Privy Council Appeal No. 8 of 1957

Baron Uno Carl Samuel Akerhielm and another - - - *Appellants*

v.

Rolf De Mare and others - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JUNE, 1959

Present at the Hearing:

LORD KEITH OF AVONHOLM
LORD JENKINS
MR. L. M. D. DE SILVA

[*Delivered by* LORD JENKINS]

In this case the present respondents (hereinafter called the plaintiffs) brought an action in the Supreme Court of Kenya against the present appellants (hereinafter called the defendants) and one Eric Von Huth (who died after action brought) claiming damages in respect of certain alleged false and fraudulent misrepresentations contained in a circular letter dated the 24th February, 1948, and signed by the defendants and Von Huth, whereby the plaintiffs alleged themselves to have been induced to subscribe for shares in Dantile Ltd. (a company incorporated in Kenya on the 20th March, 1948) and by so subscribing to have suffered damage.

The plaintiff Rolf de Mare subscribed in cash for 500 Ordinary shares of the company of 20s. each. The plaintiff Guy Magnus Alexander Faugust subscribed for 1,500 Ordinary shares and 250 Preference shares of 20s. each, and made over 500 of his Ordinary shares by way of gift to his wife, the plaintiff Barbro Wilhelmina Elisabeth Faugust, who did not herself subscribe for any shares.

The company was formed with a view to the manufacture and sale in Kenya and elsewhere of tiles for use in bathrooms etc. of a type known as "cold process tiles" as distinct from the conventional baked or heat-treated type of tile. There appears to be no doubt that at the date of the circular letter "cold process" tiles were being successfully made and marketed in Denmark by way of substitute for the conventional type of tile, which since the war had been difficult or impossible to obtain, and that a method of making "cold process tiles" was the subject of protection under a patent application in Denmark the benefit of which was vested in a Danish company called Muritas A/S.

Unfortunately the company was not a success, its failure being mainly attributable to the reappearance on the market within a short time after its formation of adequate quantities of the conventional type of tile, and the consequent cessation of the demand which had previously existed for "cold process" tiles, which were in truth no more than a war-time or post-war substitute for the normal article. In August, 1950, a Mr. Erik Seex (who gave evidence at the trial) was appointed as an Inspector to investigate the affairs of the company under the Kenya Companies Ordinance. His report led to the prosecution of the defendants

and Von Huth for certain offences (not involving dishonesty) under the Ordinance. Later the company went into liquidation and it was found that the whole of the shareholders' money had been lost. In such circumstances it was natural that persons in the plaintiffs' position should look back with a somewhat jealous eye at any statements in regard to the company's position and prospects made to them at the time when they subscribed for its shares.

The statements in the circular letter alleged by the plaintiffs in their plaint to constitute the false and fraudulent misrepresentations on which they relied were three in number, viz.:—

(*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"; and

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

The plaint also charged the defendants with omitting to state in the circular letter that free shares were to be issued to the defendants as well as to other persons.

At the trial before Corrie J. representation (*a*) was admitted to be true and the complaint concerning the non-disclosure of the issue of "free shares" was found to have been based on a misunderstanding of the position as to shares issued for a consideration other than cash, and was dropped.

There thus remained to be dealt with by the learned Judge representation (*b*) as to the patent rights and representation (*c*) as to "about one third of the capital" having "already been subscribed in Denmark".. The learned Judge held that these representations were both untrue but that the defendants honestly believed them both to be true at the time when they were made. Accordingly, directing himself correctly as to the law applicable to these findings by reference to the principles stated in *Derry v. Peek* 14 A.C. 337, he held that the plaintiffs had failed to make good their charges of fraudulent misrepresentation and by his judgment dated the 18th May, 1955, dismissed the action.

From that judgment the plaintiffs appealed to the Court of Appeal for Eastern Africa. In a judgment delivered by Briggs J.A., and concurred in by Sinclair V.P. and Bacon J.A. that Court as to representation (*b*) hesitated to hold that it was false and declined to hold that it was made fraudulently; and as to representation (*c*) concurred with Corrie J.'s finding that it was untrue, but reversed his finding to the effect that the defendants honestly believed it to be true. Accordingly by the judgment of the Court of Appeal dated the 4th July, 1956, the appeal was allowed, and judgment was directed to be entered for the plaintiffs for damages assessed at the full amounts paid up on the shares subscribed for by them, on the footing that at the date of their allotment such shares were valueless.

The defendants now appeal from that judgment.

The appeal has been fully and elaborately argued, but the essential issues fall within a relatively small compass, and may be thus summarised:—

The first question is whether the Court of Appeal were warranted in reopening Corrie J.'s finding to the effect that the defendants honestly believed representation (*c*) to be true; and if so whether the Court of Appeal, treating the matter as at large, were justified in concluding as they did that the defendants did not honestly so believe. A distinction is here to be observed between the first defendant Baron Akerhielm who gave evidence at the trial and the second defendant Mr. Ole Beyer who did not.

The second branch of this first question only arises if the defendants fail to secure a negative answer to the first.

The second question is whether the circumstances of the case are, as the plaintiffs contend, such as to warrant their Lordships in reopening the concurrent findings of the trial Judge and the Court of Appeal to the effect that the defendants honestly believed representation (*b*) to be true; and if so whether a finding to the effect that they did not honestly so believe would be justified on the facts.

If the defendants succeed on the first question in either of its branches, then the appeal must be allowed unless the plaintiffs succeed on both branches of the second question. All else failing, it is still open to the defendants to contend that the representations complained of were true or that they were immaterial and did not induce the plaintiffs' purchases of shares.

Finally, the defendants contend that even if the decision of the Court of Appeal is held to have been right in other respects the damages awarded by that Court are excessive.

As to the facts, the plaintiffs and the defendants are, and Von Huth was, of Scandinavian origin.

In 1947 the plaintiffs and defendants were resident in Kenya. Von Huth who had formerly been so resident was living in Denmark where he had been for some years.

In 1947 Von Huth conceived the idea that the manufacture of cold process tiles might be profitably carried on in Kenya. He enlisted the co-operation of Mr. D. G. Stewart an Accountant practising in Nairobi and opened negotiations with Muritas A/S with a view to obtaining from them the requisite interest in their patent rights under the Danish patent application referred to above. These negotiations resulted in an agreement between Muritas A/S and Von Huth which must be referred to in some detail. By this agreement, which was dated the 29th November, 1947, and expressed to be made between Muritas A/S (thereinafter called "the Vendor") and Dantile East Africa Ltd., by Erik Von Huth (thereinafter called "the Purchaser") it was agreed (so far as material for present purposes) as follows:—

I.

The Vendor agrees to assign unto the Purchaser the sole right of exploitation within the territories (the countries, the governmental districts) of Kenya and Uganda in East Africa of the manufacturing of Muritas tiles which is patented in this country, with priority right, by the Vendor's application for Danish Letters Patent of November 5, 1946, No. 4330.

II.

The Purchaser's right of exploitation shall be limited to the aforesaid two territories, within which he shall be entitled to manufacture, sell and advertise Murit glazing powder or Murit products of any kind, while the Purchaser must not in any other territory (country or governmental district) undertake any of the above mentioned acts before a special agreement concerning such exploitation has been entered into with the Vendor in regard to each territory (country or governmental district).

However, the Purchaser shall be entitled to sell a quantity not exceeding 20,000 Murit tiles for the purpose of introducing the article in any other territory in which the Vendor has not advised the Purchaser that he has, by a final agreement, assigned the right of exploitation to a third party.

III.

By an option on the right of exploitation of the Muritas patent in (1) Abyssinia, (2) Belgian Congo, (3) Madagascar, (4) Mozambique, (5) Nyasaland, (6) North Rhodesia, (7) South Rhodesia, (8) Southwest Africa, (9) Natal, (10) Transvaal-Oranje, (11) Cape Colony, (12)

Tanganyika, (13) Zanzibar and (14) the Indian Empire with Ceylon, already given to a third party, the Vendor is, until further, prevented from assigning to the Purchaser the right of exploitation in the aforesaid 14 territories. However, the Vendor declares himself to be willing, if the third party has not on or before June 30, 1948, alternatively October 1, 1948, carried out his option by concluding a final agreement of exploitation, to give the Purchaser an option on the right of exploitation in all, respectively the remaining part of the 14 countries, for a consideration of £500.0.0 for each of the 11 countries mentioned above under 3-13 and £1000.0.0 for each of the countries mentioned under (1) and (2), and £5000.0.0 for No. 14, the Indian Empire and Ceylon together.

However, in the event that a third party should acquire the right of exploitation for all, respectively part of the 14 countries, the Vendor shall bind himself to include in the final agreement drawn up in this respect, stipulations concerning a definite limitation of the right of exploitation within the countries in question, and concerning liquidated damages to be paid by such third party for manufacturing, selling or advertising the Murit products of such third party outside the countries in question, such liquidation damages to be not less than £250.0.0 for each of the 13 countries first mentioned, and £1500.0.0 for (14) the Indian Empire and Ceylon; and to assign to the Purchaser the right to the said liquidated damages when the Purchaser to the Vendor establishes the possibility of the third party having exceeded his right of exploitation, and undertakes for his own account to collect the liquidated damages.

In this connection, however, reservation shall also be made as to the right of effecting an introductory sale of not more than 20,000 tiles as outlined under II, par. 2.

VII.

As consideration for the right of exploitation in the 2 countries mentioned in Section II, the Purchaser shall (A) on signing this agreement pay to the Vendor a sum of Kroner 6,500.00 say six thousand five hundred kroner, the receipt whereof the Vendor hereby acknowledges, and (B) pay a corresponding amount of Kr.6,500.00 in shares in Dantile East Africa Ltd., converted into £ at the rate of Kr.20.00 to £1.

VIII.

The Company of Dantile East Africa Ltd., is established by the Purchasers with a nominal capital of £10,000.0.0 say ten thousand pounds, of which amount £3,325 shall be paid in cash, or as far as concerns the amount due the Vendor according to Section VII (Kr.6,500.00 or £325.0.0) in other values.

Dantile East Africa Ltd., shall be registered in Kenya, and the board of directors shall comprise Erik Von Huth, Ole Beyer, Danish Vice Consul and Baron Uno Akerhielm, the latter of whom, being the attorney of the Vendor on the Board, shall represent the Vendor's voting power.

The said 3 members of the board shall jointly, and inclusive of the Vendor's £325.0.0 shares mentioned in Section VII, hold 60% of the capital subscribed in Dantile East Africa Ltd.

The remaining 40% shall be subscribed by Chartered Accountant D. G. Stewart, who shall himself be a member of the board of directors of the company together with his nominee.

X.

On receipt of the first instalment of the consideration for the countries concerned, the Vendor shall bind himself immediately to extend the protection of his patent acquired by the application for Danish patent of November 5, 1946, No. 4330, which is immediately valid for one year in all countries, to be valid for another year

in all countries for which the said payment has been made by applying for a patent and thereupon expedite as much as possible the acquisition of the final patents in the same manner as the Vendor is already endeavouring to obtain a final Danish patent.

All expenses incurred in connection with such extension must be borne by the Purchaser.

Having secured this agreement Von Huth returned to Kenya and succeeded in interesting the defendants in his proposed tile-making company. It should be emphasised that this company had not yet been formed and that "Dantile East Africa Ltd." referred to in the agreement of the 29th November, 1947, was merely the name provisionally given by Von Huth to the proposed new company, ultimately formed as "Dantile Ltd.", with which the present case is concerned.

Points to note about this Agreement are (i) that the sole right of exploitation given by clause I was limited to Kenya and Uganda, (ii) that as regards the 14 other countries mentioned in clause III all the Purchaser was given was an option to take up the right of exploitation in all or any of these countries on payment of the prices therein mentioned, totalling £12,500 in the event of the right being taken up in all of them, in addition to the payments in cash and shares provided for by clause VII; and (iii) that the 14 countries mentioned in clause III were subject to a prior option outstanding in a third party. The third party referred to in the singular was primarily Mr. Stewart, but a Mr. Alber appears to have been to some extent interested jointly with him. It appears that Mr. Stewart's prior option was cleared off by an agreement under which he was to retain the option for South Africa to the exclusion of Von Huth and Dantile Ltd., while Dantile Ltd. was to take over his option for the rest of the 14 countries mentioned in the Agreement of the 29th November, 1947. This arrangement would seem to have been made before the date of the circular letter by letters dated the 26th and 27th January, 1948, passing between the second defendant Ole Beyer and Mr. Stewart to the production of which the plaintiffs objected, but the existence of which is not now open to doubt. Mr. Alber's interest was also got in, but it is not clear whether this transaction was actually completed before or after the date of the circular letter. Von Huth appears to have agreed orally with the defendants before the date of the circular letter to make over his interest to the company when formed, and to have confirmed this later in writing. It is unnecessary to investigate these transactions in detail, as it is now reasonably plain that at the date of the circular letter the defendants and Von Huth had either got in or were satisfied that they were in a position to get in these prior interests so as to be able to make over to the company when formed the unencumbered benefit of the Agreement of the 29th November, 1947.

Reference should next be made to the circular letter of the 24th February, 1948. The defendants and Von Huth appear to have collaborated in the production of this document and to have been assisted, to an extent not easy to assess, by a Mr. Hollister, a solicitor, who later became solicitor to the company when it had been formed. The circular letter was not an invitation to the public to subscribe for shares but was sent out to individuals by name. It was therefore not subject to the statutory requirements applicable to a prospectus. So far as material for the present purpose the circular letter was in these terms:—

"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.

MEMORANDUM ON DANTILE LTD.

(annexed to Circular Letter)

"STRICTLY PRIVATE AND CONFIDENTIAL NOT FOR PUBLICATION"

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 ,, ,, ,, ...		170,000.00
	Shs.	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.

SECRETARY:

Registered Office: Box 412, Nairobi.

OBJECTS AND PROSPECTS:

We further enclose a form of 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.

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.

Several factories are already existing in Denmark and paying a good dividend.

The production of this tile is an entirely new invention, as the tiles are not burnt, but made by a cold process as specified in the contract with the patent holders.

The tiles are sold in Denmark at 52 Ore per tile, whereas here in Kenya the suggested price has been put as low as 36 cents.

This price can most likely be raised considerably.

The purpose of the Company is further to produce anything as specified in the Memorandum and Articles of Association, (these are at your disposal in our office) but in principal the production of the above-mentioned tile.

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

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

Should the Company consider it advisable to start production in other countries, further Capital would naturally be required and old shareholders will have priority in taking up these shares in proportion to shares already held.

MANAGEMENT

The Company will be managed by the Directors, with Eric Von Huth as Manager and Accountant.

. . . . . .

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. Ole Beyer.

It will be convenient to deal first with representation (*b*)—"We have procured the patent rights for most countries in Africa, India and Pakistan."

This statement in the circular itself should be read in conjunction with the following passage in the attached Memorandum:—

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

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

Reference should also be made to the section headed "Contract

"CONTRACT:

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

On the question whether representation (*b*) was true or false, the trial Judge said this:

"The position at the time when the Circular Letter was issued that under the Agreement made on the 29th November, 1947, between Muritas A/S and Dantile East Africa Limited, (Exhibit "E") Muritas had agreed to assign to Dantile the sole right of exploitation within the territories of Kenya and Uganda. There is no evidence that any attempt had then been made to register the patent rights in Kenya and Uganda; or indeed, to take the necessary preliminary step of registration in the United Kingdom. As far, therefore, as Kenya and Uganda are concerned, it was untrue to say that the defendants had procured the patent rights. No patent rights for Kenya or Uganda were then in existence.

"As regards the other African Territories and as regards India and Pakistan, according to the uncontradicted evidence of the 1st defendant, the option held by Mr. Von Huth and Mr. D. G. Stewart had been split; Mr. D. G. Stewart retained the sole right to exercise the option in respect of the South African provinces mentioned in Clause 3 of the Agreement, and surrendered his right as regards the remaining territories mentioned in that Clause to Dantile Limited, to whom also Mr. Von Huth had transferred his interests in the option.

> Assuming that this is a correct statement of the position at the time when the Circular Letter was issued, while it was clearly not the fact that the defendants had " Procured the patent rights for most countries in Africa, India and Pakistan " as stated in the Circular Letter, it was not untrue to say, as was stated in the attached Memorandum, " The Company hold the option for several other countries in Africa, India and Pakistan." "

In the Court of Appeal Briggs J.A. reached a conclusion more favourable to the defendants on the question whether representation (*b*) was true or false. He said in regard to it :—

> " I turn now to the patent rights. As I have said, Muritas had filed an application for Danish letters patent in 1946. I presume that under the international convention this would have enabled them to register in the United Kingdom and so to obtain provisional protection in Kenya and Uganda. There is some evidence that they did instruct agents to apply for registration in the United Kingdom. There is no reason to suppose that letters patent were ever issued in Denmark or that registration was ever completed in the United Kingdom. There was certainly no registration at any material time in Kenya or Uganda. It is of course necessary to distinguish between " patent rights " and " letters patent " or " a patent ". The respondents never claimed the latter : but the former phrase, though vague, must have some validity and meaning. If A says, " I have the patent rights for Kenya ", I think he must mean at least, " There is somewhere a patent, or an application for patent, which I believe to be valid, and to be capable, by registration in the United Kingdom and Kenya, of being valid in Kenya : to this I hold by licence, or agreement or option for licence, the exclusive rights in respect of Kenya ". It may be objected that he means much more, in particular, that the original patent or application has already by registration been validated as regards Kenya and Uganda. This was the view which commended itself to the learned trial Judge."

After a quotation from Corrie J.'s judgment on this point, Briggs J.A. continued :

> " Under the rule in *Benmax* v. *Austin Motor Co., Ltd.*, (1955) A.C. 370, I think we must form our own opinion on this question. Speaking for myself, I think that in a case of alleged fraud I might have been inclined to take a view more generous to the defendants, and to have found that the statement " We have procured the patent rights for most countries in Africa India and Pakistan " was not proved to be untrue as regards Kenya and Uganda, but on the view which I take of other issues it is not necessary finally to answer this question. As regards other countries, the position is more complex."

Then after discussing the Company's title to Mr. Stewart's and Von Huth's interests Briggs J.A. said this:—

> " The general effect of all this is, however, that there is good *prima facie* reason to suppose that all rights of Von Huth and Stewart under the prior option, except those in respect of South Africa, had become vested in Dantile Ltd. Without saying for a moment that that was proved, I think it is so probable that it would be impossible to say that the respondents did not honestly believe it to be the case, whether or not they so swore. For these reasons I should hesitate to hold that the second statement was false, and I should decline to hold that it was made fraudulently."

Their Lordships will return later in this judgment to Corrie J.'s conclusion to the effect that the defendants honestly believed representation (*b*) to be true and the evidence upon which that conclusion was based ; but assuming, without deciding, that representation (*b*) was not wholly true, they may say at once that they see no sufficient reason for disturbing the concurrent findings of Corrie J. and the Court of Appeal in favour of the defendants on this point.

Before passing to the question whether representation (*c*) was true or false, it will be convenient to state the position at the date of the circular letter in regard to the shares to the nominal amount of 70,000/– referred to as "capital already subscribed" in the "specification of capital required" annexed to the circular letter, which obviously constituted the capital referred to as having "already been subscribed in Denmark" in the letter itself. It appears that a Danish resident named Dan Christensen had promised to subscribe in cash for shares to the nominal amount of 25,000/–; that the defendants and Von Huth had promised him an allotment of shares to the nominal amount of 3,500/– credited as fully paid up for services rendered in the formation of the Company: and that under the Agreement of the 29th November, 1947, the defendants and Von Huth had promised to allot Muritas A/S shares to the nominal amount of 6,500/– in part payment for the patent rights in respect of Kenya and Uganda. As to the total cost of 18,000/– attributed to the patent rights, Mr. Seex in his report Schedule II breaks this down into 6,500/– in cash and 6,500/–in shares (making 13,000/– in all) for Muritas A/S; 2,000/– in cash and 2,000/– in shares for Von Huth in respect of his interests in the patent rights; and 1,000/– in cash for Mr. Alber, which last item suggests Mr. Alber's interest had been got in by the date of the circular letter, though the letter of the 23rd March, 1948, hereafter referred to suggests the contrary. In Schedule I of his report Mr. Seex gives "Particulars of preliminary expenses" which show allotments of the following amounts in shares credited as fully paid up:—to Von Huth (20,000/–), to the Baron (5,000/–) and to Ole Beyer (5,000/–), besides the allotment to Christensen of shares to the nominal amount of 3,500/– already referred to. Mr. Seex thus shows a total of shares to a nominal amount of 33,500/– issued to Von Huth and the defendants credited as fully paid up as part of the preliminary expenses, this figure being not far short of the 37,000/– for formation expenses included in the schedule of capital required annexed to the circular letter. The figures in the case are by no means easy to follow, but it appears plain that the statement that about one-third of the capital in the shape of the 70,000/– worth of shares referred to in the "schedule of capital required" had already been subscribed in Denmark can only be justified as a statement of truth on the footing that the fully paid shares to be taken by Von Huth and the defendants could truly be so described.

On the question whether representation (*c*) was true or false, the plaintiffs' main argument was to the effect that the word "subscribed" in the circular letter meant "subscribed in cash" and in support of this proposition they relied on *Arnison* v. *Smith* 41 Ch. D. 348. The learned trial Judge rejected this contention in these words:—

> "If the phrase: "About a third of the Capital has already been subscribed in Denmark" stood alone, a reader might reasonably infer that this meant subscribed in cash. When, however, he turned to the second page of the "Memorandum on Dantile Limited" attached to the Circular Letter, he would find the following under the heading "Specification of Capital Required.""

Then, after reading the items totalling 70,000/– under that heading the learned Judge continued:—

> "From this it is clear that the "Capital already Subscribed" included shares issued for considerations other than cash; indeed upon the face of it, it would appear that it consisted entirely of such shares.
>
> If the plaintiffs had any doubt as to the meaning of these items they had only to enquire at the Company's offices. Actually, the 2nd plaintiff did go to the office and make enquiries before he signed his cheque for the purchase of shares in the Company, but there is no evidence that he then made enquiries as to the capital subscribed in Denmark.
>
> The proposed capital of the Company was Shs. 220,000.00 of which, as shown in the Memorandum, Shs. 70,000.00 had already been subscribed. Thus the statement to which the plaintiffs object

would be true, provided that the whole Shs. 70,000.00 had, in fact, been subscribed in Denmark. This is an aspect of the matter upon which Mr. Salter has not laid any stress, but it is clearly important.

The Register of Shareholders in Dantile Limited has been put in evidence as part of Exhibit 5. In this Register the names and addresses of all shareholders are entered, with the value in pounds of the shares allotted to them respectively.

Upon examination of the Register it will be noted that the only shareholders with addresses in Denmark are as follows :—

NAME	TOTAL VALUE OF SHARES HELD
HAROLD DAN CHRISTENSEN ...	£1,425
A/S MURITAS	325
	£1,750

If to this amount there be added the value of the shares registered in the name of Eric Von Huth for services rendered by him in Denmark: £1,100, we arrive at a total of £2,850, that is to say Shs. 57,000/– : which falls short by more than Shs. 16,000.00 of a third of the total Capital of the Company.

On this ground I hold that the statement that " About a third of the capital has already been subscribed in Denmark " was untrue."

Briggs J.A. in the Court of Appeal agreed that representation (*c*) did not mean that one-third of the capital had already been subscribed in cash, so that it could not be held false on the ground that the 70,000/– of capital referred to in the " specification of capital required ", or some part of it, was in fact to be issued for consideration other than cash, but also agreed that it could not be said that the whole of this 70,000/– of capital was in fact to be subscribed " in Denmark ". Representation (*c*) was thus held false on the narrow ground that while the representation as to the amount of capital already subscribed was correct the representation that this amount had already been subscribed " in Denmark " was untrue.

Their Lordships agree on both points. It seems to them impossible to maintain that the defendants and Von Huth could not consistently with the representation pay (for example) the formation expenses by allotting fully paid shares of the appropriate nominal amount to the persons to whom the expenses were payable instead of issuing shares to a like nominal amount for cash and paying the cash so raised to those persons, or by allotting fully paid shares to the appropriate nominal amounts to Muritas A/S or Von Huth in respect of the patent rights. On the other hand their Lordships cannot regard the words " subscribed in Denmark " as apt, according to their ordinary meaning, to include shares allotted as fully paid to persons resident in Kenya for services rendered in Denmark in connection with the formation of the Company.

The only witness called on the defendants' side was the Baron, and accordingly the question whether the defendants honestly believed representations (*b*) and (*c*) or either of them to be true depended before the learned Trial Judge not only on the content of the Baron's evidence but also in great measure on the view formed by the learned trial Judge of the Baron's credibility as a witness and honesty as a man, after seeing and hearing him give his evidence.

The Baron was examined and cross-examined at considerable length, and references to his evidence must perforce be selective.

The following passages are taken from his examination in chief: —

" Q. Now before we do anything else, I want you to tell My Lord the Exchange Rate between Kroner and the East African shilling or pound in 1947 and explain fully what you say? A. In 1947 or 1948 the Exchange Rate was 19·38 to the pound.

Q. Now what does that mean in terms of per cent.? A. 3.1%. It depends if you are buying or selling. 19·38 Buyers 19·36 Sellers.

Q. And an Exchange Rate of 1,500 kroner at 3·1% A. Approximately 48,500 kroner carries an Exchange Rate for East African shillings of 1,500/–. Those two figures added together make a total of Shs. 50,000/–.

Q. And if one adds another Shs. 20,000/– on to that the sum becomes Shs. 70,000/–? A. Agreed.

Q. Now would you tell His Lordship why Shs. 20,000/– carried no Exchange? A. I know Eric Von Huth asked for 20,000 kroner for his work in Denmark. Mr. Eric Von Huth was given Shs. 20,000 in Shares; the work was done in Denmark, so the Company saved the Exchange.

Q. And this Shs. 48,500/– which carried the exchange was that money or services in Denmark? A. It was machinery and money invested in Denmark."

. . . . . .

"Q. What did he" (i.e. Von Huth) "tell you if anything about licences and patents? A. He showed me all the different contracts and licences; and also showed me an application from Muritas written to the English Patent, some bureau . . ."

. . . . . .

"Q. Now before you sent out the letters, had you received any financial support from anywhere? A. From a person or the Company?

Q. Either. A. Yes, the Company had received payment from Mr. Dan Christensen in Denmark.

Q. Was it the Company in formation? A. Yes.

Q. And perhaps you might tell us at this stage, did you yourself invest money in this concern? A. Yes.

Q. I again think it is admitted by a plaintiff witness: it was £500. A. It is only £400 in the books, but I actually paid £500 in cash.

Q. Did you do any work in connection with this Company or did you leave it to others? A. I did all the work myself.

Q. And we know that you did in fact receive a certain allotment of shares without cash consideration? A. I did.

Q. Did you get any cash payment for the work which you told His Lordship you did? A. No.

Q. And the letters as you call them; were the letters sent out to friends? A. That is correct.

Q. Were they all Scandinavians? A. Yes."

. . . . . .

"Q. . . . Now this letter to the subscribers did you draft it yourself, or who? A. It was very likely drafted by us and I gave it to Mr. Hollister for his final draft.

Q. You did a rough draft and passed it on to Mr. Hollister and he did the final draft? A. Yes. He did all the contracts, all the letters and everything.

Q. And why did Mr. Hollister do this thing and not someone else? A. They wanted to be sure the letter was correct. Mr. Hollister was appointed the Company's lawyer.

Q. And when he put this thing in final draft, I suppose you and the other two read it over and signed it? A. Yes.

Q. And it did consist as we have heard of about five pages? A. Yes.

Q. And at the time when you signed it 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."

. . . . . .

" Q. Did Mr. Ole Beyer get any shares for a consideration other than cash? A. He did, for his work done for the Company.

Q. What sort of work did he do? Was it small, insignificant, substantial, easy or hard? A. He did all the secretarial work ; there was quite a lot of it.

Q. And you heard Mr. Seex say that if Mr. Eric Von Huth spent a year in Denmark travelling around looking for factories and coming to Kenya, that Shs. 20,000/- worth of shares was a reasonable remuneration? A. I certainly agree with that.

Q. And do you agree that you got too much for the work you did? A. I do not think so."

. . . . . .

" 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.

Q. 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."

. . . . . .

COURT: There is one point which I think arises at this stage. The witness has just said that the statement:

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

is perfectly true. So far, all I have seen with regard to the acquisition of patent rights is Exhibit ' E ' which relates only to Kenya and Uganda I presume they are covered by the agreement with Mr. Eric Von Huth which I have not seen. A. It was, of course, the occasion of the patent rights. Exhibit ' E ' sets out the amounts which Dantile would have to pay for the patent rights.

MR. MORGAN: Was anything said on the other pages of the circular letter? A. It was mentioned on the second page that we had the option of these patent rights.

Q. Whose wording was the wording of this circular ; was it yours? A. It was the solicitor's, I should think. It was drafted by us, but properly written by our solicitor, Mr. Hollister.

MR. MORGAN : Your mother tongue, although you speak English is Swedish, isn't it? A. Yes, Swedish, My Lord."

. . . . . .

" 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 per cent. difference for one shilling.

Q. So Shs. 25,000/– would be about 25,000 Kroner? A. Yes, there is about 3 per cent. 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."

. . . . . .

"Q. For what purpose did you go to Mr. Hollister? A. For the purpose of getting everything straight before starting the Company.

Were you in fact relying upon your co-Directors or upon Mr. Hollister, or upon whom? A. I was relying on Mr. Hollister."

. . . . . .

"Q. Now do you see on the next page 'Amount of Capital required'? A. Yes.

Q. Do you know who prepared that particular page? A. It was prepared by Mr. Hollister.

Q. Do you know if he had any assistance from anyone? A. He might have had.

Q. And from whom do you think he would have had assistance? A. He would have figures from the books of the Company.

Q. And who provided the books? A. Mr. Eric Von Huth."

. . . . .

The following passages are from the Baron's cross-examination :

"Q. When was Mr. Hollister appointed to act as legal adviser to the Company? A. As early as possible the Company started in formation.

Q. When was that? A. I can't remember the exact date but the first time we visited him was the end of the year 1947.

Q. Is Mr. Hollister in Nairobi now? A. As far as I know, yes.

Q. Now, I think you told My Lord in your evidence-in-chief, you said "I should think the wording of the circular was Mr. Hollister's". I can only take it that it came from Mr. Hollister's office and we drafted what should be included in the circular, and then we sent it to him.

Q. So you, Mr. (name inaudible to shorthand writer) and Mr. Eric Von Huth sent a draft of what the circular should contain. A. We visited him and discussed the whole matter with him, after we had drafted certain points.

Q. Of course, Mr. Hollister could act only upon information and instructions received from you and the other two? A. No, he had all the papers relevant patent rights, contracts and everything.

Q. What was the object of the draft? A. To get everything correctly.

Q. And did you tell Mr. Hollister that this tile had been produced and sold successfully in Denmark? A. Most likely.

Q. I want to know. A. He might have taken it from me or from the letters he received.

Q. Did you tell him that : "We have procured the patent rights for most countries in Africa, India and Pakistan"? A. I can't tell for certain; he must have got that from the contracts.

Q. Do you say that you did not tell him that? A. I did not say so; I may have done so.

Q. Did you tell him : "About a third of the capital has already been subscribed in Denmark"? A. I might have done so.

Q. "and the necessary machinery for the first unit has been puchased and is already on its way to Kenya"? A. I might have done so.

Q. " and the machinery for the second unit is on order "? A. I might have done so.

Q. " We have realised from conversations that most of our Scandinavian friends are very interested in this project and anxious to subscribe some capital "? A. I might have done so.

Q. Well, he could not have got that from any document, could he? Are you trying to hide and shield yourself behind Mr. Hollister? A. I was only one of the parties at his office.

Q. But you have accepted responsibility for every single word written in this document? A. I have, My Lord."

. . . . . .

" Q. I see. Now would you look at this letter dated the 23rd March, 1948 ; the second paragraph ; does he say this ; part of it of course, deals with the Patent Register which I will come to later on ; Exhibit 8, a letter dated the 23rd March, 1948, Mr. E. J. Hollister (of Dacre A. Shaw, Buckley & Hollister) to The Secretary, Dantile Ltd. (in formation), the second paragraph reads : ' 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 '. Did you do that? A. It had already been registered in England.

Q. This is your own Advocate.

> " It is also necessary for Mr. Von Huth to write a letter to Dantile Ltd., whereby he agrees to transfer all or any of his rights with Muritas to Dantile Ltd. 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 Ltd., agreeing to transfer any rights he may have with Muritas to the Company in return for the shares he will receive of the purchase money paid on the transfer of the South African rights to Mr. Stewart ".

A. That, as far as I remember is only a confirmation of a conversation we had already had.

MR. SALTER : This letter Exhibit " H " was written presumably in pursuance of the advice in this letter of the 23rd March? A. He transferred to Mr. Stewart previous to that letter.

Q. I see. So your own Advocate, upon your instructions and after discussions with him, was unaware of that? A. He might have been I can't say.

MR. SALTER : You have seen this letter?

MR. MORGAN : He has already elicited the fact that Mr. Hollister was in Nairobi, and this is a letter from a man whom we all know. Can it be admissible?

COURT: Presumably the witness as a Director saw this letter?

WITNESS : I do not think I have seen it previously ; I have seen it now.

MR. MORGAN : The 100 per cent. method of proving this would have been to call Mr. Hollister for the plaintiffs ; he gave evidence for the prosecution in the criminal case. If Mr. Hollister is not going to be called how . . .

MR. SALTER : It is, in my submission, wholly relevant.

MR. MORGAN: Yes, but it is not admissible.

MR. MORGAN: Although we may still think it is inadmissible we do not object to it going in.

Exhibit 8 : Letter dated 23rd March, 1948, Mr. E. J. Hollister to Dantile Ltd (in formation) handed in and accepted by Court as Ex. 8."

. . . . . .

"Q. . . . From your circular, exhibit 2 did you not give the impression that you were forming a Company to make and market an entirely new type of tile and that you had obtained the rights to enable you to do so? A. In my opinion we did have the right."

Their Lordships would conclude their citations from the evidence by observing, first, that there was no cross-examination of the Baron as to the honesty of his belief in the truth of representation (*c*) that "about one third of the capital" had "already been subscribed in Denmark", or the sense in which according to his evidence in chief he understood that statement ; and, secondly, that on a perusal of the Baron's evidence as a whole it is in their Lordships' judgment impossible to hold that there was no evidence upon which the trial Judge and the Court of Appeal could find, as they did concurrently find, that the Baron honestly believed representation (*b*) as to the patent rights to be true, whether or not objectively considered it was wholly true.

The learned trial Judge summarised the effect of the Baron's evidence thus :—

"The 1st defendant Baron Akerhielm has given evidence and has been examined and cross examined at considerable length. He stated : 'We prepared the rough draft of the circular letter which was finally settled by Mr. Hollister, the Company's Lawyer. We then signed it and I did not consider that anything in it was untrue' . . . 'It was quite true that the tile had been produced and sold in Denmark. As regards the patent rights, that was a true statement according to my information. It was also true that one third of the capital had been subscribed in Denmark' . . . 'I think the wording of the circular letter was settled by Mr. Hollister. We prepared the first draft' . . . 'I saw figures as to production costs and sales figures for one factory in Denmark' . . . 'I was relying upon Mr. Hollister to get everything straight. I knew nothing of patent procedure. Before the circular letter went out Mr. Hollister had all contracts, letters and Agreements before him. The wording of the circular letter was Mr. Hollister's and I was satisfied with it' . . . 'The "Specification of Capital Required" was prepared by Mr. Hollister with assistance from Mr. Von Huth.'"

The learned Judge went on to observe that the plaintiffs had put in evidence the letter of the 23rd March, 1948, from Mr. Hollister which had been put to the Baron in cross-examination, as set out above, read the material part of that letter and continued :—

"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.

Having heard the evidence of Baron Akerhielm, I am satisfied 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.

The case as regards the 3rd defendant Mr. Ole Byer stands upon a different footing, as Mr. Beyer, though stated to be in Kenya at the time of the hearing of the action, has not seen fit to give evidence. There was, of course, no obligation upon Mr. Beyer to do so. It is for a plaintiff to prove his case and there is, in general, no reason for a defendant who is satisfied that the plaintiff's case must fail, to give evidence on his own behalf.

The circumstances of this action, however, are somewhat unusual. This is an action of deceit, which involves an allegation by the plaintiffs of fraud on the part of the defendants ; and fraud in such a case, has no mere technical meaning, but involves moral turpitude. In such circumstances, it is surprising that Mr. Beyer who occupied an official position, should not have been eager to come forward and deny the charges against him. In the absence of his evidence, the Court has to determine whether the plaintiffs have made good their case against him.

The case established by the plaintiffs is that two statements contained in the circular letter have been held by this Court to be untrue. As against this, there is in favour of Mr. Beyer, Baron Akerhielm's evidence that the terms of this circular letter and annexures were finally settled by Mr. Hollister, the Company's Lawyer, who had all the contracts, letters and Agreements before him. In such circumstances, Mr. Beyer was entitled to rely upon the accuracy of the wording of the circular letter and annexures as settled by Mr. Hollister, and honestly to believe that the statements contained in them were true ; and the plaintiffs have failed to prove that he did not, in fact do so.

The plaintiffs' claim therefore, fails as against both defendants, and their action must be dismissed."

In the Court of Appeal Briggs J. A. said this with reference to the learned Judge's comment on the letter of the 23rd March, 1948 :

" 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."

Accordingly the Court of Appeal, considering themselves as free on these grounds to go behind the learned Judge's conclusion that the defendants honestly believed representation (*c*) to be true, based though it was (so far at all events as the Baron was concerned) essentially on his acceptance of the Baron as an honest man and a witness of truth after hearing and seeing the Baron give his evidence, proceeded without these advantages to form their own opinion upon this vital issue.

In their Lordships' view the Court of Appeal erred in taking this course.

Their Lordships cannot accept the view of the Court of Appeal that the trial Judge's comment to the effect that Mr. Hollister had "not been called to say that he did not approve" and that "the evidence of" the Baron stood "uncontradicted" was a "serious misdirection" which went "to the root of the learned Judge's finding that the respondents" (i.e. the defendants) "acted innocently".

It must be remembered that the letter of 23rd March, 1948, had been put to the Baron in cross-examination with a view to destroying the Baron's evidence that Mr. Hollister had approved the circular, on the ground that he could not have been writing like this on the 23rd March if he had in February approved what was said in the circular about the patent rights. A discussion arose as to the admissibility of the letter of the 23rd March, in the course of which Mr. Morgan, for the defendants, said that "The 100 per cent. method of proving this would have been to call Mr. Hollister for the plaintiffs", adding that Mr. Hollister "gave evidence for the prosecution in the criminal case". The upshot of the discussion was that Mr. Morgan withdrew the objection to the letter being put in, "although we may still think it inadmissible".

Read in conjunction with this passage, the learned Judge's comment, on reading the letter of the 23rd March, 1948, in the course of his judgment, really came to no more than this: "It is surprising that Mr. Hollister should have written this letter in March if he had really approved what was said about the patent rights in the circular when it was settled in February; but if the plaintiffs were seeking to prove as part of their case that Mr. Hollister did not in fact approve the circular, their proper course was to call him to say he did not, and as they did not take that course the evidence of the Baron to the effect that Mr. Hollister did approve stands uncontradicted." Their Lordships see no misdirection here. It remained, of course, to consider, and the learned Judge went on to consider, whether the uncontradicted evidence of the Baron should be accepted. Their Lordships see no reason for assuming against the learned Judge that in considering that question he failed to take into account the fact that the Baron's evidence, though uncontradicted, stood alone, whereas if his story was true there was no apparent reason why he should not have called Mr. Hollister to confirm it. If, taking this fact into consideration, which he can hardly have failed to do, the learned Judge nevertheless came to the conclusion that the Baron was an honest man and a witness of truth, it was his duty to find accordingly. Their Lordships cannot accept the view that because Mr. Hollister was not called therefore the learned Judge could not reasonably accept the evidence of the Baron as true, or the Baron as an honest man and a credible witness.

The view expressed by Briggs, J.A., to the effect that if Mr. Hollister had been called by the plaintiffs all the evidence they would have wished to obtain from him would have been excluded by privilege was not seriously maintained before their Lordships. Mr. Willis for the plaintiffs in the course of his argument conceded that the charge of fraud in this case would probably destroy the privilege (see *O'Rourke* v. *Darbishire* [1920] A.C. 581 at p. 604). Moreover, the privilege might have been waived by the defendants had Mr. Hollister been called by the plaintiffs ; and over and above that, it seems to their Lordships unrealistic to suppose that the privilege would have been insisted on by the defendants having regard to the suggestion made by their counsel in the course of the Baron's cross-examination that Mr. Hollister should be called.

Their Lordships find the reasoning of the Court of Appeal on this part of the case difficult to follow.

First, it is to be observed that the passage in the learned trial Judge's judgment in which he comments on Mr. Hollister's letter of the 23rd March, 1948, is primarily related, by the context afforded by the letter itself, to the position in regard to the patent rights, and that the Court of Appeal (concurring in this respect with the learned Judge) had themselves held earlier in their judgment that the representation regarding the patent rights, i.e. representation (*b*), was not made fraudulently, or in other words was made by the defendants in the honest belief that it was true. It seems strange that the stigma of dishonesty held by the Court of Appeal to attach to the Baron through his failure to call Hollister should apply to representation (*c*) but not to representation (*b*).

Briggs, J.A., said he " must accept that Mr. Hollister was consulted ", and that he should " assume that he did his duty in the matter as an honest and competent solicitor ". But surely these assumptions tend to support the defendants' case rather than destroy it. An honest and competent solicitor consulted in the preparation of a document such as the circular letter in the present case would do his best to see that its contents were accurate.

Briggs, J.A., after expressing the opinion that it was for the defendants to call Mr. Hollister to support their case, went on to say, a little later in his judgment, that he thought an inference unfavourable to the defendants could and should have been drawn from their failure to call him. What adverse inference had Briggs, J.A., in mind? It appears to their Lordships that he can only have meant one of two things ; either that the defendants went on and issued the circular containing representation (*c*) in the teeth of objections by Mr. Hollister, or that they misled Mr. Hollister by giving him the information comprised in representation (*c*) fraudulently and without any honest belief in its truth. Neither of these inferences appears to their Lordships to be warranted.

Briggs, J.A., further said that the defendants and not Mr. Hollister must have been the source of and responsible for representation (*c*) (that about one third of the capital had already been subscribed in Denmark). But it was no part of the defendants' case that Mr. Hollister was responsible for this representation. Their case was that they, the defendants, made it, honestly believing when they made it that it was true.

Accordingly, their Lordships are of opinion that neither the learned Judge's comment on the plaintiffs' omission to call Mr. Hollister nor the fact that Mr. Hollister was not called by the defendants afforded sufficient ground to justify the Court of Appeal in reversing the Trial Judge's view formed after seeing and hearing the Baron give his evidence, that the Baron did honestly believe representation (*c*) to be true.

The conclusion which the Court of Appeal, on the footing that the matter was at large, thought fit to substitute for the conclusion reached by the learned Judge is thus expressed in the Judgment of Briggs, J.A. :—

> " I find that both Respondents were well aware in February, 1948, that the only subscribers in view in Denmark were Christiensen and Muritas, and that their subscriptions would not nearly cover the Shs.70,000 mentioned, or amount to about one-third of the capital of

> Shs.220,000. I find that the untrue statement was made by both of them with knowledge that it was untrue. If, however, I am wrong in this, and in some remarkable way which I cannot envisage the Respondents remained in ignorance of some of the relevant facts, I am of opinion that, having regard to their positions and opportunities of knowledge, they must have made the statement recklessly and careless whether it was true or false. That either of them ever believed it to be true I consider impossible."

On the assumption that contrary to their Lordships' opinion the Court of Appeal were justified in substituting their own conclusion for that of the learned Judge on the question of honest belief, the conclusion so substituted appears to their Lordships to be open to the criticism that the Court of Appeal construed the language of representation (*c*) as they thought it should be construed according to the ordinary meaning of the words used, and having done so went on to hold that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. Their Lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the Court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. This general proposition is no doubt subject to limitations. For instance the meaning placed by the Defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believe it in that sense to be true. But that is not this case. It cannot be said that representation (*c*) could not have been understood by any reasonable person in the sense attributed to it by the Baron in his evidence, or that it was impossible that he should honestly have understood it in that sense, and honestly believed it in that sense to be true. He gave evidence to the effect that he did understand representation (*c*) in that sense, and did honestly understand it in that sense to be true, and was not cross-examined in either of those points. (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it see *Derry* v. *Peek* 14 A.C. 337, *Angus* v. *Clifford* [1891] 2 Ch. 449, *Lees* v. *Tod* 9 *Rettie* 807 at p. 854, which authorities must in their Lordships' view be preferred to *Arnison* v. *Smith* 41 Ch.D. 348 so far as inconsistent with them.)

But this aspect of the matter need be pursued no further. Suffice it to say that their Lordships are satisfied that this is not one of those exceptional cases in which an appellate Court is justified in reversing the decision of a Judge at first instance when the decision under review is founded upon the Judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *The Hontestroom* [1927] A.C. 37, *Watt or Thomas* v. *Thomas* [1947] A.C. 484, *Yuill* v. *Yuill* [1945] P. 15 at p. 19, *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glasier* v. *Rolls* 42 Ch.D. 436, at p. 457).

For all these reasons their Lordships are of opinion that the Baron should succeed in this Appeal.

The case against the second defendant, Mr. Ole Beyer, is, as the learned Judge pointed out, on a different footing, in that he did not give evidence. He is, however, entitled to rely on the evidence of the Baron and its acceptance as establishing the Baron's honest belief in the truth

of representation (*c*). He is also entitled to rely on the fact that Mr. Hollister was consulted. It is improbable that if the Baron was honest Mr. Beyer was fraudulent in the common enterprise in which they were both engaged. The Baron signed the circular honestly believing its contents to be true, and the reasonable inference is that Mr. Beyer signed it in the same frame of mind. It is improbable that if Mr. Beyer had any fraudulent intent in this matter he any more than the Baron would have employed a solicitor, unless indeed he had it in mind to deceive the solicitor as well as the recipients of the circular. Moreover, according to the Baron's evidence, the figures were supplied by Von Huth. In all the circumstances their Lordships see no sufficient reason for differing from the learned Judge in his conclusion that the case against Mr. Beyer had not been made out.

Accordingly their Lordships are of opinion that in his case also the Appeal should succeed.

The views their Lordships have formed on the other aspects of the case make it unnecessary for them to express any opinion on the question whether representation (*c*) was a material representation whereby the plaintiffs were induced to subscribe for shares in the Company. But they should perhaps add that the words "in Denmark" in representation (*c*) are in their view on the very fringe of materiality, and that they would hesitate to hold on the evidence that either of the first two plaintiffs should be taken to have been induced by those words to subscribe for shares in the absence of any statement to that effect in their evidence. The third plaintiff who said that she did attach importance to those words did not in fact subscribe, but received her shares by way of gift from her husband the second plaintiff.

For the reasons above stated their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Court of Appeal for Eastern Africa set aside and the judgment of the Supreme Court of Kenya restored. The respondents must pay the costs of this appeal and the appeal to the Court of Appeal for Eastern Africa.

(39807) Wt. 8078—37 100 6/59 D.L

In the Privy Council

BARON UNO CARL SAMUEL AKERHIELM AND ANOTHER

v.

ROLF DE MARE AND OTHERS

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