

**Lascelles Augustus Chin**

*Appellant*

**v.**

**Audrey Ramona Chin**

*Respondent*

**FROM**

**THE COURT OF APPEAL OF JAMAICA**

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**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL**

**Delivered the 12th of February 2001**

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*Present at the hearing:-*

Lord Clyde  
Lord Hutton  
Lord Hobhouse of Woodborough  
Lord Millett  
Lord Scott of Foscote

*[Delivered by Lord Scott of Foscote]*

1. This is an appeal from the judgment of the Court of Appeal of Jamaica (Forte, Downer and Harrison JJA) delivered on 10th May 1999 allowing the appeal of the above named respondent (Mrs Chin) from the judgment of Panton J of 18th October 1996 in the Supreme Court of Jamaica. Their Lordships have come to the conclusion that the case ought to be remitted to the Supreme Court for a re-trial. In the circumstances it is desirable that their Lordships should say no more about the merits of the case than is necessary to explain the advice to remit and to draw attention to the particular factual issues on which findings by the trial judge are necessary.

2. The case relates to the ownership of a company, Lasco Foods Ltd. The company has 250,000 issued shares of \$1 each. One of these shares stands in the name of Mrs Chin. The other

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249,999 shares stand in the name of the appellant, Mr Chin. As their names in this litigation indicate, Mr Chin and Mrs Chin were at one time married to one another. Their relationship predated their marriage. The marriage took place on 22nd February 1986 but they had been intimate friends for some time and had had a child born on 19th October 1980. The marriage was relatively short lived. A Decree Nisi of divorce was granted on 4th February 1993; a Decree Absolute was granted on 18th February 1994.

3. The breakdown in the marital relationship between the parties led to property disputes. On 9th December 1993 Mrs Chin issued an originating summons under section 16 of the Married Women's Property Act asking the court to decide what were the respective interests of herself and Mr Chin in Lasco Foods Ltd. The summons asked similar questions about other items of property but nothing now turns on those.

4. Mrs Chin swore an affidavit on 31st January 1994. In paragraph 17 she claimed that she was beneficially entitled to one half of the value of the company. She said that originally she and Mr Chin had each held one share in the company, that she had managed the company and "at all material times ... believed that [her] husband and [herself] were working as joint owners of the company ..." (para 13). Her affidavit was relatively short and contained very little in the way of detail.

5. Mr Chin swore an affidavit in reply on 2nd December 1994. He said that Mrs Chin had been merely an employee of the company. He said he had offered her the position of manager of the company at the same salary as that which she had been receiving from her previous employers, Touche Ross (para 8). He said that 249,999 shares in the company had been allotted to him and only one to Mrs Chin. He said that Mrs Chin had been well aware of this (para 9). In paragraph 24 of his affidavit he said:

"... I deny that the Applicant is entitled to one half of the value of Lasco Foods Limited and her only interest is that of a shareholder owning 1 share which I gave to the Applicant."

6. Mrs Chin swore an affidavit in answer on 22nd June 1995. In this affidavit she set out her case in some detail. She said that she and Mr Chin had together taken part in the negotiations that led to the setting up of the company and the acquisition of

valuable business contracts. She said that she had never received a salary, but had simply drawn from the company sums she from time to time needed (para 44). She said that "it was always our intention to own the company equally and for me to operate the company as Managing Director" (para 22). She said that the original allotment of shares had been one each to her and Mr Chin and that "The allotment of these additional shares to himself were done without my knowledge and contrary to the conditions under the Articles of Association" (para 28).

7. The affidavit evidence was completed by an affidavit sworn by Mr Chin on 26th October 1995. He agreed that Mrs Chin had been with him at some of the negotiations relating to the setting-up of the company but said that she had been present simply as the prospective manager of the business rather than as a prospective joint owner (paras 5 to 13). He said that the allotment to him of the additional shares had been authorised by a resolution passed by Mrs Chin and himself at a meeting of the Board of Directors of the company (para 22) and that he had never at any time had the intention of giving Mrs Chin a shareholding in the company equal to his (para 32). He repeated that she was simply a salaried employee. He did, however, say, in paragraph 34, that "... the Applicant did not actually receive each month a regular monthly salary", and went on to say that her drawings had been excessive and unauthorised.

8. The documents exhibited to the affidavits included a number of financial statements, audited accounts, and entries in the company's Minutes book.

9. The affidavits showed clearly enough that the issue between the parties was whether they had intended that Mrs Chin would be a joint owner of the company with her husband. But when the case came before Panton J for trial he made no finding on that issue. He said, simply:

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

10. He had in mind section 115 of the Companies Act which enables an application to be made to the court for rectification of the share register. But that was not the issue. The issue was whether Mrs Chin was beneficially entitled to half of the issued shares. If she was, rectification of the share register would have

constituted a form of consequential relief. Since Mr Chin and Mrs Chin were the only persons with any claim to be shareholders, there would have been no difficulty in joining the company as a party and making the necessary rectification order. Perhaps that order could have been made without formally joining the company as a party. Or there were other forms that consequential relief might have taken. But first it was necessary to decide whether Mrs Chin's claim to be a joint owner of the company was well-founded.

11. The judge did not decide this critical issue. He was not in a position to do so for there was no cross-examination of the deponents. Mrs Chin had given sworn evidence that the intention at the time the company was acquired was that she and her husband would be joint owners. Her evidence was that the company was to be the vehicle for a joint enterprise. Her husband was to put up the money and she was to be responsible for management. Mr Chin, on the other hand, had given sworn evidence that it had never been the intention that the company should be jointly owned. He had never intended that she should be more than an employed manager. The issue as to joint ownership could not be resolved without the evidence, or at least a significant part of the evidence, of one or other of them being rejected. But the judge never grappled with the conflict of evidence. He did say this:

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

12. This passage cannot be construed as a finding on the issue as to the beneficial ownership of the company. The whole judgment comprised only one page of typescript. Her section 16 application was dismissed.

13. Mrs Chin appealed. The Court of Appeal went to the other extreme. The judgment, given by Downer JA ran to over 40 pages. The other two members of the court expressed their concurrence in the judgment. Downer JA analysed the respective affidavits of the parties with care. He tested the credibility of statements they had made both against the documents and against the inherent probabilities as he saw them. He came to the conclusion that the evidence of Mrs Chin was to be preferred and

that Mr Chin's denial of an intention that she should be the joint owner of the company could not be accepted. So an order was made declaring that Mrs Chin was entitled to one-half of the shareholding and directing that the shares be valued and that one half of the valuation figure, less the sum of \$124,999, be paid to her by Mr Chin. The \$124,999 represented the amount paid up by Mr Chin on the shares to which Mrs. Chin had been found to be beneficially entitled.

14. Although the Court of Appeal was, in their Lordships' respectful view, directing its attention to the right issue, the Court of Appeal, in the absence of any factual findings made at the trial and there having been no cross-examination at the trial, was in no better position than Panton J had been to assess the respective credibility of the parties. The normal and proper function of an appellate court is that of review. An appellate court can, within well-recognised parameters, correct factual findings made below. But where the necessary factual findings have not been made below and the material on which to make those findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a re-hearing below.

15. In their Lordships' opinion, that is what the Court of Appeal should have done in the present case. It is unfortunately true that none of the counsel in the case asked for that to be done. Nonetheless, their silence cannot, their Lordships think, be taken to signify consent to the Court of Appeal embarking on an irregular course.

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, Pannell Kerr Foster (now incorporated into Ernst Whinney), directions for that purpose too can be given. All these matters can be dealt with in the Supreme Court. Their Lordships

think it advisable that the re-hearing be conducted before a judge other than Panton J.

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?

19. Findings on these issues will, their Lordships think, enable a decision to be reached as to Mrs Chin's interest in the company and, if there is an appeal, will enable the decision to be reviewed by the Court of Appeal.

20. For these reasons, their Lordships will humbly advise Her Majesty that the case should be remitted to the Supreme Court for a re-hearing. The parties' costs incurred before Panton J, before the Court of Appeal and before the Board should be costs in the re-hearing.