JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 161/2001

BEFORE: **THE HON. MR. JUSTICE BINGHAM, J.A.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN:	**LASCELLES A. CHIN**	**APPELLANT**
AND	**AUDREY RAMONA CHIN**	**RESPONDENT**

R.N.A. Henriques, Q.C., and Leonard Green Jnr., instructed by Chen Green and Co. for the Appellant

Dr Lloyd Barnett and Gordon Steer, instructed by Chambers, Bunny and Steer for the Respondent

June 22, 23, 24, 25, September 27, 28, 29, 30, October 4, 5, 6, 2004 & December 20, 2005

BINGHAM, J.A:

This present appeal is from a judgment of Clarke, J. delivered on December 6, 2001. The judgment was consequent on a re-hearing of an originating summons brought by the respondent in the Supreme Court under the Married Women's Property Act. This re-hearing lasted for several days between May and September, 2001. At the end of the trial the learned trial judge reserved his judgment.

On December 6, 2001, in a well reasoned judgment, he found in favour of the respondent and granted the following reliefs ordering that:

> "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 audit 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 assets basis, that is full current market value at valuation date;
>
> (c) the liabilities of the said company are to be taken into account as at 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 bank's 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 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 of 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. 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."

The reliefs concluded with an order for the costs incurred in the hearings before Panton, J., the Court of Appeal, Their Lordships' Board of the Privy Council and the hearing before Clarke, J.

The History of the Claim

The parties were husband and wife in a marriage which lasted from February 22, 1986 to 1994, when it was terminated by the grant of a decree absolute. They, however, prior to that marriage, were engaged in a common-

law relationship for a number of years. This union was blessed with the birth of a daughter in 1980.

The respondent had in the interim, sought to advance herself by pursuing tertiary studies which resulted in her qualifying as a chartered accountant. She was successful in obtaining employment with a reputable firm of accountants. She retained this position until February 1986. The appellant for his part was a very successful businessman having the controlling interest in several companies.

In 1985, the appellant was successful in being offered a Contract by the Jamaica Commodity Trading Company Ltd. (J.C.T.C.), then a Government owned entity. This Contract was to package skimmed milk powder. To take up the Contract, required the setting up of a manufacturing plant with the necessary rolling stock as well as a trained workforce and a competent managerial staff.

The appellant prevailed upon the respondent to accept the position as Managing Director of the newly formed company. He contends that the respondent in taking up her position as Managing Director was a paid employee who could be hired and fired like any other paid employee working in the business.

The respondent for her part, contends that she agreed to take on the role of Managing Director of the proposed company on the understanding and belief that she was doing so as a joint and equal partner with the appellant. To support this, she relied on the following factors:

1. When the contract was being negotiated she played an active part in meeting with the principals at J.C.T.C. She took part in all the discussions leading up to the award of the Contract. Following this, she played a leading role in successfully raising the bank loans to capitalize the company.

2. She accompanied the appellant abroad to countries where machinery and equipment required for use in the plant were located. She had discussions with the principals at those companies.

3. She was responsible for having dialogue with the foreign suppliers and in arranging for someone from their plant to visit Jamaica and oversee the installation of the machinery in the plant in Jamaica.

4. When the company was incorporated the two subscriber shares were allotted equally to the parties, one each.

5. Once the company was a going concern and in production, the respondent said that she only took drawings as a director if and when she required money to meet her personal and domestic needs.

6. In a period of five years (1987-1992) the respondent never sought to increase the drawings that she took from the company. She made no payment towards statutory deductions unlike the other employees of the company. In this respect as a director of the company, the other being the appellant, such drawings as she took, were in the nature of being regarded as director's remuneration and so would not qualify to be subject to statutory deductions.

7. While not putting up any monetary capital towards the incorporation and launching of the company, the respondent's contribution was in kind by virtue of her professional expertise and in offering her services in the initial stages in the promotion of the company leading to the successful obtaining of its most valuable asset, the J.C.T.C. Contract, were factors which given the manner in which she guided and directed the company's affairs in putting the interest of the company before her own personal interests, could only be seen as a situation in which she clearly regarded her status as that of an equal partner in the venture.

It is common ground and not in dispute that the efforts made by both parties in the promotional work leading up to the incorporation of the company

did not result in any remuneration being made to them. By the manner in which they set about this task and later on after the company was a going concern, clearly points to the fact that they regarded themselves as equal partners in the business. While not making any financial contribution to the launching of the company, the respondent by her knowledge, skill and experience in corporate matters, would have been well placed to guide the affairs of the company through any possible difficulty that would have surfaced in the formative period of its existence. To quote from the judgment of Downer, J.A. in the first appeal (S.C.C.A. No. 115/96 ***Audrey Ramona Chin v Lascelles Augustus Chin*** (unreported)) delivered on May 10, 1999:

> "The appellant Audrey is a Chartered Accountant. In professional terms the marriage combined the accounting skills of the wife with the business acumen of the husband."

Learned counsel for the appellant Lascelles Chin has consistently placed the main thrust of his submissions in contending that the matter fell to be determined on whether or not the respondent was merely a paid employee of the company who could be hired and fired by the appellant who was solely in control of the company. This argument was rejected by both this Court at the first hearing of the appeal and later on by Her Majesty's Board of the Privy Council. Both saw the critical issue in the case as being what was the nature of the beneficial interest of the parties in the company.

Moreover, as Dr. Barnett for the respondent has contended, even if the respondent was a paid employee of the company that by itself would not have

disentitled her to her claim to an equal share in the company. This stood to be determined on an examination of the surrounding circumstances leading up to the formation of the company as to what was the common intention of the parties.

In this regard, of particular significance are the combined efforts of the parties in promoting and obtaining the J.C.T.C. Contract as well as the time and energy they both put into negotiating with the foreign suppliers for machinery and equipment abroad. These trips abroad included visits to the United States of America and Argentina, to meet with the principals at these companies and concluding arrangements for the shipment of the machinery necessary for the plant.

While at first attempting to down play the contribution of the respondent as to her role in the preparatory work undertaken in launching the company, the appellant later admitted that she contributed in no small measure in that regard. Further, given the varying business interests that the appellant had to pay close attention to, it was highly unlikely that he would have had much time to devote to the day to day affairs of the company. It would not be surprising if as the respondent said that he was hardly ever able to visit the plant on a regular basis. Most of what he knew of the day to day activities there was more than likely garnered from information passed on to him by the respondent when they both got together at home at the end of a day's work.

In 1993 the relationship between the parties became strained and started to deteriorate. This led to disharmony and it became difficult for the parties to work together. Following an argument the respondent told the appellant "to pay me for my shares. " His response was that she had only one share. This caused the respondent to check the register of shareholders. She then discovered that when the share capital was increased following a meeting of the company in April 1986, at that same time all the additional shares as well as the original shares were allotted to the appellant.

The relationship became worse and finally ended in November 1993, when the appellant in his capacity as Chairman of the Board of Directors sent a letter to the respondent along with a cheque representing six months salary in lieu of notice dismissing her from the position of Managing Director. The respondent then took legal advice and through her attorney issued a summons in the Supreme Court under the Married Women's Property Act. The issue before this Court is whether Clarke, J. was right in holding that the respondent is entitled to 50% of the shares of Lasco Foods Ltd.

The Allotment of the Additional Shares

Before turning to the critical issues it might be convenient to examine the circumstances of the allotment of the additional shares. The appellant's account was that two meetings were held on May 7 and 8, 1986, to deal with this matter. Prior to this however, a meeting was held on April 22, 1986, at which approval was given for the share capital to be increased from 200 to 300,000 shares of

$1.00 each. There is no issue as to the holding of the meeting of April 22, and the passing of the resolution increasing the share capital. The issue relates to the alleged meetings of May 7 and 8, 1986, and in particular, the latter meeting at which according to the appellant, a resolution was passed allotting all the additional shares (249,999) to him.

The respondent denies being present at that meeting or having any knowledge of, or consenting to this decision. The appellant states that the respondent was present at that meeting and was a party to this decision. In support, the appellant relies on the account of the attorney-at-law for the company Mr. Vincent Chen, who is also a close friend of his. Mr. Chen recalled receiving a letter from the respondent in July 1986, instructing him to increase the share capital of the company to 300,000 shares. He complied with this request. He said that the original shares of the company (200 shares) which had been in the names of his two secretaries at his law office and were being held in trust for the beneficiaries of the company were not transferred to the company until July 1986. This included the two subscriber shares one each held by the respondent and the appellant.

The learned trial judge had no difficulty in rejecting the testimony of Mr. Chen as totally unreliable. His evidence was clearly inconsistent with the evidence of both the appellant and the respondent, that the two subscriber shares had been transferred to them when the meeting of April 22, 1986, was

held. It was at this meeting that the decision was taken to increase the share capital of the company.

The appellant sought to rely for support of his contention that he was the majority shareholder in Lasco Foods Ltd., on the entry in the share register which had him owning the entire amount of 249,999 shares issued and the respondent owning only one share.

The respondent for her part prays in aid her absence at the meeting of May 8, 1986, at which the resolution was passed allotting all the additional shares to the appellant. In this regard Article 95 of the Articles of Association states:

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

Article 95 can be seen as an important procedural safeguard and this assumes importance as the learned trial judge found that the respondent's

account of not being present at the meeting of May 8, 1986, was true. It was contended by the appellant that the allotment of all the additional shares (249,800) was made at that meeting. If as he was saying the respondent was present at the meeting and agreed to the allotment, one is led to ask the question, why was there a failure on the part of the respondent and himself to sign the Register signifying their presence as is mandated by the Articles? Article 58 provides a further safeguard that:

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

There is no evidence that the respondent received any notice of the meeting called for May 8, 1986. It follows that as this was the meeting at which the decision was taken allotting all the additional shares to the appellant, if done without the knowledge or consent of the respondent it was therefore void and of no effect. Any resolution passed or business conducted at such a meeting was equally void.

It is clear that there is no issue that both parties became the beneficial owners of one share each at the time of the incorporation of the Company. As an equal shareholder, they both acquired a pre-emptive right to acquire an equal allotment *pari passu* in the event of any increase in the share capital of the company.

In this regard Article 53 provides that:

> "53. Unless otherwise determined by the Company in General Meeting any original shares for the time

> being unissued and not allotted as provided in Article 5 and any new shares from time to time to be created shall, before they are issued, be offered to the members in proportion, as nearly as may be, to the number of shares held by them. Such offer shall be made by notice specifying the number of shares offered, and limiting the time within which the Offer, if not accepted, will be deemed to be declined, and after the expiration of such term 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 the manner hereinbefore provided."
>
> (Emphasis supplied)

Section 16 of the Married Women's Property Act in this regard provides an inexpensive, comprehensive and speedy resolution of property disputes by summary procedure in the Supreme Court. In ***Pettitt v Pettitt*** [1969] 2 All ER 385 at 405 Lord Upjohn in referring to section 17 of the U.K. Act (which corresponds to section 16 of our Act) said inter alia:

> "In my view s. 17 is a purely procedural section which confers on the judge in relation to questions of title no greater discretion than he would have in proceedings begun in any Division of the High Court or in the County Court in relation to the property in dispute, for it must be remembered that apart altogether from s. 17, husband and wife could sue one another even before the Act of 1882 over questions of property; so in my opinion s. 17 now disappears from the scheme and the rights of the parties must be judged on the general principles applicable in any court of law when considering

> property, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of that relationship."

Given the above statement once the principle is accepted and when coupled with the respondent's complaint that by virtue of the mandatory provision of Article 53, she ought to have been offered one-half of the shares which were issued when the share capital was increased, then her claim to such an entitlement becomes a valid one.

The resolution passed at the meeting of the Board of Directors on April 22, 1986, authorizes the Directors "to increase the share capital to 250,000 shares, by the creation of 249,800 shares of $1.00 each" and "to dispose of the new shares in such manner as they think most beneficial to the company". The failure to adhere to the provisions of Article 53, meant that there was no power in the directors to act outside of the mandatory provisions laid down in the Article.

The respondent states that she was not present at the meeting of May 8, 1986, a meeting for which she also received no notice. Further, she did not sign the minutes and the register evidencing her presence. This very fact by its omission lends credence to her account. The absence of the respondent from the meeting meant that no business could have been transacted without a quorum (vide Article 62). To validate the proceedings at the meeting would have required at least two members to be present (Article 107).

As the parties were at the time the only two members and shareholders, in the absence of any of them, no business could have been lawfully transacted at any meeting. Any attempt to carry out such business without the concurrence of the absent member would render any decision taken, a nullity.

It may now be convenient to direct one's attention to the crucial issues formulated by the Board of the Privy Council, which ought to have engaged the attention of counsel for the parties and the Court at the re-hearing of this matter. Following thereafter, will be an examination of the other issues which counsel considered as having relevance to the outcome of the matter. The manner in which counsel addressed these issues will also require careful examination as well as the manner in which the learned trial judge sought to resolve the issues in the light of the submission made by counsel. The issues as identified by the Lords of the Privy Council were as follows:

> "1. What were the parties' joint intention when the two original shares were allotted, one to Mrs. Chin and 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?
>
> 2. 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?
>
> 3. 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 shares?"

The learned trial judge in commenting on these issues observed that:

> "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 the 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."

Critical Issue No. 1 - What were the parties joint intention when the two original shares were allotted?

The respondent in advancing her claim to an equal share in assets of the Company (now known as Lasco Products Ltd.) in an affidavit sworn to on January 31, 1994, stated:

> "That at all material times I believed that my husband and myself were working as joint owners of the Company ..."

In a later affidavit in response to an affidavit sworn to by Mr. Chin denying her claim to a beneficial interest in the Company, she stated that:

> "... it was always our intention to own the company equally and for me to operate the company as Managing Director."
>
> (Paragraph 22 of her affidavit of June 22, 1995)

While acknowledging under cross-examination by learned counsel for the appellant that there was nothing in her affidavits making specific reference to any discussion or agreement concerning the 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 accepting the account of Mrs. Chin as the credible narrative of the true position in respect to the beneficial ownership in the shares of the Company, the learned trial judge had regard to the following dialogue which emerged during the cross-examination.

Under cross-examination of the respondent by Mr. Henriques, Q.C., the following emerged:

> "Quest. You say that 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 share was issued one share for Mr. Chin and one share to myself and this was reflected in the minutes of April 22, 1986."

As the learned trial judge rightly observed the "appellant" gave varying accounts of the manner in which the subscriber shares were dealt with. At one stage he gave evidence of the shares being allotted at the meeting of April 22, 1986, shortly after the company was incorporated. The additional shares were increased afterwards. At another stage, however, he said that:

> "the subscriber shares were transferred after the additional shares had been allotted to him."

It may be mentioned in passing, that if this was so, it would have rendered any resolution passed at a meeting allotting these additional shares void for the simple reason that neither of the parties would have had the capacity to hold any meeting (having no shares) and any business conducted would equally be rendered invalid and of no effect.

The learned trial judge referred to the following evidence which emerged from the cross-examination of Mr. Chin (appellant) by Dr. Barnett on this aspect of the case:

> "Quest. On April 22, 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 instructions for two 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 shares allotted to me.
>
> Quest. 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 shares.
>
> Quest. And you didn't have any company meeting to discuss the shares of the company?
>
> Ans. If you are talking the foundation shares and the starting shares of the company, those I gave instructions to the lawyer to do.

Quest. And you didn't have any company meetings to discuss the additional shares either.

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

Quest. Why did you ask Mrs. Chin to communicate with the lawyers why didn't you do it yourself?

Ans. She would be (sic) the Managing Director and I had given her instructions what to do. Yes the lawyer was Mr. Vincent Chen.

Quest. 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.

Quest. You would have given Mrs. Chin the instruction about two months after your wedding.

Ans. I don't remember the time.

Quest. You had any discussions with Mrs. Chin about the additional shares before giving her the instruction to speak to the lawyer?

Ans. I am sure I must have done.

Quest. 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 that discussion. There was never any discussion about equal shareholding as that was never my intention.

Quest. 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.

Quest. 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.

Quest. And you see there, that it is stated that approval is 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 numbers 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."

Quest. At the time when the one share was transferred to Mrs. Chin and the one to you the share capital had not yet been increased?

Ans. Yes.

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

Ans. Yes."

(Emphasis supplied)

In the face of this conflicting evidence which emerged during the account of the appellant, the learned trial judge was led irresistibly to conclude that the

appellant's attorney-at-law, Mr. Vincent Chen had sought to give an account which had him as having kept back the subscriber shares for a period of 18 months in the names of his secretaries before transferring them to the parties. This he saw as being; " a colourable attempt on their part to bury the truth."

It follows therefore that the judge's acceptance of Mrs Chin's evidence as to when the subscriber shares were transferred, was fully supported by the evidence. Furthermore, as the learned trial judge observed, this finding meant that there was no doubt whatever that on the 22nd April, 1986, the two subscriber shares were transferred, one to Mrs. Chin and one to Mr. Chin. It was these two shares properly termed "the qualification shares" which would have given the parties the capacity to hold regular meetings of the company and to lawfully transact its business.

Also touching on the determination of this issue, the learned trial judge referred to the evidence of the appellant in regard to the events leading up to acquisition of the various contracts and the eventual launching of the company. In this regard the appellant first stated that Mrs Chin:

> 1. "... had absolutely nothing whatever to do with the negotiations leading up to the award of the contract to the Company." (Vide para. 11 of his affidavit of December 2, 1994).
>
> 2. "... had nothing whatsoever to do with the negotiations of the loans." (see same paragraph)
>
> (Emphasis supplied)

The appellant later recanted and in a subsequent affidavit sworn to on October 26, 1995, agreed that the respondent had been with him at some of the negotiations leading up to the setting up of the Company. He however, sought to down play her role by stating that she was present at some of the negotiations as "the prospective manager of the Company". Under cross-examination it later emerged that the respondent (Mrs. Chin) not only attended some of those negotiations but participated in them and helped with the application for the financing of the business.

In light of this evidence the learned trial judge accepted the respondent's account as to the role she had in launching the Company. When one takes into consideration that her involvement in this regard was carried out without any compensation for her services, as a chartered accountant with good career prospects, the only reasonable inference that can be drawn from her conduct was that it was founded on her belief that she was to have an equal share in the assets of the company. Although not putting up any cash to capitalize the formation of the company her contribution was more than adequately provided for in kind, by the knowledge and expertise that she brought to the table. Her belief was further supported by the manner in which the subscriber shares were distributed in an equal proportion to the appellant and herself.

Added to this was the fact that the company was incorporated on February 21, 1986, and that the parties were married the following day. This led the learned trial judge to conclude in finding on this issue 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."

I hold that the learned trial judge was correct in coming to this conclusion. In so far, therefore, as the grounds of complaint sought to challenge the manner in which he dealt with the matter, given the evidence before him, this complaint must fail.

Critical Issue No. 2

This reads:

> "Was it intended that each would become a beneficial owner of the allotted shares?"

The learned trial judge answered this issue in the affirmative. He based this conclusion on the evidence of the appellant who admitted the respondent's claim to the beneficial ownership of this share. He was careful to observe that this situation meant that if the parties became at the inception of the incorporation of the company beneficial owners of an equal number of shares, legal consequences would follow on that entitlement with respect to their rights and obligations as shareholders.

The appellant's main thrust below and before this Court was to contend that it was he who capitalized the company and that by so doing he regarded it as his own, thus entitling him to the majority shareholding. The respondent was

nothing more than a paid employee of the company who was obliged to carry out his orders as he dictated them to her.

It is not in dispute that the company was capitalized by bank loans which were guaranteed by the appellant. However the respondent testified that she never received a regular salary but took drawings as a director if and when this was required, mostly for attending to the domestic needs of the household. An examination of the documentary evidence revealed that over the seven years that the respondent was actively engaged as the Managing Director, she received no bonus, nor vacation leave entitlement, to which, had she been a paid employee, she would be entitled to. For the first five years her drawings remained the same and in one year it was less than the preceding year. The appellant has not persuaded me that the learned trial judge's conclusion was wrong.

Critical Issue No. 3

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

In determining this issue the learned trial judge relied on the following factors:

> "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, energy and expertise she devoted to the business."

He concluded that when these factors were taken together and considered as a whole, the only reasonable inference that could be drawn is that the allotment of the subscriber shares was intended by the parties to reflect an equal ownership in the company.

The appellant sought to contend that he was solely responsible for the capitalization of the company. This was not correct as his contributions went only to guaranteeing the bank loans which were used for that purpose. The loans were negotiated mainly through the efforts of the respondent. They were repaid out of income generated by the company after it commenced production. The learned trial judge formed the view that, apart from guaranteeing the loans, if the appellant did provide some cash, this was to be pitted against the efforts of the respondent, whose contribution to the venture was in kind, she being a chartered accountant and someone with the competence and expertise to undertake the task of setting up the company on a proper foundation. This joint effort on the part of both parties he said:

> "would not disturb the broader picture of a joint enterprise and a common intention of an equal partnership."

He cited in support the following cases, ***Pettitt v Pettitt*** [1970] A.C. 77, ***Gissing v Gissing*** [1971] A.C. 886 ***Nixon v Nixon*** [1969] 3 All ER. 1133; ***Muetzel v Muetzel*** [1970] 1 All ER. 443.

It is sufficient to elaborate on the statement of principle relied upon by the learned trial judge by referring to the speeches of Lord Reid, Viscount Dilhorne, and Lord Diplock in ***Gissing v Gissing*** (supra) at pages 896 (E-F) and 897 (F-G). There Lord Reid puts the principle thus (896):

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

Then continuing at page 897 Lord Reid said:

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

Viscount Dilhorne at page 900 expressed the principle thus:

> "I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on

> establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a *cestui que trust.*
>
> Where there is a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest."
>
> (Emphasis supplied)

Then continuing, Viscount Dilhorne stated these important words at page 900(G):

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

Turning then to the speech of Lord Diplock at page 905 (B-C):

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

What follows thereafter at page 906(B-C) is a very important statement of principle which is applicable to this case:

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

When the manner in which the subscriber shares were allotted coupled with the way in which the parties acted prior to the incorporation of the Company, there was sufficient evidence from which the learned trial judge could infer that the common intention of the parties was that they were to share equally in the ownership of the company.

Critical Issue No. 4

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

The alleged allotment of the 249,998 shares to Mr. Chin was said to have taken place at a meeting of the Company on May 8, 1986. Mrs. Chin emphatically stated that she was not present at this meeting and that "she neither agreed to, nor had knowledge of the allotment when it was made." That "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 to Mr. Vincent Chen, Attorney-at-Law for the company, for the share capital to be increased from 200 to 300,000 shares. This letter was written after speaking to the appellant. She rejected any suggestion that in 1986, she knew that 249,998 shares had been allotted to Mr. Chin. She first became aware of this when she checked the share register in 1993, after the marriage had broken down.

There is clearly no question as to the fact that the letter of July 4, 1986, instructing Mr. Vincent Chen to increase the share capital was written on the receipt of instructions from the appellant. As the attorney did not deny receiving the letter, one is led to ask the question, therefore: If Mrs. Chin (the respondent), was then aware of the allotment of the 249,998 shares to the appellant, why did she not first make enquiries as to the reason for writing the letter in that form?

She was aware that at the meeting of April 22, 1986, approval had been given to increase the share capital of the Company from 200 to 250,000 shares of $1.00 each. The only reasonable inference that could be drawn from the

letter of July 4, 1986, is that the respondent as she has asserted was at that time totally unaware of the allotment of the additional shares to the appellant. She was also not present at either the meeting of May 7, or that of May 8, 1986. In short, the allotment was done behind her back without her consent.

The effect of all this has serious consequences, the most important being that for the meetings to be regular and the business conducted therein lawful, would require a quorum of at least two members. As the only two members at the relevant period were the appellant and the respondent, the absence of the respondent rendered all business transacted at this "meeting" invalid. This included the resolution passed allotting the 249,998 shares to Mr. Chin (the appellant). This however, would not affect the increase of the share capital. The evidence is that the increase was of 249,800 shares of $1.00 each. The instructions to Mr. Vincent Chen per letter dated July 4, 1986, was to increase the share capital from 200 to 300,000 shares. If there was a further increase of the additional 50,000 shares, then in keeping with the mandatory provisions of Article 53, the respondent would be entitled to receive half of the total additional shares allotted to the appellant. Failing this, she is entitled to be compensated for her half of the beneficial interest in the Company. The formula for fixing the basis for arriving at a fair and equitable sum to be paid to the respondent has been addressed by the learned trial judge and forms a part of his judgment. I can find no reason for disturbing his approach to resolving this matter.

Critical Issue No. 5.

This reads as follows:

> "5. If she (the respondent) did not agree to it or have any knowledge of it at the time, did she subsequently become aware of the fact of the allotment?"

The respondent had stated that she became aware of the allotment of the additional shares to Mr. Chin (the appellant) after the marriage broke down in 1993. During an argument with him she had asked him; "Why you don't pay me for my shares?" He replied, "You only have one share."

It is the respondent's consistent view that she believed from the conduct of the parties leading up to and following the formation of the company that they were equal joint partners in the company. The manner in which the company was incorporated and the role she played in launching and placing the company on a solid foundation, support that fact. For her to be turned away with nothing to show for her efforts would be grossly inequitable. It was the respondent who wrote the letter of July 4, 1986, to Mr. Vincent Chen, the attorney-at-law requesting him to increase the share capital to 300,000. She no doubt believed that she could reasonably expect to receive her half share of the additional shares when issued.

Mr. Vincent Chen in an affidavit sworn to on April 12, 2001, deposed that in August 1986, he received a phone call from Mrs. Chin complaining about not receiving any of the additional shares issued. Mrs. Chin in an affidavit sworn to on May 2, 2001, denied ever having a conversation with Mr. Chen concerning

shares. The learned trial judge found Mr. Chen's account to be unreliable. He came to this conclusion after reviewing Mr. Chen's account relating to the important matter of the original shares and the date he said that they were transferred. When his account is examined against the documentary evidence contained in the Company's Register of shareholders and the document purported to be the minutes signed by Mr. Chin what emerged was that the two original shares had already been transferred on April 22, 1986. The learned trial judge also found that the suggestion put by the respondent's attorney-at-law that Mrs. Chin (the respondent), based on Mr. Chin's account, if true, would have not been a party to an agreement or present at any meeting at which the allotment of the additional shares to him was approved. This further supported the finding of the learned trial judge that she first discovered and became aware of the allotment in 1993 after the marriage had broken down.

Critical Issue No. 6 – The inference to be drawn

The learned trial judge in dealing with this issue said:

> "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."

In this regard the learned trial judge had previously found in considering Issue No. 4, that the respondent had no knowledge of the additional shares being allotted to the appellant (Mr. Chin), that she did not consent to any such allotment being made, and that when she eventually discovered it, she did not

acquiesce in it. This, therefore, rendered Issue No. 6 as otiose and of no effect. It also meant that on the basis of this finding there was no room left open for the question of waiver to arise as to affect the pre-emptive rights to which the respondent was entitled by virtue of Article 53.

The Peripheral Issues

Both before the Court below and in this Court, learned Queen's Counsel Mr. Henriques, Q.C., placed great store on the argument that Mrs. Chin (the respondent) was a salaried employee in the company and as such she could be hired and fired at will. The Board of the Privy Council in examining this issue did not regard this matter of much importance to include it as one of the critical issues to be addressed by counsel and the Court at the rehearing of the case.

Learned counsel for the respondent, Dr. Barnett, saw the reason for the omission as obvious. He submitted quite correctly that the fact that a person is paid some remuneration is not inconsistent with the ownership of shares in a company. Moreover, this was a private company with two members up to the date that the respondent was unceremoniously booted from her position as Managing Director. She, for her part denied receiving a monthly salary. She regarded the money taken from the company's account as monthly drawings or director's remuneration. There is support for this as an examination of the records of the company which were part of the exhibits in the case, revealed that there were only two occasions on which statutory deductions were made from the sums received by her.

Learned Queen's Counsel for the appellant submitted that the issue of whether the respondent was in receipt of a salary becomes a matter of paramount importance in the determination of the case. The learned trial judge held that in his view, the matter raised merely a subsidiary issue which goes to credit. As the issue emerged however, from the evidence given by the parties, it is of some interest to note their respective accounts as summarized by the learned trial judge. He had this to say:

> "From the start Mrs. Chin stated that she received payments from the company. She said that these were not salary but director's remuneration (paragraph 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 characterizes as salary, were brought into the accounts as director's remuneration (paragraphs 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's handwriting sent to a clerk who has 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 examined the evidence both oral and documentary, the learned trial judge found that the vouchers that referred to the drawings as salary and the payment, bore no true relationship to the characteristics of a salary.

This finding is borne out by the fact as stated in the submission of the respondent's counsel Dr. Barnett, that for the entire period of seven years, only

two vouchers referred to statutory deductions and all other payments to Mrs. Chin including that appended to the letter dismissing her from the post of Managing Director, had no employee related deductions. To this it may be stated that unlike regular employees, the respondent received no annual pay increase, no bonus, no paid vacation leave, which given her status and qualification, had she been a paid Managing Director, would no doubt be part of her conditions of employment and her "package" that went along with the job. This was no 'grass roots' company, but one which, as the evidence shows, by the time the respondent was ungraciously dismissed from her post, was earning profits after tax of over $15,000,000.00.

The Review of Findings of Fact by a Court of Appeal

As the evidence unfolded in this case the most important question which fell to be resolved by the learned trial judge was the issue of credibility. In the end he accepted the respondent, Audrey Ramona Chin, as a truthful and credible witness.

The principles applicable in a case tried by a judge without a jury have been enunciated in a number of cases going back to the latter half of the twentieth century. These principles have been examined and refined in two cases decided by the House of Lords viz ***Benmax v Austin Motors Co. Ltd.*** [1955] 1 All ER 326 and ***Watt (or Thomas) v Thomas*** [1947] 1 All ER 582; [1947] A.C. 484. The dicta elicited from these cases are that:

> "An appellate Court, on an appeal from a case tried before a judge alone, should not lightly differ from a

> finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge."
>
> (Emphasis supplied)

In this case the issue of the credibility of the several witnesses who were cross-examined left the learned trial judge in a most advantageous position in seeing and hearing them and observing their demeanour to weigh, assess, and evaluate their testimony in coming to a conclusion as to where the truth lay in the case. In ***Benmax v Austin Motor Co. Ltd.*** (supra) Viscount Simonds referred to the Rules of the Supreme Court (England), Order 58, rule 1, which prescribes that (p. 327 F-G):

> "All appeals to the Court of Appeal shall be by way of a re-hearing,"

and rule 4 which states:

> "The Court of Appeal has power to draw inferences of fact and to give any judgment and make any order which ought to have been made ..."

And at p. 327 H, he said:

> "This does not mean that an Appellate Court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. ..."
>
> (Emphasis supplied)

The Board of Her Majesty's Privy Council has put its stamp of approval on the above statement of principle in several cases from these Courts of which two in particular were relied on by the respondent, namely, ***Industrial Chemical Co. (Ja.) Ltd. v Owen Ellis*** (1986) 35. W.I.R. 323; and ***Green v Green*** P.C. Appeal No. 4 of 2002 (May 20, 2003).

Conclusion

To sum up the matter, the learned trial judge, in my view, correctly held that the company Lasco Foods Ltd. was a family company. The appellant and respondent were the only interested parties hence, the informal nature as shown by the way in which funds were drawn from the accounts of the company by both parties. The learned trial judge found that the respondent's drawings as she said were for personal expenses which she had to meet. He rightly found that the respondent was engrossed in the company's business and was entitled to be adequately compensated. Such drawings as she received as a Director of the company had to be correctly recorded as "Directors remuneration", or "salary" or "advance/loans." She clearly was not treated as an employee with respect to these payments or drawings. There is much support for this finding such as the varying amounts, the irregularity of the times of receipts, the inconsiderable length of time she was allowed a discretion in relation to the drawings and the fact that the respondent received considerably less than Mr. Chin says she was entitled to.

Mr. Henriques, Q.C., also submitted below that the respondent has shifted her case to a different basis. In this regard she has made an attempt following the decision of the Privy Council to depose in a later affidavit that there was an agreement between Mr. Chin and herself to own the company jointly. This was repeated under cross-examination. Prior to the Board's decision she had said: "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).

This submission did not find favour with the learned trial judge for the reason that the respondent had said from the outset of the claim in her first affidavit that she and her husband had conducted themselves as joint partners and took one share each in the company. The learned trial judge then said:

> "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."

(Emphasis supplied)

The underlined words indicate that the learned trial judge had his mind fully focused on what represented the crucial question for his determination.

In addressing the manner in which the appellant (Mr. Chin) responded to the issue of ownership of the company, the learned trial judge had regard to his evidence under cross-examination. He noted that the appellant had admitted

that the question of ownership had been discussed, then later said that he did not intend to say so.

Under cross-examination when challenged by Dr. Barnett his responses were:

> "Quest. Did Mrs. Chin agree with you that she would take one share and you one share at the commencement?
>
> Ans. No."

The appellant later added:

> "I told her one share was for me."

He then said:

> "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."

This performance by the appellant led the learned trial judge to conclude that:

> "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."

The learned trial judge then referred to another matter relating to the demeanour of the appellant. This concerns the role if any that the respondent played in the negotiations for the J.C.T.C. Contract and the bank financing. In this regard he observed that:

> "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 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."

Having reviewed the submission of counsel and given careful consideration to them the learned trial judge rejected those made by learned Counsel for the appellant. He accepted those made for the respondent as he found that:

> "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 less than Mr. Chin said she was entitled to receive."

This also led the learned trial judge to conclude that it was unreasonable as counsel for the appellant had submitted to contend that the respondent was "handsomely remunerated for her services." Added to this "she received no

payment 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."

He held that based on the above, the dismissal of the respondent from her position as Managing Director of the Company was wrongful and unjustified. That she was entitled to one-half of the shares in the company. He then made an order in terms of his findings.

In my opinion, having regard to the evidence which the learned trial judge was confronted with both oral and documentary, I am firmly of the view that he approached what was a difficult task with the utmost care. His acceptance of the respondent's case meant that the beneficial ownership of the subscriber shares which were held by the parties at the incorporation of the company when coupled with their joint efforts leading up to the incorporation of the company was clear evidence from which the learned trial judge could hold as he did that they both acted as joint and equal partners in this venture. This common intention carried with it, the pre-emptive rights of the parties as spelt out in Article 53. It also meant that, the respondent was entitled to be offered an equal allotment of any new shares issued by the company and on the evidence she received no such offers to take up and pay for the additional shares all of which were allotted to Mr. Chin. The respondent had no knowledge of this allotment and when she learnt about it she protested. As a consequence, the

appellant was legally and equitably bound to hold half of the additional shares issued to him in trust for the respondent.

I would accordingly dismiss the appeal and affirm the judgment of Clarke, J. with an order for costs to the respondent to be agreed or taxed.

SMITH, J.A:

Mr. Lascelles Chin (the appellant) is a businessman. Mrs. Audrey Chin (the respondent) is a Chartered Accountant. They became intimate friends and in October, 1980 she bore his child. They were married in February, 1986. In the same month Versatile Packing Ltd. (the company) was incorporated with a share capital of 200 shares of $1 each. The respondent was the managing director. The two subscriber shares were allotted, one to the appellant, one to the respondent.

The share capital of the company was later increased from 200 to 250,000 ordinary shares of $1 each. The records of the company show that of these shares one is in the name of the respondent. The other $249,999 stand in the name of the appellant. In May, 1992 there was a change in the name of the company to Lasco Foods Ltd.

Unfortunately the marriage was short lived. A decree absolute of divorce was granted on February, 1994. As so often happens, a breakdown of a marriage leads to property disputes. This was no exception. The respondent's "employment" as managing director was terminated by the appellant by letter dated November 4, 1993. On June

31, 1994, the respondent issued an Originating Summons under section 16 of the Married Women's Property Act (MWPA) seeking declarations as to the interests of the parties in the Company and other properties.

In her affidavit in support of the Originating Summons the respondent claims that she is beneficially entitled to one half of the value of the company.

In an affidavit in reply the appellant swore that the respondent had been merely an employee of the company. He claims that 249,999 shares in the company had been allotted to him and that only one (1) was issued to the respondent. Accordingly, he says the respondent's only interest in the company is that of a shareholder owning one (1) share.

On October 18, 1996 Panton J, (as he then was) dismissed the respondent's claim that she was beneficially entitled to one-half of the value of the company.

On May 10, 1999, this Court (Forte, P, Downer and Harrison, JJA) (as they then were) reversed Panton, J's decision and found that the respondent was entitled to one half of the shareholding of the company.

On appeal by the appellant to their Lordship's Board it was held that:

> "16. To allow the judgment of Downer, JA to stand would in their Lordships' view, be unfair to Mr. Chin. He has given evidence which, if believed, contradicts Mrs. Chin's case. He is entitled to ask for his credibility to be judged

> after cross examination of himself and Mrs. Chin. Mrs. Chin's position is no different.
>
> 17. Accordingly their Lordships have concluded that the case must be remitted for a re-hearing in the Supreme Court. Directions for the cross-examination of Mr. Chin and Mrs. Chin should be given. If the parties want to adduce additional evidence, for example from the secretary of the company, or from the auditors Parnell Kerr Foster (now incorporated into Ernst Whinney) directions for that purpose too can be given...".

Further, their Lordships expressed the view that:

> "18. At the re-hearing the judge will be able with the assistance of cross-examination of the parties, to make factual findings on the following critical issues:
>
> > '(1) What were the parties' joint intentions 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?
> >
> > (2) 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?
> >
> > (3) If she did agree to 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 shares'?"

The Re-hearing

Before Clarke J were some sixteen (16) affidavits including three (3) from Mrs. Chin and three (3) from Mr. Chin. Both parties and their witnesses were subjected to extensive cross-examination. The learned trial judge and the attorneys-at-law on both sides treated the issues identified by their Lordships' Board as critical to the decision to be reached as to Mrs. Chin's interest in the Company.

Additional issues, mainly factual, were raised with a view to assisting the learned trial judge in making findings on the critical issues enumerated by their Lordships' Board.

After a trial which lasted some twelve (12) days, Clarke, J found that Mrs. Chin was beneficially entitled to one half of the Company.

Mr. Chin has appealed this decision.

I have had the privilege of reading in draft the judgments of my brothers Bingham and Harrison, JJA, and am in agreement with their conclusions that the appeal should be dismissed for the reasons given. Bingham JA has examined fully the complaints of the appellant against the decision of Clarke J. These complaints are contained in some sixteen (16) grounds of appeal. I do not think it necessary to add anything to what my brothers have written however, I am constrained to say something on three points raised by counsel for the appellant.

The first point concerns the authenticity (or lack thereof) of the minutes of a meeting of the directors which the appellant claimed was held on May 8, 1986. These minutes are exhibited to the respondent's affidavit dated June 22,1995 – see Vol. 1 of the Record at page 153. The relevant part of these minutes for this exercise reads:

> "**Allottment 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."

The minutes indicated that both the appellant and respondent were present. These minutes were signed by the appellant alone in his capacity as Chairman.

In a subsequent Affidavit dated May 2, 2001 the respondent at para. 16 (see Vol. 2 p. 486) stated that she had always contended that she was not aware of the purported allotment of the shares referred to in the minutes previously exhibited and in particular that she did not attend any meeting which approved the alleged allotment of the additional shares.

Mr. Henriques Q.C submitted that when the respondent exhibited the minutes to her affidavit she did so voluntarily and without reservation or qualification or suggestion that the minutes were false. In those circumstances, he argued, the only reasonable inference to be drawn is that she accepted them as authentic. The respondent he argued, later

shifted her case after the decisions of the Court of Appeal and Privy Council and claimed that the minutes were false. The learned judge he argued failed to adjudicate on this evidence which went to the respondent's credibility which was of fundamental importance. The respondent, he said, was bound by the minutes which she exhibited and these minutes show – the directors who were present, what was the purpose of the meeting and the decisions which were taken. The learned judge, he continued, erred in finding that she was not aware of the allotment of the additional 249,998 shares to the appellant. In relation to this and other finding of fact he complained that the trial judge failed to apply the correct test for the proper determination of issues.

In this regard he relied on a statement entitled "**The Judge as Juror: The Judicial Determination of Factual Issues**" by Lord Tom Bingham in the Business of Judging. At page 6 Lord Bingham stated:

> "The main tests needed to determine whether a witness is lying or not, are, I think, the following, although their relative importance will vary widely from case to case:
>
> (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;
>
> (2) the internal consistency of the witness's evidence;
>
> (3) consistency with what the witness has said or deposed on other occasions;

> (4) the credit of the witness in relation to matters not germane to the litigation;
>
> (5) the demeanour of the witness.
>
> The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility."

Dr. Barnett for the respondent, submitted that it was grossly inaccurate to say that the respondent exhibited the minutes without any comment or that she accepted the authenticity of the minutes dealing with the allotment.

As Dr. Barnett suggested, it is important to examine the context in which the minutes were tendered by the respondent. After the breakdown of the marriage the respondent was eventually dismissed from her job as managing director of the company by the appellant. The respondent in her first affidavit claimed that she is beneficially entitled to fifty per cent of the company. The appellant denied her claim and said that her only interest is that of a shareholder owning one(1) share which he had given to her out of the issued shares of $1 each.

The respondent then in her second affidavit exhibited minutes of meetings held on the 22nd of April, 1986 and on the 8th May, 1986 among others - see pages 148 and 153 (Vol.1). The minutes of the 22nd April

show that there was consensus to increase the authorized share capital to $250,000 by the creation of 249,800 shares of the $1 each to rank pari passu with the existing shares. The directors were authorized to dispose of the new shares in such a manner as they think most beneficial to the company. These minutes also show that both directors (the appellant and respondent) and the Secretary, Miss Thelma Miller, were present.

The minutes of 8th May show an allotment of the additional shares to the appellant. They indicate that the Secretary was absent.

Having exhibited the minutes (see para. 27. p. 121. Vol. 1) the respondent in paras. 28 and 29 stated:

> "28. That at no time were any of the 249,800 shares offered to me parri (sic) passu with what I held along with the Defendant. The allotment of those additional shares to himself were done without my knowledge and contrary to the conditions under the Articles of Association.
>
> 29. I certainly would not have agreed for the Defendant to virtually give me a nil interest in a company that I had operated from its birth so to speak..."

I agree with Dr. Barnett that it is not correct to say that the respondent exhibited the minutes of the 8th May without any comment. It is clear beyond peradventure that she was not accepting the authenticity of the minutes dealing with the allotment of the additional shares to the appellant.

The respondent's evidence that she was unaware of any such allotment is consistent with a letter written by her to Mr. Chen, the appellant's attorney-at-law on July 4, 1986. This letter was produced by the appellant. The respondent wrote this letter requesting that the share capital of the company be increased from 200 shares at $1 each to 300,000 shares at $1 each. However, by that time as shown by the minutes of May 8th the 249,998 unissued shares of the company had already been allotted to the appellant. This clearly demonstrates that although the respondent was aware of the decision taken to increase the share capital she was not aware that steps had already been taken to allot the shares to the appellant.

The learned trial judge carefully analysed all the relevant evidence-oral and documentary and said at (p.18 of judgment, p 892. Vol. 3):

> "So, on the evidence before me it is as plain as plain can be that Mrs. Chin did not attend any such meeting."

Earlier in referring to the meeting of May 8, the learned judge had said (at 14 ibid):

> "I have no doubt whatever that no such meeting was actually held."

In my view there can be no doubt that the learned trial judge was, on the evidence, entitled to so hold.

The second point concerns the basis of the respondent's case. Mr. Henriques Q.C. contends that there is a clear shift in the respondent's

case. His argument is as follows: Up to the hearings before Panton J and the Court of Appeal, the respondent based her claim on work and services performed in relation to the company for which she received no salary thereby giving rise to an equitable proprietary interest in the company.

Whereas before Clarke J the respondent's case was presented on the basis that there was an agreement that the parties would own the company equally and pursuant to this agreement each party received one subscriber share. At the time when the subscriber shares were transferred to them it was the common intention that each would have a beneficial interest in the company.

Dr. Barnett in reply submitted that although the respondent did not use the word "agreement" in her first two affidavits she used such words or phrases which clearly imply that there was an agreement to establish a joint venture.

These submissions are more or less a repeat of the submissions made before Clarke J. In rejecting the submissions of Mr. Henriques, Q.C. the learned trial judge said:

> "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."

The learned judge thereafter examined the evidence on this aspect and concluded that it was the appellant who had been less than frank with the court. I will refer briefly to the evidence. In her first affidavit the respondent stated (p. 9 Vol.1):

> "(4) That soon after the marriage we discussed the possibility of our going into business together...
>
> (5) We heard about the packaging of milk products for Jamaica Commodity Trading Company and we decided to set up a Manufacturing Operation to package these products.
>
> (6) That we incorporated a company... and I received one share and my husband received one share.
>
> (7) That we obtained the Contract and we obtained loans to purchase the necessary equipment."

The above clearly indicates that the respondent was basing her case on a joint venture between her husband and herself. She went on to state that she never received any dividends and that the director's renumeration that she received was not a salary neither was it in any way commensurate with her duties at the company. She said she never took a salary because she believed that they were working as joint owners of

the company and that she was beneficially entitled to one half of the value of the company.

It seems to me that in this affidavit the respondent endeavours to show that there was a common intention that the parties should have beneficial interests in the company and that she acted to her detriment on the basis that by doing so she would acquire a beneficial interest. This is certainly not inconsistent with her affidavit sworn to after the Privy Council's decision in which she stated that they agreed that they would own the company equally and that it was always their common intention so to do.

In my judgment the appellant has failed to show that the learned trial judge was plainly wrong in holding that the respondent had not changed the basis of her case.

The third point I wish to mention involves the complaint of learned Queen's Counsel for the appellant that the learned trial judge made no finding whatsoever in respect of the affidavit evidence of the appellant's witnesses.

Mr. Henriques, Q.C. advanced his argument in this way. Their Lordships having stated that the issue of credibility between the appellant and the respondent was of paramount importance in determining the issue in the matter, the learned trial judge failed to properly adjudicate in

this regard by ignoring the evidence of persons who deponed affidavits and were cross-examined.

It was the contention of the respondent that the appellant rarely came to the business and did not play any part in the company's day to day affairs. The appellant controverted this and stated that he in fact spent many hours in the operation of the company and worked with the staff to deal with the many difficulties encountered. Affidavits were filed by Messrs. Walter Francis, Keith Senior, Daniel Strachan, and Paul Dillon in support of the appellant.

Affidavits of Messrs. Victor Markman and Clive Fischett were also filed with a view to refuting the respondent's evidence that she did not receive a salary.

Mr. Henriques, Q.C. submitted that in the circumstances the judge should have adjudicated on the witnesses' evidence which went to the respondent's credibility.

Dr. Barnett on the other hand submitted that if the tests proposed by Lord Bingham (supra) as relevant to the assessment of credibility of witnesses are examined, it will be seen that the learned judge's assessment was consistent with the suggested approach.

Now, Messrs. Francis, Senior, Strachan and Dillon deponed to the appellant's involvement with the operation of the company and his regular presence there.

The respondent in her response stated that Francis, Dillion and Strachan were, up to the time she left the factory, machine operators. She denied their evidence that the appellant was in charge of all the company's operations.

With regards to the affidavit evidence of Mr. Senior the respondent said that when he was engaged in 1991 the company was already well established and was profitable. She said that Mr. Senior's visits to the factory were mainly to attend "Monday morning production meetings and occasionally he made a short tour of the facilities." She denied his evidence that he and the appellant worked long hours at the factory and that the appellant was intimately involved with the operations of the factory.

All of these witnesses were cross-examined. The judge had the benefit of seeing and hearing them give evidence under the search light of cross-examination.

At the end the learned judge accepted the respondent's evidence. He said that he had not the slightest doubt that "she became completely involved in the negotiations of the JCTC contract, in the negotiations for financing the business, the procuration of equipment, supplies and raw materials and the everyday running of the factory, including the marketing, the sales and the general administration of the business of the company".

The burden of Mr. Henriques' complaint is that the judge found the respondent to be a witness of truth and rejected the evidence of the appellant and his witnesses without giving reasons therefor. The decision of the Privy Council in ***Green v Green*** [2003] UKPC 39 (20th May, 2003) is instructive. Their Lordships were of the view that although the trial judge had the advantage of seeing and hearing the witnesses he did not make full use of that advantage when he came to prepare his judgment. There was "no discussion of the reasons why he felt able to reach these conclusions or of any competing versions given in evidence by the other witnesses." However, their Lordships were not persuaded that the judge was not entitled to reach his conclusions. Their Lordships in applying the well known principle in ***Watt v Thomas*** [1947] AC 484, said:

> "It is plain that the trial judge based this discriminating approach to what the appellant said in his evidence on his assessment of the parties' credibility. This was pre-eminently a task for the judge who saw and heard their evidence."

In my view the failure of the learned judge in the instant case to discuss the reasons why he rejected the evidence of the appellant and his witnesses in relation to the parties' involvement in the affairs of the company and accepted that of the respondent, does not entitle this court to interfere. This court may only interfere if it can come to the clear conclusion that Clarke, J, was "plainly wrong".

The respondent's credibility was also challenged by the evidence of Mr. Fischett and Mr. Markman. The evidence of these two witnesses concerns a note which the respondent sent to the auditors in respect of outstanding salary. Mr. Fischett's evidence, in this regard, is to the effect that during discussions with the respondent, she told him that she had outstanding salary from the company for the years 1987 to 1990. She later sent him a handwritten note with a breakdown of the amounts. This note was exhibited to the affidavit of Mr. Markman, a chartered accountant, who was responsible for the auditing of the company's books. The respondent's evidence in answer to this is that it was Mr. Fischett, the audit clerk, who requested her to write the note indicating that the drawings should be treated as salary since they could not be treated as company's expenses. In cross-examination Mr. Fischett disagreed with the respondent's version.

Mr. Henriques Q.C. submitted that this is another clear instance of conflict of facts which involves the respondent's credibility. Yet, he complained, in spite of this, the trial judge without making any finding in this regard rejected the appellant's case and found the respondent to be a witness of truth.

In my view this criticism of the trial judge is not justified. The learned judge expressed the view that the question as to whether or not the

respondent was in receipt of a salary is a subsidiary issue which goes to her credibility. He said (p.21 of judgment):

> "If in fact she was in receipt of a 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."

He then referred to the evidence of the parties in this regard. The respondent on one hand saying that she received payments from the company but that these were not salary but director's renumeration and that the accounts do not show her as a salaried employee. The appellant on the other hand insisting that the payments were salary and relying on documents including the note in the respondent's handwriting sent to the clerk auditing the accounts. Then the learned judge said:

> "Having carefully examined and weighed the oral and documentary evidence on this issue I find that the vouchers normally referred to the drawings as salary and that the payments bore no true relationship to the characteristics of a salary... 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."

In my view, having reached such a conclusion it was not necessary for the learned judge to decide whether or not the note concerning the respondent's "outstanding salary" was written at the instance of Mr.

Fischett. A trial judge does not have to adjudicate every conflict of evidence.

I will end by saying that in my view, the learned trial judge has given careful consideration to the critical issues identified by their Lordships' Board. He has also given due consideration to other relevant issues raised such as those which touched and concerned the issue of credibility. The learned judge was entitled on the totality of the evidence to make the findings, he did. As I said before I agree with the reasoning and conclusions of my brothers. Accordingly I too, would dismiss the appeal with costs to the respondent.

K HARRISON J.A:

I have read the draft judgments of my brothers Bingham and Smith, J.J.A. and am in agreement with the reasons and conclusions arrived at. I do wish however, to make a few observations on some of the issues raised in the appeal.

This appeal is concerned with a dispute between husband and wife over the ownership of shares in a company known as Lasco Foods Ltd. ("Lasco") On the 9th December 1993, Mrs. Audrey Chin ("the respondent") issued an originating summons under section 16 of the Married Women's Property Act seeking inter alia, an order as to their respective interests in Lasco. At that time, Lasco had 250,000 issued shares of $1 each. One of these shares stands in her name and the other 249,999 shares stand in the name of her husband Mr. Lascelles Chin ("the appellant"). The marriage between the parties was

subsisting at the time when the originating summons was instituted but it was finally dissolved on the 18th February 1994.

The matter came on for hearing on the 18th day of October 1996, before Panton J. (as he then was) and having reviewed the evidence before him, he dismissed the originating summons. He held that of the company's 250,000 issued shares, the respondent owned one (1) share and that the remaining 249,999 shares belonged to the appellant.

The respondent appealed the judgment of Panton J. and was successful at the Court of Appeal on the 10th May 1999. This Court ordered that she was entitled to one-half of the share-holding in Lasco.

The appellant appealed the decision of the Court of Appeal to the Judicial Committee of the Privy Council and on the 12th February 2001, their Lordships' Board ordered that the case be remitted to the Supreme Court for a re-trial. It is quite clear from the Opinion of the Board that their Lordships were of the view that the credibility of the parties was of fundamental importance and cross-examination of the parties on their affidavits could assist the trial judge in resolving the issue regarding the ownership of the shares. In remitting the case for re-hearing, the Privy Council stated that if the parties wished to adduce additional evidence from other persons, directions for that purpose could be given.

Clarke, J. (now deceased) presided over the re-trial and on the 6th day of December 2001, he ordered inter alia, that the respondent is entitled to one-half

of the equity capital of Lasco. His judgment is now the subject of this appeal.

The issues

Their Lordships' Board in Privy Council Appeal No. 61 of 1999, delivered on the 12th of February 2001, identified a number of critical issues for consideration by the judge who had the responsibility to re-hear the matter. They are:

> "1. What were the parties' joint intentions 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?
>
> 2. 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?
>
> 3. If she did agree to 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 shares?"

At the hearing the learned judge also considered other issues that he described as subsidiary or peripheral. These issues concerned:

(a) allegations whether the respondent was a salaried employee;

(b) whether the respondent had altered her case since the decision of the Privy Council;

(c) whether or not the respondent had played any or any significant role in the promotional or managerial activities of the company;

(d) whether decisions could be validly made by the Board of Directors at general meetings if the respondent was not present; and

(e) whether additional shares could be allotted to the appellant without regard being had to the respondent's pre-emptive rights.

The findings of fact by Clarke J.

In deciding the outcome of these matters, a trial judge is called upon to determine a number of factual issues and to evaluate the evidence presented. He has to consider amongst other things, the consistency of the witness's evidence and whether the witness is a credible person. Of course, the test for determining whether a witness is lying or not will vary widely from case to case.

It is abundantly clear after examining the volume of evidence adduced, that the case turned on the credibility and reliability of the parties and their witnesses. In his judgment, the learned judge stated that the cross-examination of the parties and witnesses had been "ample" and this enabled him when he examined the evidence, to assess their respective credibility in order to make factual findings on the critical issues involved in the case. Clarke, J. having seen and heard the parties and their witnesses formed his opinion in regard to them

and made a number of pertinent findings of fact in relation to the issues that had to be resolved.

A heavy burden therefore lies on the appellant in seeking to have this court reverse the learned judge's findings of fact. See ***Brokers Stores Ltd. v Mustapha Ally*** (1972) 19 WIR 230.

The findings of fact by learned trial judge can be summarized as follows:

1. On the evidence both parties contributed to the promotion of the company on 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 owned the company in equal shares;
2. The transfer of the subscribers shares, one to each party is indicative of the common intention;
3. At that stage each party was the beneficial owner of one share;
4. Mrs. Chin was not aware of the allotment of the additional shares to Mr. Chin and when she discovered it she protested;
5. 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.

The role of the Court of Appeal

The role of an appellate court when called upon to reverse a judge's decision on issues of fact has been the subject of many important decisions over the years. Starting with ***Yuill v Yuill*** [1945] 1 All E.R 183, Lord Greene M.R said:

> "It can only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest consideration that it would be justified in finding that a trial judge had formed a wrong opinion."

In ***Watt v Thomas*** [1947] AC 484 Lord Thankerton examined the principles embodied in previous decisions of the House of Lords and at page 487 said:

> "(I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

> (II) The appellate court, may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court ..."

There is what was said by Viscount Simonds LC in ***Benmax v Austin Motor Co. Ltd.*** [1955] 1 All ER 326 at 327. He said:

> "This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and ***I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness.***"
>
> [*emphasis supplied*]

Very impressive statements were made by Lord Pearce in the House of Lords case, ***Onassis v Vergottis*** [1968] 2 Lloyd's Rep 403. At page 431 he said:

> "A trial judge has, except on rare occasions, a very great advantage over an appellate court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should not interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of views between the trial judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded the Court of Appeal) or by any other of those advantages which the trial judge undoubtedly possesses."

In the Privy Council, Lord Morris of Borth-y-Gest said in ***Bookers Stores Ltd v Mustapha Ally*** (supra) at 231:

> "There were issues which had to be resolved by the learned judge which involved questions of credibility. If a learned judge has reached conclusions on such questions after seeing and hearing witness (sic) and forming his opinion in regard to them it is accepted and in well-known authorities it has been laid down that only by reason of some very telling factors or compelling circumstances will an appellate court differ from such conclusions."

I refer also to what Luckhoo JA, said in ***Abdool Hack v Rahieman*** (1977) 27 WIR 109 at 116:

> "Though this is a court of rehearing it should be borne in mind that we, sitting here, see only the recorded testimony in cold print, coming, as it were, at second hand, and are deprived of the advantages of the recorder who obtained it at first hand. We are robbed of that appeal which only a live version can have on the senses, robbed of the ring of truth in the spoken words which only the trained sensitive ear can detect, robbed of the manner in which the testimony was given which only the keen judicial eye can perceive, robbed of the whole atmosphere in which the examiner and cross-examiner elicited that testimony. We are called upon to assess and analyse that evidence, which in print might look formidable but which when given must, indeed, have been devoid of the qualities of conviction."

In ***Green v Green,*** Privy Council Appeal No. 4 of 2002 delivered on May 20, 2003, a case from this jurisdiction, Lord Hope of Craighead stated:

> "... The question is whether it has been shown that his judgment on the facts was affected by material inconsistencies or inaccuracies or that

> he failed to appreciate the weight of the evidence or otherwise went plainly wrong."

What was the intention of the parties when the two original shares were allotted?

The principles applicable to cases of this nature are well settled and can be stated briefly. Where the property in dispute is in the name of one of the parties only, as in the case of the additional shares, the party in whose name the property is held will hold it on trust for the other by virtue of direct evidence that the other should have a beneficial interest or in the absence of express agreement by inference from their actions or other circumstances. In cases where there is no direct evidence of an express agreement, it must be shown that the Claimant has acted to his or her detriment on the basis of conduct which is indicative of the common intention. See ***Green v Green*** (supra); ***Azan v Azan*** (1988) 25 JLR 301; ***Gissing v Gissing*** [1971] AC 866 and ***Grant v Edwards*** [1986] Ch. 638.

The learned trial judge in the instant matter clearly appreciated the difficulties relating to the establishment of the common intention of the parties and/or whether the respondent had acted to her detriment on the basis of a common intention. He stated inter alia:

> "Indeed, I take judicial notice of the fact that it is only infrequently (sic) husband and wife discuss these matters in exact terms. The agreement or common intention may be demonstrated by express words or inferred from conduct."

The question whether it was the intention of the parties that each would become a beneficial owner of the allotted subscriber share was a critical issue to

be determined by the learned judge. The background facts relating to the incorporation and development of Lasco are therefore crucial when it comes to determine the intention of the parties at the material time.

It is common ground that the parties had an established common law union before the marriage was celebrated. The respondent stated in her affidavit, sworn to on the 31st January 1994, that soon after the marriage, her husband and herself discussed the possibility of them going into business together. Versatile Packing was incorporated the day before they were married and each of them eventually received one share in the company. The company concentrated basically on the packaging of milk products on behalf of the Jamaica Commodity Trading Corporation ("JCTC").

The respondent contended that she had been under the impression that they were equal owners and shareholders in the company and because of this she had put all her efforts in the "fledgling" company. She was a Chartered Accountant by profession and had left her job with a very reputable company in Jamaica in order to embark upon the business with the appellant as "an equal partner". She was appointed Managing Director of the company.

The respondent has also stated in an affidavit sworn to, on the 2nd May 2001, as follows:

> "11. That on several occasions prior to the formation of the company and after its formation, my husband referred to this company as our little business and said it was going to be a nice little business with good cash flow and that if we operate it well it could grow to become a substantial

> business. We were of the opinion that the risk was low as we would be receiving all the production inputs from the Jamaica Commodity Products and the market was readily identified.
>
> 12. That it was always our intention that the business and company would belong to us both equally and all the discussions between the Defendant and me proceeded on that basis and for this reason I worked very hard and for long hours in an effort to build up the business."

She further asserted that the appellant and herself were involved in the negotiations to take over the operations of JCTC (a government entity) when it ceased carrying on business. She claimed that Lasco was the logical choice to take over the milk powder processing as they were already operating a factory and packaging milk powder. It was contended by her that it was due to their combined efforts that they negotiated with overseas suppliers for machinery and equipment. This necessitated them making trips to the United States of America and Argentina in order make purchases.

The appellant, on the other hand, deposed that the respondent and he had no discussions about the possibility of them going into business together. He stated: "as a businessman I am always interested in diversifying my holdings". He agreed that after their marriage he had discussed the management and operation of the packaging business with the respondent. He denied the allegations made by the respondent that they were business partners. He claimed that he had offered her the position of Manager of the company and that she was paid the same salary that was paid to her by her previous employers.

With regards to the contract that was secured with JCTC, the appellant contended that the company had obtained the contract through his instrumentality and that the respondent had absolutely nothing whatever to do with the negotiations leading up to the award of the contract.

The appellant further deposed at paragraph 20 of his affidavit of the 26th October 1995 as follows:

> "20. That I did not at any time contemplate nor intend nor agreed to make the Applicant an equal owner nor partner in the business of packaging powdered milk. I had always contemplated that the Applicant's major role in the said business was a management function and consequently she was appointed a Manager in the company."

The appellant seemed to have had second thoughts however, about the negotiations leading up to the award of the JCTC contract. He said under cross-examination at page 745 of the Record:

> "As far as I can remember she would have on few occasions discussed the finalization of the contract. It is true that through my instrumentality the company got the contract. It could be that Mrs. Chin took part in negotiations leading up to the contract but I can't remember. I know we went to many meetings together before and after the contract."

It would seem that the learned judge was quite satisfied that the respondent was a partner along with the appellant in the establishment and promotion of Lasco. There was no dispute that they were the only two directors

of the company up to the time when her service as Managing Director was terminated by the appellant.

There were conflicts in the evidence of the respondent. For instance, the respondent agreed that she had not mentioned in her affidavit evidence that there was any discussion or agreement between the parties regarding the ownership of the company. The learned judge nevertheless accepted her evidence and said at pages 9-10 of his judgment:

> "... 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 (J.C.T.C) contract, in the negotiations for financing the business, the procuration 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."

The learned judge held that the only reasonable inference one could draw from the facts adduced was that the allotment was intended by the parties to reflect an equal ownership in the company. He concluded thus:

> "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."

The evidence in my view, clearly indicates that there was a common intention from the outset that the parties would share the beneficial ownership of the company equally. The appellant himself recognized that they were beneficial owners as he admitted during cross-examination that the respondent was the beneficial owner of the share transferred to her. The learned judge would therefore be empowered to adjudicate on all property rights, whether legal or equitable under the Married Women's Property Act.

I am in further agreement with the learned judge when he stated that if the parties became beneficial owners of an equal number of shares at the inception, legal consequences would follow with respect to their rights and obligations as shareholders. It meant that the respondent was entitled to be offered an equal allotment of any new shares that were issued by the company. In the circumstances, the learned judge's finding cannot be faulted when he concluded that when the two original shares were allotted, one to Mrs. Chin and the other to Mr. Chin, there was a common intention that both would jointly own the company.

Did Mrs. Chin agree to or had knowledge of the allotment when the additional shares were allotted to Mr. Chin?

The record of appeal reveals that Versatile Packing was incorporated on the 21st February 1986 with a share capital of 200 authorized shares. The two subscriber shares were issued to Jacqueline Whitely and Mabel Emanuel who were employees of Vincent Chen, the Attorney at Law who was responsible for incorporation of the company.

The record further reveals that shortly after the company's incorporation, a meeting of the Board of Directors was convened on the 22nd April 1986. The minutes of that meeting show that the two issued shares were transferred to Audrey Chin and Lascelles Chin with each one holding a share in the company.

According to the minutes of the meeting held on the 22nd April, it was proposed that there should be an increase of the share capital to Two Hundred and Fifty Thousand Dollars (250,000.00) by the creation of 249,800 shares of $1.00 each and such shares to rank *pari passu* with the existing shares in the capital of the company. Mrs. Thelma Miller, the Company Secretary, was instructed to convene an Extraordinary General Meeting on the 7th May 1986 for the purpose of considering the increase of the capital of the company.

Notice was given for the holding of this Extraordinary General Meeting but that meeting was apparently adjourned to the 8th May. The minutes of this meeting are set out hereunder:

"**VERSATILE PACKING LIMITED**

Minutes of a Meeting of the Board of Directors held at 38½ Red Hills Road, Kingston 10, on Thursday, 8th May 1986 at 4:00 p.m.

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

MINUTES:
Minutes of Directors' Meeting of 22nd April 1986 and of the Extraordinary General Meeting of 7th May 1986 were read and signed.

ALLOTMENT OF SHARES:
Pursuant to the authority of Article 53 of the Articles of Association it was determined that the 249,998 un-issued 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 undernoted Certificates in respect of the Shares allotted herein and cancelled Certificate No. 4.

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

TERMINATION:
There being no other business the Meeting terminated.

Sgd.

CHAIRMAN."

On the 4th July 1986, the respondent wrote a letter to Clinton Hart & Co. and sent it to the attention of Vincent Chen. She requested the share capital to be increased from 200 ordinary shares of $1.00 to 300,000 of $1.00. That letter further requested that the changes were to be effected "immediately".

On the 7th July 1986 Vincent Chen wrote a letter to the Company Secretary. The contents of that letter are set out hereunder:

> Exhibit VAC 4
>
> "7th July 1986
>
> Miss Thelma Miller
> ...
>
> Re: Increase in share capital – Versatile Packing Ltd.
>
> We confirm our telephone conversation today when we instructed you to increase the share capital of the above company from 200 ordinary shares of $1.00 each to 300,000 of $1.00 each. You have advised us that you have already on instructions of Versatile Packing Limited, increase the share capital to $250,000, so it is now necessary to increase it by 50,000 only.
>
> Please confirm to Mrs. Audrey Chin at Versatile Packing Limited, as soon as you have effected the increase.
> .....
> Sgd. Vincent A. Chen."

Another meeting was arranged for the 9th July 1986, in order to consider increasing the share capital to $300,000.00.

There were obvious areas of conflict in the evidence regarding when the shares were allotted to the appellant. The question the learned judge had to

decide was whether the respondent was unaware of the steps taken to allot the shares to the appellant at the meeting of the 8th May 1986. Certainly, if the respondent had no knowledge of this allotment it would be unauthorized, irregular and illegal.

The minutes of the 8th May, indicate that both the appellant and respondent were present at the extraordinary general meeting but the respondent contends however that she was not present and that she was unaware of the allotment to the appellant. She further contends that it was not until after the marriage had broken down in 1993, that she became aware of the allotment. She admitted however, seeing a note to the financial statements of the company in 1988, that the authorized share capital was $300,000.00. When she was further pressed under cross-examination she agreed that she knew from 1986 that the share capital had in fact increased to 300,000 in accordance with her instructions. She has denied however, knowledge of the 249,999 shares that were issued and allotted to the appellant in 1986.

What is also of interest is that the appellant had deposed that he did not authorize the release of the two shares that he said were held in trust for him, until the middle of 1987. He further deposed that he was informed by his Attorney that the relevant transfers were duly executed in blank and delivered to the respondent by letter of the 23rd September 1987. This testimony has to be considered along with the documentary record which revealed that the two shares were already transferred. The minutes of the meeting for the 22nd April,

1986 show that they were already transferred on that date. These minutes are set out hereunder:

"VERSATILE: PACKING LIMITED

Minutes of a Meeting of the Board of Directors held at 38½ Red Hills Road, Kingston 10 on Tuesday the 22nd of April 1986 at 10:30 a.m.

Present were:	Mr. Lascelles A. Chin	Director
	Mrs. Audrey Chin	Director
In attendance:	Miss Thelma Miller	Secretary

MINUTES:
Minutes of the Directors' Meeting held on the 1st of April 1986 were read and signed.

TRANSFER OF SHARES:

It was resolved that transfers of the Subscriber shares, as under, be and are hereby approved:-

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

and it was resolved:-

"THAT the Seal of the Company be affixed to the undernoted share Certificates drawn in respect of the shares transferred.

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

PROPOSED INCREASE OF CAPITAL

It was recommended:-

THAT the Capital of the Company be increased to TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000) by the creation of 249,800 shares of $1.00 each, such new shares to rank pari passu with the existing shares in the capital of the Company; and

THAT the Directors be authorized to dispose of the said new shares in such manner as they think most beneficial to the Company.

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

TERMINATION:

There being no other business the Meeting ended.

CHAIRMAN."

The cross-examination of the appellant's witness, Vincent Chen, in relation to the transfer of the subscriber shares is quite instructive. He conceded that the meeting of the 22nd April could or could not be held at "the time and date indicated on the minutes" so he could not say when the meeting was held. He said he was quite sure however that the transfers were not false. I have reproduced that portion of the transcript in the judgment and have set it out hereunder:

"Q ... why did you not have the shares transferred immediately on incorporation?

A. Because I had no instructions at the time from Mr. Chin to transfer them. I had instructions to hold them.

Q. You see any good reason why the subscriber shares should be held from the incorporation in February 1986 to the date you gave, namely September 1987?

A. September 1987 is the date I wrote a letter to Versatile Packing Ltd. sending the shares to them as instructed by Mr. Chin and Mrs. Chin. ...

Q. In your affidavit you said that in July 1986 Mrs. Chin wrote asking that steps be taken to increase the share capital from the original 200 shares to 300,000 shares. You then said you communicated with Mrs. Thelma Miller, the company's secretary about it. Would it be correct to say that up to that time you were not aware of any attempt to increase the share capital?

A. I am not sure now whether or not I was told about any attempt or intent to increase the share capital before the letter of July 1986 written to me by Mrs. Chin. I cannot now recollect if there was discussion before that.

Q. But you can say that at that time you were not aware that the share capital had actually been increased?

A. I cannot recollect it with any clarity now, but what I do know from this letter of 7/7/1986 now shown to me is that I telephoned through to Mrs. Miller who told me that the share capital had been increased prior to my conversation with her on the 7th July to 250,000.

Q. When you wrote this letter you were of the view that the only two shareholders of this company were your two secretaries?

A. That is correct.

Q. And therefore Mrs. Thelma Miller could not proceed increase the share capital without a resolution signed by the two secretaries?

A. That is correct.

Q. And no such resolution was provided to Mrs. Thelma Miller?

A. Not as far as I know.

...

Q. I am putting it to you that there was no such transaction in September 1987 in respect of the subscriber shares?

A. I disagree.

Q. And when Mr. Chin signed a document purporting to approve transfers from your secretaries in April 1986, that document is false in relation to stating that on the 22nd April 1986 there were transfers from your secretaries?

A. The transfers are not false. Transfers are undated. That is the practice and the transfers are delivered to the client or as the client directs, undated. So, I cannot say to the Court that the resolution in regards to that aspect of it, namely the dating is false – because I did not fill in the date and I was not a party to it. And I do not know if the transfers themselves bear that date. Yes I told the Court that the transfers were not delivered until September 1987.

Q. If what you say is true, a meeting in April 1986 would not have approved of those transfers?

A. The meeting could or could not be held at the time and date indicated on the minutes. So I

> cannot say when the meeting was actually held."

The learned trial judge was far from impressed with the evidence of the appellant and Vincent Chen. He said he did not believe both of them. Having considered this aspect of the evidence he said:

> "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 ... 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 ...
>
> It is also worthy of note that at 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 unauthorized and irregular. So by virtue of Clause 53 of the Articles of Association of the Company Mrs. Chin was entitled to have 50% of the new shares offered to her in a prescribed notice. It is not in dispute that no such offer was made to her."

In dealing further with the respondent's right under the Articles of Association the learned judge said:

> "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 authorized 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 ...
>
> The minutes in question were signed by Mr. Chin alone. So, on the evidence before me it is 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 meetings could have been held."

He then concluded as follows:

> "Accordingly on this critical issue ... 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".

In my view, there was evidence in the case that could have caused the learned judge to conclude that the appellant and his witness were not worthy of belief.

Did the respondent subsequently become aware of the allotment and if so, what, if any, inference could be drawn as to her beneficial interest in the allotted shares?

In making his finding on this issue, the learned judge said:

> "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."

These findings in my view, adequately dispose of that issue.

The salary issue

The appellant placed great emphasis on the proposition that if the respondent were a salaried employee, she could not at the same time be an equal owner of the company. I do agree with Dr. Barnett that there is neither a legal or factual basis for this contention since there are many situations in which an employee of a company is at the same time a shareholder in the company.

The learned trial judge treated this issue as subsidiary. There were areas of conflict on the evidence but he found that credibility was the key factor at the end of the day. The learned judge stated:

> "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...She also said that the accounts do not show her as a salaried employee.
>
> Mr. Chin agrees that these payments which he characterizes 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 a note in Mrs. Chin's handwriting sent to a clerk who had been auditing the accounts."

The judge then found:

> "... 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 considerable less than Mr. Chin said she was entitled to."

I am of the opinion, that the learned judge cannot be faulted in making these findings having regard to the evidence.

Conclusion

It is quite evident that not only did the learned trial judge follow the guidance of the Privy Council in relation to those critical issues identified by the Law Lords, but he also dealt with several other issues.

The learned trial Judge, in my view, heard an abundance of evidence and made comprehensive findings of fact on all the pertinent issues in the case. There is therefore no reason why this court should interfere with the findings of the learned judge who saw and heard the witnesses.

It is further my view, that the respondent was an equal partner in the formation, growth and development of Lasco. In the circumstances, it would be grossly inequitable to allow the appellant to deny the respondent's claim to an equal interest in the company.

I would accordingly dismiss the appeal with costs to the respondent to be taxed if not agreed.

BINGHAM, J.A.

ORDER:

Appeal dismissed. Judgment of Clarke, J affirmed. Costs to the respondent to be agreed or taxed.