the defendant's have not in their admissions exaggerated the extent of their depredations on the plaintiff's trade."  
(Underlines for emphasis.)

The facts in this case are not too dissimilar as the defendants have sought to downgrade the author's work and then to pass it off as an original work and in so doing sought to defy the clear refusal to stage the work when permission was sought from the plaintiff to do so. Bearing in mind the observations of Peterson J in the case referred to and taking all the facts and circumstances into consideration I would consider that a sum of \$15,000 would be a reasonable award under this head.

The overall result is therefore, that there will be judgment entered for the plaintiff on the claim for \$84,400 with costs to be taxed, if not, agreed.

Stay of execution granted for six weeks. Mrs. Benka Coker asking for interest at the commercial rate.

Interest awarded at 18% as from 2nd April, 1986 to payment.