

10/11/01

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 467/93

BETWEEN AUDREY RAMONA CHIN APPLICANT

A N D LASCELLES AUGUSTUS CHIN DEFENDANT

Dr. Lloyd Barnett and Gordon Steer instructed by
Chambers, Bunny & Steer for the applicant
R.N.A Henriques, Q.C. and Leonard Green instructed
by Chen Green & Co. for the defendant

Heard: 7th, 8th, 9th, 10th May, 2001; 11th, 12th, 18th, 19th
20th June, 2001; 30th, 31st July; 25th September,
2001 and 6th December, 2001

CLARKE, J

This is a re-hearing of the summons issued by the applicant, Mrs. Audrey Chin, on December 9, 1993 under section 16 of the Married Women's Property Act. She issued the summons before her marriage to the defendant, Mr. Lascelles Chin, was brought to an end by the grant of a Decree Absolute on February 18, 1994.

On October 18, 1996 Panton, J sitting on the Supreme Court dismissed Mrs. Chin's claim that she was beneficially entitled to one-half of the value of Lasco Foods Limited. He held that of the company's 250,000 issued shares of \$1.00 each Mrs. Chin owned 1 share and that the remaining

249,999 shares belonged to Mr. Chin. On May 10, 1999 the Court of Appeal reversed the decision of the learned judge and found that Mrs. Chin was entitled to one-half of the shareholding. Mr. Chin appealed to the Privy Council and on February 12, 2001 the Privy Council decided that the case should be remitted to the Supreme Court for a re-hearing. The Board so decided because in the absence of cross-examination no finding had been made or could have been made at the trial on the central issue whether the parties had intended that Mrs. Chin would be a joint owner of the company with Mr. Chin. And there having been no cross-examination of the parties it was necessary in order for a decision to be reached as to Mrs. Chin's interest in the company that they be cross examined. This would assist the judge at the re-hearing to make factual findings on certain critical issues arising from the conflict of evidence on the parties' affidavits.

The critical issues for determination identified by the Lords of the Judicial Committee of the Privy Council are as follows:

- (a) "What were the parties' joint intention when the two original shares were allotted, one to Mrs. Chin, one to Mr. Chin? Was it intended that each would become a beneficial owner of the allotted share? What, if any, inference can be drawn from that allotment as to the intended ownership of the company?"
- (b) When the additional shares were allotted to Mr. Chin, did Mrs. Chin agree to, or have knowledge of the

allotment? If she did not agree to it or have knowledge of it at the time, did she subsequently become aware of the fact of the allotment?

- (c) If she did agree or know of the additional allotment, or subsequently become aware of it, what if any, inference can be drawn as to her beneficial interest in the allotted share?"

The cross examination of the parties and their witnesses has been ample. This facilitation has enabled me in examining the evidence to assess the respective credibility of the parties and their witnesses and to make factual findings on the critical issues involved in the case.

THE ISSUES OF FACT

Critical issue No. 1

"What were the parties' joint intention when the two original shares were allotted, one to Mrs. Chin, one to Mr. Chin?"

It is common ground that important negotiations led to the setting up of the company and the acquisition of valuable business contracts for the packaging and sale of milk products. It is also not disputed that at all material times the only two directors of the company were Mr. And Mrs. Chin, that Mrs. Chin was its managing director and that up to the date of the company's incorporation and their marriage the next day, they had been living together in a common law union for a number of years.

Mrs. Chin in her affidavit sworn on January 31, 1994 stated that “at all material times [she] believed that [her] husband and [herself] were working as joint owners of the company.” She also stated in a later affidavit in answer to Mr. Chin’s affidavit denying her claim that she was entitled to one-half of the value of the company, that “it was always our intention to own the company equally and for me to operate the company as Managing Director” (para. 22 of her affidavit sworn on June 22, 1995).

Whilst she agreed before me that nowhere in her affidavits had she made any specific reference to any discussion or agreement concerning ownership of the company, she maintained that her belief or impression as to her entitlement was derived from discussions and agreement she had had with Mr. Chin about joint ownership of the company. In this connection the following portion of her cross examination by Mr. Henriques Q.C. is helpful:

Ques: You say that this paragraph 22 [of affidavit of June 22, 1995] refers to an agreement. Can you point out where it so refers.

Ans: I stated that it was our intention to own the company equally and that was the reason for paragraph 25 which stated that the shares were issued, one share to Mr. Chin and one to myself and this was reflected in the minutes of 22nd April 1986.”

Mr. Chin gave varying accounts of the manner in which the subscriber shares were dealt with. At one stage he gave evidence (consistent with “Minutes of a meeting of the Board of Directors held ... on Tuesday the 22nd April 1986 at 10.30 a.m.”) to the effect that the subscriber shares were transferred shortly after the incorporation of the company and that the additional shares were to be created shortly after. Nevertheless, at another stage, he said the subscriber shares were transferred after the additional shares had been allotted to him. Here is how this probing piece of cross examination of Mr. Chin by Dr. Barnett on this aspect of the case unfolded:

“Ques: On April 22nd 1986 were the two subscriber shares transferred to Mrs. Chin and you, one each.

Ans: Yes, two subscriber shares were transferred then, one to me and one to Mrs. Chin.

I had given instruction for the subscriber shares to be transferred as by law we need two shareholders, and since Mrs. Chin was going to get one share and one to me and soon afterwards the shares to be increased and all the increased share allotted to me.

Ques: Did Mrs. Chin agree with you that she would take one share and you one share at the commencement.

Ans: No. I told her one share was for me. I didn't mean to say to the Court, 'I told her one share was for me'. I did not tell her that. We did not have any discussion about the shares.

Ques: And you didn't have any company meeting to discuss the shares of the company.

Ans: If are talking the formation shares and the starting shares of the company those I gave instructions to the lawyer to do.

Ques: And you didn't have any company meeting to discuss the additional shares either.

Ans: We did have company meeting to discuss the further issuing of shares. And Mrs. Chin was given instructions to communicate with the company secretary and the lawyer.

Ques: Why did you ask Mrs. Chin to communicate with the lawyer – why didn't you do it yourself.

Ans: She was the managing director and I had given her instructions what to do.
Yes, the lawyer was Mr. Vincent Chen.

Ques: He was a close friend of yours.

Ans: At that time I don't remember how close he was.
Yes, I suppose Mr. Vincent Chen was the best man at my wedding.

Ques: You would have given Mrs. Chin the instructions about two months after your wedding.

Ans: Don't remember the time.

Ques: You had any discussions with Mrs. Chin about the additional shares before giving her instructions to speak to the lawyer.

Ans: I am sure I must have done.

- Ques: Did Mrs. Chin and yourself not agree that the new shares would be divided between you equally as was the case with the subscriber shares.
- Ans: There was never any discussion. There was never any discussion about equal shareholding as that was never my intention.
- Ques: She did get one share at the same time as you got one share, is that not correct.
- Ans: I am not too sure because apparently Mr. Chen, the lawyer, did not transfer the shares until 1987, that is, the subscriber shares.
- Ques: Did you sign a document in April 1986, that is 'Minutes of Meeting of the Board of Directors of 22/4/1986' – copy at pages 147 and 148 of Bundle Volume 1.
- Ans: Yes, I did.
- Ques: And you see there, that it is stated that approval is being given to the transfer of one share to Audrey Chin and one share to Lascelles Chin.
- Ans: Yes.
Yes, I see there the heading 'Distinguishing Nos. Of Shares'. Yes, I see also that No. 1 goes to Audrey Chin and No. 2 goes to me.
Yes, I see further in the document, 'Proposed Increase of Share Capital' to 250,000 shares.
- Ques: At the time when the one share was transferred to Mrs. Chin and one to you the share capital had not yet been increased.
- Ans: Yes.

Ques: And you see that you signed the document that the additional shares should rank *pari passu* with the existing shares.

Ans: Yes”.

Those glaring inconsistencies in Mr. Chin’s evidence as well as Mr. Vincent Chen’s improbable account of this aspect of the matter reveal a colourable attempt on their part to bury the truth. Mr. Chen, although an experienced attorney, sought, as in the words of Dr. Barnett’s accurate summary, to make out that he kept the subscriber shares for 18 months in the name of his secretaries, holding back the transfers so that provision had to be made to explain the non-application of stamp duty and permitting the company to operate without any genuine members although it was making important contracts. Mr. Chen had to admit that if this were true, not only would the exhibited Register of Shareholding made up by a professional company secretary and the date on the minutes signed by Mr. Chin namely, 22nd April, 1986, be false, but that he gave advice relating to the increase of the company’s share capital at a time when Mr. and Mrs. Chin were not members. Such advice could, of course, not be legally implemented in that manner.

I have no doubt whatever that on April 22, 1986 the two subscriber shares were transferred, one to Mrs. Chin and one to Mr. Chin. They became the only share holders each owning one share in the company.

Again, Mr. Chin at first stated that Mrs. Chin –

- (1) “had absolutely nothing whatsoever to do with the negotiations leading up to the award of the contract to the company”. (see para. 11 of his affidavit of December 2, 1994);
- (2) “had nothing whatsoever to do with the negotiations of the loans” (see the same paragraph).

Mr. Chin in his subsequent affidavit sworn on October 26, 1995 agreed that Mrs. Chin had been with him at some of the negotiations relating to the setting-up of the company but stated that she had been there as the prospective manager of the business rather than as a prospective joint owner (paras. 5 to 13). He revealed under cross examination that Mrs. Chin not only attended some of those negotiations but participated in them and helped with the application for the financing of the business.

I accept Mrs. Chin’s evidence on this aspect of the matter also, and I have not the slightest doubt that although she was a chartered accountant with good prospects in her career, she became completely involved in the negotiations for the Jamaica Commodity Trading Company Limited (JCTC) contract, in the negotiations for financing the business, the

procurement of equipment, supplies and raw material and the everyday running of the factory, including the marketing, the sales and the general administration of the business of the company. I agree with Mrs. Chin's counsel, and I so find, that it is clear from the conduct of the parties, their joint participation in the preparatory and promotional work, for which it is not alleged that either was to be or has been paid, that they behaved then as equal partners. And I further find that the two original shares were allotted, one to Mrs. Chin, one to Mr. Chin on that basis consistently with the common intention of joint ownership.

Critical issue No. 2

Was it intended that each would become a beneficial owner of the allotted share?

The answer to that question is undoubtedly in the affirmative. Mr. Chin, so far from denying Mrs. Chin's beneficial ownership of the original share transferred into her name, has specifically admitted her beneficial ownership of that share (paras. 24 and 27 of his affidavit sworn on December 2, 1994). That answer is important, for if both persons became beneficial owner of an equal number of shares at the inception, legal consequences would follow on that entitlement with respect to their rights and obligations as shareholders.

Critical issue No. 3

What, if any, inference can be drawn from that allotment as to the intended ownership of the company?

That allotment must, in my view, be looked at in the following context:

- (a) the manner in which the company was formed;
- (b) the surrounding circumstances with respect to the parties' close relationship;
- (c) the involvement of Mrs. Chin in the company's promotion and formation;
- (d) the giving up of her professional career and the time and energy and expertise she devoted to the business.

When so looked at, I hold that the only reasonable inference is that the allotment was intended by the parties to reflect an equal ownership in the company. In the initial stages the parties were the only shareholders and directors of the company. The evidence is overwhelming that they in the initial stages of the company's existence were legal and beneficial owners of one share each. As was pointed out in argument, there is no evidence that either party contributed to the initial capitalization of the company by cash injections although it was Mr. Chin who guaranteed the loans to the company. It cannot be doubted that the company's most important asset was

the contract it obtained from the J.C.T.C. So, I am prepared to hold that even if Mr. Chin had subsequently provided some cash it would not disturb the broader picture of a joint enterprise and a common intention of equal partnership: see **Pettit v Pettit** [1970] A.C. 77; **Gissing v Gissing** [1971] A.C. 886; **Nixon v Nixon** [1969] 3 All. E.R. 1133; **Muetzel v Muetzel** [1970] 1 All. E.R. 443.

Critical issue No. 4

When the additional shares were allotted to Mr. Chin, did Mrs. Chin agree to, or have knowledge of the allotment?

Mrs. Chin says that she neither agreed to, nor had knowledge of that allotment when it was made. She said she could never have agreed to this having regard to the sacrifice she made in building the company. She agreed that by letter of July 4, 1986 she gave instructions for the share capital to be increased “from 200... to 300,000 shares” and that on 7th July 1986 she signed a short notice to effect the increase to 3000,000 shares. She also agreed that in accordance with her instructions on July 4, 1986 she knew that the share capital was subsequently increased that same year to 300,000 shares. She however rejected the suggestion that in 1986 she knew that 249,998 shares had been allotted to Mr. Chin. She said that she first became aware of the allotment to him after examining the share register in 1993 after the marriage had broken down.

Now, attorney-at-law Mr. Vincent Chen agreed that on July 4, 1986, the date of Mrs. Chin's letter requesting an increase in the share capital "from 200.. shares to 300,000 shares," the share register was showing that 249,998 shares had already been registered in Mr. Chin's name. Nevertheless, he said that when he wrote letter of July 7, 1986 to the company secretary in response, he was of the view that the share capital stood at 200 shares and that the only two shareholders of the company were his two secretaries, the subscribers.

Mr. Chin sought at first to make out that actual meetings were held to deal with the allotment and that Mrs. Chin was present. Here is what he states at paragraph 22 of his affidavit sworn on October 26, 1995:

"That in respect of paragraph 28 [of Mrs. Chin's affidavit of June, 1995] I say that the allotment of the 249,800 unissued shares to me was authorised on May 8, 1986 by the Board of Directors [of the company] by the resolution of the Applicant and me pursuant to Article 53 of the Articles of Association of the Company and exhibited herewith ... is a copy of the Minutes of the said meeting of the Board of Directors of the said Company".

The minutes he referred to and exhibited are as follows:

"Minutes of a Meeting of the Board
of Directors held at 381/2 Red Hills,
Kingston 10, on Thursday, 8th May
1986 at 4.00 p.m

Present were: Mr. Lascelles Chin - Chairman
Mrs. Audrey Chin - Director

Minutes:

Minutes of Directors Meeting of 22nd April 1986 and of
The Extraordinary General Meeting of 7th May 1986
read and signed.

ALLOTMENT OF SHARES:

Pursuant to the authority of Article 53 of the Articles of
Association it was determined that the 249,998 unissued
Shares of the Company be allotted to Mr. Lascelles Chin.

ISSUE OF SHARES:

Mr. Chin requested that certificate No. 4 in his name be
cancelled and two certificates comprising his entire
shareholding in the Company be issued instead. The
Board agreed and it was accordingly resolved:

That the Seal of the Company be affixed to the
undonated Certificates in respect of the Shares
allotted herein and cancelled Certificate No. 4

<u>Cert. No.</u>	<u>Name</u>	<u>No. of Shares</u>	<u>Distinguish No. of Shares</u>
5	Lascelles Chin	187,499	2-187500
6	Lascelles Chin	62,500	187,501-250,000

TERMINATION

There being no other business the Meeting terminated.

(Sgd.) Lascelles Chin.”

I have no doubt whatever that no such meeting was actually held. The
minutes in question were signed by Mr. Chin alone. Moreover, he has

caused to be produced the letter of July 4, 1986 written by Mrs. Chin (already referred to) requesting , be it noted, that the share capital of the company be increased from 200 shares of \$1.00 each to 300,000 shares of \$1.00 each. That the letter reads as follows:

“Clinton Hart & Co.,
58 Duke Street,
Kingston.

Attention: Mr. Vincent Chen

Dear Sir,

Re: Increase in Chare Capital ...

We hereby request that the Share Capital of the ...
Company be increased from 200 ordinary Shares of
\$1.00 to 300,00 shares of \$1.00.

The Company Secretary is Miss Thelma Miller.

Kindly arrange for the above changes to be
effected immediately.

Yours faithfully,

Sgd. Audrey Chin (Mrs.)”

AC/ar

It is also worthy of note that by the time Mrs. Chin wrote that letter Mr. Chin, as shown by the questionable minutes, had purported to increase the capital of the company to \$250,000.00; and by the official record of the company in the Register of the Minutes, the additional shares had already

been allotted to Mr. Chin on May 8, 1986. That was a circumstance which in my view, tellingly supports Mrs. Chin's contention that she neither knew nor agreed to the allotment at the time it was made.

Again, it is plain that when the additional shares were allotted to Mr. Chin, the allotment was unauthorised and irregular. Such a feature therefore also support Mrs. Chin's contention that she did not agree or have knowledge of the allotment then. The parties, as I have already found, initially owned one share each. So by virtue of Clause 53 of the Articles of Association of the company Mrs. Chin was entitled to have 50 percent of the new shares offered to her in a prescribed notice. It is not in dispute that no such offer was made to her. That Clause provides:

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

apportioning the same, cannot in the opinion of the Directors be conveniently offered in manner hereinbefore provided”.

Mr. Chin, nevertheless, contended that Mrs. Chin’s pre-emptive right was excluded by a determination of an extraordinary general meeting held on May 7, 1986. The notices summoning the alleged extraordinary meeting for that date contained no reference to a resolution to dispense with the pre-emptive rights provision of Article 53. Also, the resolution which it is alleged was passed at that meeting made no reference to Mrs. Chin’s pre-emptive rights as is required by section 129 of the Companies Act. So there was no valid determination by the company that Mrs. Chin’s pre-emptive rights should be dispensed with. Mrs. Chin said that she attended no such meeting and I find that she did not.

Mr. Chin also alleges that the allotment of the additional shares to him was authorised by the Board of Directors by a resolution of Mrs. Chin and himself. The fact of the matter is that Mrs. Chin signed no minute of any such resolution. There is no record of her signing a register of attendance at any meeting in accordance with Article 95 which provides:

“95. The Directors shall cause minutes to be made
in the books provided for that purpose –

- (a) of all appointments of officers made by the Directors;

- (b) of the names of the Directors present at each meeting of the Directors and of any committee of Directors;
- (c) of all resolutions and proceedings at all meetings of the Company and of the Directors, and of committees of Directors,

and every Director present at any meeting of Directors or committee of Directors shall sign his name in a book to be kept for that purpose. (Emphasis supplied)

The minutes in question were signed by Mr. Chin alone. So, on the evidence before me it as plain as plain can be that Mrs. Chin did not attend any such meeting as well. Since the parties were the only shareholders no such meeting could have been held.

Accordingly, on this critical issue No. 4 I find that the inference is inescapable that when the additional shares were allotted to Mr. Chin, Mrs. Chin did not agree to or have knowledge of the allotment.

Critical issue No. 5

If she did not agree to it or have knowledge of it at the time, did she subsequently become aware of the fact of the allotment?

Mrs. Chin says that she knew of the increase of share capital and assumed that in keeping with the common intention the additional shares were held by Mr. Chin and herself equally. Mr. Vincent Chen states that Mrs. Chin complained about the allotment. This is what he stated in that regard in his affidavit sworn on April 12, 2001:

“That about the middle of August 1986 I received a telephone call from the Applicant who complained to me that all the 249,800 shares that had been authorised had been allotted to [Mr. Chin] and she did not think it was fair as she was working in the business and she should get ... at least the additional 50 shares that I had requested Miss Thelma Miller to create”.

Mrs. Chin in her affidavit sworn on May 2, 2001 denied ever having a conversation with Mr. Vincent Chen concerning shares.

Of this conflict it is enough to say that Mr. Chen’s evidence is unreliable and I reject it. After all, his evidence about the important matter of the original shares and the date they were transferred strains credulity in the light of the Company’s Register of Shareholders and the document purporting to be minutes signed by Mr. Chin that those two shares had already been transferred on April 22, 1986. In any event, as had been put by the other side, Mr. Vincent Chen’s evidence refutes any suggestion that Mrs. Chin had agreed to the allotment or that when she discovered it she accepted it as fair.

I accept Mrs. Chin’s evidence that she first became aware of the fact of the allotment in 1993 after the marriage had broken down.

Critical issue No. 6

If she did agree to or know of the additional allotment, or subsequently became aware of it, what if any, inference can be drawn as to her beneficial interest in the allotted shares?

In my judgment, the only inference that can be drawn from the evidence is that Mrs. Chin had not agreed to the additional allotment, did not know of it at the time it was done and when she subsequently became aware of it, she did not approve or acquiesce in it.

So, the purported allotment can have no bearing on her beneficial interest in the shareholding.

Peripheral or subsidiary issues

(a) Although in the proceedings before the Appellate Courts the question of whether Mrs. Chin was a salaried employee in the company was much canvassed, that question is not included in the critical issues specified by the Privy Council. As Dr. Barnett points out in his careful submissions, the reason for this is obvious. The fact that a person is paid some remuneration is not inconsistent with ownership of shares in a company.

Mr. Henriques submits that the question as to whether or not Mrs. Chin was in receipt of a salary becomes a matter of paramount importance in the determination of the case.

That question is, in my view, only a subsidiary issue which goes to credit, that is to say, it may or may not affect her credit. If in fact she was in receipt of salary despite her assertions to the contrary, that would tell against her credit and would be a circumstance for asking the court to make findings of fact in Mr. Chin's favour on the critical issues.

From the start Mrs. Chin stated that she received payments from the company. She said that these were not salary but director's remuneration (paras. 9 and 13 of her first affidavit). She also said that the accounts do not show her as a salaried employee.

Mr. Chin agrees that these payments which he characterises as salary, were brought into the accounts as director's remuneration (paras. 17 and 18 of his first affidavit). He, however, insists in his evidence before me that the payments were salary, relying on a number of vouchers, requisitions, cheques, entries in the company's cash books as well as on a note in Mrs. Chin handwriting sent to a clerk who had been auditing the accounts. The note is headed, "List of accruals for O/S Salary due to A. Chin" and listed thereunder are the years 1987, 1988, 1989 and 1990 with sums against each year.

Having carefully examined and weighed the oral and documentary evidence on this issue I find that the vouchers nominally referred to the

drawings as salary and that the payments bore no true relationship to the characteristics of a salary. Dr. Barnett correctly makes the point that in fact, for the entire period of 7 years only two vouchers referred to statutory deductions and all other payments to Mrs. Chin, including Mr. Chin's arbitrary payments to her at the time of her dismissal, had no relevant employee-related deductions. It is also a fact that she was not treated as having any leave entitlement, any right to annual revision of salary, or eligibility for bonus. She did not receive payments on a regular, formal or normal basis. The auditors called on behalf of Mr. Chin agreed that the aforementioned note on which he heavily relied was no more than a reference to amounts payable to Mrs. Chin and which could be used to offset debts. And there is certainly no record of any actual payments of such amounts to her. Again, I bear in mind that in her previous employment her emoluments, excluding travel allowance amounted to \$57,200.00 per annum. Mr. Chin said that the motor car he provided was an added benefit over and above her previous emoluments. So, I find incredible Mr. Chin's assertion that Mrs. Chin told him that she had been receiving \$36,000.00 per annum and that she indicated that she was agreeing to accept that rate of pay not for one, but for five years.

The fact of the matter is that this was a family company. Mr. and Mrs. Chin were the only interested parties and so the informality with respect to the drawing of funds by both parties ought not to be surprising. As she explained there were personal expenses she had to meet. She was engrossed in the company's business and was entitled to be adequately compensated. I agree with her counsel that once payments were made to her as a Director, they had to be recorded as "Director's remuneration" or "salary" or "advance/loans". All the same, I find that she was not treated as an employee with respect to these payments or drawings, as witness their varying amounts, the irregularity of the times of receipts, the not inconsiderable length of time she was allowed a discretion in relation to drawings, and on an analysis of the accounts, the fact that she received considerably less than Mr. Chin says she was entitled to.

(b) Has Mrs. Chin altered her case since the decision of the Privy Council in the matter?

Mr. Henriques submits that she has shifted her case to a different basis. She has made, he argues, a belated and remarkable attempt after the Privy Council decision indicating the "gaps to be filled," to (a) depose in an affidavit that there had been an agreement between the parties to own the company jointly and (b) to repeat that contention

under cross examination. All that she had said hitherto was that “[she] believed she was a joint owner” (first affidavit) and that she was “under the impression that they would own the company jointly” (second affidavit).

With those submissions I cannot agree. From her first affidavit she stated that she and her husband had conducted themselves as joint partners and took one share each. There is, in my view, no inconsistency with or change of that position by reason of her stating that they had discussed and agreed to the ownership of the company. Indeed, I take judicial notice of the fact that it is only infrequently husband and wife discuss these matters in exact terms. The agreement or common intention may be demonstrated by express words or inferred from conduct.

After all, Mr. Chin did say under cross examination that initially the question of ownership had been discussed and then tried to say he did not intend to say so:

“Q. Did Mrs. Chin agree with you that she would take one share and you one share at the commencement.

A. No.”

Then in an unguarded moment Mr. Chin immediately added:

“I told her one share was for me”.

And after a long pause he sought to change that by saying:

“I didn’t mean to say to the court, ‘I told her one share was for me’. I did not tell her that. We did not have any discussion about the shares”.

Indeed, it is Mr. Chin who has made a complete **volte face** in certain important respects in this case. At first he made it clear that the subscriber shares were transferred at the beginning and before the increase of the share capital and the allotment of the additional shares to himself. And he agreed that Mrs. Chin was, like himself, initially the beneficial owner of one share. In cross examination he repeated that the subscriber shares were transferred to Mrs. Chin and himself on April 22, 1986 and the procedure was for the new shares to be issued shortly thereafter. He then appeared to have reversed himself completely as he alleged that the one share was only transferred to her for convenience to satisfy statutory provisions. Add to that the fact that he had deposed in an affidavit sworn on April 19, 2001 that the allotment of the additional shares preceded the transfer of the one share to Mrs. Chin.

Again, another radical change referred to earlier in this judgment is similarly unexplained. It is, to my mind, explicable only on the basis that Mr. Chin has been less than frank with the court. He initially deposed that Mrs. Chin had nothing whatever to do with the negotiations for the J.C.T.C contract or the bank financing. He subsequently stated that she did

participate in a limited way but only as a prospective manager. Under cross examination he admitted that she played an important role in those negotiations.

Summary of submissions of counsel on both sides and conclusion

Mr. Henriques submits:

- (1) that the evidence of Mrs. Chin is unreliable and should not be accepted in the instances where there is conflict with the evidence of Mr. Chin;
- (2) that there was no agreement for Mrs. Chin to have an interest in the company except the one share given to her by Mr. Chin;
- (3) that there was no common intention that Mr. Chin held any any of the shares in trust for Mrs. Chin;
- (4) in any event Mrs. Chin did not act to her detriment in reliance upon any such intention and she has made no investment in the business to create an entitlement to an interest in the shares.

I have given due consideration to those submissions but based on the findings I have made and the views I have expressed it is clear that I am unable to agree with any of those submission. The evidence is plain that, as

Dr. Barnett puts it, Mrs. Chin devoted herself to the building up of the company at the expense of her accounting career and that she received much less than her work was worth and even significantly much less than Mr. Chin said she was entitled to receive.

I agree that it is therefore unreasonable to submit that she was 'handsomely remunerated for her services'. The fact is that she received no payments for the invaluable, promotional, preparatory and innovating work which she did. It cannot therefore be doubted that she acted to her detriment in submitting herself completely and continuously to the requirements of the management of the company.

By way of summary I therefore accept the following submissions of Dr. Barnett as they are well founded:

1. on the evidence both parties contributed to the promotion of the company and the establishment of the business;
2. the evidence preponderates in favour of Mrs. Chin's account that there was an agreement or common understanding that they would be joint and equal parties and own the company in equal shares;
3. the transfer of the subscriber shares, one to each party is indicative of the common intention;

4. at that stage each party was the beneficial owner of one share;
5. Mrs. Chin was not aware of the allotment of the additional shares to Mr. Chin and when she discovered it she protested;
6. the allotment was made irregularly and in breach of the Articles of Association of the company;
7. both parties behaved in a manner which was only consistent with their belief that they were joint owners;
8. accordingly, both parties drew money from the company to meet personal and domestic expenses;
9. Mrs. Chin's dismissal from her position as managing director of the company was wrongful and unjustified.

Accordingly, Mrs. Chin is entitled to one half of the shares in the company.

Order

It is therefore ordered and declared as proposed on behalf of Mrs. Chin as follows:

1. Mrs. Chin is entitled to one half of the equity capital of Lasco Foods Limited.
2. The shares of Lasco Foods Limited are to be valued by Price

Waterhouse, Coopers, Chartered Accountants.

3. In valuing the said shares Price Waterhouse Coopers are to determine the fair market value for the shares of the company as a going concern at the end of the company's most recent financial year for which audited accounts are available (hereinafter referred to as "the valuation date").
4. Price Waterhouse Coopers are to be guided by, or, where necessary have regard to the following factors:
 - (a) the past, present and future earnings of the said company are to be taken into account;
 - (b) assets (fixed, current intangible and goodwill) of the said company are to be taken into account and valued using the net asset basis, that is full current market value as at the valuation date;
 - (c) the liabilities of the said company are to be taken into account as at the valuation date;
 - (d) all outstanding directors' loans and loans outstanding to any company in which Mr. Chin is a shareholder, which are outstanding, or previously written off are to be separately stated and included in the valuation together

with interest at no less than commercial banks' weighted deposit rates for the relevant periods as published in the Bank of Jamaica Statistical Digest;

(e) all transfers of property or assets or funds of the said company made prior to the valuation date other than in the ordinary course of business are to be separately stated and included in the valuation.

5. Price Waterhouse Coopers are to be provided by Mr. Chin with the financial statements and relevant subsidiary records.
6. Price Waterhouse Coopers shall present and state the value of the shares within three (3) months of the date of this Order and shall file the same in Court and serve a copy on the attorneys for Mrs. Chin and a copy on the attorneys for Mr. Chin.
7. Once the valuation of the shares is served on the parties, Mr. Chin shall within three (3) months pay to Mrs. Chin one half the amount of the said valuation in return for a transfer to him or his nominee of the shares registered in her name.
8. The costs of the valuation to be borne equally by Mr. Chin

and Mrs. Chin.

9. Either of the parties is to be at liberty to apply to this Court as he or she may be advised.

And it is hereby further ordered that Mr. Chin do pay to Mrs. Chin the costs incurred herein before Panton, J; the Court of Appeal, before the Privy Council and of the re-hearing. Certificate for two counsel granted.