Privy Council Appeal No. 17 of 1974.

T. Mahesan s/o Thambiah – – – – – – *Appellant*

v.

The Malaysia Government Officers' Co-operative Housing Society Ltd. – – – – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH NOVEMBER 1977

Present at the Hearing:

LORD DIPLOCK

LORD EDMUND-DAVIES

LORD SCARMAN

[*Delivered by* LORD DIPLOCK]

The facts of this case found by the trial judge are recounted in his judgment. His findings were accepted by the Federal Court. These are thus concurrent findings of fact, with which their Lordships, in accordance with their well-established practice, do not interfere. For the purpose of the questions of law which arise the relevant facts may be stated very shortly.

The appellant ("Mahesan") was a director and employee of the respondent ("the Housing Society"). Its object was to provide housing for government employees. In connection with a transaction involving the purchase of land in Penang from one Manickam, the appellant received from him a bribe amounting to $122,000. Shortly before this sale Mahesan and Manickam had inspected the land together. Mahesan had found it to be suitable for the Housing Society's purposes and Manickam had purchased it from its former owners at a price of $456,000. He re-sold it to the Housing Society for $944,000, thus realising a gross profit of $488,000, one quarter of which he passed on to Mahesan. Between the purchase and the re-sale expenses amounting to $45,000 had been incurred by Manickam in removing squatters from the land; so the net profit that was made out of the Housing Society was $443,000. This represents the loss sustained by the Housing Society as a consequence of Mahesan's fraudulent breach of duty in failing to inform his employers when he inspected it that the land was available at the price of $456,000, and in conniving with Manickam in the purchase of it by the latter and his re-sale of it to the Housing Society at more than double what he had paid for it.

The facts relating to the transaction were eventually discovered. Manickam escaped to India but Mahesan was apprehended and brought to trial in the High Court, Kuala Lumpur. He was convicted of two offences of corruption under section 4 (*a*) of the Prevention of Corruption Act, 1961. He was sentenced to seven years' imprisonment and ordered under section 13 of that Act to pay to the Housing Society a penalty of $122,000, being the amount of the bribe.

Within a few days of Mahesan's conviction the Housing Society brought the present action against him in the High Court of Kuala Lumpur. Relief was claimed under two separate heads: (1) recovery of the amount of the bribe Mahesan had received, *i.e.* $122,000, and (2) damages for the loss sustained by the Housing Society in connection with the purchase of the land, which they quantified at $488,000.

The trial judge, Abdul Hamid J., granted the relief claimed under head (1); he gave judgment in favour of the Housing Society for $122,000 together with interest. He refused any relief under head (2) upon the ground that the Housing Society had failed to prove that they had sustained any loss on the transaction. He apparently took the view that prices of land in Malaysia were rising and that the Housing Society had failed to adduce satisfactory evidence that they had paid for the land more than its fair price in the open market at the time of the purchase.

Both parties appealed to the Federal Court; Mahesan appealed against so much of the judgment as awarded $122,000 and interest against him under head (1); the Housing Society cross-appealed against the rejection of their claim under head (2). That Court dismissed Mahesan's appeal. It was an appeal on fact alone. The Federal Court examined the transcript of the evidence in detail. It upheld the learned judge's findings. So the judgment under head (1) for the recovery of the amount of the bribe received by Mahesan stands and as already indicated is one which their Lordships will not permit to be re-opened.

The Court allowed the cross-appeal of the Housing Society. It held that, on the evidence, if Mahesan had been regardful of his duty as director and employee of the Housing Society, the Society could have purchased the land themselves at the time when Mahesan inspected it and at the price of $456,000 which Manickam had given for it, instead of $944,000 at which he sold it on to them. In their Lordships' view this finding which is one of fact was fully justified. The Federal Court held that the difference between these two prices, *i.e.* $488,000, was *prima facie* the measure of the damages to which the Housing Society were entitled under head (2), but that there ought to be deducted from that amount a sum of $45,000 which, as the evidence disclosed, had been expended on evicting squatters from the land. Accordingly the Court gave judgment for the Housing Society on the cross-appeal for $443,000. This is in addition to $122.000, the amount of the bribe, ordered to be paid under the judgment of Abdul Hamid J. in consequence of the dismissal of Mahesan's appeal under head (1). It is also in addition to the penalty in the like amount already ordered to be paid by Mahesan to the Housing Society in the criminal proceedings, of which they had actually received $13,000 as proceeds of execution.

In assessing the damages under head (2) at $443,000 the Federal Court made no allowance for the fact that the Housing Society had already been adjudged entitled to recover the amount of the bribe from Mahesan under head (1), thus reducing their actual loss as a result of his dishonest breach of duty by $122,000 to $321,000. The judgment of the Federal Court thus gave to the Housing Society in the civil action against Mahesan *double* recovery of the amount of the bribe that

he had received; or, if account is also taken of the statutory penalty ordered to be paid to them in the criminal proceedings, *treble* recovery of that sum.

The order made in the criminal proceedings does not affect the rights of the principal against the agent in the civil proceedings. Section 30 of the Prevention of Corruption Act, 1961, so provides. The question of law which has caused their Lordships difficulty in this appeal is whether or not in civil proceedings the amount of the bribe can be recovered from the dishonest agent twice over. In allowing double recovery the Federal Court treated the question as governed in Malaysia by the common law and principles of equity in force in England in 1956—the relevant date for the purpose of their acceptance as basic law in Malaysia. They did not consider that section 30 of the Prevention of Corruption Act, 1961, made any relevant alteration to the civil liability of a bribed agent to his principal as it had been prior to the Act. They accordingly applied the principles stated in two judgments of the English Court of Appeal at the turn of the century. *Salford Corporation v. Lever* [1891] 1 Q.B. 168 and *Hovenden and Sons v. Millhoff* (1900) 83 L.T.41. On the face of them the statements relied upon by the Federal Court justify double recovery of the bribe from the agent who received it. They were, however, obiter. The actions in which they were made were actions by the principal against the giver of the bribe against whom there was no question of double recovery. They were not actions against the agent; and there does not appear to be any reported case of an action by a principal against his bribed agent in which double recovery of the amount of the bribe was obtained.

In their Lordships' view, these dicta, notwithstanding the eminence of the judges by whom they were made, are in conflict with basic principles of English law as they have been developed in the course of the present century. They call for re-examination in their historical setting.

By the early years of the nineteenth century it had become an established principle of equity that an agent who received any secret advantage for himself from the other party to a transaction in which the agent was acting for his principal was bound to account for it to his principal: *Fawcett v. Whitehouse* (1829) 1 Russ. & M. 132. The remedy was equitable, obtainable in the Court of Chancery, and there appears to be no reported case at common law for the recovery of a bribe by a principal from his agent before the Judicature Act 1875. No precedent for such a count is to be found in the 3rd Edition of Bullen & Leake, published in 1868. Nevertheless by 1888, Bowen L.J. felt able to say that the bribe was recoverable at common law as money had and received by the agent to the use of the principal.

> "The law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition—there is an equitable right, if you treat it as a matter of equity—as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity." *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888) 39 Ch.D.339 at 367.

This right of the principal to recover the amount of the bribe from the agent does not depend upon his having incurred any loss as a result of his agent's conduct. *Reading v. A.G.* [1951] A.C. 507 (H.L.), [1949] 2 K.B. 232 (C.A.). But the giving of the bribe was treated in equity as constructive fraud on the part of the giver and where it was given

in connection with a contract between the principal and the briber the principal was entitled to rescission of the contract. This equitable right was additional to his right to recover the bribe from the agent.

In *Bagnall v. Carlton* (1877) 6 Ch.D.371 the principal brought an action against the briber for rescission of the contract in respect of which the bribe had been given and against the agent for recovery of the bribe. He compromised the action against the briber on terms that he was paid a sum of money by the briber and the contract remained afoot. It was held that this did not affect the principal's right to recover the bribe from the agent. There is nothing in the report to indicate how the amount paid under the compromise was arrived at. So far as the agent was concerned it was *res inter alios acta.* No question of double recovery against him was involved.

Bagnall v. Carlton was, however, followed by *Salford Corporation v. Lever* (*ubi sup.*). Again it was an action brought by the principal against the briber, but not in this case for rescission of the contracts for sale in respect of which the bribes were given but for damages for fraud. Rescission was not available as the goods which were the subject of the sales had been consumed. It was established by the evidence that the briber had sold the goods at prices which exceeded the market prices by the amount of the bribes; so the amount of the bribes was also the measure of the damage caused to the principal by the briber's fraud. The principal had previously brought an action in the Chancery Division against the agent for recovery of the bribe and had compromised this on terms that the agent should co-operate with him for the purpose of his suing the bribers and would put up security in the sum of £10,000 which would be released progressively by the amounts recovered by the principal by way of damages from the bribers.

In the action against the briber the latter relied upon the compromise with the agent as amounting to the release of a joint tortfeasor. The Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) held that it was not, upon the ground, among others, that the principal's cause of action for recovery of the bribe from the agent was a separate and different cause of action from his cause of action against the briber for damages for fraud. *Bagnall v. Carlton* (*ubi sup.*) was cited as authority for this proposition. The terms of the compromise of the action against the agent were such that no question of double recovery of any of the bribes could arise, nor was the agent a party to the action against the briber. Nevertheless all three members of the Court expressed the opinion accurately summarised in the headnote as follows:—

> "Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of his having entered into the contract, *without allowing any deduction in respect of what he has recovered from the agent under the former head,* and it is immaterial whether the principal sues the agent or the third person first."

The liability of the briber to the principal for damages for the loss sustained by him in consequence of entering into the contract in respect of which the bribe was given is a rational development from his former right in equity to rescission of the contract. The cause of action against the briber was stated by Lord Esher and Lopes L.J. to be fraud,

and, since the agent was necessarily party to the bribery, it follows that the tort was a joint tort of briber and agent for which either or both could be sued. But fraud is a tort for which the damages are limited to the actual loss sustained; and if the principal has recovered the bribe from the bribed agent the actual loss he has sustained in consequence of entering into the contract is reduced by that amount. The words that their Lordships have caused to be italicised in the citation from the headnote were unnecessary to the actual decision of the case and appear to be in conflict with established principles of the law of tort.

Although as a matter of decision the *Salford Case* was concerned only with the liability of the briber the dicta summarised in the headnote deal also with the liability of the agent. It was accurate to say that the principal had two distinct remedies against the agent, one for money had and received and the other for the tort of fraud; but it was flying in the face of a long line of authority to say that these two remedies were not alternative but cumulative. The authorities to this effect are discussed at length in the speeches in *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C.1, a case in which the House of Lords confirmed the principle that where the same facts gave rise in law to two causes of action against a single defendant, one (formerly lying in assumpsit) for money had and received and the other for damages for tort, the plaintiff must elect between the remedies. It held, however, that such election was not irrevocable until judgment was recovered on one cause of action or the other. The House of Lords also held that where the same facts gave rise in law to a cause of action against one defendant for money had and received and to a separate cause of action for damages in tort against another defendant, judgment recovered against the first defendant did not prevent the plaintiff from suing the other defendant in a separate action: but that to the extent that that judgment was actually satisfied this constituted satisfaction *pro tanto* of the claim for damages in the cause of action against the second defendant.

In so far as what was said in the *Salford Case* conflicts with this, in their Lordships' opinion it can no longer be regarded as good law and the words that are italicised in the citation of the headnote are wrong.

In the *Salford Case* the principal's cause of action against the briber was described by the majority of the Court as being fraud, as was his second cause of action against the agent. Damage is the gist of an action in fraud and any loss proved to have been sustained by the principal in consequence of entering into the contract in respect of which the bribe was given might be less or greater than the amount of the bribe. This would no doubt affect the principal's choice of whether to seek judgment against the agent for the amount of the bribe as money had and received or to seek damages for fraud against him, but as the law was laid down in the *Salford Case* there would be no such right of election against the briber. The principal's only cause of action against him was for damages for fraud.

In subsequent cases, however, there developed differences of opinion between members of the Court of Appeal as to whether or not the principal had an alternative cause of action for money had and received against the briber too, as well as against the bribed agent. In *Grant v. Gold Exploration and Development Syndicate Ltd.* [1900] 1 Q.B. 233, Collins L.J. was of opinion that there was such a cause of action against the briber. A. L. Smith and Vaughan Williams, L.JJ., doubted this, and preferred to express their judgments as damages for fraud holding that the principal had proved a loss up to the amount of the bribes. However, in *Hovenden & Sons v. Millhoff* (1900) 83 L.T.41, A. L. Smith and Vaughan Williams, L.JJ., recanted and a new chapter was opened

in the law of civil remedies for bribery. The Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.) allowed the appeal and entered judgment for the principal against the briber for the amount of the bribe. Romer L.J., whose judgment was cited by the Federal Court in the instant case, laid down three rules which, if correct, would have the effect of making bribery a wrong committed by the principal which is *sui generis* and defies classification. The rules were:— (First) that the motive of the briber in giving the bribe is not relevant; (Secondly) that there is an irrebuttable presumption that the agent was influenced by the bribe, and (Thirdly)

> " if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it.".

These rules refer to three of the elements in the tort of fraud, the motive, the inducement, and the loss occasioned to the plaintiff, but go on to say that the existence of the first two elements and of the third up to the amount of the bribe are to be irrebuttably presumed. This is merely another way of saying that they form no part of the definition of bribery as a legal wrong. To the extent that it is said that there is an irrebuttable presumption of loss or damage to the amount of the value of the bribe this is another way of saying that, unlike in the tort of fraud, actual loss or damage is *not* the gist of the action. But then to go on to say that actual loss in excess of the amount of the bribe can be recovered only if it is proved, is to produce a hybrid form of legal wrong of which actual damage *is* the gist of part only of a single cause of action.

Upon analysis, what these rules really describe is the right of a plaintiff who has alternative remedies against the briber

(1) to recover from him the amount of the bribe as money had and received, or

(2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the transaction in respect of which the bribe was given;

but in accordance with the decision of the House of Lords in *United Australia Ltd. v. Barclays Bank Ltd.* (*ubi sup.*) he need not elect between these alternatives before the time has come for judgment to be entered in his favour in one or other of them.

This extension to the briber of liability to account to the principal for the amount of the bribe as money had and received, whatever conceptual difficulties it may raise, is now and was by 1956 too well established in English law to be questioned. So both as against the briber and the agent bribed the principal has these alternative remedies: (1) for money had and received under which he can recover the amount of the bribe as money had and received or, (2) for damages for fraud, under which he can recover the amount of the actual loss sustained in consequence of his entering into the transaction in respect of which the bribe was given, but he cannot recover both.

As stated earlier, in Malaysia, section 30 of the Prevention of Corruption Act, 1961, deals with civil remedies for bribery. It is as follows:—

> " 30 (1). Where any gratification has in contravention of this Act been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the

agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the defendant in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of such amount or money value.

(2). Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property."

Subsection (1) which refers to the principal's right to recover the amount of the gratification as a civil debt either " from the agent or from the person who gave the gratification to the agent " gives statutory recognition to the right of the principal at common law to recover the amount of the bribe from either the briber or the agent, as money had and received. Subsection (2) in their Lordships' view does no more than to preserve the right of the principal to recover from the bribed agent as damages for fraud any loss, in excess of the amount of the bribe, he has actually sustained in consequence of entering into the transaction. In their Lordships' view, the Federal Court was right in its assumption that these statutory provisions do not affect what had previously been the rights of the principal at common law.

It follows that in the instant case the Housing Society was bound to elect between their claim for $122,000 under section 30(1) of the Prevention of Corruption Act, 1961, and their claim for $443,000 damages for fraud. Since they would clearly have elected the latter, judgment should be entered for that sum with interest thereon at 5½% from 22nd February 1965. The appeal should be allowed to that extent. There should be no order as to costs of this appeal and the orders for costs made below should remain undisturbed. Their Lordships will report their opinion to His Majesty The Yang di-Pertuan Agong accordingly.

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

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LORD DIPLOCK

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