

11, 1959

# In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

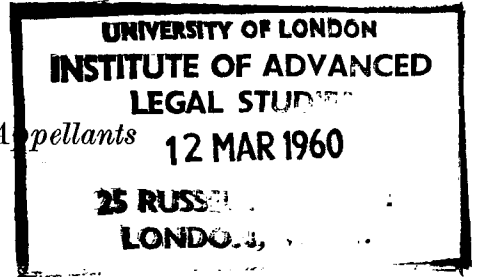
BARON UNO CARL SAMUEL AKERHIELM and  
OLE BEYER (Defendants)

*Appellants*

AND

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

*Respondents.*



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## Case for the Respondents.

RECORD.

1. This is an appeal by leave of the Court of Appeal for Eastern Africa from the judgment of Her Majesty's Court of Appeal for Eastern Africa setting aside the judgment and decree of the Supreme Court of Kenya (Corrie, J.), and entering judgment against both the Appellants as follows :—

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p. 187-205.

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(i) for the Respondent Rolf de Mare, for 10,000 shillings, damages for deceit :

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(ii) for the Respondent Guy Faugust for 20,000 shillings, damages for deceit :

(iii) for the Respondents Guy and Barbro Faugust jointly, for 15,000 shillings, damages for deceit :

(iv) for all the Respondents, for interest on the sums due to them respectively from the date of the judgment set aside (18th May, 1955), till realization :

(v) for all the Respondents for costs of the suit in the Supreme Court on the higher scale, with a certificate for two advocates, one of them a Queen's Counsel.

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(vi) for all the Respondents, for costs of the appeal and costs of the record save for the charges for making and certifying copies of the record under items 18 and 19 of Scale A in the 3rd Schedule to the Rules, with a Certificate for two advocates.

2. The Court of Appeal for Eastern Africa (Sinclair, V.P., Briggs and Bacon, J.J.A.) gave judgment on 4th July, 1956.

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3. By a plaint issued on 17th September, 1951, the Respondents brought an action against the Appellants and against one Eric Von Huth who died before the action came on for trial.

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Such plaint recited that in or before February, 1948, the Appellants and the said Von Huth conceived the idea of forming a company to manufacture a type of cold process tile in Kenya, and promoted and registered a company called "Dantile Limited" on 20th March, 1948. The plaint then alleged that the Appellants and the said Von Huth issued a letter dated 23rd February, 1948, for the purpose of inducing persons to apply for and purchase shares in such company and that copies of such letter were sent to each of the Respondents de Mare and Guy Faugust. It alleged that such letter contained false and fraudulent representations on the faith of which the Respondents acted in purchasing shares for the sums awarded to them by the Court of Appeal as damages for deceit. 10

pp. 226-231.

4. The representations complained of in the letter to which was attached an explanatory memorandum and "expected production account" were as follows:—

(1) "The tile has been produced and sold successfully in Denmark."

(2) "We have procured the patent rights for most countries in Africa, India and Pakistan." 20

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

The Plaint also complained (4) that the Appellants and Von Huth also omitted to state in the said letter that free shares were to be issued to each of them as well as to other persons.

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The Plaint then alleged the shares purchased to have been worthless and it is the fact that no tiles were ever produced by the Company on a commercial basis, the assets were gradually frittered away and the company wound up. The Respondents received nothing in the winding-up and the whole of their money has been lost. 30

5. The Respondents abandoned any claim based on representation (1) above, which the learned trial Judge found to be true and no point arises thereon. The Respondents had not pleaded any duty to disclose the matters not disclosed in complaint (4) above, and the Court of Appeal declined to deal with the complaint. The Respondents take no point thereon and accordingly complaint (4) does not call for consideration.

p. 182.

6. The Appellant Akerhielm gave evidence at the trial: the Appellant Beyer, although stated to be in Kenya at the time, did not see fit to do so.

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p. 179.

7. The learned trial Judge found that the representation (3) "about a third of the capital has already been subscribed in Denmark" was untrue finding that at most 57,000 shillings had been subscribed in Denmark, the proposed capital of the Company being 220,000 shillings. 40

The Court of Appeal also found the representation to be untrue, finding that at most 35,000 shillings had been subscribed in Denmark, and

emphasising the importance of the representation in that the tile was a Danish product known and sold in Denmark, the circular letter was addressed primarily to Scandinavians, and of the three signatories thereto one was the Consul in Nairobi for Sweden, and another the Vice-Consul in Nairobi for Denmark. Both Courts rejected the argument of the Respondents that "subscribed" in the circumstances meant "subscribed in cash" whereas the 70,000 shown in the Memorandum as "Capital already Subscribed" consisted entirely of shares issued for considerations other than cash.

p. 108.

p. 192-193.

p. 179.

- 10 8. The learned trial Judge found the representation (2) "we have procured the patent rights for most countries in Africa, India and Pakistan" to be untrue. The Company had an agreement for the assignment of the sole right of exploitation in Kenya and Uganda (which referred to an application for Danish Letters Patent of 5th November, 1946), but no steps of any kind whatever had been taken with regard to patent rights in those territories. As to the other countries the Company held an option on the right of exploitation but no steps of any kind had been taken as to patent rights.

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- 20 The Court of Appeal divided the representation into two parts; stating that they would have been inclined to find the statement not to have been proved to be untrue as regards Kenya and Uganda, but without giving any reasons for such view, and stating that it was not necessary finally to answer the question owing to the view taken of other issues; and stating that there was good *prima facie* reason to believe that the Company held the option in the right of exploitation and that the Respondents honestly believed that to be the case. They accordingly hesitated to hold the statement false, and declined to hold it fraudulent, although they had found that there was no reason to suppose that letters patent were ever issued in Denmark. They were of opinion that "we have procured the patent rights," meant, "there is somewhere an application for a patent which I believe to be valid and to be capable of being valid by registration in the countries in question: to this I hold by agreement or option for a licence the exclusive rights in respect of these countries." On this point there was a divergence between the Defences of the Appellants. The Appellant Akerhielm pleaded in paragraph 6 (B): "Since there were contracts for all relevant patent rights in existence which could be enforced at any time the admitted use of the words "have procured" by the Defendants was no real over-statement let alone any material misrepresentation." The Appellant Beyer pleaded in paragraph 3: "The said representations and the statements were and each of them was true as the Plaintiffs are well aware."

p. 193-196.

p. 193.

p. 192-3.

p. 4.

p. 7.

9. The learned trial Judge then said: "The next question is whether the Defendants honestly believed that the statements in the Circular Letter and Annexures were true." He had found representations (2) and (3) to be untrue. The Court of Appeal who had only found (3) to be untrue put it as follows: "The remaining question is whether the third statement which was untrue, was fraudulent within the rules in *Derry v. Peek*" ([1889] 14 A.C. 337, to which the learned trial Judge had also directed his attention).

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p. 172.

10. The learned trial Judge found himself satisfied having heard the evidence of the Appellant Akerhielm that he signed the circular letter in good faith honestly believing that the terms of that letter and of the documents attached to it were true. He based this conclusion on the evidence of the Appellant Akerhielm that (1) he did not consider anything in the circular letter to be untrue: and (2) that the wording of the letter was that of one Hollister, the Company's lawyer upon whom he was relying to get everything straight. The learned trial Judge went on to say that it was surprising that Mr. Hollister should have approved of the terms of the letter in view of the terms of the letter from him dated 23rd March, 1948, put in by the Respondents, but commented that Mr. Hollister, who was in Nairobi, had not been called by the Respondents, so that the explanation of the Appellant Akerhielm remained uncontradicted. 10

p. 300.  
p. 141.

With regard to the Appellant Beyer who had not given evidence the learned trial Judge said simply that although two of the statements in the letter were false the Appellant Beyer was entitled to rely on the evidence of the Appellant Akerhielm that Mr. Hollister had settled the letter, and to rely on the wording of the Circular Letter and Annexures as settled by him.

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Accordingly he dismissed the action with costs.

11. The Court of Appeal took a different view. They pointed out (1) that the Respondents 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, and that it was for the Appellants (who had given no indication in their Defence that they were proposing to shelter behind Mr. Hollister) to call him: (2) that an inference unfavourable to the Applicants should have been drawn from their failure to call him as he was available: (3) that it was inconceivable that Mr. Hollister could have originated the statement: "About a third of the capital has already been subscribed in Denmark," that this was never alleged, and that they found as a fact that he did not originate the statement, particularly in view of the Appellant Akerhielm's admissions that he might have told that to Mr. Hollister, that he accepted responsibility for every single word in the document, and that he was not trying to shelter behind Mr. Hollister: and (4) that the Appellants were business men directly and immediately concerned with obtaining subscriptions to a company with a small capital. 20

p. 199.

pp. 4-8.

p. 142.

12. The Court of Appeal accordingly found that both Appellants were well aware in February, 1948, that the only subscribers in view in Denmark were persons whose subscriptions would not nearly amount to one-third of the capital of 220,000 shillings, that the untrue statement was made by both of them with knowledge that it was untrue, that if the Respondents in some remarkable way which they could not envisage had remained in ignorance of some of the relevant facts, they, having regard to their positions and opportunities of knowledge, must have made the statement recklessly and careless whether it was true or false. They considered it impossible that either of them could have believed it to be true. 40

p. 201.

13. On the question of damages the Court of Appeal considered the judgments in *Twycross v. Grant* (1877), 2 C.P.D. 469, and, observing that it was never shown that the shares were marketable at all after issue, found the damages suffered to have been the amounts invested. 50

p. 201.

14. It is submitted on behalf of the Respondents that both lower courts were right in finding the statement "about a third of the capital has already been subscribed in Denmark" to be untrue on the grounds that the subscription had not taken place in Denmark, but wrong in declining to hold that "subscribed" meant "subscribed for cash."

15. It is submitted on behalf of the Respondents that the Court of Appeal were right and the Supreme Court wrong in holding and refusing to hold that the Appellants made that false statement knowing it to be untrue.

10 16. It is submitted on behalf of the Respondents that the Supreme Court was right and the Court of Appeal in so far as they dealt with the matter was wrong respectively in holding and hesitating to hold that the statement: "We have procured the patent rights for most countries in Africa, India and Pakistan" was untrue.

17. It is submitted on behalf of the Respondents that both lower courts were in error in failing to hold that the Appellants who were men of business, who may have told Mr. Hollister that they had procured the patent rights for most countries in Africa, India and Pakistan, who accepted responsibility for every single word in the letter, who had access to all the documents, and who must have known that under the agreement they had at most a sole right of exploitation in Kenya and Uganda and an option on such a right in the other countries in relation to tiles stated to be patented in Denmark by an application for Danish Letters Patent, and who must further have known that no steps had been taken to register any patent rights either in the United Kingdom or in any of the said countries, made the said statement knowing it to be false.

18. It is submitted on behalf of the Respondents that the observations of the Court of Appeal as to the measure of damages were right.

19. The Respondents submit that this Appeal should be dismissed for the following (among other)

### REASONS

#### BECAUSE—

- (1) The Appellants made the statement found by both lower courts to be false, fraudulently.
- (2) The Appellants made the statement found by the Supreme Court of Kenya but not by the Court of Appeal for Eastern Africa to be false, fraudulently.

#### AND BECAUSE—

- (3) Such statements were in fact false.
- 40 (4) For, in the case of the statement referred to in (1) above, the reasons given by the Court of Appeal for Eastern Africa.

#### AND BECAUSE—

- (5) The Supreme Court of Kenya was wrong in failing to find that the Appellants acted fraudulently in relation to either statement.

NEVILLE FAULKES,  
*Counsel.*

**In the Privy Council.**

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**ON APPEAL**  
*from the Court of Appeal for Eastern  
Africa.*

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**BETWEEN**  
**AKERHIELM and BEYER . Appellants**  
**AND**  
**DE MARE and Others . Respondents.**

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**Case for the Respondents**

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