Judgment 18 of 1972

IN THE PRIVY COUNCIL **49 OF 1970**

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

THE COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA — Appellant

- and -

ALAN RICHARD KNIGHT — Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from the judgment of the Federal Court of Malaysia (Azmi L.P., Suffian and Gill FJJ) dated the 2nd March 1970 dismissing an appeal by the Appellant from the judgment of the High Court of Malaya (Chang Min Tat J.) dated the 30th August 1969 allowing an appeal by the Respondent from an Order of the Special Commissioners of Income Tax dated the 29th October 1968 which had dismissed the Respondent's appeal against a notice of amended assessment to income tax dated the 30th November 1965. p.90 p.39 p.16

2. The undisputed facts found by the Special Commissioners were as follows. By an agreement in writing dated the 23rd August 1954 the Respondent entered the employment of what subsequently became the Malaya Borneo Building Society Limited as a staff surveyor. Clause 11(a) of this agreement provided that it might be determined by either party giving to the other not less than 3 months' notice in p. 7 p.12

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writing to expire at any time. The Respondent was subsequently promoted to the position of Chief Staff Surveyor. On the 6th February 1960 a letter was sent by the Company's Deputy General Manager to the Company's Staff Surveyors including the Respondent. The letter contained, inter alia, the following:-

Redundancy Pay

The subject of redundancy was discussed and it was agreed that should a Staff Surveyor become redundant, Management would consider the payment of redundancy pay to the Surveyor concerned, the maximum benefit payable being limited to one month's pay (Based on salary at date of redundancy) for every completed year's service subject to :-

(a) minimum compensation of 3 months' pay
(b) maximum compensation for 12 months' pay

Loss of Office

The Society is a commercial company and as such need not have a Malayanisation policy. Should it eventually become the policy of the Society's Board that expatriate staff should be replaced by suitably qualified local staff, Management would at that time draw up for the Board's consideration a scheme for compensation for loss of office. Management cannot, however, anticipate what the scheme will be neither can it anticipate Board's approval. However, it can safely be assumed that should compulsory replacement be introduced, Staff Surveyors would be granted compensation for loss of office on terms not less generous than those that apply to redundancy.

The Respondent did not raise any objection or protest on receipt of this letter.

3. On the 2nd November 1965 the Company's

Board resolved that

(a) The Society's Chief Staff Surveyor, Mr. A.R. Knight /the Respondent7, be declared redundant as from the 1st December 1965.

(b) Mr. A.R. Knight be given redundancy pay at the rate of one month's basic salary for every completed year's service subject to a maximum of 12 months' pay

Accordingly the Respondent was paid $28,050 arrived at by multiplying his then basic salary by 11, this being the number of years' service which he had completed with the Company. He was not given the 3 months' notice of termination as stipulated in clause 11(a) of the contract of employment. The Respondent, who was paid salary until the 30th November 1965, took no legal action against the Company for failure to give 3 months' notice nor did he contemplate such action. The passage money for himself, his wife and children was defrayed by the Company pursuant to clause 8(1) and (2) of the agreement of the 23rd August 1954.

4. By the amended notice of assessment to income tax dated 30th November 1965 the Respondent was assessed upon the sum of $28,050 paid to him by his former employers as redunancy in accordance with the resolution of the 2nd November 1965.

5. The issues which arise upon this appeal are as follows :-

(i) Whether the payment of the said sum to the Respondent was made pursuant to an agreement between the Respondent and the Company. If so, whether the payment was made pursuant to the Respondent's contract of employment as varied by the Company's offer contained in the letter of the 6th February 1960, in which case p.14

liability to tax admittedly arises, or whether it was paid pursuant to an agreement entered into for the abrogation by the Respondent of his contract of employment, in which event it is accepted that no liability to tax arises.

(ii) If the payment was not made pursuant to any agreement at all, whether it was a voluntary payment made to the Respondent by virtue of his office or employment, in which event liability to tax admittedly arises unless the payment is shown by the Respondent to have been a retiring gratuity.

6. The relevant provisions of the Malaysian Income Tax Ordinance can be summarised as follows :-

Section 10(1)(b) provided that income tax shall be payable on gains or profits from any employment. At the time that the Respondent was assessed to income tax "gains or profits from any employment" were defined by section 10(2)(a) to include "wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance . . . paid or granted in respect of the employment whether in money or otherwise."

Section 13(1)(i) exempts from liability to tax sums received by way of retiring or death gratuities or as consolidated compensation for death or injuries.

Section 76(3) and Schedule 5, paragraph 13 provide that the onus of proving that an assessment is excessive lies upon the person appealing against such assessment.

7. At the hearing before the Special Commissioners the Respondent tendered in evidence a letter dated the 16th April 1966

from the Secretary of the Company to the Senior Assistant Comptroller of Inland Revenue which stated, inter alia, that the payment was made "as consideration for the release of the [Company's] obligations" and that it was "in no way related to compensation for past services rendered". The letter further suggested that the Respondent's post had been Malayanised. The Secretary appeared before the Special Commissioners and under cross-examination it appeared that he had not been in the employment of the Company at the time when the Respondent's employment was terminated. The Special Commissioners determined that it would be unsafe to accept the evidence contained in the said letter.

8. The basis of the decision of the Special Commissioners was as follows :-

(i) The payment to the Respondent had been made pursuant to a contractual obligation. This contractual obligation was the contract of employment as varied by the letter of the 6th February 1960 to the Company's Staff Surveyors and the Respondent's acceptance of that offer to be implied from his continuing to work for the Company without protest. The Special Commissioners observed that the Respondent had adduced no evidence of a separate agreement between himself and the Company to abrogate his contract of employment, and accordingly had not discharged the burden placed upon him by section 76(3) of the Income Tax Ordinance 1947 and Schedule 5, paragraph 13 of the Income Tax Act, 1967. The Special Commissioners relied in support of this conclusion upon the facts that (a) the Respondent was paid his own and his family's passage home in accordance with clause 8(1) and (2) of his service agreement and that it could be inferred therefrom that the contract of employment remained in being; and (b) that the Respondent had no right to an indefinite

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prolongation of his contract of employment and this militated against the existence of any agreement for the abrogation of such contract of employment; and (c) that the Company's proposals regarding redundancy of Staff Surveyors were made known to the Respondent long before the Respondent's employment was terminated.

(ii) If (contrary to their view) the payment was made voluntarily, it was clearly made to the Respondent by virtue of his office or employment and was prima facie taxable. The payment did not become exempt from tax pursuant to section 13(1)(i) of the Income Tax Ordinance as a "retiring gratuity". The Respondent had never applied to retire. His employment had been terminated at the instance of his employers.

p.39 9. Upon the appeal of the Respondent to the High Court of Malaya, Chang Min Tat J. held that the Special Commissioners had erred in holding that there was a variation of the Respondent's service agreement consequent upon the Company's letter to Staff Surveyors dated the 6th February 1960. This letter was not an offer but an intimation of intention. It contained no request for acceptance by the Respondent and the latter's acceptance could not be inferred from any absence of dissent. The payment of passage money did not establish that the service agreement had not been abrogated. The service agreement might have been abrogated on terms which included a provision for the payment of passage money. Chang Min Tat J. was further of the opinion that the absence of any right to continued employment had per se no relevance to a

p.45 conclusion that there had been a variation of the contract of employment. He further considered that the Special Commissioners had been mistaken in rejecting the letter of the 10th April 1966 written by the Secretary of the Company to the Senior Assistant Comptroller of

Inland Revenue. He concluded from this letter and from the facts found by the Special Commissioners that the Respondent had been Malayanised as opposed to being made redundant. From this the learned Judge reasoned that the payment made to the Respondent was compensation for abrogation of contract and not chargeable to tax.

10. Upon the appeal of the Appellant to the Federal Court of Malaysia, Gill F.J. delivered the judgment of the Court. He agreed with Chang Min Tat J. that the Special Commissioners had been mistaken in rejecting the letter written by the Secretary of the Company. He considered that the Special Commissioners had been mistaken in holding that there had been a variation of the contact of employment pursuant to the letter dated the 6th February 1960 and concluded that the payment had been made pursuant to an agreement for the termination of the Respondent's services "which came into being by the Society conveying the terms of the resolution by its Board of Directors on the 2nd November 1965 and the Respondent accepting the terms of the resolution by leaving the service on 30th November, 1965, as required". The passage money was paid pursuant to an implied obligation under this new agreement. With regard to the observations of the Special Commissioners that the Respondent had no absolute right to be employed up to a certain date, and to the Company's policy of replacing expatriate officers by local officers, Gill F.J. observed that the Company had in mind "their moral, if not legal, obligation to provide suitable compensation in pursuing that policy". He further considered the position which would obtain if the payment to the Respondent were voluntary. He agreed that it must have been made by virtue of the Respondent's office or employment. He held that the payment constituted a retiring gratuity. He based this decision on the reasoning that whenever a person leaves an employment, whether to take up a new employment

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or not, he retires.

11. The basic principles of law in this case are common ground. It is accepted by the Appellant that, if the payment made to the Respondent was made as compensation for loss of office pursuant to a new agreement for the abrogation of the Respondent's employment, then no liability to tax arises. It is accepted by the Respondent that, if the payment was made pursuant to a contract of employment as varied in the light of the letter of the 6th January 1960, then liability to tax arises. If, however, the payment was made voluntarily then liability to tax arises unless the payment is properly to be regarded as a retiring gratuity within section 13(1)(i) of the Income Tax Ordinance.

12. The Appellant submits that the findings of the Special Commissioners should be approached upon the following basis. Such findings should only be disturbed if the only reasonable conclusion from the evidence contradicts the determination made by the Commissioners: see Edwards v. Bairstow (1956) A.C.14 per Lord Radcliffe at pp 35 and 36. Whilst the Federal Court of Malaysia purported to apply this test, it is submitted that they were in error in disturbing the findings of the Special Commissioners and that there was evidence upon which such findings could properly be made.

13. The Special Commissioners were fully justified in rejecting the contention of the Respondent that there had been a new agreement for the abrogation of his contract of employment. Such conclusion could properly be reached for the following reasons :-

(i) The resolution of the 2nd November 1965 could not properly be construed as an offer. It constituted a statement of the proposed action of the Company regardless of whether such action was acceptable to the Respondent

(ii) There was no evidence adduced by the Respondent that, whether by discussions or correspondence with officials of the Company, he agreed to forego his right to 3 months' notice in exchange for the redundancy payment. The fact that he did not contemplate or bring legal proceedings claiming that he had been dismissed on insufficient notice is not sufficiently unequivocal as to constitute evidence of acceptance of an offer (even if one had been made) to abrogate his contract of employment.

(iii) The Special Commissioners were entitled to reject the letter of the 16th April 1966. They were entitled to give weight to the fact that the Company Secretary had not been employed by the Company prior to the dismissal of the Appellant. In so far as the letter stated that the payment was made "as consideration for the release of the /Company's/ obligations", it could properly be inferred that this was (in the absence of any supporting evidence) merely the construction put upon the payment by the Company Secretary. Further, the Secretary's statement that "the Society did not look into its legal obligations . . . the Society merely felt obliged to adopt past practice" appeared to be inconsistent with the suggested agreement. In so far as the letter referred to the Malayanisation of the post, it did not indicate one way or the other the nature of the contractual obligation pursuant to which payment was made. Further, it did not refer at all to the highly material letter of the 6th February 1960.

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(iv) It would be unrealistic to view a payment of 11 months' redundancy pay as consideration for the abrogation by the Respondent of his entitlement to 3 months' notice and the substitution therefor of one month's notice. In so far as Gill F.J. purported to support his conclusion by the observation that the Company had in mind "their moral, if not legal, obligation to provide suitable compensation" in pursuing the Malayanisation policy such reasoning militated against the formation of a legally binding agreement for the abrogation of the Respondent's employment.

14. The Special Commissioners were further entitled to infer that the payment was made pursuant to the contract of employment as varied. They could properly hold, particularly as no other agreement was found proved and payments of the kind made to the Respondent are normally made pursuant to some agreement, that the Respondent had accepted by conduct the terms of the letter of the 6th February 1960. The fact that the payment was expressed by the resolution of the 2nd November 1965 to be "redundancy pay" and was calculated upon the basis set out in the said letter of the 6th February 1960 is further evidence upon which the conclusion of the Special Commissioners can properly be upheld.

15. Alternatively, if the payment was voluntary, it was held in all Courts that it was made by virtue of the Respondent's office or employment. The only question is therefore whether it constituted a "retiring gratuity" so as to exempt the Respondent from liability to tax pursuant to section 13(1)(i) of the Income Tax Ordinance. The Appellant submits that it is decisive of this issue that the Respondent was dismissed by the Company. Whether such dismissal was on the grounds of redundancy or

Malayanisation, any voluntary payment was made by reference to such dismissal. Such dismissal does not, upon the ordinary and natural meaning of the words, constitute a "retiring" by the Respondent. The Appellant further submits that in any event "retiring" must contemplate a retirement from all employment which is intended at the time to be permanent.

10. 16. The Appellant submits that the judgment of the Federal Court should be reversed and the Order of the Special Commissioners restored for the following, among other

R E A S O N S

(1) BECAUSE there was evidence to justify the Special Commissioners finding that payment had been made under the Respondent's contract of employment as varied

20 (2) BECAUSE the Respondent failed to discharge the burden resting upon him of proving that the payment was made pursuant to an agreement abrogating his contract of employment

(3) BECAUSE there was evidence to justify the Special Commissioners in finding that the payment to the Respondent (if voluntary) was a gift made by virtue of his office or employment

30 (4) BECAUSE there was no evidence that the Respondent had retired or that the payment to him was a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance 1947

(5) For the reasons appearing in the Grounds of Decision of the Special Commissioners.

ROBERT GATEHOUSE Q.C.

ROBERT ALEXANDER

49 OF 1970

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MALAYSIA Appellant

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CASE FOR THE APPELLANT

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