

219/55

IN THE SUPREME COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION).

REGISTRAR, SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)
2-JUN 1956
FILED
DEPUTY REGISTRAR

REGINA v. BENJAMIN JOHANNES HENDRIK DU PREEZ.

RECORD FOR PURPOSE OF APPEAL.

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Certified a True Copy of the Original.

W. van der Merwe
REGISTRAR SUPRE
COURT OF SOUTH AFRICA

11th October, 1955.

On resuming at 10 a.m.

J U D G M E N T.

K U P E R, J.: The accused is charged on six counts of falsitas, three counts of contravening certain provisions of the Companies Act of 1926 as amended and two counts of theft. All the counts relate to transactions and
5 dealings of three companies, namely, Benmar Holdings Ltd., Lovatt-Fraser Trust (Africa) Ltd., and Salamander Whaling and Industries Limited with which the accused was concerned.

The Benmar Company had been registered in 1947 with a share capital of £1-Million divided into four
10 million shares of 5/- each. Towards the end of 1949, 988,500 of these shares remained unissued. The accused was the managing director of the company and at all relevant times he played a leading part in the administration of the company and the other members of the Board
15 of Directors had complete confidence in the manner in which he administered the affairs of the company. Several of the directors gave evidence at the trial and a sorry picture emerged as to their conception of the duties of directors. Two of them, Sachs and Brodowsky, were

woefully/...

woefully ignorant of their elementary duties and of their obligation to safeguard the interests of the company and shareholders. Another, Dr. Berger, the Chairman of the company was a busy medical practitioner who was unable to
5 devote much time to the affairs of the company and who allowed himself to be persuaded to sign cheques drawn on the company's banking account in blank, with the result that the way was opened for unsatisfactory practices on the part of the accused. Apart from one director Newman,
10 who lived in Cape Town and who played no part in the matters referred to herein, the three directors whose names I have mentioned and who in addition to the accused at the time constituted the board of directors, were mere puppets dancing to the tune called by the accused from
15 time to time.

The Lovatt-Fraser company had a registered capital of £1000 divided into £1 shares of which 515 had been issued and all of which were held by the accused and his nominees. There were two directors, the accused and
20 Dr. Berger, and it was common cause common cause that this company carried out the directions of the accused

who/...

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who regarded the company as a convenient conduit pipe for the transaction of his affairs. Several witnesses stated that the accused used this company as his 'cash box', meaning thereby that it served as the banking
5 account for the accused.

Counts 1 and 2:

At the end of 1949 the Benmar Company had very little cash resources and on many occasions it had been obliged to borrow money from the accused or Lovatt-Fraser
10 for the purpose of meeting its requirements. The accused made all the arrangements in regard to the financing of the company. On the 2nd November, 1949 and at a meeting of the directors of the company, the accused stated (the correctness of all the minutes of the company
15 recording the statements made and resolutions passed was conceded by the accused) that, in order to ensure the company having an adequate bank balance as working capital, he had made arrangements to take up and pay for in full the unissued shares in the company, therefore
20 it was necessary that an option be given to him to purchase the unissued shares in the company at par

value/...

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value. In consequence it was resolved that an option
be given to the accused valid for a period of twelve
months to purchase the unissued shares in the company
at 5/- per share, the resolution recording that the
5 option was granted in consideration of the valuable
facilities made available to the company by the accused.

On the 24th January, 1950 and at a further meeting
the company was advised that the accused had ceded his
option to purchase to the Lovatt-Fraser company and that
10 that company had exercised the option and had by means
of a letter of transfer deposited the sum of £247,125
to the credit of the company's account with its bankers
Volkskas Ltd. It was resolved that the 988,500
unissued shares be allotted to Lovatt-Fraser and
15 delivery of the shares was effected. The Complimentary
resolutions and statements appear in the minute book of
the Lovatt-Fraser Company. The cheque for payment
of the shares was drawn by the Lovatt-Fraser company
on the 21st January, 1950 and was deposited to the
20 company's credit on the same day.

On the 21st January, 1950 a minute of the company

discloses/...

discloses that at a directors' meeting the accused stated that arrangements had been made whereby the company was to enter into an agreement with the Lovatt-Fraser company and with himself in his personal capacity
5 whereby the company would undertake to make payment to Lovatt-Fraser of the sum of £231,879 as a loan for the purpose of investment, underwriting or to acquire assets the issue of debentures or to loan and advance money against interest or to issue guarantees or gener-
10 ally to deal with and invest all of the said moneys to the best advantage of all the parties concerned. It was then resolved that the company enter into the agreement in accordance with the draft tabled at the meeting. In the result and on the same day the company
15 issued a cheque to Lovatt-Fraser for the sum of £231,879 and this cheque was deposited to the credit of Lovatt-Fraser's banking account at Volkskas Ltd., on the same day. In order that the cheque drawn by Lovatt-Fraser for the £247,125 for the shares in Benmar should be met
20 the accused deposited a further sum of approximately £10,000 to the credit of Lovatt-Fraser on the 21st January, 1950.

In/...

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In the result the two cheques (i.e. for £247,125 and £231,879) were both honoured by the bank, the shares of Benmar were transferred to Lovatt-Fraser and the joint venture in terms of the agreement of the 21st
5 January, 1950 was constituted. Neither company could have met the cheque drawn on its own account otherwise - the amount standing to the credit of the Benmar account being the sum of £670.9.0. and the amount to the credit of the Lovatt-Fraser account being the sum of £6087.12.0.

10 It is in regard to these transactions that counts 1 and 2 of the indictment have been framed. In count 1 it is alleged that the accused falsely and with intent to defraud the Benmar company gave out and pretended that (i) the Lovatt-Fraser company was able to pay for
15 the shares in full in cash and (ii) that such payment had been made. As a result of these pretences both of which it is alleged the accused knew to be false, he influenced and induced the Benmar company to allot and deliver the shares to the loss and prejudice,
20 actual or potential of the Benmar company. In Count 2 it is alleged that the accused falsely and with intent to defraud gave out and pretended to the Benmar
Company/...

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Company (i) that the agreement of joint venture was a genuine agreement; (ii) that Lovatt-Fraser was able and willing to carry out its duties and exercise its rights under the agreement; and (iii) that the capital sum of
5 £231,879 would be spent as provided in the agreement.

As a result of these pretences which it is alleged the accused knew to be false, he influenced and induced the company to its loss and prejudice, actual or potential, to enter into the agreement and to draw the cheque for
10 £231,879 and to deliver it to Lovatt-Fraser.

During the course of argument it became common cause that the matters referred to in the two counts really formed portion of one transaction and that they could not be divided into two offences as alleged.

15 The Crown case really is that the accused obtained possession of the 988,500 shares of the Benmar company as the result of the pretences alleged in count 1, the accused making the opportunity for such pretences by the joint venture agreement which the accused knew
20 not to be a genuine agreement. There can be no doubt that the joint venture agreement was, from the point

of/...

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of view of the accused, an essential feature of the transaction to purchase the shares, for if no such agreement had been entered into the accused would not have handed over the cheque for £247,125 well knowing
5 that the cheque could not be met.

The critical question to be determined therefore is whether the joint venture agreement was genuine or false. I have no doubt that it was a false agreement and that when he entered into it, the sole purpose of
10 the accused was to create an opportunity of getting the shares without paying for them. Mr. Rosenberg, who appeared for the accused, contended that the agreement was genuine. He said that the Crown had not investigated the financial position of Lovatt-
15 Fraser and that in relation to its assets and interests and general activities in addition to the prospects for the future which the accused might have entertained it had not been established that the accused did not intend to implement the obligations undertaken in
20 terms of the agreement. He pointed to the terms of the agreement and maintained that it was an unusual

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one. I agree that that is so. The agreement recites
inter alia, that Benmar desires to promote, advance
and finance various business projects of an industrial
nature and undertakings and that Lovatt-Fraser has
5 agreed to enter into a joint venture agreement with
Benmar and the accused for that purpose. Clause 1
of the agreement records the entering into of the
joint venture. Clause 2 provides for the payment of
the sum of £231,879 as a loan for the purpose of
10 investment, which sum was to constitute the subject
matter of the investment. Clause 3 provided for the
use of the capital in the following manner:

- "(a) To make such investment of the said monies
" in such form as it may deem fit and
15 " whether to any Third Party, corporate
" or otherwise, or,
"(b) To acquire assets by means of direct
" purchase from any third party or parties,
" corporate or otherwise, or
20 "(c) To underwrite the issue of any shares,
" debentures, debenture stock or otherwise
in/...

- " in any company or companies, or to
- " acquire by purchase or otherwise the
- " rights of option to all kinds against the
- " payment of consideration, or
- 5 "(d) To issue debentures itself or debenture
- " stock, or
- "(e) To lend and advance monies against interest
- " or other consideration to any Third Party
- " or parties, corporate or otherwise, or,
- 10 "(f) To issue guarantees or other security on
- " such terms and conditions as may be in the
- " interests of the said parties,
- "(g) Generally to administer, deal with and
- " invest all or any of the said monies to
- 15 " the best advantage of the parties hereto
- " and in such manner and to such person
- " or persons, corporate or otherwise, as it
- " may deem fit.",

all the powers being vested in Lovatt in the entire

20 discretion of Lovatt as it may deem necessary and

advisable. Clause 4 provided for the division of the

profits/...

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profits - 45% to Benmar, 45% to Lovatt and 10% to the accused. Clause 5 provided for the payment of interest at the rate of 5% per annum on the capital sum. The remaining provisions, in so far as they

5 are relevant, provide for the keeping of proper books of account of the joint venture transactions, for the operation of a banking account, for the duration of the venture and for the fact that no trust was being created by the agreement. I think Mr. Rosenberg

10 was correct in contending that the fact that the agreement might have been an unwise one from the point of view of the company, was irrelevant in considering whether the agreement was a genuine one, more particularly as the other directors of the

15 company and particularly Dr. Berger certainly regarded the agreement as genuine. Nor does the fact that Lovat-Fraser paid the Benmar company interest on the capital assist, for this payment would have been made in either event. In fact, the longer the accused

20 continued to pay the interest the less chance there was of the nature of the agreement being investigated.

The/...

The accused had complete control of the affairs of Lovatt-Fraser and of Benmar, and in the absence of an obviously criminal or reprehensible act on the part of the accused, there was little likelihood of his
5 conduct being investigated.

In my view any investigation into the affairs of Lovatt-Fraser in addition to the position as it appears from the evidence was unnecessary. Whilst it may be true that the fact that no books of account
10 were opened, that no banking account was opened, and that no transactions were entered into might not be important in regard to the intention of the accused at the time he entered into the agreement they are in my view factors to be taken into account in deter-
15 mining the position from the point of view of the accused at that time. The important factors however which in my view remove any doubt as to the intention of the accused are the following:

20 (a) The money, if that term can be used for for what was really the passing of worthless pieces of paper, was immediately used for the

purchase/...

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purchase of Benmar shares, and this purchase was certainly not one of the purposes of the joint venture agreement. The immediate intention of the accused was to use the cheque for that purpose
5 and no other.

(b) The agreement did not contemplate the sale by Lovatt-Fraser or the accused (the terms are interchangeable and were so regarded both by the Crown and the defence) of any assets belonging
10 to them (if there were any such assets) but it did contemplate that the capital would be used for the matters provided for in the agreement.

(c) The transaction between Lovatt-Fraser and the witness Drew, of the 23rd January, 1950,
15 that is to say immediately after the agreement had been entered into. Drew was the personal representative of the accused engaged mainly in the investigation of the prospects of exploiting certain base mineral possibilities in East Africa.
20 He said that early one morning (it must have been the 22nd or the 23rd January, 1950) the accused asked him to endorse two cheques for internal purposes/...

purposes. The cheques were put before him face down, and he never turned them over nor did he know the amounts of the cheques. These two cheques were for the sums of £102,000 and 5 £130,000, both drawn by Lovatt-Fraser and both in favour of Drew. The counterfoils show that the first cheque was for the purpose of the Industrial Rubber Limited - Uganda Lease and Property and the second for the purpose of 10 Consolidated Minerals Limited. Both counterfoils and both cheques are in the handwriting of the accused. Drew said that neither of these amounts had ever been given to him for the purposes of the two companies and that he never 15 knew that these sums were available - as of course they were not. The two cheques were deposited to the account of Lovatt-Fraser the same day. This transaction is an extraordinary one. The cheques were drawn when the company 20 had a credit balance of £1091.12.0. and they were honoured by the bank because they were simultaneously/...

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simultaneously deposited to the credit of the company. The only possible explanation of this transaction is that the accused wished to create an impression that he had utilised £232,000 of
5 the money of the joint venture for the purpose of the two companies mentioned, purposes which would accord with the terms of the agreement. If questioned by the directors of Benmar he would be able to flourish two cheques made out to Drew
10 and endorsed by him, the prima facie suggestion being that Drew had received the sums of money disclosed for the purpose of the joint venture. This was clearly a step taken by the accused to conceal the fact that monies were not being used
15 for the purpose of the joint venture, a step he would take only because he never intended when the agreement was entered into to implement its terms. It was clearly not a genuine agreement. That this was the purpose of the accused is clearly
20 demonstrated by the following extract from a report of directors of Lovatt-Fraser signed by
the/...

the accused on the 14th December, 1950 : "In terms of a joint venture agreement entered into with Benmar Holdings Ltd. and Benjamin du Preez, your company has advanced to Mr. R.E. Drew a
5 sum of £232,000.0.0. for investment purposes on the Joint Venture Account." This statement was false to the knowledge of the accused and its purpose was to cover up the deceitful conduct of the accused in entering into the
10 agreement.

(d) The fact that the accused gave no evidence. There were, in my view, several aspects of the evidence which directly implicated the accused and to which I have already referred, and I
15 am entitled to regard his failure to give evidence as an element to be weighed in connection with those aspects. In the case of Rex v. Nyati (1916 A.D. 319) INNES, C.J. said "As was pointed out in Rex v. Dube (1915 A.D. 557)
20 the failure of an accused to give evidence in his own behalf is a circumstance which may

properly/...

"properly be taken into consideration by a court of law. It should not be pressed too far.

But when there is evidence, entitled to credence, which directly implicates an accused person, the fact that he refrains from going into the box to contradict that evidence may well be regarded as an element to be weighed in connection with all the others in the case, bearing in mind always that the ~~onus~~ remains on the Crown."

10 I have therefore come to the conclusion beyond a reasonable doubt that the accused entered into the joint venture agreement not with the intention of entering into such an agreement and carrying out its terms but solely to deceive the Benmar company into allotting and
15 delivering the unissued shares to him without payment in return. I have already indicated that the crime committed by the accused could not be split into the two ~~portions~~ as reflected by Counts 1 and 2 of the indictment, and that the offence was that described
20 in Count 1, the pretence in regard to the joint venture agreement in Count 2 being the basis of the pretences
alleged/...

alleged in Count 1, namely, that Lovatt-Fraser was able to pay in full in cash for the shares and that such payment had been made. I find the accused guilty on Count 1 and not guilty on Count 2.

5 The remaining counts concern the affairs of the Salamander Company. This company was registered on the 18th January, 1950 with a share capital of £1,000,000 divided into 4,000,000 shares of 5/- each. The main object of the company was to acquire from the Benmar
10 company its right and title to the lease from the Government of the Union of South Africa of certain land in the Division of Malmesbury together with certain assets namely, plant, buildings and erections, foundations and jetty, and foreshore rights for the purpose of conducting
15 the whaling industry formerly carried on from and on the site. The accused, De Berger and the witness Hans Reineke were the Johannesburg directors of the company, the others were living in England, Scotland and Hout Bay respectively.

20 Count 3:

On the 22nd September, 1950 the company registered a prospectus with the registrar of companies and then/...

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then opened lists for the subscription of shares by members of the public in accordance with the prospectus. 800,000 shares were offered to the public for subscription at 7/6d per share and in terms of clause 9(i) of the statutory information given pursuant to section 77(1) of the Companies Act of 1926 as amended, the directors were of the opinion that the minimum amount which had to be retained by the issue of the shares then offered for subscription was the sum of £200,000, in other words the minimum number of shares to be taken up (in respect of each share the full sum of 7/6d was payable on application) by the public was approximately 535,000 shares.

The total proposed issue was underwritten by H. Reineke and Partners in terms of an agreement dated the 8th March, 1950. Although the agreement purports to have been made by H. Reineke and Partners there was in fact no such firm, the sole contracting party being H. Reineke himself, one of the directors of the company. On the same day Reineke and Partners entered into a sub-underwriting agreement with Lovatt-Fraser in terms of

which/...

which the latter undertook to take up all the shares not applied for by the public in terms of the offer contained in the prospectus. Count 3 alleges that the accused, being a director of Lovatt-Fraser, falsely and
5 with intent to defraud gave out and pretended to Reineke that Lovatt-Fraser was able and willing to perform its obligations under the sub-underwriting agreement, and knowing such pretences to be false had influenced Reineke to his loss and prejudice, actual
10 or potential to enter into the underwriting agreement. The issue was not successful as only 137,400 shares were applied for by members of the public for the sum of £51,525.0.0. The company did not flourish and in July, 1951 it was placed under judicial management.
15 The judicial manager instituted proceedings against Reineke for the implementation of his obligations under the underwriting agreement and Reineke settled this claim for the sum of £39,000. Reineke stated that he only entered into the underwriting agreement because
20 the sub-underwriting agreement was entered into the same day. He says that he was told by the accused that

all/...

all the shares had already been allocated a few days before the agreement although the names of the persons acquiring the shares was not given and that in front of Williams, the secretary of the company, and Dr. Berger

5 the accused told him that Lovatt-Fraser was in a strong financial position and would meet its liabilities. In view of the other evidence given I am not prepared to find beyond a reasonable doubt that these representations were made. Dr. Berger does not say that any representation

10 as to the financial position of Lovatt-Fraser was made by the accused to Reineke; he says that Reineke wanted Lovatt-Fraser to enter into the sub-underwriting agreement and that the accused said that all the shares would be taken up - that some had been placed and that others would

15 be placed. Williams does not refer to any discussion or to any representation made by the accused to Reineke. Furthermore, it is clear that Reineke signed a declaration as required by section 76 (bis) of the Companies Act, that he was able to perform his obligations under

20 the underwriting agreement - and Reineke admitted in evidence that he could not do so. I have come to the conclusion/...

conclusion therefore that the Crown has not established the requisite essentials as alleged in this count, and the accused is discharged on that count.

Count 4:

5 Similar considerations have led me to the same conclusion in regard to Count 4. The accused is charged with falsitas in that he falsely and with intent to defraud, gave out and pretended to potential subscribers of shares that Lovatt-Fraser was able and willing to
10 perform its obligations under an agreement with the Salamander Company in terms of which it was to purchase 1,886,200 shares in the company and that it was able to perform its obligations under the subunderwriting agreement. It is alleged that these pretences were false
15 to the knowledge of the accused and that because of these pretences the accused influenced and induced or attempted to influence and induce potential shareholders to subscribe for shares to their loss and prejudice actual or potential. The first pretence is based upon
20 the following statement in the prospectus under the heading Ordinary shares. 1,886,200 ordinary shares of 5/- each to be subscribed by Lovatt-Fraser Trust
Africa/...

Africa Limited at par, in terms of agreement dated 8th March, 1950 and amended agreement dated 17th August, 1950.

This agreement is referred to in paragraph 19(viii) of the statutory information attached to the prospectus in

5 the following terms "Agreement dated the 8th March, 1950, and amended Agreement dated the 17th August, 1950, entered into between this company and Lovatt-Fraser Trust Africa Limited, whereunder the latter company has undertaken to subscribe for and accept the allotment of 1,886,200

10 shares of a nominal value of 5/- each in this company at par and to make payment against such allotment of the consideration of £471,550.0.0. which said undertaking is to be effected within a period of 120 days after the closing of the subscription lists of the issue being

15 made. The agreement therefore contained an obligation entered into in March, 1950 and August, 1950 which required to be implemented in March, 1951. This was therefore a representation as to future conduct or payment and no representation of any existing fact as contained
20 in the prospectus has been proved to be false; and this is insufficient(See Rex v. Ballard:1935 C.P.D. 256; and

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Rex v. Deetlefs 1953(1) S.A.L.R. 418). Although the accused has not given evidence and where the question of the state of mind of an accused person is in issue it is not easy for a Court to come to a conclusion

5 favourable to the accused as to his state of mind unless he has himself given evidence on the subject per SCHREINER, J., as he then was, in the case of Rex v. Moher (1944 T.P.D. 108). It seems to me in the present case that here the accused merely undertook an obligation

10 tion in the future, a contractual obligation. It must be remembered that he obtained no shares as the result of the representation and presumably these shares would only be delivered simultaneously with payment. Furthermore the evidence of Drew satisfies me that the accused

15 did believe that he had some prospects of placing large blocks of shares with overseas investors.

In regard to the second pretence the only reference to the sub-underwriting agreement in the prospectus is contained in paragraph 20(c) of the statutory information

20 in the following form "An indirect interest in favour of B. du Preez and Dr. B. Berger consequent to

a/...

a sub-underwriting agreement dated 8th March, 1950 entered into by Hans Reineke and Partners and Lovatt-Fraser Trust Africa Limited, of which latter company B. du Preez and Dr. B. Berger are directors. No potential
5 subscriber could gather from this statement the magnitude of the obligation undertaken by Lovatt-Fraser particularly as the whole issue was stated in the prospectus to be underwritten by Reineke and Partners.

The reasons I have given in coming to my conclusion on
10 Count 3 operate equally in regard to the allegations dealing with both underwriting agreements; and in addition there is the fact that it seemed quite probable that Lovatt-Fraser would be able to place large blocks of shares overseas.

15 The accused is therefore discharged on Count 4.

Counts 5 and 6:

On the 20th January, 1951 four cheques drawn by Lovatt-Fraser were paid to the credit of the Salamander account with its bankers and honoured. These
20 cheques were for the following amounts : 1.) £248,405 - representing the amount to be paid for 662,600 shares;

2.)...

2.) £471,550 - representing the amount to be paid for
the 1,886,200 shares already referred to; 3.) £46500 to
which fuller reference will be made in regard to Count 10;
and 4) £78,200 representing the amount due by a company
5 called Hedaya Mercantile Corporation, New York, U.S.A.,
in respect of the purchase of 312,800 shares. These
cheques totalled the sum of £844,655.0.0. On the same
day the Salamander account was debited with the sum of
£844,655.0.0. in respect of a cheque drawn by it in favour
10 of Lovatt-Fraser. The banking account of Lovatt-Fraser
shews corresponding entries. It is in respect of these
cheques that counts 5 and 6 are concerned and again it
was common cause that these cheques were relevant to one
complete transaction and not to two separate transactions.

15 In count 5 the charge of falsitas is that the
accused falsely and with intent to defraud gave out and
pretended to Hans Reineke and Robert Williams a director
and the secretary respectively of the Salamander company
that he intended to pay certain small charges to Volkscas
20 Limited and that he intended to use a blank cheque for
that purpose. This was a false pretence because he well

knew/...

Judgment.

knew that he did not intend to pay these small charges
or to use the blank cheque for the purpose, and by
means of the false pretence influenced and induced them
to their loss and prejudice or to that of the Salamander
5 Company to sign the blank cheque for that purpose.
As will later appear the blank cheque was filled in by
the accused for the sum of £844,655.0.0.

In count 6 the charge of falsity alleged was
based upon the delivery to Lovatt-Fraser of 662,600
10 shares in the Salamander Company which had been allotted
to nominees of Lavat-Fraser, the allotment to the
Hedaya Company of 312,800 shares in the company, and the
allotment and delivery to Lovatt-Fraser of 1,886,200
shares. It is alleged that three of the four cheques
15 namely those for £248,405, £471,560 and £78,200 were

represented by the accused to be good and available
cheques and that they represented ^{payments} in cash for the shares.

This representation was alleged to be a false pretence
20 made with intent to defraud and it was acted upon by the
Salamander company to its loss and prejudice, actual
or potential. It/...

It is clear that the only means by which Lovatt-Fraser could hope that the cheques would be honoured would be by the deposit of the Salamander cheque for £844,655.0.0. At the times the cheques were given

5 Lovatt-Fraser had a credit of £2669.0.8. I am satisfied that what the accused intended to do was to obtain 2,861,600 shares in the Salamander company without paying for them, and that the evidence relating to Count 5 reveals that his manoeuvre in regard to the

10 obtaining of the cheque from Salamander was directed to that end and was part of the scheme of the accused to obtain the shares.

The evidence shows that the accused had told Williams, Dr. Berger and Reineke from time to time

15 that he had obtained a large sum of money, stated to be £1,000,000 from an overseas company or companies for the purpose of obtaining a participation in the share capital of the Salamander company and ⁱⁿ its direction.

On Friday the 19th January, 1951, the accused told

20 Williams that on the following day he would be making a deposit of a large sum of money and that as

payment/...

payment had to be made in respect of bank charges he asked Williams, who could not be present on the Saturday, to sign three or four blank cheques for such charges. The amount of the charges was not known and for that
5 reason the cheques were to be signed in blank, and it was said that the amount of the bank charges would be in the neighbourhood of £100. It was still necessary for the accused to obtain the signature of a director to the cheque (for cheques had to be signed by two directors
10 and the secretary) and for this purpose Reineke was approached. Williams says that the accused approached Reineke, whereas the latter says that Williams asked him to sign the cheque in blank on the Friday afternoon, and that he signed the cheque as it was to be filled in
15 for a comparatively small amount to pay the required bank charges in connection with the large deposit to be made the following day. I am prepared to accept the position that Williams asked Reineke to sign the cheque.

On the following day Reineke accompanied the
20 accused to the Volkskas bank and saw him make the deposit to the credit of the Salamander account of the four

cheques/...

cheques. Dr. Berger saw the accused after he had returned from the bank and the accused showed him the deposit slip and said : "We now have a million pounds". There was naturally great jubilation in the Salamander company and it was immediately resolved by the company to allot and deliver to Lovatt-Fraser 2,548,800 shares and to allot 312,800 shares to the Hedaya company. For some three or four weeks this satisfactory position continued and it was only when Williams received a report from the company's accountant on the bank statement from the Volkskas Bank, that it was realised that no money had come into the Salamander banking account because of the cheque for the corresponding amount drawn on its banking account. Williams, Reineke and Dr. Berger confronted the accused with the position. According to Williams, the accused said that the money had been taken out of the Salamander account and placed in a special account. At a meeting of directors held on the 1st March, 1951, the accused said that the money had been placed in a special account with Volkskas, that pending authority to transfer the money to the

Salamander/...

Judgment.

Salamander company the bank would make certain payments on behalf of the company, and that when the authority was received the bank would pay the money to the company and account for such payments as it might have done.

- 5 Reineke corroborates the discussion at the directors meeting. He also said that shortly before the meeting he asked the accused what it meant and the accused replied that it was perfectly in order and that he had had to do it. Dr. Berger said that when he received
10 a report from Williams some three or four weeks after the deposit, he saw the accused and asked for an explanation. The accused said that this was his way of arranging the capital for division and that this was the only way in which he could defrost the money coming
15 from a hard 'currency country'; the money was supposed to have come from the United States of America. The accused said that the money was there and in good time it would be divided up, the money was in a special account because he had to move it from one account into
20 another. Berger corroborates the account given by Williams of the discussion at the directors meeting.

At/...

At one stage Mr. Rosenberg suggested to Williams that the accused would say that on the Friday afternoon Williams knew that the cheque he signed was not a blank cheque but was filled in for £844,655 and that he was
5 going to put assets into the Salamander company in place of the money. The accused did not give evidence in support of this suggestion and I have no doubt that any such evidence would have been false. A certain amount of evidence was directed to the fact that at a
10 meeting held on the day before, the company's attorney was asked to investigate the nature of certain interests which the accused held and of which there were some some corroborating documents at the Volkskas Bank.

The Attorney conducted the investigation and presented
15 a favourable report of the assets provided that certain conditions were complied with. Dr. Berger in particular and Williams and Reineke made it clear that the directors were seeking a method whereby the accused would repay to the company the amount he had withdrawn, and
20 they are all quite definite that there was never any suggestion before the 20th January, 1951, that the

accused/...

5 were intended by the accused and were in fact the necessary preparatory acts for the purpose of the offence alleged in Count 6 and were part of the same transaction the accused is found not guilty on count 5.

5 Count 7:

I have already stated that the issue of shares offered to the public was not a success and that instead of the minimum capital sum of £200,000 being subscribed only £51,525,0.0. was received in respect of applications 10 for 137,400 shares. At a meeting of directors of the company held on the 16th November, 1950, at which the accused presided, a resolution was passed that these 137,400 shares should be allotted and the names of the subscribers entered into the register of members. It 15 is not certain when the letters of allotment were despatched to the subscribers but it is clear that they were sent before the 15th December, 1950. On these facts it was common cause that the provisions of section 81(i) of the Companies Act had been contravened 20 and the only question to be determined is whether the accused can be held responsible for such contravention.

Section 82(2) of the Act provides that if any director of a company knowingly contravenes or permits the contravention of the last preceding section with respect to allotment he shall be guilty of an offence. Mr. Rosenberg agreed that it had not been proved that the accused knowingly contravened or permitted the contravention. I do not agree. Williams says that the fact that the minimum amount had not been applied for was pointed out to the meeting but the accused said that he guaranteed that the other shares would be taken up and that he already had parties interested in applying. It seems to me clear that the accused knew that the allotment was irregular and that he therefore knowingly permitted the contravention of the provisions of section 81 (1) of the Act. I find him guilty on count 7.

Count 8:

A further meeting of the Board was held on the 30th November, 1950 at which the accused presided. A resolution was passed allotting a further 662,600 shares to the Lovatt-Fraser company although the Salamander company had not received any payment in respect of the shares/...

shares. Section 81(1) makes the payment a condition prerequisite to the allotment and it further provides that an amount stated in any cheque received by the company in payment shall not be deemed to have been
5 paid to and received by the company until the amount of the cheque has been credited to the account of the company with its bankers.

Again it was common cause that the provisions of this section had been contravened, and again the only
10 question is whether the accused knowingly contravened or permitted the contravention. The accused informed the meeting that the amount due for the shares had been paid into a special account but that certain formalities had to be complied with before the money could be paid
15 into the company's account. There can be no doubt that the accused knew that the allotment was irregular without payment for the shares being received by the company. I find him guilty on count 8.

Count 9: The accused is charged, in terms of count 9,
20 with knowingly failing to set apart as a separate fund the monies paid in by the public on application for the

137,400 shares, or that he permitted such failure,
and further that he held or permitted the monies to be
held for the purposes of the company for the satisfac-
tion of its debts although the minimum subscription,
5 namely £200,000 had not been made up. This was alleged
to be a contravention of section 81(4) and the Crown
contended that this contravention was made an offence
in terms of section 82(2). It is clear that a special
banking account was opened for the receipt of the amounts
10 paid on application and that it was only after the
allotment, which I have already found to be irregular,
that the money was transferred to the ordinary business
account of the Salamander company and the money used for
the payment of debts due by the company. This use
15 excludes the sum of £46,500 which is the subject matter
of the next count. I doubt whether the provisions of
section 82(2) apply to a contravention of section 81(4)
for it seems to me that these provisions apply only
to the position before allotment. An irregular
20 allotment creates an offence, and any payment out of the
special banking account before allotment would be an
offence./...

offence. Be that as it may, I have come to the conclusion that the accused did not knowingly contravene or permit the contravention of section 81(4). The amounts that were paid were trivial amounts and it has
5 not been shown that the accused knew or authorised the payment of these amounts from the special account. I find the accused not guilty on Count 9.

Count 10:

The accused is charged on this count with the
10 theft of £46,500, the property or in the lawful possession of the company. The manner in which this sum was obtained by the accused was described by Williams. He said that late one afternoon, after banking hours, the accused approached him and told him that he (the accused)
15 and one Frank, the company's broker, were in urgent need of the sum of £46,500 in connection with the company's business. The only possibility there was for the making available of such sum was the obtaining of a bank-initialled cheque from Volkskas. Williams replied
20 that the company had no money and the accused asked about the money in the special account of the amounts paid by members/...

Judgment.

members of the public on application for the shares.

Williams then told the accused that the account could not be operated upon. The accused persisted and offered

Williams two cheques drawn by Asiatics for the total sum
5 of £46,500 which cheques could be deposited the next day.

Williams then signed a cheque drawn on the Salamander account for £46,500 and handed it to the accused. The cheque had been signed in blank by Dr. Berger and it therefore only required the signature of the accused to
10 render it negotiable. The accused used the cheque to enable Volkas to transfer the sum of £46,500 to the banking account of H.S. Frank at Barclays Bank. It is not now contended that this payment had anything to do with the affairs or business of the Salamander company.

15 Williams then said that on the following morning the accused asked him for the two Asiatic cheques which he said he would deposit immediately to the company's account, and Williams gave him the cheques and the deposit book of the company. The accused left the office and
20 on his return Williams asked him for the deposit book.

The accused replied that the deposit book had been left

at the/...

at the bank but that the cheques had been deposited.

When Williams received the next bank statement from the bank he saw that the Asiatic cheques had not been deposited. He immediately confronted the accused and threatened to resign, and that same afternoon a meeting took place attended by him, the accused and Dr. Berger. The accused did not deny Williams' version of the incident, and he has not given evidence at this trial to deny it; he said that he could not deposit the Asiatic cheques but that the money would be repaid out of the bulk money coming from overseas. Dr. Berger corroborated Williams' recollection of the discussion and both of them stated that the payment of £46,500 was unauthorised.

In cross-examination Williams said that he knew that the accused was a creditor of the company in a substantial sum, and that if in the ordinary course the accused had wanted a payment in reduction of his claim he would have had no objection. Williams knew that the money in the special account should not be used for the payment of any debt due by the company or at all until the minimum amount had been paid in.

In/...

In argument Mr. Rosenberg conceded that at the least the taking of the £46,500 was an unauthorised borrowing by the accused but that the accused had no animus furandi because he was at the time a creditor of the
5 company in an amount in excess of £46,500. The contrivance having been proved, the question whether it was accompanied by the mental state requisite to constitute it theft depends upon the circumstances. The question is, whether the Crown has proved beyond a reasonable
10 doubt that the accused took the money not with the intention of paying himself under a claim of right. In my view the Crown has proved the allegation of theft beyond a reasonable doubt, and particularly for the following reasons :

- 15 (a) At no stage, either when he persuaded Williams to give him the cheque, or when he was confronted by Williams and Berger did the accused ever mention the fact that he was entitled to the money.
- 20 (b) Even up to the present moment the accused has not stated that he took the money on
account/...

account of his claim.

- (c) The fact that he persuaded Williams to give him the cheque by handing Williams the two Asiatic cheques for deposit the next day is completely inconsistent with any claim by the accused to be entitled to the money.
- (d) The fact that he removed the Asiatic cheques the next day by playing on Williams' confidence in him is also completely inconsistent with such a claim.
- (e) Williams had told the accused that this sum was not available for the purpose of paying the debts of the company.
- (f) When confronted by Williams and Dr. Berger the accused promised to "fix the matter up" by which they both understood that the money would be repaid.
- (g) The accused fraudulently purported to repay the sum when he deposited to the company's account the four cheques on the 20th

January/...

Judgment.

January, 1951, one of which was for the sum
of £46,500.

It is impossible under the circumstances to accept the
suggestion that when the accused took the money he had
5 any intention of claiming a set off, he knew that the
money had to be kept intact by the company and could not
be used for the payment of the debts of the company, and
he knew that the only way he could get the money was by
deceiving Williams with the story of the two Asiatic
10 cheques, and with the statement that the money was
required by the company's broker for the purpose of the
business of the company. I would add, in passing,
that although Williams did say that the accused was a
creditor of the Salamander Company in a large amount,
15 neither the precise amount nor the circumstances of the
claim were investigated.

I therefore find the accused guilty on count 10.

Count 11.

It is unnecessary to deal with Count 11 in any
20 detail. The allegation is that the accused stole a
share certificate for 1,000,000 shares in the Salamander

Company./...

Company. The witness Jarrett who was employed as a share transfer clerk by the Salamander Company stated that he made out the certificate and handed it to the accused, and that the accused was entitled to the
5 certificate and to remove it. The evidence is that the certificate remained in the possession of Volkshas until after the company was placed under judicial management. Mr. Thomas, who appeared for the Crown, conceded and in my view correctly, that on this evidence
10 the Crown had not established the charge of theft. Although Jarret's evidence does conflict with the evidence of Williams', it is clear that at the very least a reasonable doubt as to the guilt of the accused must exist.

15 I find the accused not guilty on Count 11.

In the result the accused is found guilty on Counts 1, 6, 7, 8 and 10 and not guilty on Counts 2, 3, 4, 5, 9 and 11.

(Sgd.) S. Kuper.

JUDGE OF THE SUPREME COURT.

Sentence.

THE ACCUSED: I admit my previous convictions.

S E N T E N C E.

KUPER, J.: I do not think there is any necessity for me to point to the serious nature of the charges. You embarked upon a scheme of getting rich quickly without regard to the interest or right of the shareholders in the company, or members of the public who might subscribe. I propose, in regard to the three serious counts, to make either whole or portion of the sentence to run concurrently the one with the other.

Your sentence will be as follows:

Count 1 : Four Years hard labour.

Count 6 : Four Years hard labour to run concurrently with count 1.

Count 10: Three years hard labour, of which two years is to run concurrently with counts 1 and 6.

Count 7 : A fine of £25 or alternatively six weeks hard labour.

Count 8 : A fine of £25 or alternatively six weeks hard labour.

Application for Leave to Appeal.

Mr. Rosenberg applies for leave to appeal to the Appellate Division.

Judgment on the
Application for leave
to appeal.

KUPER, J.: I have come to the conclusion that leave to appeal should be granted in this case as I feel it might be possible that other Judges might have a different view to the matter. I therefore grant leave to appeal to the Appellate Division.

Application for Bail.

After hearing Mr. Rosenberg on the question of bail, bail is ordered to stand and the accused is to report to the police at Marshall Square once a week.