

No. 39 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

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|----|----------------------|-----------------------------------|
| 1. | DATUK JAGINDAR SINGH | |
| 2. | DATUK P. SUPPIAH | |
| 3. | ARUL CHANDRAN | <u>Appellants</u>
(Defendants) |

- v -

- | | | |
|----|------------------------|----------------------------------|
| 10 | TARA RAJARATNAM (M.W.) | <u>Respondent</u>
(Plaintiff) |
|----|------------------------|----------------------------------|

CASE FOR THE RESPONDENT

RECORD

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| 20 | 1. This is an appeal from a judgment of the Federal Court of Malaysia (Lee Hun Hoe, Chief Justice (Borneo), Sallah Abas, Chief Justice (Malaya) and Abdoocaler F.J.) dated 16th May 1983 dismissing with costs the Appellants' appeal from judgments of Razak J. dated 17th July 1982 and 21st November 1982 whereby it was ordered that the Appellants should pay to the Respondent the sum of \$973,000 as general damages plus 6% interest per annum on the sum of \$370,260 from 1975 until July 1982 plus 8% per annum on the judgment sum from the 21st November 1982 until payment. The Federal Court of Malaysia granted the Appellants final leave to appeal to His Majesty the Yang di-Pertuan Agong on the 15th August 1983. | p.678 1.1-
p.713 1.10
p.381 1.1 -
p.521 1.8
p.563 1.-
p.588 1.20 |
| 30 | 2. The Appellants appeal both on the issue of liability and on the issue of the quantum of damages. Both Razak J. and the Federal Court found breach of contract, breach of fiduciary duty, fraud and undue influence. Damages were awarded for fraudulent misrepresentation. There are in the view of the Respondent four main issues in this case as follows :- | p.717 1.1-
p.718 1.11 |

RECORD

- (i) Whether the learned trial Judge was entitled to make the findings he did;
- (ii) Whether fraud was pleaded with sufficient particularity;
- (iii) Whether an award of damages was an appropriate remedy against the third appellant;
- (iv) if damages were an appropriate remedy, whether the learned trial judge was entitled to make the award he did. 10

3. The facts of this case are as follows. Datuk Jagindar Singh ("Jagindar") and Datuk P. Suppiah ("Suppiah") at all material times carried on practice under the title "Suppiah & Singh" as Advocates and Solicitors in Johor Bahru, Malaysia ("the Firm"). They were very senior lawyers and State Datuk a position of respect and dignity in the community, and high social standing. Suppiah became State Datuk in 1978. 20

4. The Hong Kong and Shanghai Bank Singapore ("H.K.B.") lent \$120,000 money on overdraft to Dr. Krishna Shivadas (also known as Dr. Das) ("Dr. Das"). This overdraft was guaranteed by Jagindar. Early in 1974, Jagindar pressed Dr. Das to pay the sum so secured, but Dr. Das was unable to do so. Dr. Das however had a brother, who was married to the Plaintiff, ("Tara") and Tara lived with her husband and five daughters at a property which she owned "the Property". Dr. Das and Jagindar agreed that the Property was the only property which might be rendered available to secure repayment to H.K.B. The Property was however already charged to Chung Khiaw Bank ("CK.B.") to secure an overdraft of Tara's husband Mr. K.V.Devan ("Devan") to that Bank. Some time prior to 12th March 1974, Devan went to the Firm and was met by Jagindar and Suppiah, and following discussions, Devan agreed to have the property placed as security for a loan of a higher sum to cover the sums owing to CKB and HKB. Accordingly, on the 12th March 1974, the Firm as Solicitors for Tara wrote to C.K.B. stating that they were writing as Tara's Solicitors and that Tara wished to pay off their charge by obtaining a charge for a greater sum, and requesting for this purpose 40 50

a statement of the sum due to C.K.B. and the title deeds. On the 14th March 1974, C.K.B. replied stating the balance to be \$103,658.44 with interest at 11.5% per annum giving such information and enclosing such documents.

RECORD

p.852 1.1 -
1.20

10 5. At some date prior to the 30th March 1974, Jagindar and Suppiah agreed that they should endeavour to induce Tara to transfer the Property to Suppiah, and that in respect of any transactions entered into with Tara, Suppiah should act as agent for Jagindar who should be his undisclosed principal, although both Suppiah and Jagindar consistently denied such agency.

20 6. On the 30th March 1974, Jagindar and Suppiah attended at Tara's home, bringing with them a number of documents for her execution. These included :-

(1) a Transfer of the Property to Suppiah for the sum of \$220,000 ("the transfer").

p.770 1.1 -
p.771 1.37

30 (2) a Memorandum by Tara ("the memorandum") that the sum of \$220,000 was arrived at (a) in consideration of Suppiah paying to C.K.B. the sum stated due to them in their letter dated 14th March; (b) as to a further sum of \$6,341.56 partly in respect of accrued interest as from the 9th March 1974 and as to the balance to be paid to Tara; and (c) as to \$110,000 in consideration of Suppiah paying Jagindar the amount payable by Dr. Das to Jagindar who would be paying the same to H.K.B.

p.753 1.1 -
p.754 1.17

40 (3) certain blank forms and certain typed papers with empty spaces.

7. When Tara was asked to sign the said documents, she questioned Suppiah why the word 'transfer' was used in what she understood to be a security transaction. Suppiah told her :

(1) That the security was by way of transfer

(2) That if Dr. Das paid the debt back, Tara would get the property

RECORD

back, and if he did not,
Suppiah would sell the land and
after payment of the debt the
balance could be used to buy a
property nearby.

p.754 1.17 -
1.27

8. Further in order to satisfy Tara's
anxiety, Suppiah caused there to be written
out in manuscript an undertaking ("the
manuscript addendum") which he himself
signed, to the following effect :

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(1) that he would not sell the
property to anyone for one year
without the consent of Tara

(2) that he would retransfer the
property to Tara within one
year in the event of her paying
the sum of \$220,000 to himself.

9. When Tara further questioned Suppiah
as to the period of one year, he assured
her that notwithstanding that provision
she could get back her property at any
time by repaying the money. He said that
he did not want her land.

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p.770 1.1 -
p.771 1.37
p.753 1.1 -
p.754 1.17

p.770 1.1 -
p.771 1.37

10. Tara, in reliance upon the statements
of Suppiah, in the belief that the
transaction was in substance a security
and in the confident belief that she could
trust and rely on Jagindar and Suppiah to
protect her interests and act as her lawyers
and advisers in the transaction (all of which
were known to Jagindar and Suppiah) thereupon
signed the Transfer and Memorandum and the
blank forms and typed documents, and entrusted
them to Jagindar and Suppiah to use them in
accordance with the terms of the agreement.
Suppiah and Jagindar deliberately did not
date the Transfer. It is to be noted that
the documents (1) did not specify when
the various payments were to be made and
(2) did in no way describe the transaction
as a sale.

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11. At the time of her execution of the said
documents, Tara did not have any independent
advice, nor was she aware of the agency
relationship between Suppiah and Jagindar.

12. Further, at the time Tara executed the
said documents, neither Jagindar nor Suppiah
had any intention of giving any effect to
the representations or assurances set out in

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10 paragraphs 5-7 hereof or to any term of the contract. Further, as solicitors they knew and verily believed that on the authority of Abdul Rahman v. Mohd Hassan [1917] A.C. 209, the documents which Tara signed together with the manuscript addendum thereto constituted an outright sale of the property with an option to repurchase, time being of the essence of the contract, and not, as they represented to Tara, a security arrangement which would give Tara an equity of redemption in the Property unlimited by time. They thus fraudulently misrepresented to Tara

(a) their intentions; and

(b) the effect of the documents which she had signed.

20 The whole transaction was merely a device to induce Tara to sign the undated transfer forms.

13. Notwithstanding the terms of the Transfer and Memorandum, Suppiah at no time made any payment. In respect of the debt due to H.K.B., Jagindar discharged the indebtedness on 27th April 1974 in the amount of \$121,619.80. Jagindar then continued to press Dr. Das to repay him this sum; and in April 1975 Suppiah sued Dr. Das in Singapore for the sum of \$149,520 on a cheque which had been dishonoured, which sum included the said \$121,619.80. At this time, no payment had been made to C.K.B., and by Suppiah's act in suing Dr. Das, Tara was led to believe that Suppiah did not intend to rely on the documents which she had signed on 30th March 1974, and had elected to forego his security.

p.770 1.1 -
p.771 1.37
p.753 1.1 -
p.754 1.17

pp.1169-1172

40 14. As regards the debt to C.K.B., the events were as follows: The Firm had obtained the title deeds to the Property from C.K.B. as set out in paragraph 2 hereof. Between 12th March 1974 and 2nd February 1975, the Firm continued to correspond with C.K.B. on the basis that they acted for Tara and Devan. The Firm returned the title deeds to C.K.B. on 30th January 1975 at C.K.B.'s request, and sent a carbon copy of the covering letter to Devan. On 2nd February they wrote to C.K.B. saying they were acting for Suppiah

p.851 1.1 -
p.871 1.30

p.870 1.1 -
1.28
p.871 11.1-30

RECORD

p.1096 1.1 -
p.1100 1.10
p.873 1.1 -
p.876 1.14
pp.859-860
p.880 11.1-16
p.881 11.1-18
p.815
p.767

"to whom the owner of the above land had sold the land subject to the charges..." and on the same day, Suppiah filed a caveat against the Property. C.K.B. then insisted that Tara executed a further charge on the Property; but this could not be registered because of the caveat. C.K.B. therefore continued to press Devan to reduce his overdraft. This he did on 2nd June 1975, when he paid in \$40,000 which he had borrowed from a friend, Mr. Anandan reducing the overdraft from \$123,623.83 to \$83,623.83.

p.883 11.1-24

pp. 884-887

pp. 889-892

15. The Firm then again requested the certificate of title and the amount of the overdraft from C.K.B. by a letter dated 22nd June 1975. There was a further exchange of letters between C.K.B., the Firm, and Messrs. Yeow & Chin, solicitors for C.K.B., concerning the amount payable to redeem the charges on the property. Jagindar then discharged the overdraft on 5th July 1975.

p.893 1.1 - 1.20
p.768

p.770 1.1 -
p.771 1.36
p.770

16. Jagindar then attested the transfer form which Tara had signed on 20th March 1974, and inserted the date 5th July 1975. The transfer was registered on 22nd July 1975, and on 31st July 1975, Suppiah transferred the Property to the Third Defendant, Arul Chandran ("Arul"), a Singaporean lawyer who was a close friend of both Jagindar and Suppiah. The record of transfer is dated 10th August 1975. This transfer purported to be in consideration of the sum of \$220,000 paid by Arul to Suppiah; but in fact no money ever changed hands, and Suppiah as the nominee of Jagindar merely transferred the Property at the direction of his principal to Arul who was also a nominee of Jagindar.

p.790 1.1 -
p.791 1.36

p. 793

17. The intention of Jagindar in directing such transfer, and of Suppiah in effecting such transfer, was to defeat the claim of Tara to set aside the original transfer on the ground of fraud or misrepresentation, by falsely holding out Arul as a bona fide purchaser for value whose title would be indefeasible. Arul well knew that this was the purpose of Suppiah and Jagindar, and he accepted the said transfer willingly to help in defeating Tara's claim.

p.792 1.1 - 1.27

18. Devan and Tara only came to know of the transfer to Suppiah in September 1975 when they received a Real Property Gains Tax Return

requiring them to furnish particulars of their sale to Suppiah. When Devan queried Jagindar and Suppiah about the transfer they told him that the transfer was still a security. They did not inform him that the property had already been transferred to Arul.

RECORD
p.799-802

10 19. In early 1976, applications for the subdivision of the Property were made in Arul's name by the Firm. In March 1976, Tara and her husband received a notice to quit from the Firm acting for Arul dated 4th March 1976 and giving them 9 days to vacate the Property. The Plaintiff and her husband refused to leave, and on 20th March 1976 Arul issued a summons through the Firm claiming vacant possession as registered owner. On 30th August 1976, Arul obtained possession of the Property and Tara and Devan left the property on September 20th 1976. Throughout all the subsequent legal proceedings until the 7th day of the trial in the present action, when he amended his defence, Arul represented that he was a bona fide purchaser for value of the Property, and that as a result, his registered title was indefeasible. In fact, as Arul well knew, he had never given any consideration for the Property, and he held it merely as nominee for Jagindar. By so falsely representing, Arul deprived Tara of her remedy of setting aside the transaction of 30th March 1974 and rectifying the register so as to show herself as registered proprietor.

p.897 11.1-17

pp.1026-1029

p.1068 1.1 -
p.1070 1.16

40 20. On Jagindar's instructions, Arul later transferred the Property to Jet Age Construction Company, which company was owned as to 80% by Jagindar and of which both Jagindar and Suppiah were directors.

Findings of fact by the Trial Judge and the Federal Court

21. On the relationship between Jagindar and Suppiah

(a) Razak J.

50 "The second defendant was also the nominee and therefore agent of the first defendant when P30 [the Memorandum] and the transfer were transacted...the second defendant

p.411 11.13-15

p.412 11.25-27

RECORD

never bought the land in the first place but had done so on behalf of the first defendant...."

(b) The Federal Court

p.697 11.20-24

"The evidence shows clearly this.... although [Suppiah] put himself out as owner when the transfer was executed on 5.7.75 he was not so as it was [Jagindar] who put up the money...

p.698 11.6 & 7

We see from the evidence that [Jagindar] was interested in the property. Suppiah and Arul were his nominees."

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22. On the confidential relationship between Tara and Jagindar and Suppiah

p.420 11.2-8

(a) Razak J.

"The defendants must be well aware of the fact that in the position then held by them they were in fact holding out to the plaintiff that they were men of trust and confidence and of the utmost honesty and integrity and therefore she would have tended to accept without much ado what they represented to her".

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(b) The Federal Court

p.682 11.32-33

"From the correspondence it seems clear that Suppiah and Singh were acting for Tara...One thing is clear from the correspondence and conduct of the appellants, that Suppiah & Singh were acting as solicitors for Devan and Tara in connection with the agreement of 30.3.74."

p.684 11.33-36

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23. On the representations made on 30th March 1974 by Suppiah to Tara

(a) Razak J.

p.430 1.21 -
p.431 1.9

"I think there can be no question from the facts above that when she signed [the confirmation] and the transfer forms which were undated, the plaintiff was under the impression that the land was transferred to the defendant as a security for the purpose of securing [Dr. Das'] debt to H.K.B. vis-a-vis the first defendant, reinforced by the assurance given by the defendants that although it was a transfer the security was by way of a transfer; that Dr. Das

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10 would pay back the money and she
would get back her land, and if he
could not do so the land would be
sold and the debt paid, and the
balance be used to buy some property
nearby, coupled with the assurance
given in [the manuscript addendum]
that the land would not be sold within
one year and that she would be able
to recover it within a year when she
paid the \$220,000; that she would
be able to get her land even after
the year was over".

(b) The Federal Court

20 "[The Plaintiff's] questioning of
Suppiah about the agreement and the
insertion by Suppiah of the manuscript
showed quite clearly that they knew it
was meant to be a security agreement
...."

p.693 11.26-
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24. On the state of mind and intentions
of Jagindar and Suppiah on 30th March
1974

(a) Razak J.

30 "The defendant was also guilty of
fraudulent misrepresentation...when
they falsely represented to Tara that
if [Dr. Das] was unable to pay the
debt, the land would be sold and the
balance could be used to buy some
property nearby....which representation
the defendants knew to be false....
because the opportunity was never
given to her, and since they mentioned
it was an outright sale, they could
not have intended to give her that
opportunity...although they represented
that the transfer was subject to
paying in accordance with the terms as
stated in the memorandum and the
manuscript, not for a moment had they
ever complied with the terms, and...
the reasons they gave for not complying
only goes to substantiate the non-
existence of that intention...It was
evident that [the memorandum and
manuscript addendum] were only used
as a dangling carrot, a false device
to induce the plaintiff to sign the
undated transfer so as to enable them
to effect the transfer of the land
to them...The defendants had plainly

p.438 11.13-17

p.438 11.20-24

p.438 1.26-
p.439 1.5

p.439 11.14-17

p.441 11.10-18

RECORD

shown that they never intended to give effect to [the manuscript] because in their submission they said that it was a "jual janji" transaction which by the principle laid down in Haji Abdul Rahman v. Mohd Hassan [1917] A.C. 209 could not in any event be given effect to. But by accepting the terms of [the manuscript] they were also acknowledging and representing to the plaintiff that it was a security, the form of which they categorically knew to be unenforceable". 10

(b) The Federal Court

p.693 11.7-13 "On the evidence the learned Judge was entitled to take the view that the appellants were not honest in that the first appellant and the second appellant never really intended to fulfil the conditions of the agreement and that all they wanted was mainly to get the respondent to sign the transfer form so that they could lay their hands on the property at a time of their choosing....The evidence shows clearly that Suppiah had no intention of paying off the C.K.B. within a reasonable time;that he merely pretended to give Tara a year within which to redeem her property; that in fact he had no intention of allowing Tara any opportunity of redeeming her property at all... To achieve the objective Suppiah had to breach the contract. That was no problem to him since he never intended to fulfil the conditions of the agreement.... The agreement of 30.3.74 was actually a farce as Suppiah never intended to act on it". 20 30 40

p.697 11.20-22

p.697 11.24-27

p.698 11.29-32

p.702 11.1-3

25. On the intention and knowledge of Jagindar, Suppiah and Arul in relation to the transfers of July 22nd 1975 and August 9th 1975

(a) Razak J.

p.473 11.12-17 "If Jagindar did not know, it obviously meant that there was no truth in saying that he did not enjoy good relationship with the authorities, and the property would have been registered in the 3rd defendant's name only to hide it from the plaintiff, having fraudulently 50

10 obtained it from her....[The third defendant] accepted the first defendant's word without more and clearly abstained from making further enquiry for fear of learning the truth about the defendant's fraud or because he already knew, and therefore fraud must be properly ascribed to him. But once had had made the admission that he was not the registered owner and had lied to say that he was, it would only go intrinsically to confirm the allegation of fraud against the first and second defendants because the third defendant could only have done so in order to conceal that fraud".

20 (b) The Federal Court

"In the light of the recent amendment made by Arul to his defence and other evidence we cannot say the learned Judge was wrong to say that not only Syed Othman J. but also Annuar J.C. were misled into believing that ARul was a bona fide purchaser for value of the property. It is difficult to accept that a lawyer of his experience knew nothing of the matter on 31.7.75 but came to know something only in January 1977. Even then he chose to cover up the matter. In order to maintain any sort of claim against Arul the respondent would first have to succeed against Suppiah and impeach his title. Under the National Land Code, in order to succeed against Arul, the respondent must prove against him that at or prior to the time he obtained registration and title to the property, he was either fraudulent, which means that he was a party to the fraud, or had knowledge of the fraud.

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50 So as a bona fide purchaser for value as he had alleged until the mid-trial amendment of his defence, Arul was protected although his vendor or any predecessor in title might have acted in bad faith. That

RECORD

is to say even though Suppiah or Singh had acted in bad faith, Arul was protected. If Arul had admitted that he was not a bona fide purchaser for value he would not have been protected and the respondent would have a better chance of recovering her property. Singh, Suppiah and Arul all knew perfectly well that although on the face of it Arul was a registered proprietor in actual fact he was merely a nominee or trustee for Singh, and therefore not a bona fide purchaser for value as claimed all along until the amendment. In other words they had all along misled Syed Othman J. and Annuar J.C. to the detriment of Tara. They had no justification to mislead the courts into believing that Arul was a bona fide purchaser for value when he was a mere nominee.....

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p.693 11.17-22

The third defendant colluded with the other defendants to get possession of the property. The haste with which the second defendant transferred the property to the third defendant was part of a design to deprive Tara of the property which was eventually put out of her reach by the property being subdivided and sold to the public."

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Submissions of the Respondent

26. Fraud

(1) The respondent respectfully submits that both the courts below correctly found that the first and second appellants were liable to the respondent in damages for fraudulent misrepresentation. Both the learned trial Judge and the Federal Court held that both Jagindar and Suppiah knowingly misrepresented their intentions in relation to the use of the transfer form executed by the Respondent on the 30th March 1974 and in relation to the effect of the documents she had signed. Further, both the learned trial Judge and the Federal Court addressed their minds to the objection raised by the appellants that the misrepresentations had become terms of the contract, and clearly held that Jagindar and Suppiah had knowingly misrepresented a present fact, namely their state of mind. The respondent respectfully submits that since the learned

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p.687 11.28-32

p.693 11.7-13

p.702 1.28 -

p.703 1.28

p.480 11.1-12

p.703 1.22

p.441 11.10-23

trial Judge and the Federal Court applied the correct principles of law to the facts as they found them on the evidence, their finding of fraud against Jagindar and Suppiah should not be overturned.

10 (2) The respondent respectfully submits that Section 340 of the National Land Code, about which there was much argument in both the lower courts, is irrelevant to the Respondent's claim. Section 340 provides for rectification of the Register in a case of fraud or misrepresentation. By the time this action was commenced, the respondent's land had been subdivided and much of it sold on to bona fide purchasers from whom she could not recover the land. Her claim against the appellants was not to set aside the transfer under Section 340, but for fraud, undue influence, breach of fiduciary duty and breach of contract. She neither claimed nor was awarded damages under Section 340. The learned trial Judge held that in order to be able to succeed with a claim for damages the respondent first had to show that the transfers to the appellants could be set aside on the basis of fraud under Section 340 of the National Land Code. He so held on the common sense basis that otherwise, in a case where the land had not been transferred on from the fraudulent party, the plaintiff would be able to recover damages although she could not recover the land. He did not hold that Section 340 gave rise to an alternative claim for damages. The Federal Court recognised that the respondent did not rely on Section 340, but that "It is the very case of the respondent that the appellants deliberately obtained the transfer form with the intention of using the transfer form to secure the property and then to enable Suppiah to transfer it to Arul in such haste as to prevent Tara from recovering her property. To make it doubly sure, Jagindar further caused Arul to transfer the property to Jet Age Construction Company (in which Jagindar held a majority share). Eventually, the company sold the property in small lots to the public", thus destroying the respondent's claim for rectification under Section 340.

20 p.425 11.16-28

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40 p.686 11.17-26

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(3) The appellants also contended in the Federal Court that fraud had not been

RECORD

pleaded with sufficient particularity. However, in the case of the first and second appellants, the respondent respectfully submits that this argument was not available to them in the Federal Court, neither is it available to them in the present appeal. At the trial, the matter proceeded on the basis that the pleading was sufficient, and it was merely contended on the behalf of the first and second Appellants that the allegations of fraud contained in the Statement of Claim were untrue. 10

(4) The respondent does not dispute that fraud must be clearly pleaded and clearly proved; but further respectfully submits that, however inelegantly pleaded, the case against the appellants is clear from the statement of claim, namely,

(a) that the entire transaction of 30th March 1974 was entered into solely to induce the respondent to sign the transfer form 20

(b) that Jagindar and Suppiah misrepresented their intentions with regard to the same

(c) that having done so, Jagindar and Suppiah later colluded with Arul to defeat the respondent's claim for rectification by falsely holding out Arul as a bona fide purchaser for value. 30

The respondent respectfully submits that fraud has therefore been pleaded with sufficient particularity, and the appellants therefore knew what was being alleged against them from the beginning. They have been given ample opportunity to refute these allegations, which both the learned trial judge and the Federal Court held they have failed to do on the evidence. The appellants, having been fairly presented with a case to answer, having failed to answer that case, and having clearly been proved to have committed acts of the grossest fraud, should not in equity be allowed to shelter behind any drafting inadequacies of counsel for the respondent which have in no way prejudiced them. 40

27. Undue Influence

RECORD

(1) Both the learned trial Judge and the Federal Court held that the Firm were acting as the Respondent's solicitors in relation to the transaction of 30th March 1974, and further that Jagindar and Suppiah were in a position to and did in fact exercise undue influence over the Respondent by reason of their social standing. The learned trial Judge further held that the transaction was unconscionable, and the Federal Court upheld his finding. Section 16(3) of the Contracts Act provides that:

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p.418 1.29
p.682 1.32

p.419 1.26-
p.4-0 1.2

p.422 11.18-20
p.700 11.4-8

" Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of another. "

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The learned trial Judge held that Jagindar and Suppiah had failed to discharge the burden that fell on them by virtue of Section 16(3) and his previous findings, and the Federal Court upheld that finding on the facts. The respondent respectfully submits that the finding of the learned Judge was correct both in law and on the facts.

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p.423 11.12-18

28. Breach of Fiduciary Duty

Both the learned trial Judge and the Federal Court held that the Firm were acting as the Respondent's solicitors in relation to the transaction of 30th March 1974 and further that the Respondent trusted them and relied on their advice. It was further found that in breach of the fiduciary duty owed to the Respondent as her solicitors, the first and second Appellants

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p.418 1.29
p.682 1.32

p.420 11.2-8

p.703 11.17-23

(1) misrepresented the true significance of the transaction; and

(2) failed to ensure that the Respondent was independently advised.

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p.441 11.10-18

p.685 11.3-
p.420 11.8-13

RECORD

The respondent respectfully submits that the finding of the learned trial Judge was correct both in law and on the facts.

29. Breach of Contract

The learned trial Judge held that as a matter of construction of the Memorandum and the manuscript addendum

- p.406 11.26-28 (1) The sums to be paid under the agreement should be paid forthwith, and within a week of 30th March 1974 at the latest. 10
- p.406 11.11-15 (2) The period of one year stated within which Suppiah would not sell the land ran from the date when the two sums due were paid in full.

The learned trial Judge further held that in breach of the agreement

- p.406 11.21-24 (1) The sum of \$121,619.80 was not paid until 27th April 1974, and the sum of \$92,000 was not paid until 5th July 1975; and that in any event, neither sum was paid in pursuance of the contract. 20
- p.406 11.19-20 (2) The Property was transferred to Arul within 17 days of the sum of \$92,000 being paid to the C.K.B.

The Respondent respectfully submits that the finding of the learned trial Judge was correct both in law and on the facts. 30

30. The case against the Third Appellant

- p.495 1.27 -
p.496 1.9
p.692 11.3-37 The learned trial Judge found and the Federal Court upheld such finding, that the Third Appellant accepted the transfer of the Property and allowed himself to be registered as registered proprietor with knowledge of the fraud of the first and second Appellants or wilfully closing his eyes to such knowledge, with the intention of furthering such fraud by representing himself as a bona fide purchaser for value whose title would be indefeasible. The Respondent respectfully submits that having colluded with the first and second Appellants, having made himself a party to their fraud, having lied to the Court and disposed of the Property for the benefit of 40

the First and Second Appellants thus making the consequences of the fraud irreversible and putting the seal on the whole transaction by defeating any right of recovery by the Respondent, the Third Appellant cannot be in any better position than the first two Appellants, and that the award of damages made against him by the learned trial judge should be upheld.

10 Alternatively, the Respondent respectfully submits that on the facts as found by the learned trial Judge and as upheld by the Federal Court, the Third Appellant is liable as a constructive trustee on the bases

- 20 (1) that he knowingly assisted in and furthered the fraudulent and dishonest design of the first and second Appellants; and
- (2) that he knowingly received trust property.

31. Damages

(1) The learned trial Judge found against Jagindar and Suppiah on the basis of breach of contract, undue influence, breach of trust and fraud. The Respondent through her counsel elected for an award of damages rather than an account, which would be the usual remedy for breach of trust and undue influence where the property is no longer in esse, because from her previous experience of the Appellants' conduct she believed that an order for an account would engage her in further fruitless litigation and several more years before she was eventually compensated for the wrong she had suffered.

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40 The learned trial Judge awarded damages for fraud, holding that any other damages recoverable would be included in such an award. p.567 11.3-8

The learned trial Judge then held that the measure of damages for fraud is the tortious measure, i.e. the value of the property or services transferred less the valued received at the time of the wrong; and that then an increment must be added to take into account the change in the value of the property in the period between July 1975 and the date of judgment.

50 p.566 11.12-20 p.567 11.8-20

RECORD

(2) The respondent respectfully submits that this approach is correct. The function of damages in deceit is to place the victim in the position in which he would have been if the misrepresentation had not been made. Macgregor on Damages 14th ed. p.1459. It is clear that this includes consequential loss which flows from the fraud. Doyle v. Olby [1969] 2 Q.B. 158 at 167A, 168F. "The proper starting point...is to compare the position [of the defrauded person] before the representation was made to him with his position after it, brought about by that representation" per Winn L.J. Applying this principle, it is clear that before the representation was made the Respondent possessed the property, subject to the charge to C.K.B.; now, she has no property. Her loss is therefore continuing to the date of judgment and indeed to the present day. If the Respondent were only awarded damages related to the value of the land as at July 1975, she would not have been compensated for her loss.

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Recent cases on breach of contract for the sale of land have shown that damages should be awarded as at the date of judgment: Wroth v. Tyler [1974] Ch.30, Johnson v. Agnew [1980] A.C.367. The respondent respectfully submits that where the damages are compensatory, damages for the loss of land induced by fraud should also be awarded as at the date of judgment.

30

Further, it is by the appellants' own acts that this action has taken so long to come to trial. As the record shows, they have taken every possible point and have continually misled the court in an effort to prevent the respondent from bringing her just claim. In the meantime, the respondent has had to live in rented accommodation for nearly 10 years and has suffered acute distress and anxiety through the appellants' wrongdoing. To award damages on the basis of land values in 1975 would, in the respondent's respectful submission, cause grave injustice to the Respondent and would allow the Appellants to take advantage of their own wrongdoing.

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(3) Land Valuation

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3 experts were called to give their opinions as to the value of the land, and their opinions widely differed. The learned

	trial Judge clearly was not impressed by the appellants' expert witness who gave evidence that \$220,000 was a reasonable price for the property in 1975. He said "he accepted everything regarding the district superiority of [the property] except giving it the extra value which it deserved". He did not find the Respondent's witness Chong's valuation of \$3 per square foot unreasonable; and he came to the conclusion that "In my view, considering what has been said, the value of the subject land at \$1.70 per square foot in July 1975 would not be unreasonable". The respondent respectfully submits that the learned trial Judge was entitled to weigh up the evidence before him and come to the conclusion he did.	RECORD p.567 1.24 p.568 11.7-8 p.573 11.12-14
10		p.577 11.20-22 p.579 11.24-26
20	The respondent accepts that the best method of assessing the value of land is by comparables; however, in this case there were no sales of comparable lots which could be used, and the judge had to do the best he could on the evidence before him; per Lee Hun Hoe J. in Khoo Peng Loong & Ors. [1966] 2 MLJ 156	
30	"....sometimes it happens that the land to be valued possesses some unusual, and, it may be, unique features as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities".	
40	(4) The Respondent respectfully submits that the learned trial Judge was also entitled to take judicial notice of the fact that land prices had risen by an average 20% per annum between July 1975 and July 1982 in assessing the capital value of the land. In <u>Loi Hieng Chiong v. Kon Tek Shin</u> , [1983] 1 MLJ 31 Syed Othman F.J. said	
50	"....considering the number of land cases passing through the courts nowadays, the courts are entitled to take cognisance of land values in a given area in this country. One does not have to be a valuer to know that	

RECORD

in Kinchung and surrounding areas,
land has shot up in value by reason
of the tremendous expansion of the
town. "

(5) The Respondent further respectfully
submits that the learned trial Judge was
entitled to award 6% interest on the sum
of \$370,260.00 as being the value of the
use of the Property for the years in which
she did not have possession of it and
instead was forced to incur the expense of
rent for herself and her family. 10

(6) The Respondent further respectfully
submits that the learned trial Judge was
right to award a sum in respect of the house
in addition to the value of the land. The
property was not merely an investment of the
Respondent, it was her home. The Respondent
has, through the acts of the Appellants,
had to live in rented accommodation for the
last 9 years, and, it is respectfully
submitted, an element for the loss of her
home and the extra expense incurred as a
direct consequence should be awarded to her
as part of the overall award of damages. 20

(7) The Respondent further respectfully
submits that the learned trial Judge
correctly declined to deduct the sums paid
by the first Appellant from the damages
awarded to the Respondent

p.406 11.21-24 (a) because the learned trial Judge 30
clearly held that neither the sum of
\$121,000 paid to H.K.B. nor the
sum of \$92,000 paid to C.K.B. were
paid in pursuance of the contract of
30th March 1974. As a result both
the courts below held that these
sums were not recoverable when the
contract was avoided. Further, the
sum of \$121,000 paid to H.K.B. was
paid neither to the respondent's use
nor to her account. 40

p.582 11.1-14 (b) because, as the learned trial Judge
held, section 65 of the Contracts Act,
which provides for the repayment of
any benefit received under a contract
when that contract is avoided, does
not apply to contracts which are unlawful
under Section 24 of the Contracts Act.

(8) Alternatively, if the Judicial Committee
are of the opinion that the finding of fraud
against the Appellants cannot be upheld, the 50

Respondent respectfully submits that in the exceptional circumstances of this case the Court in its inherent jurisdiction has power to award equitable compensation for the loss caused by breach of a fiduciary duty; and that although in form the remedy for such a breach would not have been damages, since the result would be practically the same, the Respondent would humbly ask that the sum awarded by the learned trial Judge as damages for fraud be awarded to her as compensation for loss caused by breach of a fiduciary duty. The Respondent will rely on Nocton v. Ashburton (Lord) [1914] A.C. 932.

(9) Alternatively, the Respondent would humbly ask that she be awarded damages for breach of contract.

(10) Alternatively, if the Judicial Committee considers that the award of damages made by the learned trial Judge cannot be upheld, the Respondent would humbly ask that damages should be assessed by the Judicial Committee on the evidence before them, as was done by the Court of Appeal in Doyle v. Olby [1969] 2 Q.B. 158 and by the Judicial Committee in Lai Wee Lian v. Singapore Bus Service [1984] A.C. 729.

Since the litigation in this matter started in 1976, there have been about ten applications to strike out, six or seven appeals to the Federal Court, an application for leave to appeal to His Majesty the Yang di-Pertuan Agong, and finally this appeal to His Majesty the Yang di-Pertuan Agong. The Respondent greatly fears that an order that the matter be remitted for an assessment of damages or for an account will give the Appellants further opportunity to abuse the process of the court in an effort to force her to drop her claims, and will at the least result in a further delay of years before she is compensated for the loss she has suffered.

(11) Alternatively, the Respondent would humbly ask that the matter be remitted for an assessment of damages or for an account to be taken.

RECORD

The Respondent respectfully submits that this Appeal should be dismissed for the following among other

R E A S O N S

- (1) BECAUSE both the learned trial Judge and the Federal Court correctly found that the first and second Appellants fraudulently misrepresented their intentions to the Respondent on 30th March 1974. 10
- (2) BECAUSE both the learned trial Judge and the Federal Court correctly found that the third Appellant accepted the transfer with the intention of furthering the fraud of the first and second Appellants and fraudulently misrepresented that he was a bona fide purchaser for value.
- (3) BECAUSE fraud was pleaded with sufficient particularity. 20
- (4) BECAUSE both the learned trial Judge and the Federal Court correctly found that the first and second Appellants were acting as the Respondent's solicitors on 30th March 1974.
- (5) BECAUSE both the learned trial Judge and the Federal Court correctly found that by virtue of such solicitor-client relationship and by virtue of their social standing the first and second Appellants were in a position to exercise undue influence over the plaintiff. 30
- (6) BECAUSE both the learned trial Judge and the Federal Court correctly found that the transaction of 30th March 1974 was unconscionable within the meaning of Section 16(3) of the Contracts Act.
- (7) BECAUSE the Appellants failed to discharge the burden falling on them by virtue of Section 16(3) of the Contracts Act. 40
- (8) BECAUSE the learned trial Judge and the Federal Court correctly found that the first and second Appellants breached the fiduciary duty they owed to the Respondent.
- (9) BECAUSE on the true construction of the Confirmation and the manuscript addendum

and in the events which happened
the learned trial Judge was correct
in finding that the first and second
Appellants did not comply with the
terms of the agreement.

RECORD

- 10 (10) BECAUSE since there were findings
of fraudulent misrepresentation
and breach of contract and in the
particular circumstance of this
case an award of damages was an
appropriate remedy.
- (11) BECAUSE the learned trial judge
correctly applied the law to the
evidence before him in assessing
the quantum of damages.

GAVIN LIGHTMAN Q.C.

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

FROM THE FEDERAL COURT OF MALAYSIA

[illegible]

TARA RAJARATNAM (M.W.) Respondent
 (Plaintiff)

CASE FOR THE RESPONDENT

Solicitors for the Respondent