JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 21/92

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

BETWEEN	BARNETT HOLDINGS LIMITED	
AND	ISABEL JOYCE CHADWICK	
AND	DOREEN WHITMAN	
AND	IAN KERR-JARRETT	
AND	CHRISTINE NOBLE (Executors of estate of Marion Kerr-Jarrett, deceased)	DEFENDANTS/APPELLANTS
AND	BARNETT LIMITED	
AND	PETER FRANCIS KERR-JARRETT	PLAINTIFFS/RESPONDENTS

R.N.A. Henriques, Q.C., Pamela Benka-Coker, Q.C., C. Honeywell and Joye Donaldson, instructed by Messrs. Clinton Hart & Co., for defendants/appellants

Richard Manfood, Q.C., Dr. Lloyd Barnett, John Vassell and Avis Somers, instructed by Messrs. Dunn, Cox & Orrett, for plaintiffs/respondents

November 17 - 20; 23 - 25, 1992
and June 28, 1993

WRIGHT, J.A.:

This is an appeal against the judgment of Theobalds, J. delivered on January 29, 1992, whereby it was adjudged and ordered:

"1. DECLARED THAT:

(a) The sales and transfers of 49,920 shares each by ISABEL CHADWICK, DOREEN WHITMAN and the Executors of ESTATE MARION KERR-JARRETT, deceased to Barnett Holdings Limited were made in breach of the provisions of Articles 29 to 33 (inclusive) of the Plaintiff's Articles of Association.

(b) The Resolutions passed on the 5th day of April, 1988 and on the 10th day of January, 1989 in respect of the transfer of shares to Barnett Holdings Limited are ultra vires and null and void.

(c) By instructing the Secretary of the Plaintiff Company to proceed with the scheduling of the Meeting for 2:00 p.m. on the 10th January, 1989, Peter Ross Kerr-Jarrett abused his power as a director and acted in breach of his fiduciary duties.

(d) The directors present at the meeting of the 10th January, 1989, abused their powers and pursued a course of conduct designed to circumvent the legal consequences of the Judgment of the Court of Appeal in Suit No. C.L. of 1988/K023 which Judgment frustrated the abortive attempt of the group led by Peter Ross Kerr-Jarrett and Dr. Paul Chen-Young to take over Barnett Limited.

(e) By requisition to the Directors of the Plaintiff Company dated the 22nd day of December, 1988, to convene an extraordinary general meeting to put to members a resolution that, inter alia, Peter Ross Kerr-Jarrett, Ian Kerr-Jarrett, Christine Noble and Isabel Joyce Chadwick be removed as directors of the Plaintiff Company, the Plaintiff Peter F. Kerr-Jarrett was exercising his fundamental legal rights as a shareholder conferred by Section 175 of the Companies Act & Article 86 of the Articles of Association of the Plaintiff Company.

(f) The directors present at the meeting of 10th January, 1989 acted in breach of their fiduciary duties and abused their powers as directors by holding the meeting on that date to exercise their voting power to ratify and confirm the transfers which had been effected at the instance of the shareholders Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion Kerr-Jarrett deceased to Barnett Holdings Limited.

"2. THAT the register of members of the First Plaintiff Company be rectified pursuant to Section 115 of the Companies Act by striking out the name of the First Defendant Barnett Holdings Limited as the holder of 149,760 shares in the said Company and by restoring to the said register the names of the Second Defendant Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion Kerr-Jarrett, deceased, as the holders of the said shares as follows:

ISABEL JOYCE CHADWICK	49,920 shares
DOREEN WHITMAN	49,920 shares
ESTATE MARION KERR-JARRETT, deceased	49,920 shares

3. Costs to the Plaintiffs to be agreed or taxed.

4. The Counterclaim is dismissed with no order as to costs."

The challenge to this judgment is presented in the following sixteen grounds of appeal:

"1. That the learned trial Judge erred as a matter of law when he failed to adjudicate on the issues relevant to the determination of the matter before him, and instead misdirected himself on erroneous matters and entering Judgment and Orders for the Plaintiffs/ Respondents.

2. The Judgment and Orders of the learned trial Judge cannot be supported having regard to evidence.

3. The learned trial Judge misdirected himself as what was the law applicable to the matter before him and consequently his Judgment cannot be supported as a matter of law.

4. The learned trial Judge failed to appreciate that the undisputed facts and the law applicable thereto clearly indicated that the Plaintiffs/Respondents case could not be sustained as a matter of law, and that the relevant law and facts supported the Defendants/ Appellants case.

5. The learned trial judge erred as a matter of law when he came to the conclusion that the sales and transfer of 49,920 shares were in breach of the provisions of the Articles of the Plaintiff's/ Respondent's company, Barnett Limited, as the evidence clearly

" indicated that the transfers were in accordance with the Articles of Association when properly construed.

6. The learned trial Judge erred when he held that the Resolutions passed on the 5th day of April 1988 and 10th day of January 1989 in respect of the transfer of the shares to Barnett Holdings Limited were ultra vires and null and void as such as they cannot be supported having regard to the evidence and the law applicable to the transaction.

7. The learned trial judge further erred as a matter of law and misdirected himself as to what constitutes fiduciary duty when he held that in instructing the secretary to call a meeting on the 10th day of January 1989 constituted such a breach and further erred when he held that what transpired at the meeting was the abuse of the powers of the directors and so designed to circumvent the legal consequences of the Judgment of the Court of Appeal in Suit No. C. L. 1988/K 023, when such findings are neither supported by the facts of the case and is wholly erroneous as a matter of law.

8. The learned trial judge misdirected himself in law and fact when he held that the extraordinary general meeting summoned on the 22nd day of December 1988 and held on the 11th day of January 1989 was valid as the Secondnamed Plaintiff/Respondent was exercising his fundamental legal rights as a shareholder conferred by section 175 of the Companies Act and Article 86 of the Articles of Association as such findings cannot be substantiated as a matter of fact as the undisputed facts of the case and the law applicable thereto clearly demonstrated that the Secondnamed Plaintiff/Respondent acted illegally and wrongly in transferring shares to himself contrary to the provisions of the court order when a condition precedent for such transfer was not satisfied, consequently, the Secondnamed Plaintiff/Respondent did not have the power conferred on a majority shareholder pursuant to section 175 of the Companies Act, and further, that the meeting was illegal and void as there was no quorum, as the undisputed facts also indicated that the Secondnamed Plaintiff/Respondent wrongfully registered two members in breach of the Companies Articles for the purpose of having a quorum to convene a meeting which was clearly illegal.

"9. The learned trial Judge failed to appreciate that as consequence of the Secondnamed Plaintiff/Respondent illegal acts in both registering the shares to himself and to two other members rendered all Resolutions passed at the meeting of the 11th day of January 1989 null and void.

10. The learned trial Judge erred when he held that the directors presented at their meeting on the 10th day of January 1989 acted in breach of their fiduciary duties and abuse of their powers as directors by holding the meeting on that date and ratifying and confirming transfers which had been effected at the instance of the shareholders to the Second, Third, Fourth and Fifthnamed Defendants/ Appellants to the Firstnamed Defendant/Appellant.

11. The learned trial Judge failed to appreciate that the evidence adduced disclosed no breach of any fiduciary duty whatsoever either as a matter of fact or as a matter of law and further, that in the exercise of the power of sale of shares the shareholders owed no fiduciary duty to the company.

12. The learned trial Judge was confused as is evident from the inconsistent findings he has made on the amended Originating Summons, by Orders made on some aspects thereof and the failure to make Orders on others. Moreover, failing to appreciate that the Originating Summons had become a Writ by Order of the Court and that a Statement of Claim, Defence and Counterclaim was filed and proceeded instead of giving Judgment and relief on the Statement of Claim has done so on the Originating Summons.

13. The Judge further failed to appreciate that the evidence adduced by the Defendant/Appellant failed to substantiate the allegations of breach of fiduciary duty as pleaded and erroneously gave Judgment for the Plaintiffs/Respondents.

14. The learned trial Judge erred as a matter of law when the undisputed facts and the law applicable thereto clearly indicated that the gravamen of the Secondnamed Plaintiff/ Respondent's contention that he did not have the opportunity of purchasing the shares of the Second, Third, Fourth and Fifthnamed Defendants/

" Appellants was unfounded and the Secondnamed Plaintiff/Respondent failed to establish a case in this regard.

15. The learned Judge failed to appreciate that the transfers of the shares from the Second, Third, Fourth and Fifthnamed Defendants/ Appellants to the Firstnamed Defendant/Appellant and the undisputed facts and the law application thereto was validly done and that the complaints made by the Secondnamed Plaintiff/Respondent was in relation to events that in no way affected the validity of the transfers.

16. The Judgment of the learned trial Judge clearly indicates that the Judge failed to appreciate what were the substantial issues in the case to be adjudicated on and the law applicable thereto as it contains findings of facts on matters clearly erroneous which cannot be substantiated by the evidence and his judgment is flawed."

The respondents countered with a Respondent's Notice, which reads:

"(1) The directors present at a meeting held on the 10th day of January, 1989, acted ultra vires or alternatively improperly and in breach of the Articles of Association in confirming and ratifying the transfers which had been effected at the instance of the shareholders ISABEL JOYCE CHADWICK, DOREEN WHITMAN and the Executors of ESTATE MARION KERR-JARRETT, deceased to the First Appellant, in that -

(a) The said transfer was not made within three (3) calendar months after the expiration of the Notice as required by Article 33 of the Articles of Association;

(b) Following the abortive attempt of the firstnamed Appellant to take over the Respondent's Company the second-named Respondent was not offered the opportunity to acquire the shares that were being transferred although as established by the uncontradicted evidence of the Second Respondent the circumstances had changed and the majority holding was of special financial value;

" (c) The said transfers did not result from the issue of such a Notice as is required by the provisions of the said Articles.

(2) That the aforesaid transfers were made, confirmed and/or registered in contravention of the Articles of Association of the Respondent Company as well as in breach of the fiduciary duties of the Directors for the reasons hereinbefore stated and in addition, for the following reasons, inter alia:

(a) No proper Notice of the Meeting was given to the Second Respondent;

(b) The said Meeting was called and proceeded with the objective of frustrating and/or defeating the legitimate exercise of the fundamental rights of the majority of the shareholders conferred by section 175 of the Companies Act and Article 86 of the Articles of Association of the Respondent Company to call an Extraordinary Meeting for the purpose of removing Directors of the Company;

(c) In convening the said Directors Meeting and in effecting the transfer of the said shares the said Peter Ross Kerr-Jarrett acted in his own interest in that he obtained or sought to obtain direct and/or indirect financial benefits and/or personal advantage;

(d) The Registration was invalid, in that the:

(i) Company's share register was removed from proper custody without the proper authority;

(ii) action was taken on the instructions of Mr. Vincent Chen who had no authority to give such instructions and was as the agent of the said Peter Ross Kerr-Jarrett, in a position of a conflict of duty and interest."

The real question in controversy between the parties centres around the endeavours of Barnett Holdings Limited, through the instrumentality of Peter Ross Kerr-Jarrett (Peter Ross) to take over Barnett Limited. In the eye of the resultant storm are Peter Francis Kerr-Jarrett (Peter Francis), a member of Barnett Limited and his stepson the aforesaid Peter Ross who is not a member of Barnett Limited but was employed as a director and a manager but was not a managing director. Arising out of this conflict the two major issues which to my mind require the determination of the court are:

1. Were the shares currently registered in the company's Register in the name of Barnett Holdings legitimately acquired?

2. Is the claim for rectification of the company's Register sustainable?

The nature of the conflict does not admit of a short answer to these questions but requires the relation of the history of the matter and the solution of questions which are subsumed under the two major issues identified above.

Barnett Limited is a private company incorporated on May 28, 1953, with a nominal share capital of $700,000 divided into 350,000 shares of two dollars each of which 312,000 shares have been issued and fully paid up. The members were seven brothers and sisters of the Kerr-Jarrett family and as of March 9, 1988, their shareholdings were as follows:

(a)	Isabel Joyce Chadwick	49,920
(b)	Peter Francis Kerr-Jarrett	49,920
(c)	Ian Kerr-Jarrett	49,920
(d)	Christine Aruber Noble	49,920
(e)	Doreen Whitman	49,920
(f)	Sydney John Winder	12,480
(g)	Estate Marion E. Kerr-Jarrett	49,920
		312,000

The significance of March 9, 1988, derives from the fact that on that date the shareholders with the exception of Peter Francis gave notice to the Board of Directors of

their intention to sell their shares at an agreed price of $30.71 per share. In so doing, they were acting in compliance with Article 30 of the company's Articles of Association. Also in keeping with the provisions of the said Article 30 the Directors notified Peter Francis, the only non-vending shareholder, of the intention to sell the shares and he was invited to indicate whether he was willing to purchase any of the shares and if so, how many. This is the notice sent to him:

"

NOTICE

BARNETT LIMITED

TO: PETER KERR-JARRETT

NOTICE is hereby given that the Board of Directors of BARNETT LIMITED have received notice from the undermentioned shareholders of their intention to sell the following shares:

IAN KERR-JARRETT	49,920	shares
ISABEL J. CHADWICK	"	"
CHRISTINE A. NOBLE	"	"
DOREEN WHITMAN	"	"
ESTATE MARION KERR-JARRETT (Deceased)	"	"
SYDNEY WINDER	12,480	"

AND THAT the Board of Directors at their meeting of 9th March 1988 has agreed with the said shareholders that the shares be sold at a price of $30.71 per share.

YOU ARE HEREBY AFTER TWENTY TWO (22) DAYS from the date hereof to indicate whether you are willing to purchase any of the said shares and if so what maximum number."

By letter dated 28th March, 1988, he replied that he was prepared to purchase at the agreed price the shares of:

Ian Kerr-Jarrett	49,920
Christine A. Noble	49,920
Sydney Winder	12,480
	112,320

But he was careful to stipulate that he would still accept 112,320 shares however the Directors may choose to allocate

the shares. The next logical step, if the Directors had continued to obey the Articles, would be the allocation of the shares to Peter Francis and the shares not purchased by him would then become available for sale as provided by Article 33. But this is not what followed. As appears from the Minutes of a Directors' Meeting held on April 5, 1988, the following resolution was passed over the objection of Peter Francis:

> "Be it resolved that the directors in exercise of their discretion pursuant to Article 30 of the Articles of Association of the company require that the shares being offered by Ian Kerr-Jarrett, Isabel J. Chadwick, C.A. Noble, D. Whitman, Sydney Winder and Ian Kerr-Jarrett and C.A. Noble as Executors of the estate of Marion Kerr-Jarrett, deceased be sold in one lot."

It is of no small significance that at that very meeting a resolution was passed approving the transfers which were tendered, viz.:

> "That the following transfers of shares now tendered to the Board are hereby approved:

Isabel Joyce Chadwick	49,920 shares to Barnett Holdings Ltd.
Christine A. Noble	49,920 shares to Barnett Holdings Ltd.
Doreen Whitman	49,920 shares to Barnett Holdings Ltd.
Estate Marion Kerr-Jarrett (deceased)	49,920 shares to Barnett Holdings Ltd.
Sydney Winder	12,480 shares to Barnett Holdings Ltd.
Ian Kerr-Jarrett	1 share to Eagle Merchant Bank of Jamaica Ltd.
Ian Kerr-Jarrett	1 share to Eagle Holdings and Investments Ltd."

These transfers were all dated 30th March, 1988.

This turn of events was manifestly calculated to deprive Peter Francis of the benefit of his election and he lost no time in taking action to secure those benefits. On April 8 he filed action against Barnett Limited and on

November 18, 1988, Malcolm, J. gave judgment in his favour declaring that he was entitled to be allocated the shares he had opted to purchase. That judgment was contested on appeal but it was affirmed by the unanimous decision of the Court of Appeal (C.A. 66/88) delivered on December 14, 1988, written reasons being given on 31st January, 1989. In explaining the effect of the relevant articles, the Court of Appeal (per Carey, J.A.) said at pages 7 - 8:

> "The arguments of Mr. Muirhead, as I understand them fail to recognize the right of the member to the shares he requires and also fails to recognize that the directors are not permitted to force a member to accept more shares than he has notified that he is willing to take. The obligation and indeed the need to sell to a third party, only arises where the non-vending member has been given every opportunity as allowed by the articles to purchase such number of shares as he requires.
>
> In my judgment to construe the articles to mean that the directors in this case had an absolute right to sell the shares in one lot to the respondent, a member of the company, who had complied with article 31, is to render wholly nugatory the right of pre-emption conferred on a non-vending shareholder under article 29. On the true construction of articles 29 - 33 the directors were obliged to allocate the shares requested by the respondent, and were not empowered to sell the shares on offer to a third party, ignoring the rights of the respondent. To do so, would be contrary to article 32 which requires that the directors 'shall allocate the said shares amongst the members who have expressed their willingness to purchase as aforesaid.' Moreover, article 29 would also be breached because the requirement there, is, that no transfer to a third party may be allowed 'unless and until' the right of pre-emption has been exhausted. That right as I have indicated, has been spelt out in articles 30, 31 and 32 and it is not exhausted when the willing non-vending shareholder has stated the number of shares he requires. Articles 29 - 32 must be read as a whole."

This determination cannot be re-litigated in the present appeal and it should suffice to set out the articles thus dealt with:

"29. Except as hereinafter provided no shares in the Company may be transferred unless and until the right of pre-emption hereinafter conferred has been exhausted.

30. Every member who intends to transfer shares (hereinafter referred to as 'the Vendor') shall give notice in writing to the Directors of his intention. Such notice constitutes the Directors his agent for the sale of the said shares, in one or more lots at the discretion of the Directors, to members of the Company at a price to be agreed upon by the Vendor and the Directors or, in default of agreement, at a price which the Auditor of the Company for the time being certifies, by writing under his hand, to be, in his opinion, the fair selling value thereof as between a willing vendor and a willing purchaser.

31. Upon the price being fixed as aforesaid, the Directors shall forthwith give notice to all the members of the Company of the number and price of the shares to be sold, and invite each of them to state in writing, within twenty-one days from the date of the said notice, whether he is willing to purchase any, and if so what maximum number, of the said shares.

32. At the expiration of the said twenty-one days, the Directors shall allocate the said shares amongst the members who have expressed their willingness to purchase as aforesaid, and so far as may be pro rata according to the number of shares already held by them respectively, provided that no member is obliged to take more than the said maximum number of

> "shares so notified by him as aforesaid. When such allocation has been made, the Vendor, on payment of the said price, shall transfer the shares to the purchasers. If he makes default in so doing the Chairman for the time being of the Directors of the Company, or failing him one of the Directors duly nominated by resolution of the Directors for that purpose, shall forthwith be deemed to be the duly appointed attorney of the Vendor, with full power to execute, complete and deliver in the name and on behalf of the Vendor a transfer of the shares to the purchasing members, and the Directors may receive and give a discharge for the purchase money on behalf of the Vendor, and enter the name of the purchasers in the Register of Members as holders by transfer of the shares purchased by them.
>
> 33. If all the said shares are not sold as aforesaid, the Vendor may, at any time within three calendar months after the expiration of the said twenty-one days, transfer the shares not so sold to any person, subject to the provisions of Articles 24 and 27 hereof, and at any price not less than the price fixed as aforesaid."

In pursuance of the judgment of this court, Peter Francis proceeded to acquire the three sets of shares for which he had opted. This he did at a meeting convened on December 15, that is, the day following the decision of the Court of Appeal, which was attended by Peter Francis Kerr-Jarrett, his wife and his son to each of whom in pursuance of Article 35(a) he had allocated one share. The ownership of these shares is not an issue in this appeal - and requires no further notice. Copies of the transfers are exhibited, one of which is set out below, principally to afford comparison with the transfers which are in issue:

> "I, IAN KERR-JARRETT formerly of Montego Bay in the parish of Saint James but now of the County of Somerset, England (hereinafter referred to as 'the Transferor') IN CONSIDERATION of the sum of ONE MILLION FIVE HUNDRED AND THIRTY THREE THOUSAND AND FORTY-THREE DOLLARS AND TWENTY CENTS ($1,533,043.20) paid to me by PETER FRANCIS KERR-JARRETT of 1 King Street, Montego Bay in the parish of Saint James (hereinafter referred to as 'the Transferee') HEREBY TRANSFER to the Transferee the 49,920 ordinary shares standing in my name in the above company TO HOLD the same unto the Transferee

"subject to the several conditions on which I hold the same immediately before the execution hereof.

A N D the Transferee HEREBY AGREES to accept and take the said shares subject to the conditions aforesaid."

As the holder of 52% of the issued shares Peter Francis, being thus enabled by Article 94 on December 22, 1988, nominated himself as Chairman, a position which he had held from the inception of the company until his removal on April 5, 1988, and on the same date he issued the following requisition for an Extra-ordinary General Meeting:

"I, PETER FRANCIS KERR-JARRETT being the holder 52% of the issued share capital of the company which carries the right to vote at general meetings and upon which all calls have been paid hereby (pursuant to article 50 of the company's articles of association) requisition that an extraordinary general meeting of the company be convened at the earliest possible date.

The object for which the meeting is proposed to be called is to put to the members the following resolutions:

(1) That Peter Ross Kerr-Jarrett, Ian Kerr-Jarrett, Christine Noble and Joyce Chadwick be removed as directors of the company pursuant to the provisions of article 86 of the company's articles of association.

(2) That Janet Kerr-Jarrett and Mark Kerr-Jarrett be appointed as directors of the company pursuant to the provisions of article 87 of the company's articles of association."

Article 50(a) states the procedure which is to follow upon the receipt of such a requisition, viz.:

"The Directors may, whenever they think fit, and they shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company, which carries the right to vote at general meetings, and upon which all calls or other sums then due have been paid, forthwith proceed to convene an extra-ordinary general meeting of the company."

Accordingly, on the following day, December 23, a notice was issued to Directors and shareholders of a meeting to be held on January 11, 1989. But at about 2:00 p.m. on January 9, 1989, Peter Francis received a telephone call from the Secretary advising him of a Board Meeting to be convened on January 10. This would be a meeting by the very Directors whom it was proposed to remove from office on January 11. He pleaded prior business engagement on the company's farms, in addition to the short notice as precluding his attendance. Further, there was no intimation as to the nature of the business to be transacted and reference to the resolutions passed makes this much more than a squeamish objection. Here are those resolutions:

"WHEREAS 1. The Directors by resolution passed on the 5th day of April, 1988 approved the transfer of shares which were tendered to the board from Isabel Joyce Chadwick, Christine A Noble, Doreen Whitman, the Executors of the Estate of Marion Kerr-Jarrett deceased and Sydney Winder of all of their shares to Barnett Holdings Limited and of Ian Kerr-Jarrett as to 49,918 shares to Barnett Holdings Limited, as to one share to Eagle Merchant Bank of Jamaica Limited and as to one share to Eagle Holdings and Investment Limited and authorised and directed the secretary of the company to issue the share certificates accordingly subject to the approval of the Bank of Jamaica.

2. The Supreme Court ruled on the 18th November, 1988 that the shares of Ian Kerr-Jarrett, Christine Noble and Sydney Winder should be allocated by the Directors of the Company to Peter Francis Kerr-Jarrett Snr. in satisfaction and fulfillment of the rights of pre-emption conferred upon him by the Articles of Association of the Company at the price of $30.71 per share and which decision was confirmed by the Court of Appeal on the 14th day of December, 1988.

3. The said Peter Francis Kerr-Jarrett Snr. through his Attorneys, Messrs. Dunn, Cox & Orrett obtained the consent of the Bank of Jamaica by letter dated 15th December, 1988 for the transfer of the shares of Ian Kerr-Jarrett, Christine Amber Noble and Sydney John Winder to Peter Kerr-Jarrett Snr. and Messrs. Clinton Hart & Co., Attorneys-at-Law for the Company, Barnett Limited, obtained the consent of the Bank of Jamaica by letter dated 22nd December, 1988 for the transfer of all of the shares of the

"Estate Marion Kerr-Jarrett, Isabel Joyce Chadwick and Doreen Whitman to Barnett Holdings Limited.

4. The said Peter Francis Kerr-Jarrett has in accordance with the said Court Order caused the shares of the said Ian Kerr-Jarrett, Christine Noble and Sydney Winder to be transferred and registered in his name and the Secretary of the Company has made the appropriate entries in the books of the company and issued the appropriate Certificate to the said Peter Francis Kerr-Jarrett.

5. The Secretary of the Company has in compliance with the request of Isabel Joyce Chadwick, Doreen Whitman and the Executors of the Estate Marion Kerr-Jarrett deceased and the Resolution passed by the Directors on the 5th day of April, 1988 as varied by the decisions of the Supreme Court and the Court of Appeal, effected the Transfer of the shares of the said Isabel Joyce Chadwick, Doreen Whitman and the Executors of the Estate Marion Kerr-Jarrett deceased to Barnett Holdings Limited and issued the appropriate share certificate in the name of Barnett Holdings Limited.

IT IS HEREBY RESOLVED THAT:

1. The Directors do hereby ratify and confirm the issue by the Company of the relevant share certificate to Peter Francis Kerr-Jarrett Snr.

2. The Directors do hereby ratify and confirm the Transfer of the shares of the said Isabel Joyce Chadwick, Doreen Whitman and the Executors of the Estate of Marion Kerr-Jarrett deceased to Barnett Holdings Limited a company duly incorporated and existing under the Companies Act and having its registered office at 21 East Street in the parish of Kingston as approved and authorised by the Directors at the aforesaid meeting held on the 5th day of April, 1988 and in the alternative, out of an abundance of caution, if the approval of the 5th April, 1988 is not effective which the Directors do not admit, the Directors do hereby approve the transfer of 49,920 shares of Isabel Joyce Chadwick, 49,920 shares of Doreen Whitman and 49,920 shares of the Executors of the Estate of Marion Kerr-Jarrett deceased to Barnett Holdings Limited.

3. The Directors do hereby approve, ratify and confirm the issue by the company of the relevant share certificate to Barnett Holdings Limited.

"Mr. Ian Kerr-Jarrett moved that the resolutions be passed and this was seconded by Mrs. Isabel Joyce Chadwick. The resolutions were passed by unanimous vote.

Mr. Peter Ross Kerr-Jarrett advised the Board that he had been suspended as Manager by Mr. Peter Francis Kerr-Jarrett and that the Company's Range Rover had been repossessed from him by forcible entry into the premises occupied by him as a consequence of which he has been constrained to hire a car.

The Directors placed on record their condemnation of these actions of Mr. Peter Francis Kerr-Jarrett as well as his conduct in denying them access to the premises of Barnett Limited. The Directors by unanimous resolution proposed by Ian Kerr-Jarrett and seconded by Joyce Chadwick approved ratified and authorised the leasing of a motor car by Peter Ross Kerr-Jarrett and agreed that the company should pay the cost of same.

Mrs. Christine Noble moved that the following resolutions be passed:

BE IT RESOLVED THAT:

1. The company, in compliance with the existing employment terms, hereby agrees to pay to Mr. Peter Ross Kerr-Jarrett Jnr. the sum of Three Hundred and Thirty-seven Thousand and Fifty-seven Dollars ($337,057) upon his dismissal as Manager of Barnett Limited and/or its Subsidiaries, or upon his resignation from same for any reason and at his complete discretion. This payment is to be made in full immediately upon his dismissal or resignation save and except where he is prepared to accept any variations in the terms and method of payment. If dismissal or resignation takes place at any date after today then the sum above would be increased proportionately using the following formulae:

	$
CASH SALARY	100,000
OVERSEAS TRAVEL COSTS (High season 'apex' fares for family to England)	16,000
HOUSING (Fully maintained house with all utilities included) @ say $8,000 p.m.	96,000
MOTOR VEHICLE (all costs of maintaining own motor vehicle)	25,000

	$
"DOMESTIC STAFF (@$280 per week)	14,560
BLUE CROSS MEDICAL INSURANCE	5,000
LIFE INSURANCE	7,000
PER ANNUM VALUE	265,560

Termination entitlement (as per 1st January, 1982 employment agreement) is 6 weeks per year of service calculated from 11th November, 1977. As at 11th November, 1988 entitlement would therefore be:

	$
6 weeks x 11 years x $265,560	337,057

2. The Directors do hereby authorise and instruct Mr. Peter Ross Kerr-Jarrett to write to Mr. Peter Francis Kerr-Jarrett advising that the Board dis-associates itself from the wrongful suspension of the Manager and the wrongful repossession of the Range Rover and will not shield him from or indemnify him in respect of any action which the Manager Mr. Peter Ross Kerr-Jarrett may seek by way of redress.

These resolutions were seconded by the Chairman of the meeting Mr. Ian Kerr-Jarrett. When put to the vote Mr. Peter Ross Kerr-Jarrett abstained and all other Directors present voted in favour of the resolutions whereupon the resolutions were passed by unanimous vote.

The Board noted that Notices of an Extra Ordinary General Meeting dated 23rd December, 1988 had been received by Mrs. Isabel Joyce Chadwick, Mrs. Christine Noble, Mrs. Doreen Whitman and Mr. Ian Kerr-Jarrett calling a shareholders meeting for 11th January, 1989 at the Company's office at Barnett Estates, Montego Bay. That accompanying the Notice was a Notice of Directors meeting dated 20th December, 1988 informing of a meeting to be held at 11:30 a.m. on the 24th December, 1988 at 6 King Street, Falmouth.

Mr. Roy Swaby advised the Board that he had been informed by Mr. Bill Ives that no meeting of the Board of Directors was held on either the 23rd or 24th December, 1988.

Thereupon the Chairman moved the following Resolution:

> 'Be it resolved that Mr. Peter Ross Kerr-Jarrett be and is hereby authorised requested and required to advise the Secretary of the Company and Mr. Peter Francis Kerr-Jarrett that the Board objects to the holding of the Extra Ordinary General Meeting on Wednesday 11th January, 1989 as it considers it illegal and improper and will regard any decisions taken by the proposed

> " meeting as being null and void.'
>
> This Resolution was seconded by Mrs. Joyce Chadwick and was unanimously passed."

There was a further resolution appointing Alternate Directors to Ian Kerr-Jarrett, Mrs. Christine Noble and Mrs. Isabel Joyce Chadwick, who were authorised:

> "...to attend all meetings, perform all duties, functions and responsibilities of a Director in place of the Director at all meetings of the Board at which the Director may not be present."

More will be said about this meeting and resolutions passed thereat but for the nonce I think it can safely be said that the obvious purpose of this meeting was to frustrate the Extraordinary General Meeting which was to be held the next day, and which was, in fact, boycotted by the persons present at the meeting of January 10. Indeed, it is charged that the directors at that meeting acted ultra vires or alternatively improperly in breach of the Articles of Association.

On May 7, 1990, the respondents filed an Originating Summons which was subsequently amended, seeking rectification of the Register of Members of the plaintiff company by striking out the names of Barnett Holdings Limited as holder of 149,760 shares of the said company and by restoring to the Register the names of Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion Kerr-Jarrett as the holders of the said shares. These are the shares which had not been acquired by Peter Francis.

Order giving directions was made by Langrin, J. on July 22, 1991. He ordered that the Originating Summons proceedings be treated as if begun by writ and made the necessary consequential orders. Further, he ordered:

> "That the affidavits filed herein by each party together with their supplemental affidavits, if any, shall be deemed to be the evidence in the case, subject to the right of each party to adduce additional evidence and cross-examine the affidavits at the trial."

There were then on file two affidavits by Peter Francis, one by Peter Ross and one by Pamela Phillips.

The trial giving rise to this appeal began before Theobalds, J. on December 2, 1991. Peter Francis testified on oath and was cross-examined at length by Mr. R.N.A. Henriques, Q.C., who represented the appellants, after which he elected to adduce no evidence and consequently withdrew the affidavits which had been tendered on behalf of the appellants. Theobalds, J. delivered judgment referred to supra.

Despite the multiplicity of issues raised in the grounds of appeal, it is my opinion, as earlier expressed, that the issues which are critical to the resolution of this appeal are (a) the validity of the claim of Barnett Holdings Limited to the shares registered in its name and (b) whether the claim to rectification is sustainable. But it needs to be recognised that a favourable answer to the first question does not necessarily negate the second because both have their distinct parameters.

The validity of the claim by Barnett Holdings Limited

Pertinent to resolving the impasse regarding the shares registered in the name of Barnett Holdings Limited is a consideration of the conditions precedent to such an acquisition. Barnett Limited being a private company, a family company, with articles designed to retain membership in the company to family members and so precluding sales to non-members except as specified, a claim to ownership of such shares must be shown to have complied with the requirements. As previously stated, the relevant articles are Articles 29 to 33 and so far as a non-member is concerned Article 33 is of crucial importance. Article 29 places a caveat against the transfer of any shares unless and until the right of pre-emption has been exhausted. Articles 30 to 32 deal with the sale of shares by vending members to non-vending members. Then comes

Article 33, which I repeat for ease of reference:

> "If all the said shares are not sold as aforesaid, the Vendor may, at any time within three calendar months after the expiration of the said twenty-one days, transfer the shares not so sold to any person, subject to the provisions of Articles 24 and 27 hereof, and at any price not less than the price fixed as aforesaid."

(Articles 24 and 27 deal with the refusal by Directors to register transfers of shares).

By the resolution of the Directors on April 5, 1988, to sell all the shares in one lot, they were effectively denying Peter Francis his right of pre-emption to secure which he had to resort to legal action, as earlier stated, followed by the Directors' meeting on December 15, 1988, which gave effect to the judgment of the court. In my opinion, it was at this latter meeting that there was done what ought to have been done by the Directors' Meeting on April 5, 1988, that is, secure to Peter Francis his pre-emption rights. Therefore, having regard to the plain language of Article 29, proscribing any transfer of shares "unless and until the right of pre-emption..." had been exhausted the "Transfers" (so called) dated March 30, 1988, which purported to effect transfers to Barnett Holdings Limited were ineffective as such. They, quite apart from having been precipitately executed - as had been admitted before us - like the resolution which sought to give effect to them are invalid as instruments of transfer. Since, in point of time, these instruments could not transfer, that is, assign the beneficial interest in the shares to Barnett Holdings Limited (see Lyle & Scott Ltd. v. Scott's Trustees [1959] A.C. 763 HLSc) they could at the highest be regarded only as inchoate and, provided they are not flawed in any other respects, could at the right time take effect as transfers. Such a point in time would have to come within the three calendar months provided in Article 33. It follows that Barnett Holdings Limited could not and did not

acquire ownership in the shares on March 30, 1988, or at any time prior to December 15, 1988.

It was contended on behalf of the appellants "that the trial judge had failed to appreciate that the resolution to transfer these shares to Barnett Holdings Limited was already approved by the resolution of the 5th April, 1988, at a lawfully constituted meeting and that all that was being done by the Directors on the 10th day of January, 1989, was merely to re-confirm same and, as already pointed out, the shares were already registered on the 30th December, 1988." But the fallacy inherent in this submission is patent. It has already been shown that it was not competent for the Directors to pass that resolution to sell the shares on offer in one lot thus ignoring the right of pre-emption of Peter Francis. The resolution was not, in my opinion, partly valid and partly invalid. It was wholly invalid and could not effect the intended purpose. Accordingly, the purported reconfirmation on the 10th January, 1989, could not make valid what was in fact a nullity. While I am on this point, it may be convenient to meet a claim by Peter Francis regarding these shares which, if correct, could negative the claim of Barnett Holdings Limited. The claim made on his behalf was that as majority shareholder he had a right which attaches to majority share holding, viz. the right to acquire the remaining shares from the minority shareholders - his sisters - and at a price less than the agreed valuation of $30.71 shares since, it is claimed, the price of minority shares declines. Such a claim, to my mind, attempts to establish another right of pre-emption derived, not from the articles, but from the majority share holding. However, where there is a specific provision it cannot be sidelined by any general rule, if, indeed, there is such a rule, which, invoked in this context, is an unpardonable attempt at manipulation of the minority shareholders. But even so that is not the main obstacle to this claim. That obstacle is provided by Article 33 which specifically provides that:

> "If all the shares are not sold as aforesaid, the Vendor may, at any time within three calendar months after the expiration of the said twenty-one days, transfer the shares not so sold to any person, subject to the provisions of Articles 24 and 27, and at a price not less than the price fixed as aforesaid."
>
> [Emphasis supplied]

Obviously, the "any person" referred to in this article includes Peter Francis who as well as any non-member, may purchase the shares in question but "at a price not less than the price fixed as aforesaid." This article, therefore, retains the fixed price of the shares on offer for at least three calendar months from the expiration of the period provided for the exercise of the right to pre-emption and during that period the shares may be sold for more but not less than the agreed price. The transfer registered by Peter Francis, evidencing the sale of the shares affected by the exercise of his right to pre-emption, is dated 15th December, 1988. That is the date when those shares were sold to him. He could not compel the vendors to refrain from selling the shares not opted for by him until the expiration of three calendar months from the date of his purchase to escape the application of Article 33. Clearly, therefore, his claim to those shares is unfounded. The registered transfers of those shares bear the ineffective date March 30, 1988, but it was submitted that they were registered on December 30, 1988, the date immediately preceding the delivery of the written reasons for judgment by the Court of Appeal in C.A. 66/88.

The fate of another contention on behalf of the respondents against the validity of the appellants' claim follows inexorably upon the rejection of March 30, 1988, as being a valid reference point. That contention is that the registration in the names of Barnett Holdings Limited on December 30, 1988, was invalid being more than three calendar months after March 30, 1988. But even if March 30, 1988, were indeed a valid reference point the intervening period would, to my mind, be what I choose to regard as a hiatus created by legal and judicial proceedings which effectively halted the running of time.

From the above reasoning, therefore, it follows that if the date of the transfer to Barnett Holdings Limited was the only objection to their claim to those shares the claim would stand. But there are far more serious objections which involve, as well, the second issue to be dealt with, namely, the claim to rectification, and may, therefore, be conveniently considered therewith.

The claim to rectification

This claim is based on section 115 of the Companies Act which provides as follows:

> "If -
>
> (a) the name of any person is, without sufficient cause, entered in ... the register of members of a company, or
>
> (b) ...
>
> the person aggrieved, or any member of the company or the company, may apply to the Court for rectification of the register."

In the instant case the application has been made by the company and a member. What has to be shown is that the name Barnett Holdings Limited has, without sufficient cause, been entered in the register of members of the company.

As already stated, Barnett Limited is a private company and, accordingly, membership therein can be acquired by an outsider such as Barnett Holdings Limited only within the provisions of Articles 29 to 33. I have already concluded that there was no valid resolution to sell the shares to Barnett Holdings Limited. Hence, any purported sale in those circumstances would not entitle Barnett Holdings Limited to have its name entered in the register of members of the company and if the name were entered then there is a good claim for rectification. But that is not the only problem confronting Barnett Holdings Limited.

On the face of the transfers, there are two objections which are insurmountable. The first relates to the price at which the shares were being acquired by Barnett Holdings Limited.

The value per share on the face of the transfer is $2.00 each. This is in flagrant breach of Article 33 which prohibits a sale of the shares at less than the fixed price, that is, $30.71. So that, whether the transfer had taken effect on March 30, 1988, as was apparently intended, or on December 30, 1988, as it eventuated, this breach of Article 33 would entitle the applicants to an order for rectification. In coming to this conclusion, I am not unmindful of the fact that the courts have not visited such a sanction in every breach of a restriction on the transfer of shares. In Hawks v. McArthur and others [1951] 1 All E.R. 22, shares in a private company were transferred without the rights to pre-emption being observed. The full purchase price for the shares was paid and transfers executed in the purchasers' names but the shares remained registered in the name of the vendor. A judgment creditor of the vendor within three weeks of these transactions obtained a charging order nisi on the shares in the company standing in the vendor's name. This order was made absolute. However, the claim of the purchasers that by the date of the charging order nisi they had obtained the beneficial interest in the shares prevailed despite the failure to comply with the company's articles. What was involved here was a dispute not between the company and the purchasers but between the purchasers and the creditors. It was held that the purchasers, having paid the full consideration for the shares, had obtained equitable rights therein which were earlier than the creditors' equitable right.

But Barnett Holdings Limited is not in the position of the purchasers in Hawks v. McArthur and others (supra) not being able to show payment of the full consideration. Nor would that have saved the day so far as the claim to rectification is concerned. In that case no registration had been made in the names of the purchasers while in the instant case a prohibited registration is involved. That is the second objection referred to appearing on the face of the transfer.

Section 30 of the Companies Act defines a private company thus:

> "30-(1) For the purposes of this Act the expression 'private company' means a company which by its Articles -
>
> (a) restricts the right to transfer its shares;
>
> ...
>
> (e) subject to the exceptions provided for in the Fourteenth Schedule, prohibits any person other than the holder from having any interest in any of the company's shares."

Article 26 restricts the transfer of shares in the manner set out therein and with particular reference to the issue under discussion, paragraph (e) provides:

> "Subject to the exceptions provided for in this Act, any person other than the holder is prohibited from having any interest in any of the company's shares."

Barnett Holdings Limited does not qualify for consideration under the exceptions provided for in the Act and reflected in Article 26(e) (supra). Accordingly, to transfer the shares to Barnett Holdings Limited "in pursuance of the terms of an Option Agreement...between the transferor and Barnett Holdings Limited as nominee for the transferor to hold the same pursuant to the terms of the said option agreement etc." is in breach of the above stated provisions. Further, Article 23 provides that:

> "All instruments of transfer shall be:
>
> (a) in the usual common form, and
>
> (b) executed by or on behalf of the transferor and the transferee
>
> and the transferor is deemed to be the holder of such shares until the name of the transferee is entered in the Register of Members in respect thereof."

Here is how a common form of transfer of shares/stocks taken from Butterworth's Encyclopaedia of Court Forms reads:

"Common Form of transfer of shares or stocks

I [We] [name[s]] of [address[es], etc.] in consideration of the sum of... paid to me [us] by... of [address[es], etc.] (hereinafter called the transferee[s]) do hereby transfer to the transferee[s] the share[s] numbered ... [or ... pounds stock] in the undertaking called ... Limited, to hold unto the transferee[s], subject to the several conditions on which I [we] held the same immediately before the execution hereof; and I [we] the transferee[s], do hereby agree to accept and take the said shares [or stock] subject to the conditions aforesaid.

IN WITNESS etc.

[Signatures and seals of both parties]."

That no attempt was made to adhere to this form is evident from a reading of the disputed transfer. Here is one:

"Transfer of Shares

I ISABEL JOYCE CHADWICK (hereinafter called 'the Transferor') being registered as the holder of 49,920 shares of $2.00 each (hereinafter called 'the said shares') numbered 197,601 to 247,000; 311,481 to 312,000 inclusive in the undertaking of BARNETT LIMITED in pursuance of the terms of an Option agreement dated day of 19 made between the Transferor and BARNETT HOLDINGS LIMITED (hereinafter called 'the Transferee') DOTH HEREBY TRANSFER the said shares to the Transferee as nominee for the Transferor to hold the same pursuant to the terms of the said Option Agreement subject to the several conditions on which the Transferor now holds the same. Dated the 30th day of March, 1988."

The mischief against which the above-cited provisions, that is section 30, and Articles 23 and 26, aim is concealment of the ownership of the beneficial interest in the shares registered in the company's register. Those provisions have been blatantly flouted and in those circumstances a claim to removing the offending registration is unanswerable.

Sufficient has been said to dispose of the appeal adversely to the appellants, but having regard to the submissions made concerning the abuse of powers by directors that issue deserves some attention.

Abuse of powers by the Directors

The allegations of abuse of powers and breach of fiduciary duties are made in paragraphs (e), (f), (g) and (i) of the Originating Summons as follows:

> "(e) The Directors present at the meeting held on the 10th day of January, 1989, abused their powers as directors and acted in breach of their fiduciary duties.
>
> (f) By instructing the Secretary of the Plaintiff Company to proceed with the scheduling of the Meeting for 2:00 p.m. on the 10th January, 1989, Peter Ross Kerr-Jarrett abused his power as a director and acted in breach of his fiduciary duties.
>
> (g) The directors present at the meeting of the 10th January, 1989, abused their powers and pursued a course of conduct designed to circumvent the legal consequences of the Judgment of the Court of Appeal in Suit No. C.L. of 1988/K 023 which Judgment frustrated the abortive attempt of the group led by Peter Ross Kerr-Jarrett and Dr. Paul Chen-Young to take-over Barnett Limited.
>
> (i) The directors present at the meeting of 10th January, 1989 acted in breach of their fiduciary duties and abused their powers as directors by holding the meeting on that date to exercise their voting power to ratify and confirm the transfers which had been effected at the instance of the shareholders Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion Kerr-Jarrett deceased to Barnett Holding Limited."

The learned Judge had no hesitation in finding these allegations proved. Said he at page 271 of the record:

> "The Affidavit evidence of Peter Francis Kerr-Jarrett along with his viva voce evidence in court and the reasonable and quite inescapable inferences to be drawn therefrom justify, in my view, a rejection of the submission that the Plaintiffs have not discharged the burden of proving their case on a balance of probability or at all. There was a clear conflict of interest between Peter Ross Kerr-Jarrett as sole beneficial owner of Barnett Holdings Limited and in his position as a Director of the Plaintiff Company. The same conflict of interests applies to the second, third, fourth and fifth Defendants."

Having thus found, he made the declarations prayed for in paragraphs (a), (d), (f), (g), (h) and (i) of the Amended Originating Summons though, as Mr. Henriques pointed out, the declarations ought to have been made in terms of the Statement of Claim filed pursuant to the order giving directions made by Langrin, J. on July 22, 1991. But that was more a comment made en passant than a matter of serious complaint.

It must be borne in mind that the only evidence adduced was by the respondents in the affidavit of Peter Francis and his viva voce evidence in cross-examination. Where the appellants have, through competent and experienced counsel, exercised the right not to adduce evidence, I think it is now much too late for them to complain about the conclusions at which the court arrived on the basis of the evidence before it where such evidence does, in fact, support such conclusions. One complaint is that the learned judge found that there had been abuses of power but had failed to identify any such abuse and furthermore that Peter Ross was not a shareholder and had not been made a defendant. While it is true that the judgment would have been more helpful if it had particularised the findings that deficiency is not fatal if, indeed, any abuses appear from the evidence which was accepted. Regarding the omission of Peter Ross from the list of defendants, it was urged that the proceedings were directed at determining whether the transfer effected in favour of Barnett Holdings Limited were valid and consequently whether Barnett Holdings Limited should be treated by the company as a shareholder. In those circumstances, the relief was sought only against Barnett Holdings Limited and none sought against Peter Ross. But in this regard, there is a very significant finding by the learned judge that:

> "It is not in issue that Barnett Holdings Ltd. the First Defendant is a Company in which Peter Ross Kerr-Jarrett is the sole beneficial owner of and controls all the issued shares. This fact appeared to have escaped the notice of the Second Plaintiff initially"

which has the consequence of making Barnett Holdings Limited, for the purpose of the proceedings, the alter ego of Peter Ross. What is also of importance is that although Peter Francis had been Chairman of Barnett Limited from its inception and for thirty-five years thereafter up to his removal from that office by the controversial Board of Directors Meeting of April 5, 1988, he was, until April 6, 1988, unaware of the existence of Barnett Holdings Limited or of the interest of Peter Ross, a director of Barnett Limited, in that company. He said he had seen no documents relating to these matters. It is not difficult to see how a conflict of interest would arise between Peter Ross' interest in Barnett Holdings Limited and his duty as a director of Barnett Limited. At the meeting of April 5, 1988, Peter Ross voted for the sale of the shares on offer for sale to Barnett Holdings Limited. He did so despite the fact that Mr. John Lord, Attorney-at-law, representing Barnett Limited at the meeting in place of Peter Francis, the Chairman and legal representative for the company, who was interested in purchasing some of the shares concerned, about which a decision was to be made at that meeting, advised the meeting that the resolution proposing the sale to Barnett Holdings Limited was ultra vires and illegal. The courts have since confirmed Mr. Lord's opinion but, to my mind, the abuse by the directors, including Peter Ross, is so patent it did not have to wait to be decided to be so by the courts.

The Minutes of the Meeting of the Board of Directors held on January 10, 1989, discloses that, with Peter Ross abstaining, the following resolution was unanimously passed:

> "BE IT RESOLVED that:
>
> The company, in compliance with the existing employment terms, hereby agrees to pay to Mr. Peter Ross Kerr-Jarrott Jnr. the sum of Three Hundred and Thirty-seven Thousand and Fifty-seven Dollars ($337,057.00) upon his dismissal as Manager of Barnett Limited and/or its subsidiaries, or upon his resignation from same for any reason and at his

> "complete discretion. This payment is to be made in full immediately upon his dismissal or resignation save and except where he is prepared to accept any variations in the terms and method of payment. If dismissal or resignation takes place at any date after today then the sum above would be increased proportionately using the following formulae."

The formulae is then set out. It is difficult to see how these provisions could be anymore generous if Peter Ross had proposed and passed the resolution all by himself.

This virtual indemnity against any wrong that Peter Ross could do in his office as Manager was the Directors' response to his informing the meeting of his suspension by Peter Francis, the Chairman of the company. This seemed to have been but an angry reaction to the news of Peter Ross' suspension. In that mood the Directors, completely forgetting the obligations of their office, became totally pro-Peter Ross and then proceeded to literally hand him carte blanche authorization for mismanaging, wasting and even misappropriating the company's property and then be free to collect his cheque and to walk off the job at any time. If that is not of the grossest type of abuse - with not a single dissenting voice - I should find it extremely difficult, if not impossible, to ever identify an abuse of powers by directors. What is more, this rash decision, for this is what it seems to me, was taken without them hearing a single word from Peter Francis, the company's Chairman, a solicitor of fifty years experience, as to the reasons for the suspension. And lest it be thought that their action had nothing to do with the suspension, the formulae was followed by this:

> "The Directors do hereby authorise and instruct Mr. Peter Ross Kerr-Jarrett to write to Mr. Peter Francis Kerr-Jarrett advising that the Board disassociates itself from the wrongful suspension of the Manager and the wrongful repossession of the Range Rover and will not shield him from or indemnify him in respect of any action which the Manager Mr. Peter Ross Kerr-Jarrett may seek by way of redress."

It is obvious that they did not wish to hear from the Chairman, although, as it appears from their point of view, the issue was between him and Peter Ross.

Any question of abuse of powers by directors must be considered against the background of the nature of the powers given to directors. In Pennington's Company Law, 6th Edition at pages 591-2 a compendium of abuse of powers by directors is set out. It reads in part:

> "Abuse of powers
>
> Directors' powers are given to them to be used for the benefit of the company, that is, for the benefit of the shareholders as a whole and not for the benefit of the directors themselves, nor for the benefit exclusively of a section of the shareholders or employees of the company, nor for the benefit of the company's parent or holding company or the company's subsidiary, or of outsiders. It has been held in Australia that this is so even if the directors in question are nominated by outsiders (such as debenture holders or trustees for them), or by a particular shareholder or group of shareholders (such as a parent or holding company) to represent their interests, but of course, it does not follow that in protecting those interests a nominated director is guilty of a breach of duty to the company, unless at the same time he disregards the interests of its shareholders as a whole. The interests of the shareholders as a whole, to which the directors must have regard, normally means the collective interests of both present and prospective shareholders, but if a takeover bid is made for a company, the interests of the shareholders which the directors must protect in supporting or opposing the bid are those of the present shareholders, and not those of the person who has made the bid as a prospective shareholder if the bid succeeds.
>
> All the cases where directors have abused their powers in order to make a personal profit for themselves may be brought under this present rule, but the rule is wider than the one relating to personal profits, and renders directors liable to compensate their company for loss caused to it in circumstances where they have enjoyed no corresponding gain at its expense. Thus, directors

> "are guilty of an abuse of their powers if they issue new shares to themselves or their nominees, not because the company needs further capital or because they seek to gain some business advantage for the company, but simply in order to gain or retain voting control in general meetings of the company, or to deprive a shareholder or group of shareholders who hold a majority of the votes at a general meeting of the control over the company which they have, or to defeat a genuine takeover bid made by an outsider, or to favour one of two competing takeover bids made by existing shareholders or outsiders. It is also an abuse of directors' powers for them to approve a transfer of their own partly paid shares in order to escape liability for a call which they intend to make, or for them to pay up the amount unpaid on their shares in advance of calls at a time when the company is insolvent in order to use the amount they pay up to satisfy arrears of salary which the company owes them, or for them to negotiate a new service agreement between the company and its managing director simply in order to confer additional benefits on him or his dependants."

Among authorities cited are: Parke v. Daily News Ltd. [1962] Ch. 927, [1962] 2 All E.R. 929; Heron International Ltd. v. Lord Grade & Associated Communications Corpn. plc [1983] BCLC 244; Piercy v. S. Mills & Co. [1920] 1 Ch. 77; Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] A.C. 821, [1974] 1 All E.R. 1126; Hogg v. Cramphorn Ltd. [1967] 254, [1966] 3 All E.R. 420; Bamford v. Bamford [1970] Ch. 212, [1969] 1 All E.R. 969; Re R & M Roith Ltd. [1967] 1 All E.R. 427, [1967] 1 W.L.R. 432.

The conduct of the directors at the meeting held on April 5, 1988, which has been condemned, was already an abuse of powers not only because such conduct flew in the face of the relevant articles of the company but because it favoured the prospective shareholder, that is, Barnett Holdings Limited, over Peter Francis, the present shareholder. The meeting of January 10, 1989, which has already been discussed, fits comfortably into the above array of abuses, not only because of the criticism that has already been made of that meeting but also because of what appears to have been the real reason for the meeting, that is, transferring the shares to

Barnett Holdings Limited making the financial provisions for Peter Ross, who had been suspended from December 29, 1989, and adopting measures calculated to frustrate the purpose of the Extra-ordinary General Meeting summoned for the following day. Although the first resolution at that meeting purported to ratify the transfer of the shares to Peter Francis which had taken place at the meeting held on December 15, 1988, having regard to the hostile attitude of the meeting towards Peter Francis that ratification can properly be seen as a sham or a pretext for the real purpose of holding the meeting. In Pennington's Company Law (supra) page 593, still under the heading "Abuse of powers", it is stated thus:

> "When directors seek to achieve two or more purposes by exercising their powers, and some of those purposes are proper and others are not, it seems that the exercise of their powers is valid so as to bind the company, unless the proper purposes are a mere sham or pretext for the improper ones. See R. v. Brighton Corpn, ex p. Shoosmith (1907) 96 LT 762 at 765, per Buckley LJ."

It was submitted, too, that the directors had abused their powers in failing to call the Extra-ordinary General Meeting requisitioned by Peter Francis who at the time held 52% of the issued share capital of the company as they were required to do by Article 50(a) of the Articles of Association which reads:

> "The Directors may, whenever they think fit, and they shall, on requisition of the holders of not less than one-tenth of the issued share capital of the company which carries the right to vote at general meetings and upon which all calls or other sums then due have been paid forthwith proceed to convene an extraordinary general meeting of the company."
>
> [Emphasis supplied]

Provided the requisitionists met the share qualification stipulated in the article, the directors had a mandatory duty to immediately proceed to convene the meeting requisitioned. But they did no such thing and the reason is not far to seek. In compliance with Article 50(b) the notice requisitioning

the meeting contained the object of the meeting which was to dismiss the directors. This obviously drove them to adopt survival methods, as emerged at the meeting. There was clearly an abuse of power in the failure to comply with the article and the adoption of methods arrived at serving their own interests. On this aspect of the case, therefore, I am in agreement with Theobalds, J. that the directors were guilty of abuse of power.

By all counts, therefore, the appeal fails and is dismissed. The judgment of the court below is affirmed. The respondents are to have their costs to be taxed if not agreed.

DOWNER J.A.

In this appeal two of the Kerr-Jarrett sisters, Mrs. Isabel Chadwick and Mrs. Doreen Whitman, together with the executors of the estate of the third sister, Marion Kerr-Jarrett purported to sell their shareholdings in Barnett Ltd., the proprietor of the family sugar estate. This private company also has shareholdings in other companies which own realty. The three sisters are the appellants and with them is Barnett Holdings Ltd., who has sought to purchase the sisters' shareholdings and Mr. Ian Kerr-Jarrett, a former shareholder of the respondent, Barnett Ltd. The dominant shareholder in the Barnett Holdings Ltd., was Peter Ross Kerr-Jarrett, the sisters' nephew by adoption.

The respondents are Barnett Ltd. and Peter Francis Kerr-Jarrett, the majority shareholder of this company. He is also the father by adoption, of Peter Ross Kerr-Jarrett. Peter Francis became the majority shareholder by virtue of exercising his pre-emptive rights to purchase the shareholding of three other members of the family, namely, Ian Kerr-Jarrett, Christine Noble and Sydney Winder. In exercising these rights, he had to seek and obtain confirmation, first from the Supreme Court, and thereafter in the Court of Appeal: see **Barnett Ltd. v. Peter Francis Kerr-Jarrett** (unreported) S.C.C.A. 66/88 delivered 31st January 1987.

Apart from being a hostile take-over bid by the appellant Barnett Holdings Ltd. for the assets of the respondents' company, this dispute is a classic family feud, and its resolution depends on the application of sedate principles of company law. In the court below, Theobalds J. decided in favour of Barnett Ltd. and Peter Francis. The substance of His Lordship's order was, that the share register of the respondent company, Barnett Ltd. be rectified pursuant to section 115 of the Companies Act, by removing the name of Barnett Holdings Ltd. and restoring the names of the three sisters. At first blush this is a curious decision since the

sisters are joint appellants with Barnett Holdings Ltd. to retain the appellant company's name on the share register. However, if this seemingly curious order is correct in law, and meets the justice of the case, it must be affirmed. It is appropriate to state that behind Peter Ross and the appellant company, is a powerful financial syndicate.

The issues on appeal may be resolved by posing the following questions - Were the three sisters entitled to sell their shareholdings to the appellant company, Barnett Holdings Ltd.? If the purported transfers were not in accordance with law, was it correct to register the appellant company? Having regard to the manner in which the registration was effected, was rectification of the respondent company's register the appropriate remedy in the circumstances of this case? In answering these three questions, be it noted none of the appellants gave evidence. Such evidence might have been of great assistance in exercising the discretionary remedy of rectification. So the issue had to be decided on the basis of the respondents' evidence, the agreed bundle and the application of legal and equitable principles.

Were the three sisters entitled to sell their shareholdings to the appellant company, Barnett Holdings Ltd.?

Since the entitlement of the sisters to sell the shareholdings was challenged by the respondents, it is helpful to advert to the interests of the parties in this contest. Initially, the appellant company attempted to take over the respondent company. That bid failed. The appellant company now contends that it had purchased the sisters' shareholdings and it relies on the relevant instruments of transfer and the entries on the share register of the respondent company.

The respondents' interest are markedly different. The respondent company is obliged to abide by its Articles and the Companies Act. Section 30 and 31 of that Act restricts the right to transfer shares and prohibit nominee shareholdings in a private

company. Peter Francis, by virtue of Article 29, would claim a pre-emptive right to purchase the sisters' shareholdings if the transfers were ultra vires and the register rectified.

It is in the light of the above circumstances that the sisters' entitlement to sell at that time must be determined. The evidence is that at a meeting of the board of directors of the respondent company on 5th April 1988, the following resolutions were proposed, seconded and passed.

> "1. BE IT RESOLVED that the Directors in exercise of their discretion pursuant to Article 30 of the Articles of the Company require that the shares being offered by Ian Kerr-Jarrett, Isabel Joyce Chadwick, Christine A. Noble, Doreen Whitman, Sydney Winder and Ian Kerr-Jarrett and Christine A. Noble as executors of the estate of Marian Kerr-Jarrett, dec'd be sold in one (1) lot.
>
> 2. THAT the following transfers of shares now tendered to the Board be and are hereby approved:-

ISABEL JOYCE CHADWICK	49,920 shares to	BARNETT HOLDINGS LTD.
CHRISTINE A. NOBLE	" "	"
DOREEN WHITMAN	" "	"
ESTATE MARION KERR-JARRETT (Deceased)	" "	"
SYDNEY WINDER	12,480 shares	"
IAN KERR-JARRETT	49,918 shares	"
IAN KERR-JARRETT	1 share to	EAGLE MERCHANT BANK OF JAMAICA LIMITED
IAN KERR-JARRETT	1 share to	EAGLE HOLDINGS & INVESTMENTS LIMITED

> AND that the Secretary be directed to issue the share certificates accordingly, subject to the approval of the Bank of Jamaica."

Additionally, the following resolution was defeated:

> " 'Mr. Ian Kerr Jarrett, Mrs. Christine A. Noble and Mr. Sydney Winder having pursuant to Article 30 of the Company's Articles of Association each appointed the directors their agents to sell their respective shares in the company and Peter Francis Kerr-Jarrett being the sole applicant for the purchase of such shares it is hereby resolved that pursuant to Article 32 of the Company's Articles of Association the said shares be allocated and sold to Peter Francis Kerr -Jarrett at the agreed price of $30.71 per share.'"

Although this resolution was defeated, because Peter Francis had a pre-emptive right by virtue of the Articles of Association to purchase the shares of Ian Kerr-Jarrett, Christine Noble and Sydney Winder, and he rightly exercised it, that defeat as recorded, was of no effect. The pre-emptive right was acknowledged by Malcolm J. in the Supreme Court and affirmed by the Court of Appeal (Carey, Campbell, Forte, JJ.A.). In delivering the judgment of the court Carey J.A. in **Barnett Ltd. v. Peter Francis Kerr-Jarrett** (unreported) S.C.C.A. 68/88 delivered January 31, 1989 at p. 8 said:

> " In my judgment to construe the articles to mean that the directors in this case had an absolute right to sell the shares in one lot to the respondent, a member of the company, who had complied with article 31, is to render wholly nugatory the right of pre-emption conferred on a non-vending shareholder under aritcle 29. On the true construction of article 29 - 33 the directors were obliged to allocate the shares requested by the respondent, and were not empowered to sell the shares on offer to a third party, ignoring the rights of the respondents. To do so, would be contrary to article 32 which requires that the directors - 'shall allocate the said shares amongst the members who have expressed their willingness to purchase as aforesaid.' Moreover, article 29 would also be breached because the requirement there, is, that no transfer to a third party may be allowed 'unless and until' the right of pre-emption has been exhausted. That right as I have indicated, has been spelt out in articles 30 31 and 32 and it is not exhausted when the

> willing non-vending shareholder has stated the number of shares he requires. Articles 29 - 32 must be read as a whole."

By relying on his right as confirmed by the court, Peter Francis did purchase the shares he had requested, he then became the majority shareholder and those shares were transferred to him on 18th November, 1988 and registered in his name in December 1988.

It was contended by Mr. Mahfood for the respondents, that the resolutions which were carried at the Board's meeting was ultra vires and that the decision of the Court of Appeal supported that contention. That submission was correct. It was further contended that if the three sisters wished to sell their shares at that time, the whole process, taking into account the rights of non-vending shareholders, would have to be restarted. Such a procedure, it was argued, would entitle Peter Francis to exercise his pre-emptive rights again. He then would approach that exercise as a majority shareholder. It is doubtful if such a contention has any merit. Article 33 suggests a just solution to this aspect of the case. That article reads:

> "33. If all the said shares are not sold as aforesaid, the Vendor may, at any time within three calendar months after the expiration of the said twenty-one days, transfer the shares not so sold to any person, subject to the provisions of Articles 24 and 27 hereof, and at any price not less than the price fixed as aforesaid."

In construing this article, one must bear in mind Lord Green's approach in **Greenhalgh v. Mallard** [1943] 2 All E.R. 234 at p. 237. His Lordship said:

> " Questions of construction of this kind are always difficult, but in the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is prima facie transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in

> property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention."

This article ordains that once the shareholdings of the three sisters remained unsold after the exercise of the pre-emptive right by Peter Francis, they could sell or transfer their shares to any person within three months and twenty-one days at a price of not less than $30.71 per share.

Since article 23 restricts the mode of transfer and stipulates that the transferee should be registered, it is necessary to refer to it:

> "23. TRANSFER AND TRANSMISSION OF SHARES
>
> All instruments of Transfer shall be:
>
> (a) in the usual common form and
>
> (b) executed by or on behalf of the transferor and the transferee
>
> and the transferor is deemed to be the the holder of such shares until the name of the transferee is entered in the Register of Members in respect thereof."

The evidence relied on by the appellant to show that there was compliance with Articles 23 and 33 were the instruments of transfer used by the three sisters. It is convenient to refer to that of Isabel Joyce Chadwick as an example:

> " TRANSFER OF SHARES
>
> ISABEL JOYCE CHADWICK
>
> (hereinafter called 'the Transferor') being registered as the holder of 49,920 shares of $2.00 each (hereinafter called 'the said shares')
> numbered 197,601 to 247,000
> numbered 311,481 to 312,000
> inclusive in the undertaking of BARNETT LIMITED in pursuance of the terms of an Option Agreement dated the day of 19 made between the Transferor and BARNETT HOLDINGS LIMITED (hereinafter called 'the Transferee') DOTH HEREBY TRANSFER the said shares to the Transferee as nominee for the Transferor to hold the

same pursuant to the terms of the said Option Agreement subject to the several conditions on which the Transferor now holds the same.

DATED the 30th day of March 1988.

sgd/.....
I.J. Chadwick"

It will be necessary to examine this instrument to determine whether it had any effect.

The order of Malcolm J., which acknowledged Peter Francis' pre-emptive rights was made on 18th November 1988. The relevant sections read as follows:

"... IT IS HEREBY ADJUDGED AND DECLARED that the Plaintiff is entitled to be allocated by the directors of the Defendant all of the shares of Ian Kerr-Jarrett, Christine Noble and Sydney Winder in the Defendant Company at the price of $30.71 per share.

AND IT IS HEREBY ORDERED:

1. That on the failure of any of the shareholders of the said shares allocated in accordance with the above declaration to execute transfers of the said shares in favour of the Plaintiff within fourteen (14) days of the date hereof, that delivery of the said transfers shall be made in exchange for payment by the Plaintiff of the effective purchase prices.

2. That on failure of compliance with the foregoing order any of the directors present in Jamaica shall execute, complete and deliver such transfers in favour of and to the Plaintiff and thereupon the Defendant shall enter the name of the Plaintiff in the register of members of the Defendant as holder of the said shares.

3. That the Defendant be restrained whether by its directors and officers from transferring to Barnett Holdings Limited or any other person the said shares the subject of this declaration."

Then the closing paragraph reads:

> "I make the comments set out in the immediately preceding paragraph having regard to the fact that very recently all of the remaining shareholders of Barnett Limited offered to sell Barnett Holdings Limited all of their shares in the company at the price of $30.71 per share together with the full benefit of the said debts and the securities issued therefor for a nominal consideration of $1.00."

This paragraph is significant in view of the purported transfer of the shares in issue in this case at a price of $2 each. The correspondence also shows that there was an offer for sale by these shareholders and acceptance of specific shareholdings by Peter Francis, so the courts merely confirmed the pre-emptive rights of a non-vending shareholder to purchase.

The important point to note is that at any time within three months and twenty-one days of the above letter dated 28th March, 1988 the three sisters were entitled to sell their shareholdings to Barnett Holdings Ltd., pursuant to Article 33. The resolution of 5th March was ultra vires and so it could be ignored, or in the alternative challenged in court. The purported transfer on 30th March, 1988 was within the time limit imposed by Article 33. This aspect of the case seemed to have formed no part of the reasons in the court below, but it was necessary to decide this issue so as to find, that the three sisters were entitled to sell their shares on March 30, 1988 to Barnett Holdings Ltd.. Be it noted that the articles acknowledged that even if there was a valid transfer, until there was registration, the transferor is the legal owner and the transferee holds the equitable interest. The wording which recognises this runs thus:

> "Article 33. ... and the transferor is deemed to be the holder of such shares until the name of the transferee is entered in the Register of Members in respect thereof."

This provision is particularly useful in instances where the transferor has to await the decisions of the exchange control

authorities: see **Ne Fry** [1946] 1 Ch. 312. In the light of the foregoing analysis, it is clear that the sisters were entitled to sell their shareholdings to Barnett Holdings Ltd. as Mr. Henriques contended.

Did the three sisters comply with the articles 23 & 33 in transferring their shares on 30th March 1988 to Barnett Holdings Ltd. for not less than $30.71?

Article 23 requires the instrument of transfer to be in the usual common form. The common form of transfer invariably sets out the consideration, and the consideration for $49,200 shares at $30.71 per share was $1,533,043.20. Yet the instrument of transfer for Isabel Chadwick for 49,920 shares at $2 each was $99,840. Such a transfer was in breach of article 33 (supra). Also that was the amount on which stamp duty would have been paid. Then, the transfer refers to an undated option agreement, the terms of which are not disclosed in the face of the transfer or elsewhere. Again, Barnett Holdings Ltd. is described on the instrument of transfer as a nominee of the transferor which suggests the nominee can be changed and the transferor could either name another nominee or reinstate herself at some future date. This must be the logic of the situation, for the instrument states that Barnett Holdings Ltd. holds the shares pursuant to the terms of the option agreement. In the language of traders, the shares were parked and the ownership disguised. Further, the amount entered on the share register was $1,533,043.20 instead of $99,480 which was the price at $2 per share. This instrument of transfer is a marked contrast to that which transferred and registered the same number of shares from Ian Kerr-Jarrett to Peter Francis. That instrument reads thus:

" TRANSFER OF SHARES

I, IAN KERR-JARRETT formerly of Montego Bay in the parish of Saint James but now of the County of Somerset, England (hereinafter referred to as 'the Transferor') IN CONSIDERATION of the sum of

> ONE MILLION FIVE HUNDRED AND THIRTY-THREE THOUSAND AND FORTY-THREE DOLLARS AND TWENTY CENTS ($1,533,043.20) paid to me by PETER FRANCIS KERR-JARRETT of 1 King Street, Montego Bay in the parish of Saint James (hereinafter referred to as 'the Transferee') HEREBY TRANSFER to the Transferee the 49,920 ordinary shares standing in my name in the above company TO HOLD the same unto the Transferee subject to the several conditions on which I held the same immediately before the execution hereof.
>
> AND the Transferee HEREBY AGREES to accept and take the said shares subject to the conditions aforesaid.
>
> DATED the 15th day of December One Thousand Nine Hundred and Eighty-eight."

This transfer follows the precedent in **Butterworths Encyclopaedia of Court Forms.** So the appellants, by relying on invalid transfer, are in breach of Article 23 as well as the Companies Act.

Section 30 of that Act which was contravened, reads as follows:

> " PRIVATE COMPANIES
>
> 30.—(1) For the purposes of this Act, the expression 'private company' means a company which by its articles—
>
> (a) restricts the right to transfer its shares; and
>
> ...
>
> (e) subject to the exceptions provided for in the Fourteenth Schedule, prohibits any person other than the holder from having any interest in any of the company's shares."

Despite these provisions Barnett Holdings Ltd. appears on the register; yet the instrument of transfer provides that Isabel Chadwick, as transferor, still retains an interest in the shares. If the claim for rectification was correctly accorded to the respondent in the court below, it will mean that the three sisters names were correctly restored to the share register.

Section 31 (2) provides for penal sanctions if a private company is in contravention of section 30 and further section 32 provides for the cessation of its exemptions of privilege. So it was essential for Barnett Ltd. to have instituted these proceedings to protect its status as a private company. In the light of all this, the finding must be that the sisters failed to transfer their shares, and on this crucial aspect of the case, the appellants have failed.

Since the purported transfers were contrary to the articles and the Companies Act, was it permissible for Barnett Holdings Ltd. to be placed on the share register?

Since Article 33 makes reference to article 24, it is helpful to refer to the material part of this article:

> "24. The Directors may, in their absolute discretion and without assigning any reason therefor:
>
> (a) decline to register the transfer of a share to any person."...

Then article 25 reads:

> "25. The Directors may decline to recognise any instrument of transfer unless:
>
> (a) such sum (if any) as the Directors may from time to time require is paid to the Company in respect thereof;"...

and 26 (e) states:

> " (e) subject to the exceptions provided for in the Act, any person other than the holder is prohibited from having any interest in any of the Company's shares."

If the directors were performing their duties in accordance with the articles and the law of the land, they would have declined to register the transfers to the appellant, Barnett Holdings Ltd., because it was not in the usual common form. The directors should also have refused to remove the names of the

three sisters on the ground that both they and Barnett Goldings Ltd. would have an interest in the shares and this was contrary to article 26 (e). Then article 27 should have been brought into play. It reads:

> "27. If the Directors refuse to register a transfer they shall, within three months after the date on which the transfer was lodged with the Company, send to the transferee notice of their refusal."

An example of an instance where the court rectified the register of a company because the name was improperly put there was **In re Consort Deep Level Gold Mines Exparte Stark** [1897] 1 Ch. 575 where the headnote reads:

> " By an underwriting letter, addressed to the Mines Company, Stark offered to subscribe or find subscribers, on or before September 21, for 10,000 shares, 'or such less number as may be accepted by you', in the Consort Company, which the Mines Company were promoting, 'and, in the event of my failing to comply with the terms herein stated, I authorize you as my agent, on my behalf and in my name, to apply for the number of shares (full or reduced, as the case may be) guaranteed by me as above.' It was agreed that the letter was irrevocable, provided that 40,000 shares were underwritten or applied for prior to the public issue of the prospectus of the Consort Company, and allotment made on or before September 30. No notice of the acceptance of this offer was sent to Stark, but a form of acceptance at the foot of it was signed by the secretary of the Mines Company. The Consort Company having been registered, the Mines Company, without any previous notice to Stark, applied on his behalf for an allotment to him of shares in the Consort Company, and 9000 shares were accordingly allotted to him and registered in his name. Upon a motion by Stark to rectify the register by omitting his name:-
>
> Held, by the Court of Appeal, that the underwriting letter did not constitute a contract binding Stark to take shares until it had been accepted by the Mines Company and notice of acceptance had been given to him that the authority to the Mines Company to apply for shares in

> his name did not arise until he had been informed by that company of the number of shares for which they accepted his offer, and he had failed to apply himself for that number; that he was not estopped as against the Consort Company from denying the authority of the Mines Company to apply for shares in his name, and that he was entitled to have his name removed from the register of members of the Consort Company.
>
> Decision of North J as to estoppel reversed. **Ex parte Harrison** [1893] 69 L.T. (N.S.) 204, distinguished."

The next aspect to consider is whether the relevant Board of Directors' meeting was regularly summoned. It is appropriate to refer to the meeting of 5th April 1988, to understand the tension at that time. At that meeting, the resolutions were passed. The minutes are instructive. They read as follows:

> "Mr. Chen (an attorney-at-law who represented Peter Francis) then said it was proposed to transfer all the shares to Barnett Holdings Limited except that Ian Kerr-Jarrett would transfer one share to Eagle Merchant Bank Jamaica Limited and another to Eagle Holdings and Investments Limited. It was further proposed that the meeting should direct the Secretary to make the necessary entries in the company books and to issue new share certificates accordingly in accordance with the share transfer then presented to the meeting. An Option Agreement and share transfers were presented to the meeting and Mr. Lord pointed out that the proposed Resolution was ultra vires and illegal, and that all the documents were dated and stamped 30th March, 1988 and that these entries could not be made by the Secretary without the consent of the Bank of Jamaica. Mr. Chen then asked that the words 'subject to the approval of the Bank of Jamaica' be added after the instructions to the Secretary.
>
> Despite the protests of the Chairman the Resolution was moved by Mrs. Chadwick and seconded by Mr. Ian Kerr-Jarrett who both voted in favour with Peter R. Kerr-Jarrett. The Chairman voted against.
>
> The meeting then adjourned."

To put the matter in perspective, subsequent to that meeting, there was an order of Malcolm J. confirming Peter Francis pre-emptive rights dated 18th day of November, 1988. It was against this background that the other Board meeting of the 10th January, 1989 was summoned and held.

The circumstances are best stated by quoting from the minutes of that meeting. Here is how the meeting was summoned:

> "Mr. Peter Kerr-Jarrett informed the Board that on Monday 9th January, 1989 at 12:15 he requested of the Secretary that she sent out Notices for a Board of Directors meeting to be held at the offices of Barnett Limited, Barnett Street, Montego Bay at 2:00 p.m. today 10th January, 1989. At approximately 2:15 p.m. on the 9th January, 1989 he received a telephone call from the Secretary advising that Mr. Peter Francis Kerr-Jarrett had been advised of the meeting and that he said that the time was inconvenient to him, that he had requested that the meeting be scheduled for 3:30 p.m. on Wednesday, 11th January and had dictated a letter addressed to Mr. Peter Ross Kerr-Jarrett for her signature, advising of Mr. Kerr-Jarrett Snr's position with respect to the holding of the meeting. Mr. Peter Ross Kerr-Jarrett further advised the Board that he instructed the Secretary to proceed with scheduling of the meeting for 2:00 p.m. on the 10th January, 1989 and that today he was advised by the Secretary that notice of the meeting had been given to Mr. Peter Francis Kerr-Jarrett on the 9th January and that today she also advised Mr. Peter Francis Kerr-Jarrett of the meeting this afternoon."

It was not surprising that Peter Francis declined to attend this meeting as it was inconvenient and at such short notice. So the question must be faced as to whether this was an irregular meeting. The principle that proceedings at a meeting where due notice was not given will be a nullity, was stated in **Smyth v. Darley** [1849] 2 H.L. Cas. 789. So it was essential for a director to have notice of the time and object of a Board meeting and this is illustrated from the following passage of Lord Esher

in **In re Portugese Consolidated Copper Mines Ltd.** [1889] 42 Ch. 160 at pp. 167 - 168:

> "Now, what happened with regard to Lord Inchiquin? First of all, there is no legal evidence of his having said or done anything about the meeting; what it is suggested that he said is mere hearsay. But suppose there had been evidence that Lord Inchiquin had been told that they were going to hold a meeting or meetings during the next week, and had then said, 'I cannot be there.' It is said that he did so, and that is now relied on as a waiver of the right to notice. In my opinion he could not waive his right to notice. As he was within reach, and it was perfectly possible to give him notice, it was the duty of the directors to give him notice of the meeting. The circumstances existing at the time when he used the words relied on as a waiver might have been wholly altered, or he might have taken a different view if he had had notice of the time and object of the meeting."

On this principle the notice must be served within a reasonable time and an agenda stating the objects of the meeting was also essential for a regular meeting. Another case which illustrates the same principle is **In re Homer District Consolidated Gold Mines** [1888] 39 Ch. 546. The following passage at 550 - 551 from North J., is illustrative:

> " With regard to the notice of the meeting, it was such as had never before been given in the history of the company. The shortest notice that had ever been given before was a notice for the next day. The notice was sent out in a most irregular way. What is more, it was expressed in such a way (I cannot help thinking intentionally so expressed) as not to give Witt and Simpson notice of what was to be done. On that notice at two o'clock, the two directors present knowing that one of the other two summoned could not be present till three, and not knowing whether the other could come, proceeded at once to rescind a resolution passed by the board two weeks before. In my opinion that was about as irregular as anything could be. No doubt a bare quorum is capable to act and bind the company at a meeting duly convened,

with proper notice given to the other directors, at which therefore all the other directors may, if they please, be present; but, these two directors met, having abstained from telling the others what they intended to do, and proceeded to pass these resolutions in the full belief, and, I think, knowledge, that if the others had had notice and been able to be there they would have objected; and further than that, with notice as to one that he would be there at three, they proceeded to pass their resolution at two. They ought certainly to have waited. I do not say that would have been enough. I come to the conclusion that what was done on that occasion was not the act of the board of directors, and did not bind the company, and had not the effect of getting rid of the resolutions previously passed by the board."

It is against this background that the resolution passed at this meeting must be considered. The resolution reads as follows:

" IT IS HEREBY RESOLVED THAT:

1. The Directors do hereby ratify and confirm the issue by the Company of the relevant share certificate to Peter Francis Kerr-Jarrett Snr..

2. The Directors do hereby ratify and confirm the Transfer of the shares of the said Isabel Joyce Chadwick, Doreen Whitman and the Executors of the Estate of Marian Kerr-Jarrett deceased to Barnett Holdings Limited a company duly incorporated and existing under the Companies Act and having its registered office at 21 East Street in the parish of Kingston as approved and authorised by the Directors at the aforesaid meeting held on the 5th day of April, 1988 and in the alternative, out of an abundance of caution, if the approval of the 5th April, 1988 is not effective which the Directors do not admit, the Directors do hereby approve the transfers of 49,920 shares of Isabel Joyce Chadwick, 49,920 shares of Doreen Whitman and 49,920 shares of the Executors of the Estate of Marian Kerr-Jarrett deceased to Barnett Holdings Limited.

3. The Directors do hereby approve, ratify and confirm the issue by the Company of the relevant share certificate to Barnett Holdings Limited.

Mr. Ian Kerr-Jarrett moved that the resolutions be passed and this was seconded by Mrs. Isabel Chadwick. The resolutions were passed by unanimous vote."

To appreciate the conflict in the family, it is necessary to note the members of the Board who were in attendance:

"PRESENT WERE:

MR. IAN KERR-JARRETT
MRS. ISABEL JOYCE CHADWICK
MRS. CHRISTINE NOBLE
MR. PETER ROSS KERR-JARRETT."

It was submitted by Mr. Mahfood that the Directors abused their powers because they exercised powers they did not have and when they had powers, it was exercised improperly. I think he was correct and the manner of registration is further proof of the correctness of this submission. Here is the account given by Price Waterhouse, the accountants and auditors of the respondent, Barnett Ltd., as to how registration was effected. In a letter dated 31st January to Peter Francis, that firm wrote:

"1. At the request of Barnett Ltd.'s Attorneys-at-Law, Messrs. Clinton Hart & Co., I convened a meeting on Friday 30 December 1988 between the Company Secretary, Miss Marcis Fuller; Mr. Roy Swaby, Attorney-at-Law - representing the three remaining vending shareholders, and myself."

Then paragraph 4 gave the following account as facts:

"4. The Meeting was convened and the Secretary was handed:

(a) A letter from Barnett Ltd.'s Attorney-at-Law, Clinton Hart & Co. dated 29 December 1989 instructing that the transfers be effected.

(b) Copy of directors' resolution approving transfers.

(c) Three stamped original transfer forms.

(d) The Bank of Jamaica approval for the transfers.

(e) Copy of the agreed notes of the Judgment of Mr. Justice Malcolm. (Copies of all of the above documents are attached for your ease of reference).

5. My role in this meeting, as instructed by the Company's Attorneys, was to ensure that the transfers were correctly effected by the Company Secretary in the Company's records. This I did."

Let it be noted that Price Waterhouse acted on the instructions of the then attorneys of Barnett Ltd. So on a generous approach, much blame ought not to be attached to the accountants and auditors. Some blame ought to be attached to the attorneys, but then this is not an easy branch of law, for the signigicant defects in the transfers seemed to have escaped the notice of counsel on both sides and the learned judge below.

It is now appropriate to consider the issue of rectification since the findings must be that Barnett Holdings Ltd., the appellant, ought not to have been put on the share register of Barnett Ltd., the respondent.

Should the names of the three sisters be restored to the register of Barnett Ltd. as prayed?

It is now necessary to determine if the order made by Theobalds J. in the court below ought to be affirmed. That order reads:

"It is ordered that pursuant to Section 115 of the Companies Act the Register of Members of the Plaintiff Company be rectified by striking out the name of the First Defendant Barnett Holdings Limited as the holder of 149,760 shares in the said Company and by restoring to the said Register the names of the Second Defendant Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion Kerr-Jarrett, deceased, as the holders of the said shares as follows:

ISABEL JOYCE CHADWICK	49,920 shares
DOREEN WHITMAN	49,920 shares
ESTATE MARION KERR-JARRETT	49,920 shares

The Plaintiffs are to have their costs of this trial to be agreed or taxed and to be paid by the Defendants. The Counterclaim is dismissed with no order as to costs."

Section 115 of the Companies Act 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."

It is clear that Barnett Holdings Ltd. was entered on the register of Barnett Ltd., without sufficient cause. I take account that the sisters have not asked for rectification and that some money appears to have passed from Barnett Holdings Ltd. to them. As for that money, if it matters to the parties that could probably be recovered by an action for restitution. No claim against Barnett Ltd. was made by the appellants for any damages sustained: see section 115 of the Companies Act, although this was put to counsel. So the issue was not considered.

The upshot of all this is, although these reasons have a different emphasis from that of Theobalds J., his order was correct and is affirmed. Costs of the appeal must be borne by the appellants and they are to be agreed or taxed.

WOLFE J.A.

I have had the advantage of reading in draft, the judgments of Wright J.A. and Downer J.A. and I agree with the conclusion at which they have arrived. There is nothing I can usefully add to the very comprehensive judgments of my brethren.

Cases referred to

(1) Lyle & Scott Ltd v Scott's Trustees (1959) A.C. 763 HLSc
(2) Hawtin v McArthur and others (1951) 1 All E.R. 22
(3) Parke v Daily News Ltd (1962) Ch 927
(4) Heron International v Lord Grade & Associated Communications Corpn. plc (1983) BCLC 244
(5) Piercy v. S. Mills & Co (1920) 1 Ch 77
(6) Howard Smith Ltd v. Ampol Petroleum Ltd (1974) A.C. 821
(7) Hogg v Cramphorn Ltd (1966) 3 All E.R. 420
(8) Bamford v Bamford (1970) Ch 212
(9) Re R & M Roith Ltd (1967) 1 All E.R. 427
(10) Barnett Ltd v. Peter Francis Kerr-Jarrett (unreported) S.C.C.A 66/89 delivered 31/1/87.
(11) Barnett Ltd v. Peter Francis Kerr-Jarrett (unreported) S.C.C.A 68/88 delivered 31/1/89.
(12) Greenhalgh v Mallard (1943) 2 All E.R. 234
(13) Re Fry (1964) 1 Ch 312
(14) In re Consort Deep Level Gold Mines Exparte Starke (1897) 1 Ch. 575
(15) Smyth v. Darley (1849) 2 H.L. Ca. 789.
(16) In re Portuguese Consolidated Copper Mines Ltd (1889) 42 Ch 160
(17) In re Homer District Consolidated Gold Mines (1888) 39 Ch. 546