JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 115/96

BEFORE: **THE HON. MR. JUSTICE FORTE, J.A.**
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	**AUDREY RAMONA CHIN**	**APPELLANT**
AND	**LASCELLES AUGUSTUS CHIN**	**RESPONDENT**

Dr. Lloyd Barnett and **Gordon Steer** instructed by
Chambers Bunny Steer for the appellant

David Muirhead, Q.C. and **Patrick Foster** instructed by
Clinton Hart & Co. for the respondent

18 February, 8, 9, 10 June, 1998 and May 10, 1999

FORTE, J.A.

I have read in draft the judgment of Downer, J.A. and agree with his reasoning and conclusion as well as the orders proposed. I have nothing further to add.

DOWNER, J.A.

By virtue of Section 16 of the Married Women's Property Act Audrey Chin applied to the Supreme Court for a declaration that she was entitled to one half of the share-holding in Lasco Foods Ltd. Lascelles Chin her former husband in response claimed that he was entitled to 249,999 shares in that Company and that Audrey's share-holding was one share as reflected on the share register. Panton, J. resolved the

dispute in favour of Lascelles and, Audrey Chin being aggrieved by that decision has sought redress in this court.

Originally Audrey had claimed an interest in 9 Acadia Drive and an Apartment in Ocho Rios. As there was a settlement in her favour with respect to those properties, the orders sought in the Originating Summons were formulated in the following manner:

> "1. What is the respective interest of the Plaintiff and the Defendant in the company known as Lasco Foods Limited?
>
> ...
>
> 7. That the Registrar of the Supreme Court be empowered to sign any and all documents to effect a registrable transfer if either party refuses or is unable to do so.
>
> 8. Such further and other relief as this Honourable Court may deem fit.
>
> 9. Such costs as are incidental to the proceedings."

To appreciate the nature of the challenge to the learned judge's order it is appropriate to set out his reasons. They read as follows:

> "Panton J.
>
> The Court has scrutinized all the documents that have been put before it. The unchallenged information supplied by the Registrar of Companies indicates that on October 27, 1994, the applicant and the respondent were the only shareholders in Lasco Foods Ltd. The applicant holds one share whereas the respondent holds 249,999. The authorised share capital of the company is $300,000 divided into 300,000 ordinary shares of $1.00 each. The issued share capital is $250,000. The company was incorporated on February 21, 1986. "

Then turning to the matter of jurisdiction the learned judge continued thus:

> "If there is an error in the allotment of the shares, these proceedings that are before me cannot correct that error."

Continuing the learned judge said:

> "The originating summons that was filed on December 9, 1993, states that the applicant is the owner in equal shares with the respondent so far as concerns their interests in Lasco Foods Ltd., and seeks an Order to be made in respect thereto."

On the merits of the case the learned judge found:

> "The evidence of the applicant does not indicate any investment by her in the incorporation of the company or in its operations, other than the fact that she worked for reward for the company; such reward she has already received."

In conclusion the learned judge said:

> "The information available to me forbids the making of such an Order. The applicant holds one share as opposed to 249,999 held by the respondent. It is therefore declared and ordered accordingly.
>
> Costs to the respondent to be agreed or taxed.
>
> Certificate for counsel granted."

There are two features to note. Firstly, the learned judge assumed that he had no power to order the rectification of the share register in these proceedings and secondly on the merits of the case he decided that Audrey had not persuaded him that on a balance of probabilities that she had made any investment in the Company so as to entitle her to one half the share-holding. It is pertinent to state at this point that counsel in the court below could have alerted the learned judge that he could have summoned the company on his own motion if he thought it necessary. Alternatively it could have been argued that this was one of those cases where the register of the company could have been rectified without the company being made a party.

The order of the learned judge stated in so far as is material:

"IT IS HEREBY DECLARED AND ORDERED:-

(1) That the Applicant owns one (1) share as opposed to 249,999 shares held by the respondent in LASCO FOODS LIMITED

(2) Cost to the Respondent to be agreed or taxed

(3) Certificate of counsel granted."

The principal submission by Dr. Barnett for the appellant wife, was that the learned judge erroneously decided that he had no jurisdiction to ascertain whether the wife had a beneficial share-holding in Lasco, and that there was a further error in his ruling, namely that the share register was conclusive evidence that the husband was the dominant shareholder.

The relevant page of the share register reads as follows:

"Date of Search:... 27/10/94 Prepared by .....

1. Name of Company *Lasco Foods Ltd.*

2. Registered Office... 38½ Red Hills Road, Kingston 10.

3. Date of Incorporation 21/2/86.....

4. Authorised Share Capital $300,000.00

   Divided into: i) 300,000 Card Shares of $1.00 each
   ii) ..... Shares of $..... each
   iii) ..... Shares of $ ..... each

5. Issued Share Capital: 250,000

a) Name of Shareholder	Address	Occupation	No. of Shares of $1.00 each
Lascelles Chin	"Halcon" Montgomery Rd. Stony Hill	Businessman	249,999
Audrey Chin	-do-	Business woman	1

b) Number of Shares issued subject to payment wholly in cash 250,000

c) Number of Shares issued as fully paid-up otherwise than in cash Nil. "

Did Panton, J decline jurisdiction as the appellant has contended.?

The critical statement in the learned judge's reasoning which demonstrated that he declined jurisdiction reads:

> "If there is an error in the allotment of the shares, these proceedings that are before me cannot correct that error."

The ample jurisdiction and powers of a judge of the Supreme Court pursuant to Section 16 of the Married Women's Property Act in part reads:

> "16. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society, as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or (at the option of the applicant irrespectively of the value of the property in dispute) to the Resident Magistrate of the parish in which either party resides; and the Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit:"

By virtue of this section

> "...there is additionally power to bring in banks or companies where books or registers relate to the property in dispute" . (See **National Provincial Bank v Ainsworth** [1963] 3 WLR 1 at 33).

Further there is the exceptional inquisitorial power after standing over the summons to direct any inquiry touching the matter in question to be made in such manner as he shall think fit. Had these features been pointed out to the learned trial judge he would not have erred in the jurisdictional issue. Also if the inquisitorial powers of the court had been invoked the Secretary of Lasco would have been summoned to ascertain who recorded the minutes exhibited. If Lascelles was aware that the company was a person in the eyes of he law he would not have acted in the way he did.

Then there is the special statutory provision in Section 16 for an appeal which states:

> "Provided always that any order of a Judge of the Supreme Court to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same Judge in a suit pending, or on an equitable proceeding in the said Court, would be; and any order of a Resident Magistrate under the provisions of this section shall be subject to appeal in the same way as any other order made by the same Resident Magistrate would be:"

It is also useful to refer to Section 17(1) of the said Act which states:

> "17.-(1) Any right of a wife, under section 16, to apply to a Judge of the Supreme Court or to a Resident Magistrate, in any question between husband and wife as to the title to or possession of property, shall include the right to make such an application where it is claimed by the wife that her husband has had in his possession or under his control -
>
> (a) money to which, or to a share of which, she was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, she was beneficially entitled, or for any other reason); or

> (b) property (other than money) to which, or to an interest in which, she was beneficially entitled,
>
> and that either that money or other property has ceased to be in his possession or under his control or that she does not know whether it is still in his possession or under his control."

The specific mention of shares in section 16 above and the power to make an order with respect to the property in dispute makes it clear that there was jurisdiction to consider the wife's equitable claim on the merits. There would also be jurisdiction to order rectification of the share register pursuant to section 115 of the Companies Act. That section reads:

> "115-(1) - If--
>
> (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
>
> (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member
>
> the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register."

Another issue to be considered was whether the documents scrutinised by the Court below, and the relevant law, made the copy of the share register supplied by the Registrar of Companies conclusive as to the beneficial share-holding of Audrey. In these circumstances it becomes necessary to examine evidence other than that which have been supplied by the Registrar of Companies to determine the outcome of this appeal.

It is true that paragraph 11 of the Articles of Association reads:

> "11. Except as required by law, no person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only as by these Articles or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder."

However, as previously stated section 16 of the Married Women's Property Act empowers this court to make an order in favour of an applicant who establishes that she is the beneficial owner of the property in dispute. In this context it is appropriate to show how Table A of the Companies Act is treated in these Articles.

Paragraph 2 of the Articles reads:

> "2. The regulations in Table A in the First Schedule to the Companies Act shall not apply to the Company except so far as the same are repeated or contained in these Articles."

As for the Minutes, paragraph 95 of the Articles states:

> "95. The Directors shall cause minutes to be made in the books provided for the purpose -
>
> (a) of all appointments of officers made by the Directors,
>
> (b) of the names of the Directors present at each meeting of the Directors and of any committee of Directors; ·
>
> (c) of all resolutions and proceedings at all meetings of the Company; and of the Directors, and of committees of Directors,
>
> and every Director present at any meeting of Directors or Committee of Directors shall sign his name in a book to be kept for that purpose."[Emphasis added]

These are important procedural safeguards and if it is found that the minutes are defective there ought to be some explanation by the Chairman as to why there was non-compliance with the Articles. There is a further safeguard provided by paragraph 58 of the Articles of Association which reads in part:

> "58. The Directors may, whenever they think fit, convene an Extraordinary General Meeting,...".

So a purported Extraordinary General Meeting which was convened without the concurrence of Audrey was void. If the minutes were regular, then Mr. Muirhead's Q.C. point that Audrey was estopped from claiming a pre-emptive right would have been sound. As it is, the point has little merit.

Reference ought to be made to section 140 of the Companies Act which reads:

> "140.-(1) Every Company shall cause minutes of all proceedings of general meetings, all proceedings at meetings of its directors and, where there are managers, all proceedings at meetings of its managers, to be entered in books kept for the purpose.
>
> (2) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.
>
> (3) Where minutes have been made in accordance with the provisions of this section of the proceedings at any general meeting of the company or meeting of directors or managers, then, until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid.
>
> (4) if a company fails to comply with subsection (1), the company and every officer of the company who is in default shall be liable to a fine not exceeding two hundred dollars."

The relevant minutes were not signed by Audrey and the evidence on this issue in her affidavit in response to Lascelles was as follows:

> "25. That on the 22nd day of April 1986 the issued shares were issued as to one share to Audrey Chin and one share to Lascelles Chin. 198 shares still remained unissued.
>
> 26. It was proposed at this same meeting that the share capital be increased by 249,800 and such new shares to rank PARI PASSU with the existing shares in the capital of the Company.
>
> 27. I exhibit marked with the letters "A.R.C. (5)" copy of these minutes signed by the Defendant.
>
> 28. That at no time were any of the 249,800 shares offered to me PARI PASSU with what I held along with the Defendant. The allotment of these additional shares to himself were done without my knowledge and contrary to the conditions under the Articles of Association.
>
> 29. I certainly would not have agreed for the Defendant to virtually give me a nil interest in a company that I had operated from its birth so to speak. That I had been employed to Touche Ross Thorbourn & Co. as Audit Supervisor and could have if I chose obtained employment at any number of large corporations at salaries far superior to what I had been getting as the drawings, I received from the company."

Then at paragraph 59 she continued thus:

> "59. That as to paragraph (27). That as aforesaid one share was issued to us both out of the original share capital of 200 shares. The further increase of 249,800 shares was done unilaterally and without my knowledge and consent and I repeat at no time were any of these shares offered to me. I was always under the impression that the 250,000 shares were held equally, as well as the further 50,000."

Against the background of paragraph 95 of The Articles above it is now instructive to examine the minutes exhibited by Audrey bearing in mind that Versatile Packing Ltd. was the original name of Lasco Foods Ltd. The first meeting of the Board of Directors was on the 1st April, 1986, and the following was extracted from the minutes:

> "3. Pursuant to Article 82 of the Articles of Association an instrument in writing under the hands of the Subscribers to the Memorandum of Association determining the number of Directors to be not less than two nor more than seven and naming as the First Directors of the Company, Mr. Lascelles Chin and Mrs. Audrey Chin was tabled.
>
> 4. The Chairman tabled Certificate of Incorporation as proof that the Company was incorporated on the 21st of February 1986, with registered no. 28,056. A print of the Memorandum of Association and Articles of Association, as registered, was also tabled.
>
> 5. It was resolved THAT Mr. Lascelles Chin be appointed Chairman of the Board and Managing Director of the Company to hold those offices until otherwise resolved.
>
> 6. It was resolved THAT quorum for meeting of the Board should, unless and until otherwise resolved, be two.
>
> 7. It was resolved THAT Miss Thelma Miller be appointed Secretary of the Company to hold that office until otherwise resolved at a salary to be agreed.

Then paragraph 12 reads:

> "12 The Secretary was authorised to purchase the books and stationery necessary for the Company's business."

It ought to be anticipated that if the Secretary of the Company was present at any Board of Directors meeting or any general meeting of the members there would be some indication in the minutes that this was so. Also if reliance is to be placed on Auditors' evidence that evidence, would come from Pannell Kerr Forster. When minutes are presented which carry the sole signature of Lascelles, and reliance is placed on Auditors of another company as regards transactions of Lasco Foods Ltd. then this Court ought to be cautious as to the weight to be attached to the evidence or the minutes. Additionally, if the inference from the evidence was that Audrey was not present at the relevant Board of Directors meeting, then Lascelles ought to have responded to this aspect of the case in his affidavit.

Consideration ought to be given as to the legal effect of 22(1) of the Companies Act which is critical to Audrey's case. It reads:

> "22.-(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

Referring to the comparable section in the 1948 U.K. Act Vaisley, J., said in **Rayfield v. Hands and others** [1958] 2 All E.R. 194 at 198:

> "In general discussions of the effect of s.20 of the Act of 1948 to be found in the cases, I have considered the dissentient speech of Lord Herschell in **Welton v. Saffery [1897] A.C. 299** and the comprehensive review of the earlier authorities by Astbury, J., in **Hickman v Kent or Romney Marsh Sheep-Breeders' Assoc.** ([1915] 1 Ch. 881). Among the numerous dicta cited in the judgment in that case, one which seems to me to be helpful and convincing is that of Mellish, L.J., which reads as follows (ibid., at p. 891):

> ... the articles of association are simply a contract between the shareholders inter se in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree inter se'."

Turning to the minutes of 22nd April 1986 which are so important, it is appropriate to cite them in their entirety:

> " VERSATILE PACKING LIMITED
>
> Minutes of a Meeting of the Board of Directors held at 38½ Red Hills Road, Kingston 10 on Tuesday the 22nd of April 1986 at 10:30 a.m.
>
> Present were: Mr. Lascelles A. Chin - Director
> Mrs. Audrey Chin - Director
> In attendance: Miss Thelma Miller - Secretary
>
> MINUTES:
>
> Minutes of the Directors' Meeting held on the 1st of April 1986 were read and signed.
>
> **TRANSFER OF SHARES:**
>
> It was resolved that transfers of the Subscriber shares, as under, be and are hereby approved:-

Transferor	Transferee	No. of Shares
Jacqueline Whitely	Audrey Chin	1
Mabel Emanuel	Lascelles Chin	1

> and it was resolved:-
>
> **THAT the Seal of the Company be affixed to the undernoted share Certificates drawn in respect of the shares transferred.**

Certificate Distinguishing No.	Name	Shares	No. of Nos.of Shares
3	Audrey Chin	1	1
4	Lascelles Chin	1	2

PROPOSED INCREASE OF CAPITAL

It was recommended:-

> **THAT the Capital of the Company be increased to TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000) by the creation of 249,800 shares of $1.00 each, such new shares to rank pari passu with the existing shares in the capital of the Company; and**
>
> **THAT the Directors be authorised to dispose of the said new shares in such manner as they think most beneficial to the Company.**

The Secretary was instructed to convene an Extraordinary General Meeting on Thursday the 7th of May 1986 at 38½ Red Hills Road, Kingston 10 at 2:30 p.m. for the purpose of considering and, if thought fit, passing as an Ordinary Resolution the foregoing resolution to increase the Capital of the Company.

TERMINATION:

There being no other business the Meeting ended.

CHAIRMAN."

It is significant that it was recorded that the Secretary was present at the above meeting of the Board of Directors. There is a serious allegation of irregularity here concerning the allotment of shares which is noteworthy. Reference must be made to the provision in the Article dealing with Allotment of Shares and the Power to Increase Capital.

They read thus:

"SHARES

ALLOTMENT OF SHARES

5. The shares shall be under the control of the Directors who may allot or otherwise dispose of them (subject always to the provisions of these Articles) to such persons on such terms and conditions and at such times as the Director think fit, but so that no shares shall be issued at a discount except in accordance with Section 58 of the Act.

POWER TO INCREASE CAPITAL

ALTERATION OF CAPITAL

52. The Company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

ISSUED AND NEW SHARES TO BE FIRST OFFERED TO MEMBERS UNLESS OTHERWISE DETERMINED

53. Unless otherwise determined by the Company in General Meeting any original shares for the time being unissued and not allotted as provided in Article 5 and any new shares from time to time to be created shall, before they are issued, be offered to the members in proportion, as nearly as may be, to the number of shares held by them. Such offer shall be made by notice specifying the number of shares offered, and limiting a time within which the Offer, if not accepted, will be deemed to be declined, and after the expiration of such time or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the Directors may, subject to these Articles, dispose of any such new or original shares as aforesaid, which, by reason of the proportion borne by them to the number of persons entitled to such offer as aforesaid or by reason of any other difficulty in apportioning the same, cannot in the opinion of the Directors be conveniently offered in manner hereinbefore provided."

As to the validity of Article 53, above, see **Borland's Trustee v Steel** [1901] 1 Ch 279 and **Lyle and Scott Ltd. v. Scott Trustees** [1959] A.C. 763, and **Hunter v Hunter** [1936]A.C. 222.

As Dr. Barnett rightly submitted, implicit in the learned judge's reasoning was that a challenge to the form or substance of the minutes and share register could not be made in proceedings pursuant to an application under the Married Women's Property Act. But he added that the very purpose of the Act was to provide an inexpensive, comprehensive and a speedy resolution of property disputes by summary procedure in the Supreme Court.

Referring to the Section of the U.K. Act which corresponds to Section 16 of our Matrimonial Property Act Lord Upjohn in **Pettitt v Pettitt** [1969] 2 All E.R. 385 at 405 said:

> "In my view, s. 17 is a purely procedural section which confers on the judge in relation to questions of title no greater discretion than he would have in proceedings begun in any Division of the High Court or in the county court in relation to the property in dispute, for it must be remembered that apart altogether from s.17, husband and wife could sue one another even before the Act of 1882 over questions of property; so that, in my opinion, s. 17 now disappears from the scheme and the court of law when considering questions of title to property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of that relationship."

Once the above principle is accepted, Audrey's complaint that by the mandatory provisions of Article 53 she ought to have been offered one half of the shares which were issued when the capital was increased was correct. The power of the Board of Directors was not to allot new shares as was thought most beneficial to

the company, but to follow the form and substance of Article 53. She had a pre-emptive right to be offered half the new shares and she has alleged that no such offer was made.

The notice by the Secretary dated 22nd April reinforces her point. It reads:

'VERSATILE PACKING LIMITED

NOTICE IS HEREBY GIVEN that an Extraordinary General Meeting of the Members of this Company will be held at 38½ Red Hills Road, Kingston 10 on Wednesday, 7th May 1986 at 2:30 p.m. for the following purposes:-

1. To consider and, if thought fit, pass with or without modification, as an Ordinary Resolution the undernoted:-

   THAT the Capital of the Company be increased to Two Hundred and Fifty Thousand Dollars ($250,000) by the creation of 249,800 shares of $1.00 each, such new shares to rank pari passu with the existing shares in the Capital of the Company; and

   THAT the directors be authorised to dispose of the said new shares in such manner as they may think most beneficial to the Company.

2. Any other business.

A Member entitled to attend and vote at the meeting is entitled to appoint a proxy to attend and vote in his stead; such proxy need not be a Member of the Company.

BY ORDER OF THE BOARD

T. MILLER
SECRETARY

Dated this 22nd day of April 1986"

It is instructive to note the absence of the obligatory information in the notice that for there to be an issue of new shares the provisions of Article 53 were applicable. Audrey alleges that the allotment was made without her knowledge and contrary to the articles. That allegation was correct. In any event the notice was so irregular that it amounted to a nullity. Moreover as she has not signed the minutes of the Board of Directors' of 22 April this makes her story credible. The irregular notice made the meeting a nullity. See **Barnett Holdings Ltd. v Isabel Joyce Chadwick** unreported SCCA 21/92 delivered June 28th 1993, at p.50-51 where the cases of **Smyth v Darley** [1894] 2 H.L. Cas 789, In **Re Portugese Consolidated Copper Mines Ltd.** [1898] 2 Ch. 160 at pp. 167-168 and In **Re Homer District Consolidated Gold Mines** [1898] 39 Ch. 546 were cited. It is true that paragraph 60 of the Articles reads:

> "OMISSION TO GIVE NOTICE — 60. The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at that meeting "

But this must be read in the context of paragraph 62 of the Articles which read:

> "62. No business shall be transacted at any General Meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, two members present in person or by proxy shall be quorum."

Further paragraph 107 of the Articles read:

> "107. The quorum necessary for the transaction of the business of the Directors may be fixed by the Directors and unless so fixed shall be two."

Having regard to Audrey's claims that she did not attend these meetings the lack of a quorum either at the Directors' meetings or at the Extraordinary General

Meeting would make those meetings null and void. Then the copy of the Ordinary Resolution purporting to be passed at the Extraordinary General Meeting must be examined Its importance lies in that resolutions are a means by which a company speaks. It reads:

> "RESOLVED;
>
> > THAT the Capital of the Company be increased to THREE HUNDRED THOUSAND DOLLARS ($300,000) by the creation of 50,000 shares of $1.00 each, such new shares to rank pari passu with the existing shares in the Capital of the Company; and
> >
> > THAT the directors be authorised to dispose of the said new shares in such manner as they may think most beneficial to the Company.
>
> I, LASCELLES CHIN, Chairman of the Extraordinary General Meeting of the abovenamed Company held on July 9, 1986 at 38½ Red Hills Road, Kingston 10 do hereby certify that the above is a true and correct copy of the Ordinary Resolution passed thereat.
>
> ---
> CHAIRMAN
>
> Dated this 9th day of July 1986."

This resolution would also be void as it makes no mention of the pre-emptive rights of Audrey. Then the minutes of July 9 1986 of the Extraordinary Meeting demonstrate this meeting was also invalid. If these 50,000 shares were allotted since the hearing of this case, then it is a matter to be raised at liberty to apply.

The proposal to increase the share capital in an earlier Directors' meeting of 8th May 1986 when the shares were supposed to have been allotted bear out the point that there were serious irregularities in the minutes and the sole signature was that of

Lascelles Chin. These were odd transactions and they lacked validity. The minute of the Board of Directors Meeting of 8th May when the irregular allotment took place was combined with the minute of 22nd of April and the minute of the Extraordinary General Meeting of 7th May 1986. It should also be noted that all the minutes were exhibited by Audrey save this one which was exhibited by both parties. Therefore it is imperative to advert to Lascelles' evidence on this matter. It reads:

> "22. That in respect of Paragraph 28 I say that the allotment of 249,800 unissued shares to me was authorised on May 8, 1986 by the Board of Directors of Versatile Packaging (sic) Co. Ltd. by the resolution of the Applicant and me pursuant to Article 53 of the Articles of Association of the Company and exhibited herewith and marked "LC 1" for identity is a copy of the Minutes of the said meeting of the Board of Directors of the said Company."

In his evidence Lascelles makes no attempt to refute Audrey's claim that she had no knowledge of this allotment as she was not present at the relevant meetings which required a quorum of two in each case. This is a clear instance where Audrey has established her case on a balance of probabilities. Here are the minutes:

> "**VERSATILE PACKING LIMITED**
>
> Minutes of a Meeting of the Board of Directors at 38½ Red Hills Road, Kingston 10, on Thursday, 8th May 1986 at 4:00 p.m.
>
> Present were: Mr. Lascelles Chin - Chairman
> Mrs. Audrey Chin - Director
>
> **MINUTES:**
>
> Minutes of Directors' Meeting of 22nd April 1986 and of the Extraordinary General Meeting of 7th May 1986 were read and signed."

The first question to be asked is why did the minutes of the Extraordinary General Meeting of 7th May have to be signed together with minutes of Directors Meeting of

22nd April and 8th of May? The second question to be asked is where is the resolution signed by Audrey in conformity with paragraph 95 of the Articles to prove her presence? It is against this background that the remaining portions of the minutes must be assessed. They read thus:

> **"ALLOTMENT OF SHARES:**
>
> Pursuant to the authority of Article 53 of the Articles of Association it was determined that the 249,998 unissued Shares of the Company be allotted to Mr. Lascelles Chin.
>
> **ISSUE OF SHARES:**
>
> Mr. Chin requested that Certificate No. 4 in his name be cancelled and two Certificates comprising his entire share-holding in the Company be issued instead. The Board agreed and it was accordingly resolved:
>
> > THAT the Seal of the Company be affixed to the undernoted Certificates in respect of the Shares allotted herein and cancelled Certificate No. 4.

Cert. No.	Name	No. of Shares	Distinguishing Nos.of Shares
5	Lascelles Chin	187,499	2 - 187,500
6	Lascelles Chin	62,500	187,501 - 250,000

> **TERMINATION;**
>
> There being no other business the Meeting terminated.
>
> Sgd.
> CHAIRMAN

There is no mention that the Secretary attended. There is the authority **Sharp v Dowers** [1873] 2 Q.B. 26 that a meeting presupposes at least two members. This case was followed in **Re London Flats** [1969] 2 All E.R. 744. It is in this context that

Audrey's charge that the allotment was made unilaterally gains significance. The kindest observations about these minutes that could be made was that Lascelles thought, that what he did was right. He was acting in 'breach of faith' as described by Lord Dilhorne in **Gissing v Gissing** which will be discussed later. Had he been aware of Section 36 and Section 51 of the Companies Act. he would have been more circumspect. To my mind Audrey has demonstrated that on a balance of probabilities she was unaware of the transaction recorded in the irregular minutes.

So the Ground of Appeal which reads:

> "3. That the Learned Trial Judge erred and/or misdirected himself in law when he failed to determine the question of whether the Respondent held the said 124,999 shares in trust for the Appellant, the Respondent having allotted the said shares to himself in contravention of the provisions of Article 53 of the Articles of Association of the said **Lasco Foods Limited**, without making to the Appellant an offer of the said shares by notice specifying the number of shares offered, as is required by the said Article 53."

has been successful. It is now necessary to turn to the merits of the case:

Did Audrey Chin establish on a balance of probabilities:

(a) That she invested in the Company?

(b) That there was a common intention at the inception of the Company that they were equal participants?

It is now necessary to evaluate other aspects of the affidavit evidence to determine its effect. A preliminary point which ought to be made was that there was no cross-examination in the court below so in assessing the evidence and drawing inferences this court is in the same position as the judge in the court below. The one finding of fact made in the court below was as follows:

> "The evidence of the applicant does not indicate any investment by her in the incorporation of the company or in its operations, other than the fact that she worked for reward for the company; such reward she has already received."

Grounds of appeal (4) and (5) which cover this aspect of the case read:

> **"(4)**That the Learned Trial Judge erred and/or misdirected himself in law on the facts when he held that the Appellant worked for reward in the business carried on by the said **Lasco Foods Limited;**
>
> (5) That the decision of the Learned Trial Judge is against the weight of the evidence."

The appellant Audrey is a chartered accountant. In professional terms the marriage combined the accounting and financial skills of the wife with the business acumen of the husband.

Here is how she describes her role leading to the incorporation of the company:

> "1. That my true place of abode and postal address are at 16 Brickell Terrace, Kingston 8 in the parish of St. Andrew and I am a Chartered Accountant and Managing Director of Lasco Foods Limited.
>
> 2. That I was married to the Defendant on the 22nd day of February 1986 and although a Decree Nisi was granted to the Defendant the Marriage still subsists.
>
> 3. The parties had been intimate friends for some time and the Applicant had a child for the Defendant on the 19th day of October 1980.
>
> 4. That soon after the marriage we discussed the possibility of our going into business together as my husband was already an established Businessman and wanted to diversify his holdings.
>
> 5. We heard about the packaging of milk products for Jamaica Commodity Trading Company and we decided to set up a Manufacturing Operation to package these products.

> 6. That we incorporated a company known as Versatile Packing and I received one share and my husband received one share.
> Versatile Packing Ltd. the former name of Lasco Foods Ltd. was incorporated 21st. February 1986.
> That we obtained the Contract and we obtained loans to purchase the necessary equipment."

How did Lascelles respond to this evidence? In his initial affidavit of 2nd December 1994, he called her the Manager of the company. This is how he did it:

> "8. That after my marriage to the Applicant I discussed the management and operation of the packaging business with the Applicant and offered her the position of Manager of the Company at the same salary that she was being paid by her then employers, Messrs. Touche Ross Thorburn and Company. As an added benefit to her, I also offered to provide through the Company a fully maintained motor car for her as a part of her emoluments as her then employers provided no motor car to her. She agreed and took up her position on these terms suggested."

By paragraph 20 of the same affidavit Lascelles had a change of mind as to her status. Here is how he described her:

> "20. The Applicant as Managing Director was primarily responsible for the overseeing of the accounting functions and was responsible for the preparation and presentation of the Accounts."

Then in paragraph 22 Lascelles further states:

> "22. That paragraph 15 of the Applicant's Affidavit is not true. Notwithstanding the break up of the marriage I allowed the Applicant to continue her occupation as the Managing Director of the Company but she became resentful and uncooperative, neglected her duties, absented herself from work and incurred excessive unauthorised expenditure which culminated in my being compelled to terminate her employment and I did so by letter dated 4th November, 1993 which gave her six (6) months salary in lieu of notice at a monthly rate of $41,666.66. That there is now produced and shown to me marked "LC7" for

> identification a true copy of letter dated 4th November, 1993 which I caused Lasco Foods Limited to issue and deliver to the Applicant. That consequent, upon this letter the Applicant left the employment of the Company. The Applicant ceased to be a Director of the Company on or about the 1st day of September, 1994."

Further in his letter of November 4, 1993 purporting to dismiss her he addressed her as Mrs. Audrey Chin, Managing Director, Lasco Foods Ltd. 38½ Red Hills Road, Kingston 10. The minutes of 1st April 1986, which Lascelles signed reads:

> "5. It was resolved THAT Mr. Lascelles Chin be appointed Chairman of the Board and Managing Director of the Company to hold those offices until otherwise resolved."

So the inference is that Audrey was the Managing Director of Lasco. When Audrey states that:

> "10. That I have been the sole driving force behind the Company and in fact controlled both the day to day running of the Company as well as all policy decisions as to the direction and expansion of the Company."

it was convincing.

As to how they heard of the venture, the evidence of Audrey on balance is more reliable. Here is Lascelles' version:

> "3. That I was married to the Applicant on the 22nd day of February, 1986 and that a Decree Nisi was granted on the 4th day of February, 1993 and a Decree Absolute was granted on February 18, 1994 by the Honourable Mr. Justice Harrison."

Then he goes on to say:

> "7. That paragraphs 5 & 6 of the Applicant's Affidavit are not true. That prior to my marriage to the Applicant in or about 1985 a third party suggested to me that packaging of milk powder for Jamaica Commodity Trading Company was a good business opportunity. It had been offered to others

> but they had declined. I resolved to go into the business and pursued the matter including identifying suitable equipment from manufacturers outside of Jamaica. I also gave instructions in 1985 to incorporate a Company primarily for this purpose. Some time after and in consequence Versatile Packaging (sic) Limited (hereinafter referred to as "the Company) was incorporated on or about the 21st day of February, 1986 by my Attorneys-at-Law Messrs. Clinton Hart & Co."

However, Audrey's unchallenged evidence was that they were intimate friends prior to 1980 when Lisa their child was born. So the inference must be that there were general discussions before the marriage about his business. The inference to be drawn from the intimacy and subsequent marriage was that although the information about the business came initially to Lascelles, the couple discussed them and worked jointly at it from the beginning as a common venture. Both parties commenced with one share each in a private company. Article 53 which gave pre-emptive rights of an equal number of shares to each party was a significant pointer to the fact that this was a common venture with provisions for its continuance on a basis of equality.

In **Gissing v Gissing** [1970] 3 W.L.R. 255-259 Lord Reid put the principle thus:

> "I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him."

Then Lord Reid continued thus at page 260:

> "Returning to the crucial question there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence give no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation. If the law is to be that the court has power to impute such an intention in proper cases then I am content, although I would prefer to reach the same result in a rather different way."

Viscount Dilhorne expressed the principle thus at p. 262-263:

> "I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a cestui que trust.
>
> Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest." [Emphasis supplied]

Then in continuing Viscount Dilhorne stated these significant words at p.263.

> "My Lords, in determining whether or not there was such a common intention, regard can of course be had to the conduct of the parties. If the wife provided part of the purchase price of the house, either initially or subsequently by paying or sharing in the mortgage payments, the inference may well arise that it was the common intention that she should have an interest in the house."

Turning to the speech of Lord Diplock at p.267 it reads:

> "A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three class of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

Then comes a notable statement of principle at page 268 which is particularly apt to the circumstances of this case:

> "As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are."

How are these principles to be applied to the circumstances of this case where the property is shares in a private company? Further what effect must be given to the pre-emptive rights accorded to Audrey in the articles?

Be it noted that at the inception of the venture both were accorded equal shares. Further the pre-emptive clause indicated that both be offered additional shares in proportion to their original share holding. In breach of the articles Lascelles allocated all the increased share-holdings to himself without offering Audrey her entitlement. In these circumstances equity intervenes to redress the injustice and will hold that although he has the legal title as evidenced on the share register, the court will recognise Audrey's beneficial interest and direct the Registrar of Companies to rectify the share register so as to give effect to the correct share-holdings of Audrey. In so doing equity now does what ought to have been done. A relevant case on this issue is **Re Transatlantic Life Assurance** [1980] 1 WLR 79. It is on this analysis that the Appellant Audrey has succeeded in Grounds of Appeal 1 and 2 which read:

> "1. That the Learned Trial Judge erred and/or misdirected himself in law when he held that the Appellant was only entitled to one share in the said **Lasco Foods Limited;**
>
> 2. That the Learned Trial Judge erred and/or misdirected himself in law when he failed to hold that the Respondent held 124,999 shares of the additional 249,998 shares allotted to him, in trust for the Appellant."

What were the respective contributions of each spouse to the acquisition and administration of the venture ?

The evidence discloses that both parties visited the United States of America and Argentina to purchase machinery and equipment. Audrey's statement concerning the finance to start up proceedings has already been adverted to . For emphasis it ran thus:

> "7. that we obtained the Contract and we obtained loans to purchase the necessary equipment.

She continued thus:

> "8. This company flourished and made substantial profits.
>
> 9. That I have never received any dividends on my share and the Directors remuneration that I received was not a salary neither was it in any way commensurate with my duties at the company."

What was Lascelles' response? Here it is:

> "11. That paragraph 7 of the Applicant's Affidavit is not true. The Company obtained the contract through my instrumentality and the Applicant had absolutely nothing whatever to do with the negotiations leading up to the award of the contract to the Company. Further I negotiated all loans and I provided from my own assets or from the assets of the Company the necessary security and guarantees to procure the loans and I make reference to the Notes to Financial Statements for the years 1988 to 1990 in this regard. The Applicant had nothing whatsoever to do with the negotiations of the loans. That there is now produced and shown to me marked "LC4" for identification a Loan Guarantee Agreement dated May 1986 between Jamaica Agricultural Development Foundation, Versatile Packaging (sic) Limited and myself as sole guarantor."

The company was incorporated on 21st February 1986 and first audited financial statement was dated 31st March 1988. The relevant figures are as follows:

3. FIXED ASSETS:

	Furniture and Fixtures	Machinery and equipment	Leasehold improvement	Total
Cost:				
1st April 1987	6,374	296,801	222,902	526,077
Additions	12,582	49,340	17,560	79,482
31st March 1988	18,956	346,141	240,462	605,559

4. SHARE CAPITAL:

	1988	1987
Authorised		
300,000 ordinary shares of $1.00 each	$300,000	$300,000
Issued and fully paid:		
250,000 ordinary shares of $1.00 each	$250,000	$250,000

The loan agreement dated May 1988 is instructive. The relevant part reads:

"LOAN AGREEMENT

> MEMORANDUM OF AGREEMENT made on the 19th day of May 1986 BETWEEN JAMAICA AGRICULTURAL DEVELOPMENT FOUNDATION a company incorporated under the Companies Act and having its registered office at 13 Barbados Avenue, Kingston 5 in the parish of Saint Andrew (hereinafter called "the Foundation") of the FIRST PART VERSATILE PACKING LIMITED a company similarly incorporated and having its registered office at 38½ Red Hills Road, Kingston 10 in the Parish of SAINT ANDREW (hereinafter call "the Borrower") of the SECOND PART AND LASCELLES AGUSTUS CHIN of 36 RED HILLS ROAD, KINGSTON 10 PARISH OF SAINT ANDREW (hereinafter called Guarantor") of the THIRD PART."

The loan was to the company and Lascelles was the guarantor. That however did not alter the respective share-holdings or the pre-emptive clause in the Articles which expressed the common intention that this was a joint venture. There is a further aspect to be considered. Here is how Lascelles viewed Audrey's contribution to the running of the company:

> "14. That paragraph 10 of the Applicant's Affidavit is not true. The Applicant's only function was to attend to the accounting requirements and the day to day operations of the Company. She had no idea about production and this required my regular attention and attendance to ensure efficient production and to curtail the high levels of theft taking place as the Applicant was unable to address the latter satisfactorily or at all. Policy decisions were in fact set by me and indeed fundamental to the success of the Company was my successful negotiations with Jamaica Commodity Trading Company and the Government for the take over, on favourable terms, of the sales and distribution of powdered milk formerly done by Jamaica Commodity Trading Company for whom the Company did the packaging. The Applicant

> was not a party to those negotiations. The obtaining of financing and the plans that were formulated and implemented to bring about the expansion of the Company in order to enhance its profitability and business prospects were done entirely by me."

This is how Audrey took issue with Lascelles in a powerful and convincing response:

> "6. That at this time, I assisted my husband with the accounts for Kingston Heirlooms and I did this at the offices of Henkel Chemicals Ltd. another company controlled by Mr. Chin.
>
> 7. The Chief Executive of JADF attended at the offices of the Defendant while I was on the building and he called me into a meeting and the three of us discussed the possibility of going into the packing of powdered milk.
>
> .8. We received preliminary figures provided by JADF and it appeared that the business could be viable.
>
> 9. That same day we went to the Ministry of Agriculture and met with Mr. Brascoe Lee who was then the Junior Minister at the Ministry of Agriculture. He had done some work on the project including the design of packaging material and we looked at the project as a whole and decided that we should try and obtain the contract."

Then she continued thus:

> "10. That a few days later we attended on the Jamaica Commodity Trading Company and met with Andre' Nembhard Hillary Alexander, Mike Martin and Betty Grant among others and discussed the project.
> 11. I was quite familiar with the senior Management of the J.C.T.C. as I had been doing their books for Touche Ross for some years.
>
> 12. We were offered the contract subject to our purchasing the necessary machinery as soon as possible."

Then as to the purchase of the machinery here is her version of the event:

> "13. We flew off to Miami in the United States of America in an effort to locate the necessary machinery. We spoke to machinery salesmen and were told this type of packaging was being done in Argentina. We wanted first hand knowledge of this operation and we left immediately to Argentina accompanied by a salesman from the machine suppliers.
>
> 14. Upon our arrival in Argentina we were taken to the plant and saw for ourselves how the machine worked and we enquired about its efficiency and reliability and got assurance that the equipment could package skimmed milk powder.
>
> 15. We then ordered a machine and returned to Jamaica from Argentina.
>
> 16. That I exhibit marked with the letters A.R.C. (1) copy of Travel documents and hotel bills."

Regarding her employment before the venture Audrey had this to say:

> "17. That as to paragraph (8). At the time our deciding to go into business of packaging I was not employed to Touche Ross Thorbourn & Co. as I had left even before we had any idea of forming this Company and enterprise.
>
> I8. I exhibit marked with the letters "A.R.C.(2)" copy letter from Touche Ross Thorburn and Co."

This evidence discloses that she was employed to Chartermagnates Ltd. presumably a subsidiary of Touche Ross from March 2, 1981 to January 7, 1986. As Versatile Packing Ltd. was incorporated on 21st February 1986 her point is well taken that she left her employment before the company was formed. There was also exhibited her emoluments as at February 1st. 1985. It was $60,000 per annum.

Continuing her narrative she stated thus:

> "23. I categorically deny that I agreed to be employed to him on any terms as he suggests. The Defendant considered it a little business that I

> alone would operate as at the time he had several other companies managing and had no time for this little one. It appeared to be a viable company and was set up for me alone to operate."

As for her departure from Touche Ross Thorbourn & Co. she gave this credible explanation which is repeated for emphasis:

> "29. I certainly would not have agreed for the Defendant to virtually give me a nil interest in a company that I had operated from its birth so to speak. That I had been employed to Touche Ross Thorbourn and Co. as Audit Supervisor and could have if I chose obtained employment at any number of large corporations at salaries far superior to what I had been getting as drawings, I received from the company."

It has to be reiterated that Audrey is a chartered accountant and she has stated that her income from the company was in the nature of drawings rather than a salary. Pannell Kerr Foster were the auditors for the company and one would have expected the evidence from Lascelles challenging Audrey's version to come from them. Instead he gave a statement from Ernst and Young which reads:

> "20 October 1994
>
> Mr. L A Chin
> Lasco Distributors Limited
> 27 Red Hills Road
> KINGSTON 10
>
> Dear Mr. Chin:
>
> As requested by Mrs. Neesha Lowe please find the following information:
>
> Management fee credited to Mr. Chin's current account for 1988, 1989 and 1990 is $36,000.
>
> As per memo in 1990 file, salary credited to Mrs. Audrey Chin's current account in 1990 to cover salary for:
>
> | | | |
> |---|---|---|
> | | 1987 | 64,020.00 |
> | | 1988 | 47,000.00 |
> | | 1989 | 84,167.57 |

1990 99,944.22
$295,131.79

Yours faithfully
Ernst & Young

/s/ Denees Thompson
for V.K. Markman

Be it noted that this information was sent to Mr. L. A. Chin, Lasco Distributors Ltd. not Lasco Foods Ltd. the company in issue in the proceedings.

As to start up capital of the company her narrative was as follows:

> "33. That paragraph (11) is denied as aforesaid and that the Company provided the collateral for the borrowed funds to purchase the machinery. I provided all the necessary financial information required by the lending agency."

Since the learned judge found that she made no investment in the company this aspect must be answered. There was a director's loan of $100,826 paid off quite quickly. The start-up was by a loan, the security was on the assets of the company and a personal guarantee by Lascelles and his assignment of an insurance policy. There was also a Bank overdraft to the company for $61,240.00. It was on this basis that his initial allotment was one share. As for Audrey it was her financial acumen and her preparatory work and her commitment to be Managing Director which she performed which was her contribution. That such is regarded as investment, here is how Lord Denning put it in **Nixon v. Nixon** [1969] 3 All E.R. 1133 at 1136:

> "The wife's services are equivalent to a financial contribution. And it has repeatedly been held that when a wife makes a substantial contribution she gets an interest in the asset that is acquired."

Further, Mr. Muirhead, Q.C. cited **Grant v Edwards** [1986] 2 All E.R. 426 in his written submission. In that case Nourse LJ said at 433:

> "Let me illustrate it in this way. It would be possible to take the view that the mere moving into the

> house by the woman amounted to an acting on the common intention. But that was evidently not the view of the majority in **Eves v Eves** [1975] 3 All E.R. 768. And the reason for that may be that, in the absence of evidence, the law is not so cynical as to infer that a woman will only go to live with a man to whom she is not married if she understands that she is to have an interest in their home. So what sort of conduct is required? In my judgment it must be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house. If she was not to have an interest, she could reasonably be expected to go and live with her lover, but not, for example, to wield a 14-lb sledge hammer in the front garden. In adopting the latter kind of conduct she is seen to act to her detriment on the faith of the common intention."

Although this case concerned a home the principle is appropriate to working as the Managing Director in a private company.

Then the learned Lord Justice put it this way at 434:

> "In the circumstances, it seems that it may properly be inferred that the plaintiff did make substantial indirect contributions to the instalments payable under both mortgages. This is a point which seems to have escaped the judge, but I think that there is an explanation for that. He was concentrating as no doubt were counsel, on the plaintiff's claim that she herself had paid all the instalments under the second mortgage. It seems very likely that the indirect consequences of her very substantial contribution to the other expenses were not fully explored."

Mustill L.J. at page 435 said:

> "(4) For present purposes, the event happening on acquisition may take one of the following shapes: (a) an express bargain whereby the proprietor promises the claimant an interest in the property, in return for an explicit undertaking by the claimant to act in a certain way."

Then he continued thus on the same page:

> "(6) Thus, if the situation falls into category (a) above, the only question is whether the claimant's conduct is of the type explicitly promised. It is immaterial whether it takes the shape of a contribution to the cost of acquiring the property or is of a quite different character."

Sir Nicholas Browne-Wilkinson V-C said at p. 436.

> "So, in this case, as the analysis of Nourse LJ makes clear, the plaintiff's contributions to the household expenses were essentially linked to the payment of the mortgage instalments by the defendant; without the plaintiff's contributions, the defendant's means were insufficient to keep up the mortgage payments. In my judgment where the claimant has made payments which, whether directly or indirectly, have been used to discharge the mortgage instalments, this is a sufficient link between the detriment suffered by the claimant and the common intention. The court can infer that she would not have made such payments were it not for her belief that she had an interest in the house. On this ground therefore I find that the plaintiff has acted to her detriment in reliance on the common intention that she had a beneficial interest in the house and accordingly that she has established such beneficial interest."

Then Section 51(1)(b) of The Companies Act makes provision for "shares allotted as fully or partly paid up otherwise than in cash."

Audrey continued thus:

> "34. That although the company was able to pay all its bills and to provide the Defendant with the monthly payment for most of his monthly expenses it began to show a profit after 1989. There was never any agreement as to salary, I took drawings for our household expenses and my personal expenses. I was given a car to drive which was paid for by the Company. I had a car before which was written off in an accident and this was a way for him to purchase a car for my use which would be a company expense and not directly his.
>
> 35. That as to paragraph (14). When the company started operations I was the Managing Director and

> the office consisted of a secretary, Production and maintenance supervisor, a driver and the production workers."

In view of Lascelles' version that Audrey was only involved with the accounting side of the business the following paragraph was an effective refutation:

> "36. The Defendant at that time was deeply involved with Henkel Chemicals and Kingston Heirlooms. He came to the business rarely although he was quite nearby. The Defendant was in the process of selling his shares in Henkel Chemicals and establishing a company known as Lasco Distributors and Soft Sheen Products Manufacturing Ltd. which dealt with the manufacture of soft sheen products and distribution. All of his attention was directed towards this large new project and he was not interested in my small enterprise.
>
> I did all the accounting and management systems I dealt with production and the overall operations of the company, sales and all the administrative functions. I ordered all raw materials needed and signed all the correspondence.
>
> 37. The company packaged milk powder and the production line was very simple as all it did was to put milk powder in hygenic packages for distribution and needed no special skill."

Then to demonstrate that she was an effective Managing Director here is her account of the operations of the business:

> "38. That while we packaged for the Jamaica Commodity Trading Company I had to prepare weekly management reports, accounting for all raw material consumed and finished goods produced and delivered. Raw material which was not suitable for production was sent back for replacement.
>
> 39. That the defendant never had to come to the factory to do anything and indeed never played any part in the companies day to day affairs. The stock is counted at the end of each shift and this left very little opportunity for theft. We processed

> approximately Two Hundred tons of product per month.
>
> 40. We were both involved in the negotiations to take over the operations from Jamaica Commodity Trading Company indeed we were the logical choice as we were operating a factory packaging milk powder at the time. We then set our own profit margin that took into account a normal production loss of 3%.
>
> 41. That all the information needed by the bank were provided by me and I attended meetings with the Jamaica Commodity Trading company as well as the Bank. The Defendant did not attend most of the take over meetings involving the calculation and valuation of inventory and agreeing these figures with the internal and external auditors."

As part of Lascelles' evidence overstated the benefits Audrey received from the company and the learned judge below found that she had already received her reward, it is essential to set out her version, and to test it against Lascelles' narrative:

> "44. As to paragraph (16). The records and books of the company do not show me as receiving a salary. That as far as I was concerned I was his wife and co-owner of the business and we operated the company as a family business and I took drawings for expenses as aforementioned, indeed why then would my so-called salary be less in 1988 than in 1987 a thirty percent decrease. We both benefitted from the company including our daughter and his birthday parties and other private functions that were held at our home. He benefitted whenever he wanted anything. The Defendant only began to have a hand involvement in the business after our marriage broke down and he eventually forced me to leave the business. I left not because he was the majority shareholder but because of the constant harassment and it became very uncomfortable to be around him.
>
> 45. That as to paragraph (17). When I left Touche Ross & Company now known as Deloite and Touche I was earning a salary of $60,000.00 inclusive of emoluments. I was a supervisor and would soon have been appointed a Manager if I

> chose to stay. That most of my peers leaving accounting firms at this level had become senior managers at major corporations at salaries far in excess of what they could get at accounting firms. I in fact left my job to go into business with my husband as an equal partner. The business was not intellectually challenging however through my efforts it became extremely profitable."

Having regard to the Financial Statements the inference must be that Lasco Foods is now a brand name and the goodwill coupled with the brand name must be taken into account in a valuation of the shares of the company. Capital gains is the magic which attract shareholders and this court in the interest of justice will ensure that the claimant Audrey receives her just reward.

As for the matter of salaries she continued thus:

> "47 That no salary was ever paid to me as on occasion sums were taken for expenses and the monthly figures varied as can be seen by the yearly figures. The financial statements do not disclose what was disbursed.
>
> 48. As to paragraph (18). In 1992 I received by way of drawing the sum of $84,422.00 and not $250,000.00 I kept a record of what I received. I challenge the Defendant to provide the cheques drawn to me to arrive at the sum of $250,000.00
>
> 49. As to paragraph (19). I deny that I received $300,000.00 as salary. I left the day to day operations of the company in November 1993 and at that time I had disbursed to me the sum of $30,000.00. I again challenge the Defendant to produce any cheques or documentation to prove that I received $300,000.00 by way of salary. Indeed although the accounts show $300,000.00, I in fact left in November and had no drawings for December, January, February and March 1993. Salary and drawings reflect figures taken from 1st day of April to the 31st day of March in 1992 the yearly rental was $245,600 which went to the Defendant in 1993 he increased the yearly rental to $1,479,120.00. That from inception the Company

> could have rented equal accommodation at a far cheaper rate."

It is true that Lascelles answered this credible account, but these were in nature of denials and were unconvincing.

To demonstrate how unreliable his response was he said:

> "34. That in respect of Paragraphs 47, 48, 49, 53 and 55 of the Applicant's Affidavit in Reply, I say that the Applicant did not actually receive each month a regular monthly salary. The Applicant without knowledge or proper authority caused the Company to pay certain of her personal expenses and these were debited to the Applicant's Director's Current Account. At the end of the relevant period her gross annual salary would be credited to the Applicant's Director's Current Account and exhibited herewith and marked "LC 2" for identity is a copy of an analysis of the Applicant's Director's Current Account for the years 1987 to March 31, 1994 prepared by the Company's Auditors, Ernst & Young and see Exhibit "LC 1" of the Respondent's Affidavit dated December 2, 1994 which shows the audited statement of the salary received by the Applicant for the years 1988-1993. The said analysis shows that the Applicant owes the Company the sum of Thirty five Thousand Six Hundred and Twenty One Dollars and Twenty One Cents ($35,621.21) as at March 31, 1994 in respect of her Director's Current Account. Further, I was indeed a signatory to the cheques issued by the Company but my signature was placed on the cheques on the assumption that the relevant member of the accounting staff of the Company had verified the authenticity or propriety of the expenditure before presenting the cheques to me to sign. Only now and again I may query the reason for a cheque payment before my signature of the cheques."

It is pertinent to set out the account which purported to be that of Audrey Chin's Director's Account:

"AUDREY CHIN

DIRECTOR'S CURRENT ACCOUNT

YEAR	DIRECTOR OWES COMPANY	COMPANY OWES DIRECTOR	BALANCE
1987	555.00	-	555.00
1988	184.07	-	739.07
1989	14,945.00	-	15,684.07
1990	84,867.23	295,131,79	(194,580.49)
1991	81,730.52	-	(112,849.97)
1992	226,268.00	250,000.00	(136,581.97)
1993	505,109.95	300,000.00	20,149.01
1994	15,472.20	-	35,621.21."

There is no indication who prepared the above account. There is convincing evidence in the form of audited Financial Statements and in paragraph 34 of Lascelles' affidavit above where he referred to Exhibit "LC 1" that Pannel Kerr Foster were the Auditors 1988-1993, not Ernst and Young.

There was never any explanation why there was little reliance on Lascelles' part on the minutes that Audrey relied on to demonstrate that she was unaware of the allocation of shares he had made to himself, nor how he could have found time to devote to the company on the production side in view of his numerous business activities. The evidence suggests that on two occasions he relied on evidence relating to Lasco Distributors Ltd. and Ernst Young who were presumably the auditors of that company. It bears out Audrey's point that he was so busy with other companies in his empire that Lasco Foods Ltd. did not get much attention from him as regards policy

and day to day management. Moreover as Audrey pointed out the company employed a production manager and there was no evidence that Lascelles had any expertise in that area. The evidence discloses that Audrey was an active participant in the affairs of the venture and after incorporation was the dominant partner in the business as she was effectively the Managing Director. It is true that the start up fund was by way of a loan to the company which Lascelles guaranteed. He was entitled to half the share-holding as contemplated by the pre-emptive clause in the Articles of Association. It is true that she exercised her rights to drawings from the company for family and personal matters but she was no ordinary salaried employee. The handsome capital gains which accrued to shares in the company was an entitlement which she had a right to expect and she ought not to be deprived of it by questionable minutes she did not sign and of which she has sworn she had no knowledge. On this basis then Audrey has succeeded on grounds 4 and 5 of the Grounds of Appeal. There ought to be a valuation of the shares and this may require a reference again to this court which may be by way of liberty to apply. The authority of **Rayfield v Hands and others** (supra) is useful in this context.

Conclusion

The appellant Audrey has convinced this Court that there was jurisdiction in the Court below and in this Court on rehearing to grant her prayer. Moreover, there was a basis in law and convincing evidence that her claim to half the share-holding in Lasco Foods Ltd. was correct. Consequently the appeal succeeds. The order below must be set aside. There must be further orders that: (a) the appellant is entitled to 124,999 shares in addition to the one share which is in her name on the share register; (b) the Registrar of the Supreme Court forthwith directs the Registrar of Companies to rectify

the share register to conform with the declaration concerning the shares to which Audrey is entitled; (c) the shares of Lasco Foods Ltd., at the date of this order be valued by a firm of Accountants and the value of half the share-holding be paid to the appellant Audrey less $124,999; (d) after the payment by Lascelles to Audrey the share register be further rectified pursuant to Lascelles' orders; (e) the said Accountants who could be the Auditors, be appointed by agreement between the parties and if there be no agreement within the next seven days the Registrar of the Supreme Court is directed to appoint a firm of Accountants to carry out the valuation; (f) the costs of valuation be borne equally by the parties to this appeal; (g) a copy of this Order be served forthwith on the Secretary, Miss Thelma Miller, of Lasco Foods Ltd. and the Registrar of the Supreme Court.

The appellant is entitled to costs both here and in the court below to be taxed if not agreed. Liberty to apply.

HARRISON, J.A.

I also agree.

FORTE, J.A.

The appeal is allowed. It is ordered that:

1. the appellant is entitled to one-half of the share-holding in Lasco Foods Ltd.

2. the Registrar of the Supreme Court forthwith directs the Registrar of Companies to rectify the share register to conform with the declaration concerning the shares to which Audrey is entitled;
3. the shares of Lasco Foods Ltd. at the date of this order be valued by a firm of Accountants and the value of half the share-holding be paid to the appellant Audrey less $124,999;

value of half the share-holding be paid to the appellant Audrey less $124,999;

4. after the payment by Lascelles to Audrey the share register be further rectified pursuant to Lascelles' orders;

5. the said Accountants who could be the Auditors be appointed by agreement between the parties and if there be no agreement within the next seven days the Registrar of the Supreme Court is directed to appoint a firm of Accountants to carry out the valuation;

6. the costs of valuation be borne equally by the parties to this appeal;

7. a copy of this Order be served forthwith on the Secretary, Miss Thelma Miller, of Lasco Foods Ltd. and the Registrar of the Supreme Court.

Cost to the appellant here and in the court below to be taxed if not agreed. Liberty to apply.