Privy Council Appeal No 3 of 2007

Lascelles Augustus Chin *Appellant*

v.

Audrey Ramona Chin *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 24th October 2007

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Walker of Gestingthorpe**]*

1. The appellant, Mr Lascelles Chin, and the respondent, Mrs Audrey Chin, were married on 22 February 1986. He is a successful businessman and she is a chartered accountant, then employed by Touche Ross. They had lived together for some time before their marriage, and had a daughter born in 1980.

2. Unfortunately their marriage ran into difficulties and they separated in 1993. They are now divorced. On 9 December 1993 the respondent issued an originating summons under section 16 of the Married Women's Property Act for determination by the court of her claim to a half share in the capital of the company whose original name was Versatile Packing Limited, changed in 1992 to Lasco Foods Limited ("the company"). The originating summons also raised issues as to the title to two residential properties, but those issues were settled. The dispute about the company, by contrast, has taken over twelve years to resolve. It is necessary to give a brief account of the troubled course of the litigation.

3. During 1994 and 1995 the parties exchanged affidavits, two on each side, without any apparent sense of urgency. Parts of the affidavits resembled pleadings rather than evidence, but they did not clearly define the issues. When the summons came to be heard neither side asked for cross examination on the affidavits, despite the obvious conflicts on important issues of fact. The summons was heard by Panton J who took a narrow view of his jurisdiction under the Married Women's Property Act and an exaggerated view of the conclusiveness (as to beneficial as well as legal title) of the company's records. On 18 December 1996 he declared that the respondent owned only one share in the company (as against 249,999 owned by the appellant).

4. The respondent appealed to the Court of Appeal (Forte, Downer and Harrison JJA) which on 10 May 1999 allowed her appeal and ordered that she should recover half the net assets value of the company, subject to various adjustments (including debiting her with part of the paid-up capital assumed to have been paid by the appellant). The judgment of Downer JA (with which the other members of the Court agreed) made some adverse findings against the appellant, but his evidence had not been tested by cross examination, since there had been no oral evidence.

5. The appellant appealed to the Board which on 12 February 2001 advised that the appeal should be allowed and a new trial held before a different judge. The Court of Appeal had been unfair to the appellant in making adverse findings against him on the strength of affidavit evidence alone. The Board identified several critical issues which would need to be addressed at the retrial. Both sides then put in further affidavit evidence, some made by the parties and some by other deponents.

6. The new trial took place before Clarke J over 12 days between May and September 2001. There were eleven days of oral evidence. The parties and their

advisers had by then had ample opportunities to study the other side's affidavit evidence, identify the points on which they wished to attack it, and exploit them in cross examination. Clarke J reserved judgment and on 6 December 2001 handed down a judgment in favour of the respondent. He rejected as unreliable much of the evidence of the appellant and his lawyer, Mr Vincent Chen. He accepted most of the evidence of the respondent.

7. On 20 December 2005 the Court of Appeal (Bingham, Smith and Harrison JJA) unanimously dismissed the appellant's appeal. He now appeals to the Board.

8. The appellant is at the outset confronted by a formidable difficulty, as Mr Guthrie QC candidly acknowledged. There is a strong and well-established rule that the Privy Council will not, apart from exceptional cases, entertain grounds of appeal which ask the Board to differ from concurrent findings of fact made by two lower courts (*Devi v Roy* [1946] AC 508). Mr Guthrie submitted that this was an exceptional case because both Clarke J and the second Court of Appeal had, he said, fallen into the same errors as the first Court of Appeal. In order to assess that submission it is necessary to go some way into the issues considered by Clarke J (who followed the Board's guidance as to the critical issues to be addressed) and the oral evidence which he heard.

9. The company was incorporated on 21 February 1986, the day before the parties' marriage. The formalities of its incorporation were arranged by the appellant's lawyer, Mr Chen, on the appellant's instructions, and two subscribers' shares were issued to secretaries in Mr Chen's office. The initial authorised capital was $200. The documentary evidence included a subscribers' resolution dated 27 February 1986 appointing the appellant and the respondent as the first directors; minutes of a board meeting held on 1 April 1986, at which the quorum for board meetings was fixed at two, and Miss Thelma Miller was appointed as company secretary; and minutes of a further board meeting on 22 April 1986, at which transfers of the two subscribers' shares, one to the appellant and one to the respondent, were approved. Mr Chen gave evidence that the transfers of the subscribers' shares were not made until the following year, but the judge rejected this evidence.

10. The minutes of the board meeting on 22 April 1986 also contained a recommendation that the company's capital should be increased to $250,000, the allotment of the new shares to be at the discretion of the board. An extraordinary general meeting was to be called for that purpose on 7 May 1986. No minutes of that general meeting were in evidence and the respondent denied that she had

attended it or known anything about it (as there were only two members of the company a valid meeting could not have been held without her). She also denied that she had been present at a board meeting on 8 May 1986 (of which minutes signed by the appellant were in evidence) at which 249,998 $1 shares in the company were allocated (for an un-stated consideration) to the appellant.

11. Clarke J accepted the respondent's evidence on these matters. He held that the contrary evidence of the appellant (supported by Mr Chen) was unreliable and inconsistent. The Court of Appeal held that the judge was entitled to come to these conclusions. Mr Guthrie submitted that their reasoning repeated an error made by Downer JA in the first Court of Appeal, who had attached too much weight to the fact that the respondent had not signed the minutes of the supposed board meeting on 8 May 1986 (neither had she signed any other minutes of board meetings). Downer JA had, it was submitted, confused signature of an attendance book kept in accordance with article 95 of the company's articles of association (a requirement which the company, in common with many other small family companies, had overlooked) with the misguided notion that board minutes ought to be and are normally signed by every director present at the board meeting in question.

12. The Lordships accept that the first Court of Appeal does seem to have placed considerable reliance on this bad point. But at the retrial and in the second Court of Appeal the finding that the minutes of the 8 May board meeting were false was based first and foremost on the judge's assessment of the oral evidence which he had heard. The fact that the respondent did not sign the minutes was not, in their Lordships' view, an important factor in the conclusion that the minutes of the supposed board meeting were false. It was, however, consistent with it. The courts below also relied on a letter dated 4 July 1986 written by the respondent to Mr Chen's firm which was consistent with the respondent being, at that time, unaware of the company's capital having been increased to much more than $200.

13. On that basis, only two shares in the company were validly issued and allotted. The appellant accepted in the course of the litigation (although his initial position was different) that the respondent was the beneficial owner of the single subscriber's share transferred to her, and their Lordships consider that concession to have been inevitable. The formation of the company coincided with the parties' marriage; the respondent (who had given up her previous job) was to be the manager of its business (the packing of skimmed milk under a valuable contract with Jamaica Commodity Trading Company); she actively participated with her husband in negotiating the contract, obtaining the necessary machinery and equipment and fitting out and running the workplace. The company was therefore

on a different footing from other companies owned by the appellant, in which the respondent acknowledged she held a single share as nominee for him. Moreover if the company was established on the basis of equal ownership of the two shares originally issued, the issue and allotment of 249,998 shares to the appellant as beneficial owner would have been an extraordinary departure from the original plan.

14. It has to be said that the respondent, for an accountant, seems to have been surprisingly vague and incurious about the financial structure of the company in which she was claiming a half share. In her first affidavit she described what happened in 1992, not as a mere change of corporate name, but as the formation of a new company, which she supposed to have an issued share capital of only $2. Yet she had for years been signing off the company's financial statements which (rightly or wrongly) showed the company as having an issued share capital, paid up in cash, of $250,000. The respondent also exhibited minutes to her second affidavit without stating in the clearest terms that her claim was that some of the minutes were false. But at the retrial the appellant's counsel had every opportunity to make what they could of these anomalies. Nevertheless Clarke J preferred the respondent's evidence to that of the appellant and his witnesses.

15. In the courts below a good deal of attention was directed to what the second Court of Appeal described as the subsidiary issue of whether the respondent was a salaried employee of the company. That was rightly described as a subsidiary issue. The respondent was working full-time in the company's business and salaried employment would not have been inconsistent with her having a half share in the capital of the company. In fact, as the courts below found, she did not receive a regular salary under a written contract of employment. But she often caused the company to pay bills for family expenditure which could not properly be charged as a deduction in computing the company's profits, and consequently in the analysis of the company's expenditure it was charged to her as salary. But a good deal of this expenditure was for the benefit of the family as a whole, and it was rightly treated as irrelevant to the issues before the courts below.

16. For these reasons their Lordships are not persuaded that this appeal should be treated as an exception to the Board's general practice of accepting as conclusive concurrent findings of fact in the courts below. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed with costs before the Board and in all the courts below.