



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 4828 of 1987

PAN AFRICA INSURANCE COMPANY LTD.1ST PLAINTIFF

AMERICAN LIFE INSURANCE CO. LTD.2ND PLAINTIFF

HERITAGE INSURANCE COMPANY LTD. 3RD PLAINTIFF

VERSUS

CLARKSON & SOUTHERN LIMITEDDEFENDANT

AND

KENYA NATIONAL ASSURANCE COMPANY LTD

INTRA AFRICA ASSURANCE COMPANY LTD

JUBILEE INSURANCE COMPANY LTD.....THIRD PARTIES

J U D G M E N T

The Plaintiffs are Insurance Companies. The defendant is a limited liability company carrying on the business of insurance brokers. Each plaintiff has a distinct liquidated claim against the defendants thus:

First plaintiff claims Shs.7,087,770/=, with interest; second plaintiff Shs.5,060,969/=, with interest and third plaintiff Shs.3,514,562/=, with interest.

The facts giving rise to the claims are stated in paragraphs 5, 6, 7, 8, 9 and 10 of the Re-Amended Plaintiff. As most facts are in dispute, it is sufficient at this stage to state that the Plaintiff discloses that the sum claimed by each is the decretal sum paid by each plaintiff to First National Bank of Chicago (the bank) pursuant to a decree in *H.C.C.C. No. 1422 of 1982* which suit was brought by the bank against each plaintiff to recover a sum of Shs.15,000,000/= advanced by the bank to Silvester Holdings Ltd (SHL) and guaranteed by each plaintiff proportionately. The plaintiffs allege that the defendant who negotiated the contract of guarantee is liable in contract and in tort to indemnify the plaintiffs.

The defendant in its Further Amended Statement of Defence denies liability and with the leave of the court has served a Third Party Notice against the three other insurance Companies claiming indemnity under a Professional Indemnity Policy. However, Bosire J. on 18.2.91 ruled that the trial between the plaintiffs and the defendant should precede the trial between the defendant and the third parties.

One unusual feature of this suit is that neither party called any witnesses to give oral evidence relating to the transaction which gave rise to this suit. The plaintiffs however called two witnesses, Mr. Thomas Kithinji (PW1) an expert witness and Mr. Terence Christopher Goss (PW2) who, though a Managing Director of the third plaintiff, gave evidence as an Insurance expert. Needless to say, the defendant did not call any witnesses.

The only factual evidence tendered in this suit is a bundle of correspondence exchanged before, in the course of, and after the transaction and other relevant correspondences. This bundle was produced as exhibit 1. No other exhibit was produced in the trial. I shall be referring to the particular documents in the bundle merely as “DOC No.”.

In the absence of oral evidence, each counsel engaged in a laborious exercise of reconstructing the transactions in favour of his client. As the correspondence is the decisive primary evidence, I shall first examine the relevant correspondence and later extract the transactions and make findings of fact on the basis of the correspondence in relation to the pleadings.

The correspondence in the bundle fall into four broad categories:

First Category:

These relates to the transaction concerning the construction of luxury apartments along Ngong Road.

Doc. No. 1:

A letter dated 18.3.80 from SHL to the defendant authorizing the defendant to investigate the possibility of arranging an “Insurance Company Guarantee” up to Shs.20,000,000/=.

Doc. No. 2:

Is a record of the instruction given to the defendant by SHL and recorded by Mr. Seagon of the defendant. It is dated 19.3.88. It notes that SHL has a 5 acre plot along Ngong Road, Nairobi, expected to be valued at Shs.20,000,000/=. It records the instructing as to arrange a syndicated Insurance guarantee upto Shs.20,000,000/= against security of land.

It notes that the bank has to arrange a bridging finance once the insurance guarantee has been given. It also notes that insurers can obtain independent valuation of the land if so required at the expense of SHL and that the Contractors All Risk (CAR) insurance and all the development insurance is to be placed with guarantors.

It then notes the credentials of Silvester Kuria (M.D. of SHL) and notes that the second plaintiff was agreeable to support the project subject to adequate collateral being put up.

Doc. No. 3:

A letter from the third plaintiff to the defendant asking for a copy of the bond recently signed by the third plaintiff and a copy of the charge. The third plaintiff wrote several such letters to the defendant (Doc. Nos. 6, 7, 10, 14, 25, 39, 64).

Doc. No. 4:

A letter dated 2.4.80 from the defendant to Mr. S. K. Kuria of SHL informing him that the defendant has been able to fix up the bond with underwriters on condition that they would also share in the contractors All Risk Insurance. It asked Mr. Kuria to make sure that that condition is included in the contract documents. Defendant also ventures to give a list of good contractors with whom it has had good relations over the years to Mr. Kuria.

Doc. No. 5:

Letter dated 2.4.80 from defendant to Mr. Nyaga of the bank enclosing the original Bond in the sum of Shs.20,000,000/= sealed by SHL and underwritten by five insurance companies (including the plaintiffs). It also confirms that the defendant would pay 25% of the commission that defendant receives for placing the contract after receipt from the defendant's principals.

Doc. No. 9:

A letter dated 22.5.80 from defendant to SHL reminding SHL, among other things, of the undertaking given by the defendant to the underwriters subscribing to the bond that all insurance relating to the project would be placed with the underwriters.

Doc. No. 11:

A letter dated 28.5.80 from the defendant to Mr. S. Rahimtulla Advocates instructing him on behalf of SHL to draw a floating charge over assets of SHL to be granted to "anyone or more" of the five named underwriters. The letter states that there was a prior meeting about the same issue between the defendant and Mr. S. Rahimtulla and stated further that SHL owns freehold land situated on L.R. 209/4808 Ngong Road which is shortly going to be developed into luxury apartments complex.

That letter was not copied to any of the plaintiffs.

Doc. No. 17:

Reply by defendant to third plaintiffs' letter of 26.5.80 (Doc. No. 10 and of 20.8.80 (Doc. No. 14) regarding the copy of the charge. It informed the third plaintiff that the advocates preparing it had promised to forward a draft to the defendant by 4.7.80 for approval by all to sureties. It was copied to other co-insurers except the 2nd plaintiff.

Second Category:

This relates to shelving of the luxury apartments project along Ngong Road in favour of project along Mombasa Road Nairobi.

Doc. No. 19:

Instructions note made by the defendant dated 8.7.80. It shows that Mr. Silvester Kuria had shelved the Ngong Road project and was asking that the guarantee executed by the underwriters be transferred to the housing project along Mombasa Road. It notes that the land is worth Shs.18,000,000/= and details the nature of the project. It is noted that Mr. Silvester Kuria was asked to write an official letter to the defendant.

Doc. No. 20:

Official letter from SHL to the defendant dated 8.7.80 concerning the instructions to transfer the bond to a proposed middle class housing project and the details of the project. It shows that the detailed plan and the site plan were sent to the defendant together with the letter.

Doc. No. 21:

Defendant's letter dated 14.7.80 to the second plaintiff which is also copied to the first and third plaintiffs. It refers to the defendant advice "last week" to the effect that the Bond already signed for Ngong Road luxury apartments development is to be transferred to middle class housing project on Airport Road. It, among other things, requests the underwriters to sign a new Bond to be presented to the bank and informs the underwriter that the defendant is still awaiting for the legal charge which would be

forwarded to them very shortly.

Doc. No. 22:

Letter dated 15.7.80 informing the bank of the new arrangements and requesting the bank to return the Bond of Shs.20,000,000/= while awaiting the new Bond of Shs.15,000,000/= to be drawn up.

Doc. No. 23:

Letter dated 15.7.80 from the defendant to SHL basically informing SHL that the insurers are prepared to enter into a new financial guarantee in the sum of Shs.15,000,000/= subject to the insurers being satisfied with the legal charges being prepared by SHL's advocate. More importantly, the defendant informs SHL that it has prepared a Bond for underwriters' signature but defendant is unable to release the Bond until legal charges have been completed and asks SHL to follow Mr. Rahimtulla to have the legal charges completed. That letter was copied to the underwriters.

Doc. No. 26:

Letter dated 25.7.80 from the defendant to 2nd plaintiff and copied to the other underwriters. It encloses a copy of the Bond and confirms that the original has been deposited with the bank. It also confirms the lines of each of the four underwriters and asks underwriters to allow the defendant to charge a commission of 15% for arrangement of the contract based on the numbers of man hours involved in the discussions concerning arrangement of the counter indemnities and securities for benefit of underwriters.

Doc. No. 28:

Note from SHL dated 23.7.80 showing the anticipated profits from the proposed Mombasa Road housing project on plot No. L.R.209/8790.

Bond No. 29:

Bond executed by SHL and underwriters on 1.8.80 securing the loan of Shs.15,000,000/= to SHL.

Doc. No. 30:

A copy of the floating charge in favour of underwriters to secure the obligations of the underwriters under the Bond. It is neither stamped nor registered.

Doc. No. 34

Doc. No. 38

Doc. No. 46

Doc. No. 51

They show that the original Bond (Doc. No. 29) was amended, a fresh letter of offer from the bank to SHL issued and a fresh Bond (Doc. No. 51) executed by the underwriters on 12.2.81.

Doc. Nos. 40 and 44:

Letters dated 25.9.80 from the defendant to 2nd and 3rd plaintiffs respectively confirming that Mr. Sadru Rahimtulla has drawn up and executed the necessary "Counter guarantees and legal charges" on SHL's assets.

Third Category:

This relates to demand and search for security by defendant from S. Rahimtulla and SHL.

Doc. No. 54:

Letter dated 22.4.81 from defendant to Mr. S. Kuria of SHL and copied to Mr. S. Rahimtullah reminding him that, he Mr. S. Rahimtulla had not implemented the floating charge and threatening to instruct another firm of lawyers unless he, S. Rahimtullah is able to finalise the matter.

Doc. No. 55:

Letters dated 25.4.81 and 27.5.81 from S. Rahimtullah to the defendant confirming that the charge has never been stamped or registered though executed on 1.8.80 because defendant did not pay stamping charges.

Doc. No. 57:

File note dated 3.6.81 made by R. N. Sampson Advocates of Archer & Wilcock Advocates concerning a meeting he had with S. Rahimtullah concerning security interceding on behalf of the defendant. The note contains a record of what was discussed. Among the thing discussed, was the ownership of the two properties on Ngong Road and Mombasa Road alleged to belong to SHL. Mr. S. Rahimtullah said that he checked on the ownership of Ngong Road property and found that it was not registered in the name of SHL but in the name of Kuster Developers or another Kuster company. He however, agreed to check on the ownership of Mombasa Road Property and inform Mr. Sampson. Another matter discussed was the viability of SHL and Mr. Rahimtulla is noted to have said that he was thinking of resigning as a director because of its lack of viability.

Doc. No. 58:

Letter dated 20.5.81 from Mr. Rahimtullah to M/s. Archer & Wilcock Advocates confirming that he had not been given instructions by defendant to search title No. L.R. No. 209/8790 (Mombasa Road property) but has since searched the title and discovered that no title had been granted and that that property was being developed by Kuster Developers, an associated company of SHL. By that letter Mr. Rahimtullah forwarded the five copies of the unstamped and unregistered floating charge (Doc. No. 30).

Doc. No. 59:

Letter dated 28.5.81 from M/s. Archer & Wilcock to the bank stating that the Bond was conditional upon adequate security being given by SHL and inquiring how much money has been disbursed to SHL.

Doc. No. 60:

Letter dated 28.5.81 fro Mr. Ransley of M/s. Archer & Wilcock to Mr. S. Rahimtullah stating, inter alia, that they have been instructed by the defendant on behalf of the sureties and that the floating charge (Doc. No. 30) is useless as SHL has no assets.

Doc. No. 61:

Note made by defendant dated 29.5.81 showing that the title deeds for Ngong Road property and Mombasa Road property have been charged by Kuster Developers to Prudential Insurance Company to secure bonds worth Shs.12 million and that there are no other assets to charge.

Doc. No. 63:

Letter dated 3.6.81 from the bank to M/s. Archer & Wilcock confirming that the entire Kshs.15,000,000/= has been fully disbursed to SHL.

Doc. No. 69:

Letter dated 30.6.81 from defendant to M/s. Archer & Wilcock impressing upon them to obtain a valid security as a counter guarantee for the Bond issued by underwriters.

Fourth Category:

These documents relate to proceedings in H.C.C.C. No. 1428 of 1982 and subsequent payment of the decretal sum by the plaintiffs to the bank.

Doc. No. 73:

Decree given on 14.6.84 and issued on 30.4.85.

Doc. No. 74:

Settlement, Agreement between the bank and 3rd plaintiff dated 4.1.85.

Doc. No. 74A:

Letter from 3rd plaintiffs advocates to bank advocates enclosing a bankers cheque for Shs.3,514,562/=.

Doc. No. 75:

Dishcharge dated 5.6.87 by which the bank discharged the first plaintiff upon payment of Shs.7,087,770.

Doc. Nos. 76, 77 and 78:

Settlement Agreement and copy of the cheque for the 5,060,696/= paid by the second plaintiff to the bank.

SUMMARY OF FACTS AS EXTRACTED FROM BUNDLE OF CORRESPONDENCE

Having examined the correspondence the following broad facts, in my view, emerge from the correspondence:

Sometimes in early 1980 SHL through the defendant approached the bank for a bridging loan of Shs.20,000,000/= for construction of luxury apartments on plot No. L.R. No. 209/4808 along Ngong Road allegedly owned by SHL. The bank agreed to advance the money on condition that the loan was guaranteed by SHL and by Insurance companies. SHL then instructed the defendant, an insurance broker, to arrange a syndicated insurance guarantee up to Shs.20,000,000/= against the security of the land. The defendant then negotiated with five insurance companies (including the three plaintiffs) who agreed to give the guarantee provided that SHL offered security over the land on which the housing scheme was to be developed. They also required payment of premium and that all the insurances connected with the project would be placed with them rateably. They also agreed to pay the defendant 10% commission.

SHL and the five insurance companies thereafter executed the Bond (guarantee) which was forwarded by the defendant to the bank by a letter dated 2.4.80.

By a letter dated 28.5.80 the defendant on behalf of SHL instructed Mr. Rahimtulla, an advocate, to draw a floating charge over the assets of SHL in favour of anyone or more of the specified five insurance companies. The defendant in that letter informed Mr. Rahimtulla that SHL owned plot No. L.R. 209/4808, Ngong Road, which was shortly to be developed into a luxury apartments complex. The floating charge was to be approved by the five co-sureties (Doc. No. 17).

There was some delay by the bank in releasing the money to SHL. In the meantime, Mr. Silvester Kuria of SHL then met the defendant and gave it instructions that the Bond already executed be transferred to the Mombasa Road project. Formal instructions were given to the defendant by a letter dated 8.7.80 by which a detailed plan and site plan of the proposed project was forwarded to the defendant. The defendant then held a meeting with the underwriters. The underwriters agreed to execute a new bond for Shs.15,000,000/= on the previous terms and conditions.

The bank was advised by the defendant of the new development and asked to return the original Bond while accounting for a fresh new Bond. The defendant drew up the new Bond but informed SHL by a letter dated 15.7.80 copied to the underwriters that it was unable to release the Bond until legal charges have been completed. Nevertheless, the Bond was executed by four underwriters on 1.8.80 and lodged with the bank by the defendant. The bank forwarded the bond to its lawyers and eventually the Bond was amended and re-executed by the plaintiffs only on 12.2.81 restricting the plaintiffs' liability to 39%, 36% and 25% respectively. The bank then disbursed the entire Shs.15,000,000/= to SHL before 3.6.81. Pressed by the three plaintiffs for a copy of the charge, the defendant wrote to Mr. Silvester Kuria on 22.4.81 urging him to impress upon Mr. S. Rahimtulla to implement the floating charge. Mr. S. Rahimtulla by a letter dated 25.4.81 informed the defendant that the floating charge was executed on 1.8.80 but it was not stamped or registered as the defendant did not pay the stamping charges.

The defendant then instructed M/s. Archer & Wilcock (its current lawyers) to act for it on behalf of the sureties. M/s. Archer & Wilcock wrote to both SHL and Mr. S. Rahimtullah. Mr. S. Rahimtulla denied that he had been instructed by the defendant to search the title but confirmed that on a subsequent search he discovered that title to L.R. 109/8790 had not been granted (to SHL) and that the property was being developed by Kuster Developers, an associated company of SHL and S. Rahimtullah released five copies of the unstamped and unregistered floating charge to M/s. Archer & Wilcock vide a letter dated 20.5.81.

The defendant and its lawyers in the process discovered that Kuster Developers had in fact mortgaged plots Nos. L.R. 209/4808 – Ngong Road and L.R. 209/8790 to Prudential Insurance Company and that SHL had no assets and no security was therefore forthcoming.

SHL on its part did not implement the project or pay the loan to the bank. The bank then filed *Civil Suit No. 1422 of 1982* in the High Court against SHL and the plaintiffs which resulted in a decree against each plaintiff in the sum earlier mentioned which sum each plaintiff duly paid to the bank.

Some 19 agreed issues were at first filed but later 4 further issues were filed. I should consider issues Nos. 16, 17, 18 and partly issue No. 19 (other than damages) at this stage and consider the other issues generally when discussing the issue of liability. The above four issues arise from the averments in paragraphs 10, 11, 12 and 13 of the plaint. The defendant pleads that it is unaware of the matters pleaded in paragraphs 10 and 11 and neither admits nor denies them and puts the plaintiff to strict proof thereof. The certified copy of Decree in *H.C.C.C. No. 1422 of 1982* is among the documents exhibited in the bundle. Other documents which I mentioned under the heading "Fourth Category" are also in the bundle. There is no other evidence, documentary or otherwise, to contradict those documents, and, on the basis of those documents I find that the Bank filed the suit against the plaintiffs, and obtained a decree for the amounts specified and that each plaintiff satisfied the decree. I am further satisfied that each plaintiff suffered financial loss to the extent of the sum paid under the decree.

The facts recited indicate that SHL did not have any assets and it is obvious that the plaintiffs did not have any security over the properties of SHL. But I am not satisfied that the plaintiffs have shown that SHL is insolvent. However, it is clear that these proceedings against the broker have arisen because the plaintiffs do not hold any security from SHL and are unable to recover the money paid to the bank under the decree from SHL. Moreover, I do not consider the issue of insolvency of SHL relevant to this suit. The issue would have been relevant if the proceedings were between the bank and underwriters or vice versa or if the defendant contends that liability cannot arise unless SHL is insolvent.

LIABILITY IN CONTRACT:

Mr. Deverell for the plaintiffs appreciates that the normal rule in an insurance transaction is that the broker is the agent of the assured and not the agent of the underwriters; but submits that the general rule does not apply in this case as the Bond was a financial guarantee. He contends that the facts in this case show that the defendant became the agent of the plaintiffs for purpose of arranging securities required resulting in a contractual relationship giving rise to a duty of care.

Mr. Ransley for the defendant on the other had, contends that the defendant was always the agent of SHL and that what we have here is no more than a transaction between a broker, his client and insurance companies which lacks the elements of contract.

Mr. Deverell relies on the total circumstances of the case as proof that defendant was the agent of the plaintiffs, and, in particular, the implied admission in Doc. Nos. 26, 59 and 65. In Doc. No. 26 the defendant, in arguing for enhanced commission dated:

“However, as I have requested that we be allowed 15% commission for arrangement of this contract, a request motivated conclusively due to the number of man hours involved in discussions concerning arrangement of counter indemnities and securities for the benefits of underwriters I would like to propose that the rate remains at 2.5% and we be allowed 15% commission”.

In both documents Nos. 59 and 65, M/s. Archer & Wilcock say that they act for defendant who is the broker responsible for the Bond and in connection with the security which SHL agreed to give.

There are other correspondence e.g. documents Nos. 54, 60 and 69 which show that the defendant appreciated that it was his duty to obtain a valid guarantee for the Bond from SHL.

In paragraph 6 of the plaint, plaintiffs plead that the defendant acted as a broker in the transaction and that it was agreed that the defendant would be paid commission by the plaintiffs. It is pleaded in the same paragraph, in the alternative, that the defendant as a broker took upon itself the task of arranging provision of security over the land on which the housing estate was to be developed for the benefit of the plaintiffs. In response to the pleading in paragraph 6 of the plaint, defendant in paragraph 2 of the Further Amended Statement of Defence, admits that the defendant acted as a broker in the transaction and that the plaintiffs were to pay the brokerage. But the defendant denies that it took upon itself the task of arranging the provision of security. The defendant further pleads that any assistance it gave to plaintiff in trying to obtain security in favour of the plaintiffs was done gratuitously and in order to assist the plaintiffs but without any legal obligations on the defendant’s part. In addition, Mr. Ransley for the defendant stated in his submissions that he is not denying that the defendant did seek to make arrangements to obtain security documents.

The burden of proof is however, on the plaintiffs to establish a contract between themselves and the defendant as a broker. It is apparent from the plaint that the contract, and its ambit is not pleaded and it seems that the plaintiffs are asking the court to imply a contract from the totality of the circumstances. If such a contract is to be implied, then, the plaintiffs face similar problems as the plaintiffs in **JOHN N. PRYKE & OTHERS V GIBBS HARTLEY COOPER LTD** (unreported English High Court decision handed down on 11.10.90).

The plaintiffs have to prove a contract with an identifiable ambit to which identifiable terms can be implied. As it was said in that case, it does not follow that because the underwriters pay brokerage that the broker is undertaking to perform any obligations in favour of the underwriter and that the mere carrying out of functions by the brokers during their normal course of his business for the benefits of underwriters does not itself establish any contract to carry out those functions.

The plaintiffs have also to cope with the law. The general rule is that an agent may not act for both parties to a transaction unless he ensures that he has fully disclosed all the material facts to both parties and has further obtained consent to act in dual capacity – (see **ANGLO AFRICAN MERCHANTS LTD VS. BAYLEY** [1970] 1 Q.B. 311 at page 323). However, notwithstanding conflicts of interest arising from dual role of an agent, if there are some acts which were done by the agent for underwriters, then,

such acts must be recognized and legal consequences given effect to them. (See *NORTH AND SOUTH TRUST CO. LTD. VS. BERKELEY* [1970] 2 Lloyd's Rep. 467).

Thus the plaintiffs have to satisfy the court that the defendant was properly acting as agent of the plaintiffs notwithstanding that it was undoubtedly an agent for SHL.

The differentiation between a contract of insurance and a contract of guarantee is of no consequence as regards the role of the defendant in this case. Mr. Thomas Kithinji, an experienced insurance broker, did not, in his written evidence see the role of an insurance broker as materially different from the role of a broker who negotiates a contract of guarantee. According to him, the function of a broker in a contract of guarantee is that of a go-between operating between the other three parties, that is, the borrower, surety and underwriter much the same as the functions of an insurance broker. It is not certainly the character of the commercial transaction which determines whose agent the broker is but the essence of the transaction. Thus even in contracts of insurance the broker is not always the agent of the assured. In *The Zephyr* [1984] 1 Lloyds, Rep. 58, relied on by the plaintiffs to support liability in tort, a shipowner engaged a Lloyds Insurance broker to get cover for the ship. The broker approached the underwriters who in accepting to insure the ship ordered reinsurance from the same broker. The reinsurers wrote their respective lines on representations by the broker that their liability as signed would eventually be reduced to one third when the reinsurance slip is fully subscribed by the other prospective reinsurers to fully subscribe the reinsurance slip thereby leaving the reinsurers who had already, signed their lines liable to the extent of the signed lines. The ship was seriously damaged. The underwriters paid the shipowner and claimed indemnity. The reinsurers refused to pay the underwriters and repudiated liability. In an action by the underwriters against the reinsurers for indemnity, and, alternatively against the broker the reinsurers made a claim over the broker in contract or in tort in respect of the excessive liability under the insurance cover. The reinsurers in support of the claim in contract against the broker argued, among other things, that, the signing indication (that liability would be one third of the signed lines) given by the broker to the reinsurers was a collateral warranty or promise by the broker in a personal capacity and that the broker was liable for any breach of this contractual undertaking. That argument led to the examination of the role of the brokers in the transaction. The court however found that from the law and the facts of the case, the brokers were not at any time in the reinsurance transaction acting either as agents of the ship owners or of the reinsurers but as agents of the reassured (underwriters).

Further, the court while perfectly recognizing that a broker can be held personally liable in contract for breach of a collateral promise or warranty, held that the signing indication was not contractual because the signing indication given was not such as to take the indication given out of the ambit of the ordinary signing indications as given every day by Lloyds brokers in the market. The reinsurers claim in contract against the brokers failed but their claim in tort succeeded.

In order to properly assess the function of the defendant as a broker in the contract of guarantee under consideration, the documents relied on by the plaintiffs must not be construed in isolation but in the context of the total circumstances of the case. In essence, the transaction involved three parties namely, SHL via the broker, the bank and the underwriters. The transaction took this form: SHL wanted a bridging loan from the bank to undertake a housing development scheme. It engaged the defendant as a broker to procure the loan. The defendant approached the bank which agreed to finance SHL's project and offered the loan on conditions contained in the commitment letter dated 16.9.80 (Doc. No. 38). The important condition was that the loan should be guaranteed by Insurance companies (the three plaintiffs) by way of a performance Bond. SHL then instructed the defendant to arrange the Bond (Doc. No. 1). The defendant then approached the plaintiffs. There is no correspondence from the plaintiffs to show what was agreed and the conditions they wanted fulfilled by SHL, if any. But there is correspondence from the defendant and from its lawyers that the plaintiffs agreed to give the guarantee provided, *inter alia*, that, SHL offered security by way of a floating charge over the land on which the housing scheme was to be developed. I have no doubt that the defendant represented to the plaintiffs that SHL owned the land on which the housing project was to be developed. The defendant then instructed Mr. S. Rahimtulla advocate on behalf of SHL to draw the floating charge for approval by the plaintiffs.

Suppose that the bank instead of asking for a Bond from the plaintiffs asked SHL via the defendant to

prepare the charge for approval by the bank. Would that constitute the defendant as an agent for the bank for arranging the provision of security over the land? I think not, for the defendant would still be performing the duties of an agent for SHL. Suppose further, that, the bank upon being approached by the defendant did not demand any security but instead ordered insurance against the possibility of SHL failing to pay the debt via the defendant from the plaintiffs (Financial Guarantee Insurance). On the authority of *The ZEPHYR*, (supra), the defendant would be acting as agent of the bank in procuring the financial guarantee insurance policy from the plaintiffs. The defendant would be the agent of the bank, because, the contract for provision of the financial guarantee policy is an entirely independent transaction for which SHL is not interested and in which there is no conflict of interest as regards the function of the defendant. Such is not the case here. Looking at the transaction as a whole, the defendant was distinguishably acting as agent of SHL in procuring the loan and the Bond. Even when the defendant was instructing Mr. S. Rahimtulla to draw the floating charge, it was doing so on behalf of SHL and not on behalf of the plaintiffs (Doc. No. 11). It seems that there is no concrete act that the plaintiffs required the defendants to do in connection with the security other than the transmission of the floating charge to the plaintiff for approval. If, indeed, the court were to find that there was a contract between the plaintiffs and the defendant, a conflict of interest would arise, for, the defendant would owe allegiance to both the plaintiff and SHL in the same transaction. The defendant would be open to a possible action by SHL for failure to handle the provision of the Bond by plaintiffs skillfully while at the same time, exposing the defendant to liability for failing to secure the Bond as is the case here.

It is possible to maintain an action in contract against the defendant for representations that the defendant made to the plaintiffs if the plaintiffs can show that the representations were warranties or promises which induced them to provide the bond. (See *Esso Petroleum Co. Ltd vs. Mardon* [1976] 1 Q. B. 801). But as I understand the plaintiffs case, it is not shaped that way and I should not say anything more on the representatives.

I conclude from the above, that, plaintiffs have not proved that there was any contract in law which the defendant breached.

LIABILITY IN TORT:

After pleadings that the defendant acted as a broker in the transaction, and, alternatively, that, the broker took upon itself the task of arranging the provision of security over the land, the plaintiffs pleaded in paragraphs 7, 8 and 9 thus:

“7. In the circumstances the defendant owed a duty of care, both contractually and in tort, to the plaintiffs to take reasonable care to inform the plaintiffs of all the circumstances of Silverster Holdings Ltd. relevant to the transaction and to take reasonable care in the arrangement of the provision of the said security.

8. In breach of this duty, the defendant negligently:

(a) Assured the plaintiffs that Silverster Holdings Ltd was the owner of the land (the property) on which the housing development was to take place; and

(b) Assured the plaintiffs that Silverster Holdings Ltd. would grant to the plaintiffs a legal charge over the property to secure the liability of the plaintiffs under the guarantee bonds; and

(c) Assured the plaintiffs that the legal charge over the property had been executed; and

(d) Released the bond executed by the plaintiffs to the Bank without first making sure that the legal charge over the land was completed.

Whereas infact Silverster Holdings Limited never owned the property and no valid charge was ever executed in favour of the plaintiffs by Silverster Holdings Ltd or any other person.

PARTICULARS OF NEGLIGENCE:

- (a) *Failed to take any or any reasonable steps to ascertain whether or not the property was owned by Silvester Holdings Limited;*
- (b) *In the alternative to (a), being aware that the property was not owned by Silvester Holdings Ltd. nevertheless the Defendant assured the Plaintiffs that it was so owned or, alternatively, left the plaintiffs under the impression that it was so owned;*
- (c) *Failed to take any or any reasonable steps to ascertain whether or not Silvester Holdings Ltd. has executed a legal charge over the property in favour of the plaintiffs.*
- (d) *In the alternative to (c), being aware that the defendant had not and could not execute a legal charge over the property not owned by the defendant, nevertheless assured the plaintiffs that such a charge had been executed.*

9. *In reliance upon the said assurances by the Defendant and in reliance upon the belief that the Defendants would arrange the provision of the said security with reasonable care each of the plaintiffs entered into the Bond in favour of the Bank guaranteeing the liability of Silvester Holdings Limited to repay the loan advanced by the bank*

If the defendant had informed the plaintiffs of the true facts the plaintiffs would not have participated in the said scheme at all”.

The defendant in its defence denies that it held itself in contract or tort as owing any duty of care. It denies making the representations as alleged in paragraph 8 of the plaint and also denies the allegations of negligence contained in the same paragraph. It denies the contents of paragraph 9 of the plaint and pleads generally that the plaintiffs entered into the said transaction in reliance upon their own judgment and upon their own inquiries and upon the information received from the bank.

In paragraph 8 of the defence, the defendant, in the alternative, pleads that the plaintiffs provided the performance Bond carelessly or recklessly without ascertaining that the Bank financing the project adhered to the terms outlined in the letter of 16.9.80 such negligence being the failure by the plaintiffs to ascertain what value (if any) the security offered was, and, in executing the guarantee before the security had been perfected.

The plaintiffs rely on the **HEDLEY BYRNE & CO. LTD. VS. HELLER AND PARTNERS LTD** [1963] 2 All. E.R. 575 and the many cases which followed it, to support the defendant’s liability in tort. From the principles stated in that case and in the many decisions which have applied it, it is clear that what in essence the court has to decide is, firstly, whether in the circumstances of this case, the defendant owed a duty of care to the plaintiff having the scope which is pleaded; secondly, whether the defendant was in breach of that duty; and thirdly, if so, whether the plaintiffs suffered consequential loss. The case law e.g. **Smith vs. Eric S. Bush** (a firm) [1989] 2 All E.R. 514; **Caparo Industries PLC vs. Dickman and Others** [1989] 1 All E.R. 798; **John W. Pryke & Others vs. Gibbs Hartley Cooper Ltd.** (supra), to cite just a few, show that a duty of care only arises if three conditions are proved in each case, viz, foreseeability of loss, proximity of the plaintiff to the defendant, and that it is fair just and reasonable that the defendant should owe a duty to the plaintiff. Of the three conditions, proximity is the most problematical and Taylor LJ had to conclude in **Caparos** case, (supra) at 819, thus:

“In my judgment it is not possible to lay down one precise test or set of tests applicable in every situation to show whether the necessary proximity is established. In each case, the court must inquire how close and direct a relationship exists between the parties and whether the defendant should have had the plaintiff in contemplation as a person who would or might rely on the relevant statement”.

In **Hedley Byrne** Lord Morris said at page 594 paragraph B:

“My Lords, I consider that it follows and it should now be regarded as settled, that, if someone possessed of a special skill undertakes, quite irrespective of contract to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by instrumentality of, words can make no difference. Furthermore if, in a sphere in which a person is so placed that others would reasonably rely on his judgment or skill on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to another person who as he knows or should know, will place reliance on it, then a duty of care will arise”.

And Lord Devlin said in the same case at page 608 paragraph T – G:

“The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently the promise can recover in action in tort”.

The authors of ***Charlesworth and Percy on Negligence*** – 8th Edition, note at paragraph 2 – 117 – foot note at page 81 that:

“Misstatement include silence and inaction on the part of the defendant if there is an obligation to speak out or to take some active step or other”.

In the majority of case, it is easy to identify a misstatement be it a report or an oral statement and apply the principles in ***Hedley Byrne*** case. In other cases it may be difficult to determine whether the conduct complained is a misstatement within ***Hedley Byrne*** principle or a conduct falling within the scope of the wider principle of common law duty of care under ***Donogue vs. Stevenson*** [1932] AC 562. By way of example, in ***Anns v. Merton London Borough Council*** [1978] AC 728, one of the two issues that arose was whether a local authority is under any duty of care towards the owners or occupiers of houses constructed by builders as regards inspection in the building process. The House of Lords concluded that the Council acting through their building inspector, if and when he inspected the foundation, owed a duty to owners or occupiers to carry out the inspection with reasonable care and skill, and that, if the Council was found to have breached that duty, it would be liable in tort apparently on the principle in ***Donogue v. Stevenson*** (supra).

Similarly, in ***Batty v. Metropolitan Property Realisations Ltd*** [1978] Q.B. 554, one of the issues that arose was whether a developer of a housing scheme and a builder owed a tortious duty to a purchaser of one of the houses in the housing scheme for damage to the house caused by a severe slip of the natural strata in the hillside below the house. The Court of Appeal concluded that the developers and the builders owed a duty of care to prospective buyers to examine with reasonable care, the land (including adjoining land) in order to see whether the site was one on which a house fit for habitation would safely be built. Again, that tortious liability was apparently based on the principles in ***Donogue v. Stevenson***: I have referred to this aspect of the case law because the main act of negligence relied on by the plaintiffs in this case is the failure by the defendants to take any or any reasonable steps to ascertain whether or not the property was owned by SHL. It may be that the justification for applying the ***Donogue v. Stevenson*** principle in what I may call “house-defect” cases and not the principle is ***Hedley Byrne*** lies, as Lord Salmon said in ***Anns*** case (supra) at page 769 C-D, in the fact that, the loss to the house owner is not caused by reliance placed by plaintiff on the Council (or builders and developers) but by the fact that if the inspection had been carefully made, the defects in the foundation would have been rectified before the erection of the building began.

I now revert to the facts of the case to determine if there was a duty of care relationship as alleged, and, if so, whether the defendant breached the duty of care as alleged in paragraph 8 (a) – (d) of the plaint.

Mr. Deverell submits that the duty of care arose from the following salient points:

1. *Defendant knew that plaintiffs required a charge on SHL's land.*
2. *Defendant knew that plaintiffs were relying upon them.*
3. *Defendant in fact made all the arrangements, and*
4. *Defendant told the plaintiffs that they would not release the Bond to the Bank until the charge was in place.*

Mr. Ransley submits, among other things, that there was no special relationship between plaintiffs and defendant other than the relationship of an insurer and broker; that defendant had no special skill in arranging securities; that defendant relied on Mr. S. Rahimtulla Advocate to draw up the securities which were in fact drawn up; that Mr. S. Rahimtulla knew that he was being relied upon by the plaintiffs and that the defendant genuinely believed that Mr. S. Rahimtulla had prepared the floating charge.

I have found that there was no contractual relationship between the plaintiffs and the defendant. It is also true that the defendant is an insurance broker and not a general commission agent while plaintiffs are insurance underwriters. There is however no doubt that, irrespective of the specialized business of the defendant, the defendant was engaged by SHL to arrange a commercial transaction with the Bank and plaintiffs of a big magnitude. It is denied that the defendant voluntarily undertook the task of arranging the provision of security over the land for the benefits of the plaintiffs, but, it is conceded that the defendant gave assistance to the plaintiffs in trying to obtain a security in favour of the plaintiffs.

There is of course no specific correspondence from the defendant promising the plaintiffs that it would arrange the provision of security on behalf of the plaintiffs. But there is correspondence to show that it is the defendant which went about the task of making sure that the defendant's principal (SHL) provided security in favour of the plaintiffs in consideration of the Bond. Considering that the Bond was being provided for the benefit of the defendant's client, I have no doubt that it is the defendant who approached the plaintiffs for provision of the Bond and that the plaintiff informed the defendant that they needed security for the Bond over the lands of SHL. Defendant would have been interested to see the transaction through by assuring the plaintiffs that it would ascertain that SHL provided the required security.

Correspondence testify to that. In Doc. No. 23, the defendant advises SHL that though the Bond had been executed by the plaintiffs it was unable to release it to the Bank until legal charges has been completed and asks SHL to follow Mr. Rahimtulla. In Document No. 26, Defendant claims a percentage of commission justified by the amount of work he had done in the discussions concerning arrangements of counter indemnities and securities for the benefit of plaintiffs. In Doc. No. 11, defendant instructs Mr. Rahimtulla on behalf of SHL to draw a floating charge over assets of SHL to be granted to the plaintiffs.

In Doc. No. 7, the defendant told the third plaintiff that the advocates preparing the charge had promised to forward a draft to the defendant for approval by the plaintiffs. By Doc. 21 defendant, while asking the plaintiffs to sign new Bond, informs them that defendant is awaiting the legal charge which would be forwarded to the plaintiffs very shortly. By Doc. No. 40 and 44, defendant confirms to 2nd and 3rd plaintiffs that Rahimtulla has drawn up and executed the necessary counter guarantees and legal charges. By Doc. No. 54, defendant informs SHL that Mr. S. Rahimtulla has not drawn up a floating charge and that the defendant is reminded constantly by insurers. Doc. No. 30 is in fact a copy of the floating charge drawn by S. Rahimtulla. In Doc. Nos 3, 6, 7, 10, 14, 25, 39 and 64, the third plaintiff is demanding a copy of the charge from the defendant. I referred earlier to correspondence falling under the third category showing the defendant's demand and search for security from Mr. S. Rahimtulla and from SHL.

Lastly, I should mention that documents Nos. 2, 11 and 19 show that it was the defendant who was given instructions by SHL regarding the two housing projects, the value of the securities and the nature of the securities.

It is contended for the defendant that in agreeing to provide the Bond, the plaintiffs relied upon their own judgment and upon their inquiries and upon information received from the Bank and not upon any statement or representations made by the defendant. The commitment letter dated 16.9.80 has been particularly mentioned. But that letter (Doc. No. 38) is addressed to SHL and is marked "Private & Confidential". Further it does not disclose the securities or the value of the securities that SHL owned. There is no evidence that the letter was received by the plaintiffs and in any case, even if it was so received, it would not have offered any assistance to the plaintiffs regarding the securities owned by SHL. It would only have confirmed the fact already known to plaintiffs through the defendant, that, the Bank had agreed to provide a Shs.15 million bridging loan to SHL for the construction of a medium income housing project.

There is no evidence that the plaintiffs had other facts regarding SHL other than the ones provided by the defendant or that the plaintiffs sought legal advice on the deal. We have however the evidence of Mr. Thomas Kithinji (P.W.1) and Mr. Terence Christopher Goss (P.W.2) that it is normal for an insurance company to rely on what it is told by an insurance broker. Mr. Kithinji testified, in particular, that, underwriters tend to be much influenced by the presentation coming from the insured through a reputable broker and that the underwriter relies on the broker performing competently any function which the broker takes upon himself to perform. With reference to the circumstances of this case, Mr. Kithinji testified that, if he, as a broker, took upon himself the task of coordinating and procuring the performance of underwriter's requirements as to security, he would most certainly regard himself as under a duty to the underwriters to perform such functions carefully and would, further, expect the underwriters to rely upon what he tells them in that regard. Although the plaintiffs and defendant were not dealing in relation to a contract of insurance, the identity of defendant as a reputable insurance broker was well known to the plaintiffs and it was reasonable for the plaintiffs to expect the defendant to discharge its duties and obligations expected of an insurance broker.

We have also evidence that financial guarantees are very risky unless secured by a physical security and that the law of Kenya does not now allow Insurance Companies to undertake financial guarantees. These facts were within the knowledge of the defendant as an insurance broker.

It is evident from all the above that, the defendant knew that the Bond must be secured by a charge over SHL's land; that defendant undertook the task of providing the security as required on behalf of the plaintiffs to its completion; that plaintiff's role with regard to provision of security by SHL was merely to approve or, otherwise, the charge documents when transmitted by the defendant, and, that, the defendant knew that it was being trusted by the plaintiffs to perform that task competently. As it is the defendant which had instructions regarding the lands of SHL and their value and also knew that plaintiffs required the Bond to be secured, it must have made the representations or given the assurances in paragraph 8 (a) – (c) in plaint to the plaintiffs.

Even if there was no formal undertaking by the defendant towards the provision of security, the fact that the defendant, as conceded, gratuitously embarked on that task on behalf of the plaintiffs is enough to create the special relationship on which tortious duty is founded.

The defendant and the plaintiffs had a close and direct relationship and the defendant knew that an unsecured financial guarantee was very risky. It released the Bond to the Bank before seeing the charge and before the approval of the charge by the plaintiffs contrary to its assurances. The plaintiffs' loss was clearly foreseeable.

It is however argued on behalf of the defendant, that, the defendant being an insurance broker was not specialized in the arrangement of security and that its trust on Mr. S. Rahimtulla is sufficient to absolve it from the duty of care. I have been particularly referred to the Kenya case of ***Marianne Ingrid Winther v Arbon Langrish*** [1966] EA 292 which is apparently the first local decision to apply the principles ***Hedley Byrne*** three years after the decision. According to ***Hedley Byrne***, the advice or information has to be given in the ordinary course of business or professional affairs. It is true that in ***Marianne Winther*** case, the court referred to the business of an insurance broker in effecting aircraft insurance with underwriters in London as a specialized class of insurance business and the insurance broker as a person possessed of

special skill and experience in the matter of aircraft insurance. Apparently, the court was referring to the special circumstances of that case. As the law stands now, I doubt that the decision could have been different if the broker was an ordinary professional insurance broker and the risk an ordinary insurable risk. Brokers have been found negligent for failing to carry out their normal services to their clients skillfully – see London Borough of Bromley v Ellis [1971] 1 Lloyd's Rep. 91; Osman v Ralph Moss Ltd. [1970] 1 Lloyd's Rep. 313.

The defendant's counsel is revisiting the decision in Mutual Life and Citizens' Assurance Co. Ltd. v Evatt [1971] AC 793 whose correctness has been doubted and which has not been followed. But even in that case, the majority decision accepted that a person giving advice although not carrying on the business or profession, generally would be liable if he professed to possess skill and competence in the subject matter of inquiry comparable to those who carry out that profession and that he was prepared to exercise comparable skill and competence (page 806 A and B). In Esso Petroleum vs Mardon (supra) Ormrod L.J at page 827 D preferred the minority judgment in Evatt's case.

The hypothetical illustration given by Lord Devlin in Hedley Byrne at page 612 B, C, has indeed gained legal recognition. Finally, Batty's case affirmed that liability in tort was not confined to where either a person conducted a common calling or is a professional man in relation to his skills.

The defendant has put much weight to the fact that it was not competent to do a search at the Lands Registry or to draw a legal charge. Mr. S. Rahimtulla has in the correspondence stated that the defendant did not ask him to do a search of SHL's properties. This has not been denied by defendant. Indeed, the letter dated 28/5/80 (Doc. No. 11) by which defendant instructed Mr. S. Rahimtulla does not require that a search be done in respect of title No. L.R. 209/4808 Ngong Road. Even after receiving instructions from Mr. Silvester Kuria and receiving plans in respect of Mombasa Road property (see Doc. No. 20 and 21), the defendant did not instruct Mr. S. Rahimtulla to do a search in respect of the Mombasa Road property. As Mr. Christopher Goss (P.W.2) states, the defendant could have asked Mr. Rahimtulla or its lawyers, M/s. Archer & Wilcock to do a search.

The charge eventually prepared by Mr. Rahimtulla and which the defendant had not seen until long after the Bank had released the money to SHL was worthless as the SHL did not own either of the properties or any other known assets. The defendant's defence would have been reasonable if SHL had land and other assets but Mr. Rahimtulla drew a defective charge which could not be legally enforced by the plaintiffs. Plaintiffs' loss emanates not from a defective charge but from the fact that there was no land or assets which would have formed the basis of the charge. The defendant, even without any legal experience, or, a search would have been able to establish whether or not SHL owned any land or assets by asking SHL to hand over the documents of title to the defendant before going about to obtain a Performance Bond or even before instructing Rahimtulla.

In the alternative, the defendant alleges that plaintiffs provided the Bonds carelessly or wrecklessly without ascertaining that the Bank in financing the project had properly adhered to the terms outlined in its letter of 16th September 1980. No particulars of that defence were given and nothing was said to support it. I have, however, perused the letter of 16/9/80 (Doc. No. 38). It is clear from that letter that one of the conditions precedent to the initial borrowing was the receipt by the bank of the guarantees provided by the guarantors. I cannot find any terms or conditions that the bank had to fulfill before funding the project nor is it possible to say if such terms or conditions, if any, were breached by the Bank.

It is further alleged that the plaintiffs were negligent in not ascertaining what value (if any) the security offered was and in executing the guarantee before the security had been perfected.

It is true that Mr. Kithinji in his evidence testified that he would expect a prudent insurer who entered into a financial guarantee to do an inquiry before giving the guarantee and insist on tangible security. But he also testified that whether or not it is prudent for insurer to release the Bond before receipt of security depends on the arrangement with the broker and that, if he trusts the broker that security will be provided, he may release the Bond. Mr. Kithinji further stated that he would expect a prudent insurer who wishes to release the Bond before he gets security to demand something in writing from the broker that security will

be provided. As for Mr. Goss, he testified that it would not have been prudent for Insurance companies before releasing the Bond to look at the charge and get legal advise because the 2nd paragraph of Doc. No. 23 shows that the Brokers understood the needs of the insurers.

According to Doc. No. 2, the defendant had been given instructions that the 5 acre plot along Ngong Road was valued between Shs.15 million and 20 million. Doc. No. 19 also shows that the defendant was given instructions by SHL that the Mombasa Road property was valued at Shs.18 million. The defendant had also been given the projections on profitability of the Mombasa Road Project (Doc. Nos. 20 and 28). The letter dated 15.7.80 (Doc. No. 23), among others, show that the defendant understood that the plaintiffs had to have security for the full extent of their commitment. The letter dated 11.7.81 from Mr. David Boorman of the defendant show that no party involved in the transactions would reasonably be expected at the time to suppose that there was no substantial assets to render the charge valuable in the event of the Bond being called. The plaintiffs agreed to execute a new Bond for Mombasa project on the advice and request of the defendant (Doc. No. 21) and before the plaintiffs signed the new Bond, the defendant had assured them that the Bond would not be released until such a time that the legal charges had been executed (Doc. No. 23). On 25.9.80, the defendant confirmed to the plaintiffs that the charge had been drawn up and executed.

Thus the value of the security that SHL was offering was known to the defendant who in turn knew that the plaintiffs had to have security for the full extend of their commitment and had undertaken to provide the security for the benefit of the plaintiffs. The value of the security as known to the defendant was adequate to secure the value of the syndicated Bond and if the value of the anticipated housing units is taken into account, the value of the security as known by the defendant not only far exceed the full extent of each of the plaintiff's commitment, but also, the joint commitment of the plaintiffs.

As the defendant did not require the plaintiffs to undertake an independent valuation of the security, and, did not disclaim liability, it was reasonable for the plaintiffs to rely in the defendant's representation.

Similarly, as it is the defendant who advised the plaintiffs to execute the new Bond though the provision of security had not been perfected, it was reasonable for the plaintiffs to rely on the defendant's representation that security to cover full extend of each of the plaintiff's commitment would be provided.

Consequently, in both case, no contributory negligence can legitimately be attributed to them.

Is it unfair, unjust and unreasonable to fix the defendant with a duty of care in the circumstances of this case? In ***Smith vs Eric S Bush*** (supra), Lord Templeman, said at page 527 h,

"It is open to Parliament to provide that member of all professions or members of one profession providing services in the normal cause of exercise of their profession for reward shall be entitled to exclude or limit their liability for failure to exercise reasonable skill and care. In the absence of any such provision valuers are not, in my opinion, entitled to rely on a general exclusion of the common law duty of care owed to purchasers of houses by valuers to exercise skill and care in valuing houses for mortgage purposes."

As far as I am aware, Parliament in this Country has not enacted any law enabling Insurance Brokers to exclude or limit their liability in tort. The defendant has not offered any reasons of policy or otherwise which would justify its exclusion from liability. It is not contended that, by holding the defendant liable, insurance brokers would be exposed to infinite liability.

It is argued, however that one of the plaintiffs is fully insured, but, in law, the defendant cannot avoid liability on the ground that the plaintiffs will be fully compensated by reinsurers. In any case, the reinsurer, if it meets the claim of the plaintiffs will ultimately have to claim from the defendant under its right of subrogation. It seems to me that the plaintiffs have no other relief. On the other hand, the defendant had taken a professional indemnity policy and a suit in pending.

In the above scenario, it is fair, just and reasonable that the defendant should compensate plaintiffs for

financial loss suffered.

The plaintiff's counsel argued that the measure of damages is the amount each plaintiff paid to the bank. This is disputed by counsel for defendant. According to him, the measure of damages is the value of the security that plaintiffs did not get. He submitted further that the loss to plaintiffs cannot be assessed unless the court knows what the property offered as security was worth.

The Plaintiffs plead in paragraph 9 of the plaint that if the defendant had informed the plaintiffs of the true facts, the plaintiffs would not have participated in the scheme at all. Mr. Terence Goss (P.W.2) testified that if the defendant had before releasing the Bond to the bank informed the plaintiffs that there was no Bond, he believes that the plaintiffs would have withdrawn the Bond if the Bond was still with the broker. The measure of damages suggested by Mr. Ransley, is, in my opinion, not the correct measure of damages in this case. It is reminiscent of the normal measure of damages in contract which damages are intended to put plaintiff in the same position he would have been if the contract was in fact performed. The general principle in awarding damages in tort is restitution – to restore plaintiff to the same position he would have been if the tort was not committed – that is to say, that, a plaintiff is compensated for the loss he has suffered as consequence of the tort. Under the *Hedley Byrne* principle, the plaintiffs are not entitled to any loss of bargain or loss of profits but only for proved losses that were directly foreseeable as flowing from the negligent statement. As was held in *Eso Petroleum v. Mardon* (Supra), the measure of damages for breach of warranty and for negligent statement was the same whether the action was founded in contract or in tort and that damages recoverable were what the plaintiffs had lost by being induced to enter into the contract.

In this case, the security was required by the plaintiffs as a counter guarantee. Each of the plaintiff's liability was stipulated in the Bond and that is the loss which was foreseen and which flows from the negligent statement. The security was intended to enable the plaintiffs to recoup the loss should loss arise from the Bond.

In law, the plaintiffs as sureties are entitled to indemnity from SHL for their liability under the Bond. The fact that they are claiming such indemnity in tort from SHL's agent does not change the principle on which damages are to be assessed. I conclude that the correct measure of damages in this case is the liability arising from the Bond which is the amount each plaintiff paid to discharge the liability. That is the loss that each plaintiff suffered.

The result is that I enter judgment for each plaintiff as prayed in the plaint plus costs and interest as prayed against the defendant.

Dated at Nairobi this 12th day of February 1993.

E. M. GITHINJI

JUDGE