1976 : 14

No. 14 of 1975

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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O N   A P P E A L

FROM THE COURT OF APPEAL, SINGAPORE

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B E T W E E N :

RAJA'S COMMERCIAL COLLEGE (sued as a firm) — Appellant (Defendant)

- and -

GIAN SINGH & COMPANY LIMITED — Respondent (Plaintiff)

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CASE FOR THE APPELLANT

RECORD

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1. This is an appeal from a decision of the Court of Appeal of Singapore (Wee Chong Jin, C.J., T. Kulasekaram, J. and Tan Ah Tah, J.), affirming a decision of Choor Singh, J. in the High Court of Singapore. The issue before Your Lordships is confined to one of damages for loss of rent caused to the Respondent by the Appellant's wrongful occupation of the Respondent's premises. The learned judge ordered the Appellant to pay damages of $187,242.23, and his award was upheld by the Court of Appeal. The Appellant contends that the amount of the damages was too high for two reasons: first, because the damages ought to have been reduced, under the principle of British Transport Commission v. Gourley, by reason of being free from income tax; secondly, because the evidence adduced by the Respondent, if properly understood, shows that the rent lost was not the amount awarded by the learned judge, but rather the lower figure of $141,912.05.

pp.35-39 (Judgment) p.40 (Order)
p.22 (Formal Judgment)
pp.22-28 (Grounds for Judgment)

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2. The Appellant is described in the title of the appeal as "Raja's Commercial College". That

is in fact the business name of an enterprise owned and carried on by Mr. G. Natarajan. The Respondent Company, Gian Singh & Company Limited, was at all material times the owner of a building at 30-31 Raffles Place, Singapore. From 1957 the Appellant had a tenancy of just under 3,000 square feet on the second floor of the building. By 1967 the Appellant was paying rent at the rate of $0.75 per square foot. The Respondent gave to the Appellant a notice to quit with effect from 31st December 1967. The Appellant disputed the effectiveness of the notice to quit, claiming to be entitled to remain in occupation under the Control of Rent Ordinance. Consequently the Appellant remained in occupation of the premises and continued to pay rent at the old rate of $0.75 per square foot.

Cap.242

3. The Respondent denied that the Control of Rent Ordinance applied, and in due course commenced the action against the Appellant, claiming possession of the premises and damages. The main issue at the trial before Choor Singh J. was whether the Control of Rent Ordinance applied. That question turned on whether the building was a new building or not. The learned judge held that it was, the result being that the Appellant was not protected by the Ordinance. That part of the learned Judge's decision is not now disputed by the Appellant.

4. In consequence of the decision of Choor Singh J. the Appellant gave up possession of the premises on 30th November 1973. It had remained in occupation for a total of 71 months after the notice to quit expired, and therefore had been a trespasser on the Respondent's premises for that period. The Appellant accepts that the Respondent is entitled to damages for the trespass. The Appellant also accepts that the measure of damages must be based on the difference between the actual rent paid by the Appellant at a rate of $0.75 a square foot and the higher rent which the Respondent could have obtained if the Appellant had moved out at the end of 1967 so that the Respondent could have relet the premises to another tenant. The Appellant does not, however, accept that the relevant principles were correctly applied in the light of the evidence and the law.

5. The Appellant's first submission is that the damages awarded should not have been the full amount of rent lost by the Respondent (whatever that amount may have been), but rather that amount less the income tax which the Respondent would have had to pay

on the rents but (in the Appellant's submission) is not liable to pay on the damages. The basic principle of the law of damages is clearly established in the Gourley case, and is not disputed: if the rent would have been taxable but the damages are not, then the damages should be reduced to reflect the tax saving to the Respondent; if, however, the damages are themselves taxable, they do not fall to be reduced on this account. The issue between the parties is whether the damages are taxable. The Appellant contends that they are not, and that therefore they should be reduced in amount. The Respondent contends that they are.

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6. This issue was not raised before the learned judge, but it was argued in the Court of Appeal, where the Appellant's contention was rejected, the Court holding that the damages were taxable. The Appellant submits that the Court's decision was wrong. The taxability or otherwise of the damages turns on the interpretation of s.10(1)(f) of the Income Tax Act. The relevant wording is as follows :

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Cap.141

> "10. (1) Income Tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of -
>
> (f) rents, royalties, premiums and any other profits arising from property:"

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on that provision, the Court of Appeal said only :-

> "In our opinion, it is clear that the damages awarded in the present case undoubtedly fall within the expression "and any other profits arising from property" in s.10(1)(f)."

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7. In the Appellant's submission the Court of Appeal's approach to s.10(1)(f) is clearly insufficient. The Court evidently considered that, once it had held that the damages were "other profits arising from property", that concluded the issue and rendered the damages

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taxable under s.10(1)(f). However, there is another criterion which must be satisfied before any receipt falling within paragraph (f) or, for that matter, any other paragraph of s.10(1), is taxable under the subsection. Paragraph (f) and all the other separate paragraphs are controlled by the introductory words of s.10(1), which charges income tax " upon the income of any person...in respect of" the various items set out in the separate paragraphs. Accordingly, in the present case the damages are taxable if they are "income" of the Respondent "in respect of...other profits [i.e. profits other than rents, royalties and premiums] arising from property." The Appellant accepts that the damages are "other profits" of the Respondent arising from its property, but the Appellant submits that they are nevertheless not taxable because they are not "income".

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8. In the Appellant's submission, the damages were a receipt of a capital nature in the hands of the Respondent. Compensation for the loss of investment income from an income-yielding capital asset is a capital receipt, not an income receipt, and it does not make any difference that the amount of the compensation is computed by reference to the income which has been lost. In support of that proposition the Appellant relies on the decision of the English Court of Appeal in Simpson v. Executors of Bonner Maurice. The case concerned monies belonging to a United Kingdom resident but located in Germany during the First World War and vested during that period in the Treuhander (the German equivalent of the Custodian of Enemy Property). Under the German regulations in force at the time money vested in the Treuhander did not carry any form of interest, but, after the War, the effect of the Treaty of Versailles was that its owner received it back together with compensation which was calculated on the basis of interest at 5% per annum. One of the issues in the Bonner Maurice case was whether the compensation was taxable as income or not. The Inland Revenue contended that it was, but it was held by Rowlatt J. and the Court of Appeal that the compensation, though calculated on the basis of interest, was not itself interest, but capital. In Spence v. I.R.C., Lord Normand summarised the decision as follows :

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(1929) 14 Tax Cases 580

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(1941) 24 Tax Cases 311 at 318

"In...Simpson v. Maurice's Executors a sum paid to a party by way of compensation under a peace treaty for something which he might have received but which he was prevented from receiving as income during a series of years was treated as a capital lump sum payment."

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9. In the Appellant's submission the damages paid to the Respondent in this case fit exactly within Lord Normand's description: they were a sum paid by way of compensation for something which the Respondent might have received but which it was prevented from receiving as income during a series of years. They were, therefore, a capital lump sum payment, and were not "income" within the opening words of section 10(1) of the Income Tax Act. Consequently, they were not liable to income tax under section 10(1)(f), and the damages ought to have been reduced by the application of the Gourley principle. The amount of the reduction depends on the precise tax position of the Respondent. As the Court of Appeal pointed out, no evidence was led on the point before the learned judge, and it is therefore submitted that the corrent course is for Your Lordships to remit the case to the learned judge for the damages to be assessed on the basis that the income tax saving to the Respondent should be taken into account.

10. The Appellant's second objection to the amount of the damages is that the Respondent's loss of rent was assessed by the learned judge at too high a figure. His award was based on a computation given in evidence by the managing director of the Respondent. The figures used in the computation were derived from two other leases which the Respondent had granted of comparable premises on other floors of the building. They were:

(a) a lease of the first floor to Oriental Emporium Limited ("the Oriental Emporium lease") at a rent of $1.43 per square foot, commencing on 1st February 1967 and continuing for five years with an option exercisable by the lessee to extend the lease for a further 21 months at the same rent of $1.43 per square foot;

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(b) a lease of the fourth floor to Bank of America National Trust and Savings Association ("the Bank of America lease") at a rent of $1.80 per square foot, commencing on 1st May 1970 and continuing for five years.

The computation of damages put forward by the Respondent and accepted by the learned judge assumed that the Respondent could have let the premises at $1.43 per square foot for the first 28 months of the trespass by the Appellant, and at $1.80 for the remaining 43 months. The significance of the periods used in the computation - the first 28 months and the second 43 months - is that the end of the one period and the beginning of the other coincides with the commencement of the Bank of America lease at a rent of $1.80 per square foot. 10

p.44

11. The full text of the Respondent's computation is set out in the Record. It shows that the loss of rent allegedly suffered by the Respondent was $187,242.23. At the trial the Appellant did not challenge the computation, either by cross-examination or by argument or evidence. The learned judge held that in the circumstances he "had no alternative but to accept the evidence tendered on behalf of the Plaintiffs". He therefore gave judgment for $187,242.25. 20

p.28

12. The Appellant nevertheless submits that the learned judge was wrong in accepting the figure of loss of rent put forward by the Respondent. The correct measure of damages is not in itself a matter of evidence, but rather a matter for inferences, drawn on correct legal principles, from the evidence. The correct inference to be drawn from the evidence of the Respondent does not support the amount of damages claimed and awarded by the learned judge. The Respondent's computation presupposes that, if the Appellant had vacated the premises when the notice to quit expired, it (the Respondent) could have relet them at $1.43 per square foot but also on terms whereby, if the market rent increased, the Respondent would immediately be able to increase the rent above $1.43 per square foot. The assumption is contrary to the evidence and contrary to experience. The Oriental Emporium lease, from which the figure of $1.43 per square foot was derived, extended for five years at the 30 40

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minimum, and gave the option to the lessee to remain in occupation at the same rent of $1.43 per square foot for a further 21 months. By the Oriental Emporium lease, the Respondent had committed itself to accepting rent at $1.43 per square foot until 31st October 1973, only one month before the period of trespass by the Appellant ended. Provided that the lessee exercised the option to extend the lease (which it would be in the lessee's interest to do), the Respondent could not have increased the rent under the Oriental Emporium lease to $1.80 per square foot or any other figure higher than $1.43 per square foot until 1st November 1973.

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13. The question which the learned judge should have asked on the measure of damages was: if the Appellant had vacated the premises on 31st December 1967, what would the Respondent have done? The Respondent should then be awarded damages sufficient to place it in the financial position it would have been in if it had done it. The Appellant submits that the correct inference to be drawn from the Respondent's evidence is that, if it had had vacant possession of the premises from 1st January 1968, it would have relet them at a rent of $1.43 per square foot until 31st October 1973, and $1.80 per square foot thereafter. On that basis, the correct figure for the loss of rent suffered by the Respondent in consequence of the Appellant's trespass is $141,912.05, computed as follows :

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| | | |
|---|---|---|
| Recoverable rent for the period 1.1.68 to 31.10.73 @ $1.43 per square foot - 70 months | $291991.70 | |
| less | | |
| Actual rent paid for the period 1.1.68 to 31.10.73 @ $0.75 per square foot - 70 months | 153142.50 | |
| | | $138849.20 |

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$138849.20

add

| | | |
|---|---|---|
| Recoverable rent for the period 1.11.73 to 30.11.73 @ $1.80 per square foot - 1 month | $5250.60 | |
| Less | | |
| Actual rent paid for the period 1.11.73 to 30.11.73 @ $0.75 per square foot - 1 month | 2187.75 | |
| | | 3062.85 |
| | Total | $141912.05 |

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The Appellant therefore submits that the learned judge and the Court of Appeal were wrong in law in that they held that the loss of rent suffered by the Respondent was greater by £45,330.18 than the true loss proved or to be inferred from the evidence.

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14. As regards costs, the Appellant accepts that, since neither of the objections which it now raises to the award of damages were raised before the learned judge, the Respondent should retain its order for costs at the trial. However, it is submitted that an order for costs before Your Lordships and in the Court of Appeal should be made in favour of the Appellant, and that Your Lordships should make no order as to the costs of any further hearing before the learned judge.

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15. The Appellant humbly submits that the appeal should be allowed with costs here and in the Court of Appeal (but not in the High Court) and that the case be remitted to the learned judge for the damages to be re-assessed in accordance with Your Lordships' judgment, for the following among other

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## REASONS

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(1) BECAUSE the damages payable to the Respondent for the Appellant's trespass upon the Respondent's premises were a receipt of a capital nature in the hands of the Respondent, and therefore were not liable to income tax.

(2) BECAUSE the damages, being tax free, ought to have been reduced under the principle of British Transport Commission v. Gourley.

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(3) BECAUSE the learned judge erred in law in accepting the Respondent's computation of the loss of rent caused by the Appellant's trespass, in that the computation assumed that the Respondent could have let the premises from 1st January 1968 at $1.43 per square foot yet could have increased the rent to $1.80 per square foot from 1st May 1970, whereas the correct inference from the Respondent's evidence was that the rent could not have been increased to $1.80 per square foot until 1st October 1973.

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(4) BECAUSE the rent lost by the Respondent was, therefore, not $187,242.25, but rather $141,912.05.

ANDREW PARK

No. 14 of 1975

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL, SINGAPORE

BETWEEN:

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|---|---|
| RAJA'S COMMERCIAL COLLEGE (sued as a firm) | Appellant (Defendant) |
| - and - | |
| GIAN SINGH & COMPANY LIMITED | Respondent (Plaintiff) |

CASE FOR THE APPELLANT

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