11, 1959

IN THE PRIVY COUNCIL

55583

No.8 of 1957.

O N A P P E A L

FROM THE COURT OF APPEAL

FOR EASTERN AFRICA AT NAIROBI

B E T W E E N :-

BARON UNO CARL SAMUEL
AKERHIELM and OLE BEYER

- v -

ROLF DE MARE, GUY MAGNUS
ALEXANDER FAUGUST and
BARBRO WILHELMINA
ELISABETH FAUGUST

CASE FOR APPELLANTS

CLIFFORD-TURNER & CO.,
11, Old Jewry,
London, E.C.2.

Appellants' Solicitors.

IN THE PRIVY COUNCIL No. 8 of 1957

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

B E T W E E N :-

BARON UNO CARL SAMUEL AKERHIELM
and OLE BEYER (Defendants) Appellants

- and -

ROLF DE MARE, GUY MAGNUS ALEXANDER
FAUGUST and BARBRO WILHELMINA
ELISABETH FAUGUST (Plaintiffs) Respondents

C A S E FOR THE A P P E L L A N T S

1. This is an appeal from a judgment of the Court of Appeal for Eastern Africa (Sinclair, Vice-President, Briggs and Bacon, Justices of Appeal) dated the 4th July 1956 reversing a judgment of the Supreme Court of Kenya (Mr. Justice Corrie) in favour of the Appellants dated the 18th May 1955. Record pp.187-205 Record pp.170-183

2. The action was brought in the Supreme Court of Kenya by Plaint issued on the 17th September 1951 by the Respondents as Plaintiffs against the Appellants and one Eric von Huth as Defendants to recover damages for alleged false and fraudulent representations contained in a letter dated the 23rd February 1948 sent by the Appellants and the said Eric von Huth. It was alleged that by such representations each of the Respondents was induced to purchase shares in a company called Dantile Limited and thereby suffered damage. A further allegation that the said letter constituted a fraudulent prospectus was abandoned by the Respondents at the trial. Record p.1.

3. The said Eric von Huth died before the action came on for trial.

4. During and after the second great war there was an acute shortage of fire-baked tiles in Denmark. As a substitute for such tiles a company called Muritas A/S developed and put on the market with some success a cold-process tile apparently made of cement with a plastic face. The Company obtained provisional protection for its invention in Denmark. In 1947 Eric von Huth negotiated with Muritas for licences to manufacture and sell their tile in various overseas territories, including Kenya and Uganda. A Mr. Stewart was associated with Eric von Huth in these negotiations. Some time before 29th November, 1947, Eric von Huth and Stewart obtained from Muritas an option entitling them to grants of exclusive licences for the tile in a number of African and Asian territories on making a specified cash payment for each territory. Kenya and Uganda were not included in this option. On 29th November, 1947, Muritas made an agreement in Denmark with "Dantile East Africa Ltd. by Eric von Huth" granting to the latter company a licence in respect of the tile and related products for Kenya and Uganda.

Record pp.311-315

5. For some time prior to November, 1947, von Huth had been negotiating with the Appellants and they had decided to form in Kenya a company with a name including the word Dantile. In February, 1948, the Appellants and von Huth sent to a number of persons in Kenya, mostly if not all Scandinavians by race, including the First and Second Respondents (but not the Third Respondent), a letter and explanatory memorandum dated the 23rd February, 1948.

6. The letter was in the following terms:-

Record p.225

DANTILE LTD., (IN FORMATION)
P.O. Box 412,
NAIROBI,
24/2/48.

Dear

The undersigned are forming a Private Limited Company in Kenya for the purpose of producing a cold process Tile used for bathrooms etc. The tile has been produced and sold successfully in Denmark.

We have procured the patent rights for most countries in Africa, India and Pakistan.

About a third of the capital has already been subscribed in Denmark and the necessary machinery for the first unit has been purchased and is already on its way to Kenya and the machinery for the second unit is on order.

We have realised from conversations that most of our Scandinavian friends are very interested in this project and anxious to subscribe some capital.

For your information we enclose herewith a Memorandum showing the proposed formation of the Company and a statement of expected profit and loss account for the first year. Will you please let us know at your early convenience whether you wish to take up any shares.

Any further information you may like to have will gladly be given by us at our offices - c/o Beyer's (Kenya) Corporation, Kingsway Street, Nairobi.

With kind regards,

sgd. Baron Akerhielm

sgd. Ole Beyer

sgd. E. von Huth.

7. The Memorandum annexed to the letter contained the following passages:-

"STRICTLY PRIVATE AND CONFIDENTIAL NOT FOR PUBLICATION" Record p.226

MEMORANDUM ON DANTILE LTD.

Suggested Share Capital	Shs. 220,000.00
To be divided into:	
2500 6% Preference Shares at 20/- each	50,000.00
8500 Ordinary Shares at 20/- each	170,000.00
	220,000.00
Already subscribed	70,000.00
to be subscribed	150,000.00

DIRECTORS:

Eric von Huth (Danish) Nairobi.

Baron Uno Akerhielm (Swedish) Nairobi.

Ole Beyer (Danish) Nairobi.

+ +

The Company has a contract with the patent holders in Denmark for the production rights of a tile used for bathrooms, kitchens, breweries, bakeries, fire places etc.

+ +

Record p.227

Besides the patent right for Kenya and Uganda, the Company holds the option for several other countries in Africa, India and Pakistan. 10

These patent rights can either be taken up by the Company, or sold to other parties at considerable profit.

+ +

CONTRACT

A contract is held with the patent holders, A/S Muritas, Copenhagen, in the name of Dantile Ltd.,

Signed Uno Akerhielm, Eric von Huth. 20
Ole Beyer.

+ +

8. There were also annexed a Specification of Capital Required, and Expected Production Accounts for the first and second half-years respectively. The Specification of Capital Required was in the following terms:

SPECIFICATION OF CAPITAL REQUIRED

Patent right	18,000.00
Formation expenses	37,000.00
Travel account	4,000.00
Machinery & Plant plus freight	9,500.00
Exchange Danish Kr. to £	1,500.00
Capital Already Subscribed Shs.	70,000.00

FURTHER:

Factory Plot	12,000.00
Boys' Quarters for 16 Boys	5,000.00
European Quarters	30,000.00
Factory Building	30,000.00
Inventory, Machinery, Motors, Installation, Glass Trays, Boxes etc., to be purchased locally	22,800.00
Lorry	12,000.00
	111,800.00

EXPECTED EXPENSES UNTIL FACTORY IS IN PRODUCTION

Registration of Co., Solicitor etc.	5,000.00	
Salaries	7,200.00	
Reserve working Capital	26,000.00	38,200.00
TOTAL		150,000.00

CAPITAL ALREADY SUBSCRIBED	70,000.00
FURTHER	150,000.00
TOTAL CAPITAL REQUIRED Shs.	220,000.00

THIS TO BE DIVIDED INTO:-

6% Preference Shares	50,000.00
Ordinary Shares	170,000.00
Shs.	220,000.00

NAIROBI 29th January, 1948

Signed Uno Akerhielm Eric von Huth Ole Beyer

9. The First Respondent took up 500 Ordinary Shares of Shs. 20 for cash, and these were allotted to him in May 1948 after the company had been formed. The Second Respondent took up 1500 Ordinary Shares and 250 Preference Shares of Shs. 20 each for cash. He gave certain of these shares to his wife, the Third Respondent, as a present. 1000 Ordinary Shares and 250 Preference Shares were allotted to the Second Respondent and 500 Ordinary Shares to the Third Respondent.

Record p.1

10. It was alleged in the plaint that the following three representations contained in the letter were false:-

(a) "The tile has been produced and sold successfully in Denmark";

(b) "We have procured the patent rights for most countries in Africa, India and Pakistan";

(c) "About a third of the capital has already been subscribed in Denmark".

It was alleged that the Appellants and each of them when they made or caused to be made the said representations knew them to be false, or made them recklessly not caring whether they were true or false; that they were made in order to induce the Respondents to buy and become the holders of shares in Dantile Limited; that "by means of the said representations and acting on the faith thereof and in the belief that the same were true" the Respondents were induced to purchase shares therein; that the shares were and had ever since been worthless or worth less than the Respondents paid for them, and that by reason thereof the Respondents had suffered damage.

11. It was conceded at the trial that the representation lettered (a) was true.

12. Mr. Justice Corrie held that both the representations lettered (b) and (c) were false, but having heard the First Appellant examined and cross-examined at length he said he was satisfied that he signed the letter in good faith honestly believing that the terms of that letter and of the documents attached to it were true. As to the Second Appellant, he held that the Respondents had

Record p.182

failed to prove that he did not honestly believe the statements contained in the letter and annexures to be true. He accordingly dismissed the action with costs, and on the 18th July, 1955, a decree of the Supreme Court of Kenya was made accordingly.

13. As to the representation lettered (b) the Court of Appeal upheld the decision of Mr. Justice Corrie, and even went further in favour of the Appellants: Mr. Justice Briggs, with whom the other two members of the Court agreed, said "I should hesitate to hold that the second statement was false, and I should decline to hold that it was made fraudulently". As to the representation lettered (c) the Court of Appeal held that it was false, and was made by both Appellants with knowledge that it was untrue, alternatively was made recklessly and carelessly whether it was true or false. Record p.196

14. With regard to the representation lettered (b), the Appellants will contend that the position is correctly set out in the judgment of Mr. Justice Briggs in the Court of Appeal (at pages 193-196 of the Record), and that on the facts as there set out no court would be justified in finding the Appellants guilty of fraud in respect of that representation. On this part of the case both of the lower courts have found in favour of the Appellants.

15. It was in relation to this representation (b) that Mr. Justice Corrie used words which the Court of Appeal held to be a misdirection, but despite the supposed misdirection the Court of Appeal upheld the view which Mr. Justice Corrie had taken as to representation (b). Mr. Justice Corrie said:

> "The Plaintiffs have put in evidence a letter dated the 23rd March, 1948, from Mr. Hollister to the Secretary, Dantile Limited (In formation) (Exhibit 8), which contains the following paragraph: Record p.181
>
> > 'We have searched the Patent Register here and the search revealed that so far, no Muritas Patents have been registered in this country, and we would suggest that you communicate with Muritas at the earliest possible moment and ask them to register their Patents in England, since English registration is essential prior

to registration here. It is also necessary for Mr. von Huth to write a letter to Dantile Limited whereby he agrees to transfer all or any of his rights with Muritas to Dantile Limited in consideration for shares in the Company and his employment as a salaried Manager. Also, you should get in touch with Mr. Alber and he should write a letter to Dantile Limited agreeing to transfer any rights he may have with Muritas to the Company in return for the share he will receive of the purchase money paid on the transfer of the South African rights to Mr. Stewart.'

In view of the terms of this paragraph it is somewhat surprising that rather more than a month earlier Mr. Hollister, an Advocate, should have approved of the terms of the Circular Letter. Mr. Hollister however, has not been called to say that he did not approve and the evidence of Baron Akerhielm in this respect stands uncontradicted."

Upon this the Court of Appeal said:-

Record p.199

"It seems to have been accepted as true by the Appellants that the Respondents did consult Mr. Hollister as to the form of the letter and memorandum before sending them out, though there is no evidence of this other than the first Respondent's. It is remarkable that the minute book does not indicate this, though Mr. Hollister is frequently mentioned in other connections. The evidence of Mr. Seex, the accountant who was appointed by the Court as an inspector to investigate the affairs of the Company, is equivocal and may only mean that Mr. Hollister was consulted afterwards. However, I must accept that Mr. Hollister was consulted, and I shall assume that he did his duty in the matter as an honest and competent solicitor. There is no slightest reason to suppose the contrary, and even if there were it would be grossly unjust to act on any other assumption when Mr. Hollister has not given, and presumably has not had the opportunity to give evidence. It must be noted at once that the Appellants could not usefully have called Mr. Hollister, since all the evidence they would have wished to obtain from him would have been excluded by privilege. The learned trial Judge appears to have overlooked this and to have assumed that the Appellants could have called Mr.Hollister,

if they wished, to show that he was not responsible for the substance of the documents. I think with respect that this was a serious misdirection which goes to the root of the learned trial Judge's finding that the Respondents acted innocently. In my view, it was for the Respondents to call Mr. Hollister to support their case. They made no allegations against him, and if their case was true he would obviously have accepted responsibility for the form of the documents, and might have been able to show that the untrue statement resulted from some mistake or misunderstanding. He was available, and I think an inference unfavourable to the Respondents could and should have been drawn from their failure to call him. In his absence, the evidence is that the Respondents submitted a draft to him and he settled the final form. I am driven to the conclusion that the facts stated in the documents were facts supplied by the Respondents and accepted by Mr. Hollister as their instructions to him. As regards the statement which I have found to be untrue, it is inconceivable to me that Mr. Hollister should have originated it. It was so clearly a matter which either was, or should have been within the clients knowledge that humanly speaking he must have relied on them for it. It was never expressly alleged that Mr. Hollister was the source of that statement, and I find as a fact that he was not, but that the Respondents were the source of the statement and responsible for it. In fact this was practically admitted, for when asked, "Did you tell him: "About a third of the capital has already been subscribed in Denmark?", the first Respondent replied, "I might have done so." In cross examination the first Respondent further said that he accepted responsibility for the whole of the documents, that he was not trying to shelter behind Mr. Hollister, and that in his opinion and belief the statements of fact in the documents were true. Although the learned trial Judge accepted this last statement and in the ordinary way I should be loath to differ from him, I think the validity of his finding is gravely impaired by his view of the issue concerning Mr. Hollister. I think we must form our own opinions of the Respondents' mental state when they issued the false statement."

16. It was because of their view of the position concerning Mr. Hollister that the Court of Appeal departed from the normal rule and on the issue of fraud or honest belief in regard to representation (c), substituted their own view for that of the Judge who had heard and seen the

First Appellant giving evidence. Mr. Justice Corrie "was satisfied" that the First Appellant signed the letter in good faith honestly believing that the terms of the letter and the documents attached to it were true: the Court of Appeal held that he did not honestly believe that the representation lettered (c) was true. Mr. Justice Corrie held that a case of fraud was not proved against the Second Appellant: the Court of Appeal held that it was.

17. The Appellants will contend that the Court of Appeal were wrong in the view they took, and will submit that the error is apparent on the face of the judgment:-

(i) there was uncontradicted evidence, and it was conceded by counsel for the Respondents and the Court of Appeal accepted (Record page 199 line 28), that Mr. Hollister was consulted by the Appellants and von Huth before the letter was sent.

(ii) the fact stated in representation (c) was supplied by the Appellants and von Huth and accepted by Mr. Hollister as their instructions to him. "It was never expressly alleged that Mr. Hollister was the source of that statement, and I find as a fact that he was not, but that the Respondents" i.e. the Appellants on this appeal, "were the source of the statement and responsible for it. In fact this was practically admitted." If this is so, no inference adverse to the Appellants in regard to representation (c) can be drawn from the fact that Mr. Hollister was not called. The evidence of Mr. Hollister if he had been called would in these circumstances neither have corroborated nor contradicted the evidence of the First Appellant that the Appellants and von Huth honestly believed the truth of representation (c).

(iii) in regard to an issue of honest belief or fraud, the view formed by the trial Judge as to the good faith of a defendant whom he has seen giving evidence is peculiarly important and is normally decisive. There was no justification in this case for interference by the Appellate Court with the finding of the Judge that representation (c) was made honestly.

(iv) there can be no presumption of fraud: in a civil action for fraud (as in a criminal case) the presumption is in favour of innocence. Section 114 of the Indian Evidence Act does not ever entitle a court to base a finding of fraud on a presumption. In the present case at any rate no such inference was justifiable. In view of the course of the trial and the evidence given it was not necessary for the Appellants to call Mr. Hollister: the evidence that he was consulted and approved the circular letter was not challenged by counsel for the Respondents at the trial. Though counsel for the Respondents mentioned in his final speech the fact that Mr.Hollister had not been called, the Judge was not invited to draw any inference against the Appellants under section 114 of the Indian Evidence Act, and it was not therefore open to the Court of Appeal to draw any such inference.

(v) for the reasons given, the supposed misdirection by Mr. Justice Corrie bears no relation to the issue concerning honest belief in representation (c). If it became necessary the Appellants would contend that there was no misdirection. If the Respondents had called Mr. Hollister, his evidence would not have been excluded by privilege: where there is an allegation of fraud against a defendant, communications between himself and his solicitor as to the subject matter of the alleged fraud are not privileged and it is immaterial that the solicitor is not a party to the alleged fraud. Even if this were not so, the privilege being that of the Appellants could have been waived by them: since the point was never raised, the Appellants were never asked to waive privilege.

18. For all these reasons the Appellants will contend that this is not a case where an appellate court is justified in reviewing the decision of the trial Judge as to the honest belief of the First Appellant, and that his decision in favour of the First Appellant should therefore be restored. On the same principle, the Second Appellant is entitled to the benefit of the evidence of the First Appellant that the circular letter, which was sent jointly by the two Appellants and von Huth, was sent in the

honest belief that it was true. There is no ground for drawing a distinction between the two Appellants, and for the reasons given by Mr. Justice Corrie the claim against the Second Appellant also ought to be dismissed.

19. On the other hand, if it is thought necessary to reexamine on the materials available to the Court of Appeal the question whether or not the Appellants honestly believed representation (c) to be true, the Appellants will contend that there was ample evidence, totally uncontradicted and practically unchallenged, that this was so, and that the Court of Appeal was not justified in finding that a charge of fraud in respect of representation (c) was proved against either Appellant on the material before it:-

(i) It was plain from the letter and its enclosures (as both Mr. Justice Corrie and the Court of Appeal held) that the word "subscribed" in representation (c) was not used in the sense of "subscribed for cash".

(ii) The First Appellant in his evidence in chief gave the following answers:-

Record p.111

Q. And at the time when you signed it (meaning the letter dated 25th February 1948) and sent it to these people, did you consider that anything in it was untrue? A. I did not.

Q. Do you even now consider that anything is untrue ? A. There is nothing untrue.

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Record p.125

Q. Now these three statements which are complained of in the plaintiffs' plaint paragraph 4.
(a) "The tile has been produced and sold successfully in Denmark".
Now what is your honest opinion about that statement ? A. That it is quite true, my Lord.

When you say you believe it to be true, do you mean then or now or both? A. Then and now.

Q. (b) "We have procured the patent rights for most countries in Africa, India and Pakistan". What is your honest opinion

about that statement ? A. Quite true statements, according to the information I had.

Q. (c) "About a third of the Capital has already been subscribed in Denmark"; What do you say about that statement ? A. That is also quite true.

++

Q. And what impression did Mr. Dan Christensen's letter (meaning Exhibit A, Record page 302) make on you ? A. It made the impression that he was so interested he was prepared even to sign a Promissory Note to pay straight away, which greatly impressed me. Record p.136

Q. And you have already told the Court that he subscribed some shares; did he in addition, assist the Company in any other way ? A. Yes, he might have, but I can't really remember that.

Q. How many shares were allotted ? A. He invested 25,000 Kroner.

Q. Do you say that is the total allotment ? A. No, then there was allotment to Muritas for shares; then there was allotment to Mr. Eric von Huth.

Q. Do you remember the expression "About one third of the Capital has been subscribed in Denmark" ? A. I do.

Q. From memory, and without looking at the memorandum does it say what sum was about one third of the capital ? A. About Shs. 70,000.00

Q. And again from memory, can you recall how that Shs. 70,000.00 is made up ? A. Roughly, I can. Part was for machinery and patent rights and part was Mr. Dan Christensen's money; part work done by Mr. Eric von Huth and part was exchange from money invested in Denmark.

Q. Now to assist the Court, is there any English or East African coin which is the approximate equivalent to Kroner ? What is the value of one Kroner ? A. I think it is 97 cents; about 3% difference for one shilling.

Q. So Shs. 25,000/- would be about 25,000 Kroner ? A. Yes, there is about 3% difference.

Q. And when you use the expression 'about one third of the capital has been subscribed in Denmark' what did you intend to convey ? A. To convey that that money was actually subscribed. We had bought machinery; paid for services rendered and had cash for it; it was actually invested or subscribed in Denmark.

(iii) In the sense in which the First Appellant understood it, representation (c) was true:-

(a) "Dan Christensen's money" : it has never been disputed that Dan Christensen in Denmark subscribed in cash for shares to the value of Shs. 25,000, and there was evidence given by a witness for the Respondents that this money was remitted to Kenya and not spent in Denmark (Record page 104).

(b) "Machinery .... we had bought machinery ... and had cash for it": it appears from Schedule IV to the report of Mr. Seex (a witness called for the Respondents), the correctness of which was never challenged, that the equivalent of Shs. 10,281.51 was spent on machinery. The figure given in the enclosure to the letter of 25th February 1948 was Shs. 9,500 for machinery.

Record p.266

Record p.228

(c) "Patent rights": it appears from Schedule II to the same report that patent rights were purchased for the equivalent of Shs. 18,000, part of which was satisfied in cash in Denmark and part by the issue of shares:-

Record p.265

SCHEDULE II

PATENT RIGHTS

A/S Muritas. Free Shares -.325 Ordinary of 20/- each	6,500.00	
Paid in Copenhagen	6,500.00	13,000.00
	Carried forward	13,000.00

Brought forward		13,000.00
E. von Huth Free Shares - 100 Ordinary of 20/- each	2,000.00	
Paid in cash	2,000.00	4,000.00
G. Alber. Paid in cash in Copenhagen by Muritas		1,000.00
		18,000.00

(d) "part work done by Eric von Huth" : it was not disputed that shares to the value of Shs. 20,000 were issued to von Huth in consideration of services rendered, and there was evidence (which Mr. Justice Corrie accepted) that these services were rendered in Denmark.

(e) "we had paid for services rendered and had cash for it" : it appears from Schedules I and VIII to the report of Mr. Seex (Record pages 264, 266) that the equivalent of Shs. 3,981 was paid to Muritas A/S for services rendered in Denmark, and that Shs. 1,050 was paid in Denmark in respect of travelling expenses of Eric von Huth. Record pp. 264, 266

(f) "Exchange from money invested in Denmark" : the First Appellant explained this figure of Shs. 1,500 in his evidence at page 105-6 of the Record.

(g) The total of items (a)-(f) is in excess of one third of the capital.

(iv) No cross-examination of any kind was addressed to the First Appellant as to the honesty of his belief in the truth of representation (c) or as to the sense in which he had said that he understood the phrase. The only passages in the cross-examination of the First Appellant (which covers 23 pages in the Record) which have any bearing on representation (c) are the following:-

Record p.142

MR. SALTER: Would you turn to the third page where it says:

"Objects and Prospects". "We further enclose a form for subscription of the shares and should be grateful for your reply at an early date, as only a limited number of shares still are available". Would you say that was true ? A. Quite true. The bulk of the Capital was still available at that time.

Q. The Capital at which you were aiming was Shs. 220,000/-? A. Correct.

Q. And you say in this circular "Already subscribed Shs. 70,000/-" ? A. Correct.

Q. "To be subscribed: Shs. 150,000/-" ? A. Correct.

Q. So that although it is limited in the sense that it is limited to Shs. 150,000.00 there were, in fact a good many shares which could still be taken up to that date ? A. There were.

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Record p.152

MR. SALTER: "The money paid in advance was Shs. 6,500/- for consideration other than cash". Is that right ? A. It is very likely so.

COURT: Where are you taking that from ?

MR. SALTER: Mr. Seex's Report, Schedule II.

Q. And may I pause there for a moment. If that was consideration paid, consideration other than cash, would you explain to my Lord, what you mean in Exhibit 2, under 'Specification of Capital Required; Patent Rights Shs. 18,000/-". A. One is in February, 1948, and the other is November, 1948; lots of things have changed. Mr. Thomsen had then come from Denmark and had shown a better tile and it was only in our interest to produce the best tile possible.

Q. Now look at Dantile Ltd., in formation; "Specification of Capital required" "Patent Right Shs. 18,000/-". A. Correct.

Q. What was that for ? A. Paid in Denmark.

Q. Where were you to exercise the right ?
A. To exercise the right in Kenya and Uganda.

Q. Anywhere else ? A. Not to my knowledge.

Q. And do I understand instead of Shs. 18,000/- you were allotted Shs. 6,500/- in shares ?
A. No, I do not think that is correct; a certain amount in cash and a certain amount in shares.

Q. So that this would be Shs. 18,000/- and you say in addition to the 6,500 shares ?
A. I should not think so; that is included.

Q. It is included in the sum 18,000/-; then why do you put capital already subscribed Shs. 18,000/-
A. We have the patent right and paid formation expenses.

Q. You have said that the 6,500 shares were part of the Shs. 18,000/- Is that right ?
A. I can't tell for certain, but that is what I think it is.

Q. Very well, that would leave a balance of Shs. 11,500/-. A. Very likely so, my Lord.

Q. When was that paid, the Shs. 11,500/-?
A. I expect it was paid.

Q. I don't expect anything. A. I have no account books here.

Q. Did you not prepare these figures ?
A. I accept them as correct, but I have no books here. Mr. Harrison and Mr. Eric von Huth prepared them.

Q. But you have no record whether the money was paid or not ? A. These are correct figures in accordance with my recollection, but I cannot say how much was paid in cash or in shares; it is eight years ago.

Q. Did you enquire whether that cash had been paid ? A. At that time I certainly must have done.

(v) The sense in which the First Appellant stated that he understood the phrase may or may not be that in which a court would construe the words. The Appellants will contend that, even if it were not, this would be irrelevant to the issue whether or not representation (c) was fraudulent. The Appellants will rely on Angus v. Clifford (1891) 2 Ch. 449, in particular the judgment of Lord Justice Bowen at pages 469 and following. The Appellants will contend that the Court of Appeal applied the wrong test and fell into error, in that it disregarded the evidence as to the sense in which the phrase was understood by the Appellants and instead determined first what in the view of the court was the true meaning of the words used and then held that the Appellants could not have believed the words to be true in that sense. Moreover it has never been contended that the Appellants were in ignorance of any of the relevant facts, and there is (as the Appellants will contend) no ground on which the Court of Appeal could have found that the Appellants were reckless, and careless whether or not the representation was true or false, in the sense in which those expressions are used in Derry v. Peek 14 App. Cas. 337 and explained in Angus v. Clifford.

20. As further and separate contentions the Appellants will contend :-

(i) that neither the First nor the Second Respondent established that (as alleged in paragraph 10 of the Plaint) he was induced to purchase shares by means of representation (b) or (c) and acting on the faith thereof and in the belief that it was true.

(ii) that the representations were not addressed to the Third Respondent and were not made in order to induce her to take shares.

(iii) that in any event the Third Respondent did not purchase any shares on the strength of the representations or at all, and did not suffer any injury for which damages are recoverable by her.

(iv) that the assessment of damages by the Court of Appeal was incorrect.

21. The evidence of the First Respondent was (so far as material) as follows:-

Q. Did you in fact ask or apply for any shares in the proposed Company ? A. No, when I got that letter I saw signatures; I saw they were Scandinavians and as at that time I was arranging a bathroom and had difficulty in obtaining tiles, I thought it would be a good thing to put money in to the Company. Record p.55

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Q. Now what were the factors which influenced your mind when you decided to apply for these shares ? Record p.55
A. Because I had just had a good coffee crop; I had money over; I thought it was good to make investment in this country while I lived here, and I trusted in these tiles.

Q. Did you know anything about these tiles, other than what was said in the letter from these three gentlemen ? A. None at all.

Q. Had you any reason to suppose that any of the statements set out in the letter were incorrect ? A. No.

MR. COULDREY: If you had thought any of these statements were incorrect what would you have done ? A. I would probably have asked my Scandinavian friends first and then saw what the answer was.

++

MR. MORGAN: When you received this thing, was it in that form; that is a bundle of papers altogether; and did you read them all ?
A. Yes, I read them all.

Q. And after having read them all, you decided to invest £500 ? A. I had confidence in the Directors.

The Appellants will contend that there was no evidence that the First Respondent was induced by representation (b) or (c), but that his evidence rather indicates the contrary.

22. The evidence of the Second Respondent (so

far as material) is to be found at pages 12, 14-15, 23, 30-32 and 35 of the Record.

The Appellants will contend that there is no evidence that the Second Respondent was induced by representation (b) or (c) to purchase shares. Upon receipt of the letter, the Second Respondent did not in reliance on the letter apply for shares; instead he went to see the Appellants and Von Huth, as he had expressly in the letter been invited to do: "any further information you may like to have will gladly be given by us at our offices". The Second Respondent was induced to purchase shares by what he was then told and by the tile which he was shewn. His purchase of shares was not induced by the letter at all. If and in so far as it was so induced, it was the names of the three directors and the fact that the tile and process were Danish on which he relied; in the light of the specific references to these particular factors, his general references to reliance on the circular letter do not amount to evidence that he relied on representation (b) or (c) as alleged in the plaint. At page 32 of the Record the Second Respondent said "If I was in that position now, I still would believe in those tiles; now the time has passed, well it is very different".

23. It is not alleged in the plaint that the circular letter was sent to the Third Respondent. The representation and invitation to take shares were made solely to the persons to whom the letter was addressed; it was not made generally to the public, and the Appellants will contend that as the representation was not made to the Third Respondent, nor in order to induce her to purchase shares, she has no cause of action against them.

24. Furthermore, the Third Respondent did not purchase any shares and has not suffered any injury for which damages are recoverable. At pages 12-13 and at page 35 lines 4-6 of the Record the Second Respondent stated that he applied for, took up and paid for the shares which were registered in the name of the Third Respondent, and that they were a present to her. The Third Respondent confirmed this at pages 51 and 53-4 of the Record.

25. The Court of Appeal held that the shares were at the material time valueless, and that it was not necessary to remit the case for any further consideration of the question of damages. The Court of Appeal directed that the judgment and

decree of the Supreme Court should be set aside and judgment entered "for the full amount subscribed", i.e.

(i) for the First Respondent Shs. 10,000

(ii) for the Second Respondent Shs. 20,000

(iii) for the Second and Third Respondents jointly Shs. 15,000

with interest and costs. The Court of Appeal purported so to decide on the authority of Twycross v. Grant 2 C.P.D. 469, but in that case Lord Coleridge C.J. in the Common Pleas Division delivering the judgment of the Court said at page 490, that there was abundant evidence that the shares never had any real value at all, and in the Court of Appeal Cockburn C.J. said at page 545 that the shares were valueless from the beginning, from radical defects inherent in the project from its birth. In the present case the undisputed evidence, emanating for the most part from the Respondents' witnesses, is that at the date of issue the shares in Dantile Limited were not valueless. The First Respondent was asked about the value of the shares at pages 40-41 and 45-47 of the Record. At page 45 he said "Before the 18th February 1949 I believe (sic) that the shares were not valueless but full value", and at page 47 he attributed the loss of value to the resignation of the First Appellant as director on 18th March 1949. Mr. Seex, who gave evidence on behalf of the Respondents, said at page 73 that at March 1948 when the Company started the shares were probably worth a few shillings below par, say about 18/- each, whereas at the 31st August 1950 they were virtually valueless; at page 75 he said that at July 1948 the value or price of the shares on the 31st July 1948, judged from the Balance Sheet, was about five-sevenths of par. He was further questioned at page 96-97 and in reexamination at pages 102-3; at lines 30-36 he said:

> Q. Well, in view of the events which have happened and your knowledge of the matter now, what would you say was the value of the shares to the subscribers at the time of taking up ? A. I think I answered that as Shs. 18/-. That is based on the figures I had before me shortly after the Company was formed.

The First Appellant was questioned about value at page 168 of the Record, and said the shares certainly had some value in March 1949. The

Appellants will contend that on this evidence it was not open to the Court of Appeal to hold, alternatively that the Court of Appeal was wrong in holding, that the shares when issued were valueless. Upon the evidence of the First Respondent, merely nominal damages should have been awarded; on that of Mr. Seex, the damages should have been two-sevenths of par. Apart from this, there was no direct evidence as to value: the Appellants will contend in the alternative that on all the evidence the Court of Appeal should have drawn the inference that the shares at the time of issue had some value, and became valueless only because of what occurred thereafter, and that the case should have been remitted for further consideration on the question of damages.

26. The Appellants, being dissatisfied with the judgment of the Court of Appeal, on the 26th September 1956 obtained from the Court of Appeal conditional leave under section 3 of the East African (Appeals to the Privy Council) Order in Council, 1951, to appeal therefrom to Her Majesty in Council, and on the 27th February 1957 obtained from the said court final leave to appeal.

27. The Appellants respectfully submit that the judgment of the Court of Appeal for Eastern Africa should be reversed and the order of Mr. Justice Corrie dismissing the actions of each of the Respondents against each of the Appellants should be restored; alternatively that the damages awarded by the Court of Appeal should be reduced to nominal damages or to two-sevenths of the several sums awarded to the respective Respondents or that the case should be remitted to the Supreme Court of Kenya for further consideration as to damages; and that in either case the Respondents should be ordered to pay the costs of the action in the Supreme Court of Kenya, the costs of the appeal to the Court of Appeal for Eastern Africa and the costs of this appeal for the following among other

R E A S O N S

(1) Because Mr. Justice Corrie was right in holding that neither of the Appellants made any fraudulent misrepresentation.

(2) Because Mr. Justice Corrie and the

Court of Appeal were right in declining to hold that representation (b) was a fraudulent misrepresentation.

(3) Because the finding of the Court of Appeal that representation (c) was a fraudulent misrepresentation is wrong.

(4) Because the Court of Appeal ought not to have interfered with the finding of Mr. Justice Corrie, who had seen and heard the First Appellant give evidence, that representation (c) was made in the honest belief that it was true.

(5) Because no inference adverse to the Appellants ought to have been drawn from the fact that Mr. Hollister was not called as a witness.

(6) Because a finding of fraud ought not to be based on presumption.

(7) Because the evidence of the First Appellant that he understood the words used in representation (c) in a sense in which they were true, and that he honestly believed them to be true, was uncontradicted and virtually unchallenged in crossexamination and ought to be accepted.

(8) Because it was not shewn sufficiently or at all that the First and Second Respondents were induced by representation (b) or (c), as alleged in the plaint, to purchase shares in Dantile Limited.

(9) Because the said representations were not addressed to the Third Respondent, and the Appellants did not intend that she should rely on them.

(10) Because the Third Respondent did not purchase any shares in Dantile Limited, in reliance on the said representations or at all.

(11) Because the shares in Dantile Limited were not valueless when issued, but on the evidence were worth either the full par value or five-sevenths of the par value.

(12) Because the Court of Appeal should not have awarded as damages the full par value of the shares, but should have awarded either nominal damages or damages limited to two-sevenths of the par value or should have remitted the case to the Supreme Court of Kenya for further consideration as to damages.

H.A.P. FISHER

IN THE PRIVY COUNCIL

No. 8 of 1957.

ON APPEAL

FROM THE COURT OF APPEAL

FOR EASTERN AFRICA

AT NAIROBI

B E T W E E N :-

BARON UNO CARL SAMUEL AKERHIELM and OLE BEYER

- v -

ROLF DE MARE, GUY MAGNUS ALEXANDER FAUGUST and BARBRO WILHELMINA ELISABETH FAUGUST.

CASE FOR APPELLANTS

CLIFFORD-TURNER & CO.,
11, Old Jewry,
London, E.C.2.
Appellants' Solicitors.