

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No.17 of 1974

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

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B E T W E E N :

T. MAHESAN s/o THAMBIAH

Appellant

-- AND --

THE MALAYSIA GOVERNMENT OFFICERS'  
CO-OPERATIVE HOUSING SOCIETY LTD.

Respondent

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CASE FOR THE RESPONDENT

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Record

1. This is an appeal from the judgment of the Federal Court of Malaysia (Azmi L.P., Suffian C.J. and Syed Othman J.) dated the 28th February 1974, which dismissed the Appellant's appeal and allowed the Respondent's cross-appeal from a judgment of the High Court in Malaya (Abdul Hamid J.) dated the 5th June 1972. The trial judge had given judgment on the claim by the Respondent (Plaintiff in the action) for ~~£~~122,000 with interest on ~~£~~82,000, part thereof, at 5½% per annum from 13th May 1965, and on ~~£~~40,000, the balance, at 5½% per annum from 29th June 1965. The trial judge had, however, dismissed the Respondent's further claim for ~~£~~488,000 damages. The Federal Court affirmed the trial judge's award of ~~£~~122,000 and interest and allowed the Respondent's cross-appeal against the dismissal of its further claim to the extent of ordering the Appellant to pay ~~£~~443,000 with interest thereon at 5½% per annum from the 22nd February 1965.
- p.160  
p.138  
p.149  
p.182
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2. The Respondent is a co-operative society registered

Record

under the Co-Operative Societies Ordinance 1949, and was established with the object of undertaking housing projects to meet demands for houses by government servants. The Appellant was the Secretary as well as a member of the Board of Directors of the Respondent, possessed of all the powers of a director. As a result of many requests made to it by government officers to start a housing scheme in Penang, the Respondent purchased from S.M. Manickam (hereinafter referred to as "Manickam") 59 acres of land in that State at the price of \$944,000/-, the sale being completed on 22nd February 1965. 10

pp.1-4 3. This action was brought by the Respondent as Plaintiff against the Appellant, as Defendant, on the 18th September 1969, to recover the sums of \$82,000/- and \$40,000/- being secret commissions received by the Appellant from Manickam in connection with the purchase of the land by the Respondent (together with interest at 5½% per annum calculated from the respective dates those sums were so received), and the sum of \$488,000/-, being the excess amount which the Appellant had had to pay in the purchase of the land (together with interest at the same rate from the 22nd February 1965). 20

pp.5-6 By his Defence dated the 17th October 1969, the Appellant denied that it was within his knowledge that Manickam purchased the said land for only \$456,000/- or that he had received from Manickam \$122,000/- as commission. 30 His case was that his bank account, into which the two sums were paid, was operated by a Dr. Saw, that he the Appellant was only a nominee of Dr. Saw and that the payments were in repayment of a debt owed by Manickam to Dr. Saw.

pp.138-148 4. The hearing of the action in the High Court at Kuala Lumpur (Abdul Hamid J.) commenced on the 27th March 1972 and lasted for eight days. The material findings of fact sufficiently appear from the judgment. 40

5. On the 5th June 1972, Abdul Hamid J. gave judgment for the Respondent on its claim for the sums of \$82,000/- and \$40,000/- (with interest from the respective dates the sums were paid into the Appellant's account at the rate of 5½% per annum) and costs, but dismissed the Respondent's claim for the additional amount of \$488,000/- which the

Respondent had to pay in the purchase of the land. In dismissing the Respondent's claim to the sum of \$488,000/- the learned Judge held that the Respondent in order to be entitled to judgment must prove that it had suffered loss but that there was no evidence adduced of such loss.

p.139 11.27-32

10 6. The Appellant appealed to the Federal Court of Malaysia (Azmi L.P., Suffian F.J. and Syed Othman J.) against the part of the decision of Abdul Hamid J. that gave judgment for the Respondent in respect of the sums of \$82,000/- and \$40,000/-, together with interest and costs. The Respondent cross-appealed to the said Court against that part of the decision of the learned Judge which dismissed the Respondent's additional claim to \$488,000/-. On the 28th February 1974, the Federal Court gave judgment dismissing the Appellant's appeal but allowing the Respondent's cross-appeal, and ordered the Appellant to pay 20 the Respondent the sum of \$443,000/- as compensation for loss suffered by the Respondent in the purchase of the land, such compensation to be additional to what was adjudged for the Respondent by Abdul Hamid J. The Respondent was also awarded interest on the sum of \$443,000/- at 5½% per annum, as well as costs of the claim for compensation in the High Court and costs of the appeal and of the cross-appeal.

pp.150-151

pp.152-153

pp.160-180

pp.181-182

30 7. The judgment of the Federal Court was delivered by Syed Othman J. who, as regards the appeal, agreed with the findings of Abdul Hamid J. that (a) it was wholly incredible to accept that the Appellant and his wife were operating nominee accounts for Dr. Saw involving large sums of money at some time or other without any contemporaneous evidence to safeguard Dr. Saw in the event of the sudden demise of the Appellant, his wife or Dr. Saw, (b) the Appellant "was in 40 the transaction from the very beginning and that Manickam was to purchase the land if [the Appellant] found it suitable to [the Respondent]", and (c) both Dr. Saw and Manickam could not be telling the truth when they said that the sums of \$82,000/- and \$40,000/- paid into the Appellant's account were repayment of debt due from Manickam to Dr. Saw, there being no contemporaneous written document evidencing any acknowledgement of debt by Manickam to Dr. Saw. 50 On the payment of the sums of \$82,000/- and \$40,000/- into the Appellant's account, Syed

pp.160-180

p.165 1.40

p.178 1.38

p.169 11.1-8

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Othman J. said :-

p.169 ll.  
15-25

"the payment was made surreptitiously and Manickam took great pains to cover his tracks. He did not simply issue a cheque or two cheques to the Appellant. Instead he wrote out a cash cheque for ~~₹~~₹82,000/-. His clerk cashed the cheque and then immediately deposited the cash into the same bank for the account of the Appellant. He did 10 the same thing when paying the ₹40,000/- about a month later. Obviously, Manickam was anxious that nobody should know where the money had come from least of all that it came from him."

p.180 ll.  
21-33

8. With regard to the cross-appeal, Syed Othman J. held that the difference between the price for the land paid by the Respondent and that paid by Manickam for the land is sufficient proof of their loss actually sustained by the Respondent as a 20 direct result of the Appellant's misconduct or breach of duty; but the learned Judge deducted from the sum constituting the difference (₹488,000/-) a sum of ₹45,000/- being the amount which Manickam paid to Rengasamy Pillai over and above the purchase price paid by him to Lim Lai Hin, on the ground that this was the cost of clearing squatters from the land and the Respondent would have had to expend this sum if it had purchased the land directly from the original vendor. In allowing the 30 cross-appeal, Syed Othman J. relied on The Mayor, Aldermen & Burgesses of the Borough of Salford v. Lever [1891] 1 QBD 168, and said:-

p.174 ll.  
6-33

"I am aware of course that in that case the claim was by the cheated principal not against their manager and agent but against the briber of the agent, and therefore anything said in that case relating to the liability of an agent to his principal was not strictly relevant, but the principles are intended to apply to 40 both the briber and the agent ..... From the cases cited, it would appear that hitherto cheated principals have been content to sue their agents only for the return of the bribe received by the agents, and have not sued for more. But the authorities appear to be overwhelming in supporting that the principal is entitled to recover from the agent both the bribe and compensation for loss suffered by the principal." 50

9. Under section 165 of the Contracts (Malay States) Ordinance 1950, it is provided that an agent is bound to act with reasonable diligence, and to use such skill as he possesses, and to make compensation to his principal in respect of the direct consequence of his own neglect, want of skill or misconduct; and following what Romer L.J. said in Hovenden & Sons v. Millhoff 83 LTR 41 at page 43, Syed Othman J. held that since the Respondent's claim to compensation was beyond the amount of the bribe received by the Appellant from Manickam, loss must be proved. Having considered the evidence, the learned Judge came to the conclusion that the payment by the Respondent of the excess sum of \$488,000/- "in the circumstances of the case is proof of loss to [the Respondent] ... this loss, in the words of Lord Maugham in Taylor v. United Africa Co. Limited AIR (1937) P.C. 10 was actually sustained as a direct result of [the Appellant's] mis-conduct or breach of duty."
10. On the 19th August 1974, the Federal Court of Malaysia made an Order granting final leave to appeal to His Majesty the Yang di-Pertuan Agong.

p.176 1.8-18

p.180 11.21-6

p.183

The Respondent submits that this Appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. BECAUSE there have been concurrent findings of fact by the High Court and the Federal Court on the question whether the Appellant had received secret commissions from Manickam.
2. BECAUSE such findings were correct.
3. BECAUSE the misconduct or breach of duty of the Appellant had caused the Respondent to pay to Manickam a price for the land in excess of that payable for it had the Appellant properly performed his duty.
4. BECAUSE the judgment of the Federal Court with respect to the issue raised in the cross-appeal, in particular, on the question of proof and measure of loss,

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was right.

ROBERT GATEHOUSE

RAJA AZIZ ADDRUSE

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