[2019] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 23/2016

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**JONI KAMILLE YOUNG-TORRES (AS ADMINISTRATOR OF THE ESTATE OF KARL AUGUSTUS YOUNG)**	**APPELLANT**
AND	**ERVIN MOO-YOUNG**	**1ST RESPONDENT**
AND	**DEBBIAN DEWAR (AS AN EXECUTOR OF THE ESTATE OF CHAD ADRIAN YOUNG)**	**2ND RESPONDENT**
AND	**ZIP (103) LIMITED**	**3RD RESPONDENT**

Mrs Sandra Minott-Phillips QC and Mrs Simone Bowie Jones instructed by Myers, Fletcher & Gordon for the appellant

Mrs Symone Mayhew and Ms Kimberly Morris instructed by Symone M Mayhew for the 1st respondent

Allan Wood QC, Mrs Tana'ania Small Davis and Miss Kerri-Ann Allen Morgan instructed by Livingston Alexander & Levy for the 2nd respondent

Ms Carlene Larmond instructed by Rattray Patterson Rattray for the 3rd respondent

11, 12 and 13 October 2016 and 31 July 2019

MCDONALD-BISHOP JA

[1] I have had the privilege of reading, in draft, the judgment of my sister, Edwards JA (Ag). I agree with her reasoning and conclusion as well as the orders she has proposed and there is nothing I could usefully add. I would, however, take the opportunity to apologise for the delay in the delivery of the judgment, which is not at all attributable to her.

SINCLAIR-HAYNES JA

[2] I too have read in draft the judgment of Edwards JA (Ag) and agree with her reasoning and conclusion as well as the orders proposed.

EDWARDS JA (AG)

Introduction

[3] The appellant, Joni Kamille Young-Torres ("Joni Torres"), commenced a claim in the Supreme Court of Jamaica (in her capacity as the administrator of the estate of Karl Augustus Young ("Karl Young"), seeking, among other things, a declaration that the allotment of the 490,000 shares in the 3rd respondent, Zip (103) Limited ("the company"), to Chad Young, was a breach of the pre-emption rights which attached to the share entitlement of Karl Young's estate and that, as such, the allotment was unlawful and a nullity. The claim was brought against Ervin Moo-Young, Debbian Dewar (as executor of the estate of Chad Young) and the company. The company brought an

ancillary claim against Debbian Dewar in her personal capacity as well as in her capacity as executor of the estate of Chad Young.

[4] The claim and ancillary claim were heard by Sykes J ("the judge"), (as he then was), and on 5 February 2016, for reasons contained in a written judgment, he refused the orders sought by Joni Torres and gave judgment for Debbian Dewar. Ervin Moo-Young, who was the 1st defendant in the court below, did not contest the claim and supported the submissions made on behalf of Joni Torres, for the orders sought in the court below. The judge made no orders with respect to Ervin Moo-Young. He also gave judgment for Debbian Dewar in the ancillary claim brought by the company.

The facts

[5] Karl Young and Ervin Moo-Young are brothers. Karl Young died on 10 June 2010. At the time of his death the brothers were the only shareholders of the company, being registered shareholders of one share each. Ervin Moo-Young acquired his one share from the original subscriber to the memorandum of association, Brian Schmidt. The company was incorporated 17 September 2001 with an authorised share capital of $500,000.00 divided into 500,000 ordinary shares of $1.00 per share. At the time of incorporation, the company adopted a form of articles of association in Table A of the Companies Act ("the Act"). The brothers having only issued two shares from the authorised shares, it meant that at the time of the death of Karl Young, the company had 498,000 unissued shares.

[6] Chad Young and Joni Torres are brother and sister, being the offspring of Karl Young. That would also make Ervin Moo-Young their uncle. Whilst Karl Young was still alive, Chad Young was made a director of the company in August of 2004 but he was not a shareholder. Joni Torres and four other siblings lived overseas and took no part in the operation of the company. The relationship between Debbian Dewar and Chad Young is unclear but she was appointed a director of the company in 2011 and joint managing director in 2013. Ervin Moo-Young denies being in attendance at the meeting at which it is alleged that she was appointed Managing Director. However, during the lifetime of Chad Young, she acquired no shares in the company.

[7] At the time of the death of Karl Young, the issued shares in the company remained one share to Ervin Moo-Young and one share to Karl Young. However, on 8 July 2010, within a month after Karl Young's death intestate, and before any legal administrator of his estate could be appointed, the surviving shareholder and director of the company Ervin Moo-Young, along with the other director Chad Young, purported to call a general meeting of the directors and members of the company. At that meeting, which was chaired by Chad Young, it was agreed that 490,000 of the unissued shares in the company, were to be allotted to Chad Young. An amended "return of allotment" was subsequently signed by Ervin Moo-Young and filed at the Companies Office of Jamaica, on 9 September 2010. This immediately made Chad Young the majority shareholder in the company.

[8] Chad Young subsequently died on 27 February 2014, leaving a will, by which he bequeathed, among other things, 50% of his interest in the company, to Debbian Dewar absolutely. On 18 June 2015, Debbian Dewar, as one of two executors, (the other being Ervin Moo-Young) was granted probate in Chad Young's estate, with power reserved to Ervin Moo-Young. Joni Torres obtained letters of administration in the estate of Karl Young in August of 2015.

The proceedings in the court below and the judges reason for decision

[9] In her fixed date claim form filed 30 October 2015, Joni Torres sought declarations, among other things that:

(i) only two of the 500,000 shares in the company had been lawfully issued;

(ii) she (as administrator of the estate of Karl Young) and Ervin Moo-Young were the holders of the two lawfully issued shares in the company; and

(iii) the purported allotment of 490,000 shares in the company to Chad Young was unlawful and a nullity.

[10] In support of her claim, Joni Torres averred that the fact that Chad Young was never issued with any shares in the company, notwithstanding having been appointed a director during the lifetime of Karl Young, was of major significance. This, she contended, meant that control of the company remained vested in Karl Young and Ervin

Moo-Young, up until the purported allotment of 490,000 shares to Chad Young, in July 2010. She further noted that this allotment of shares was dubious as the company's articles of association required all unissued shares to be first offered to members, unless the company by special resolution directed otherwise. The relevant sections in the articles of association relied on by her are articles 34, 35 and 36.

[11] She also averred in the court below that at no point after the death of Karl Young did his legal representative or his beneficiaries receive an offer to take up any of the unissued shares in the company, and that no special resolution had been passed to circumvent this requirement.

[12] In the ancillary claim brought by the company against Debbian Dewar it sought several declaratory reliefs. The relevant portion of the claim was as follows:

> "(i) That the allotment of the 490,000 shares to Chad Young be cancelled.
>
> (ii) A declaration that the share register and the records of the Companies Office of Jamaica be rectified.
>
> (iii) A declaration that [Debbian Dewar] was appointed a director of [the company].
>
> (iv) A declaration that the director's register and the records of the Companies Office of Jamaica be rectified..."

[13] The judge refused both the orders sought by Joni Torres on the claim and those sought in the ancillary claim, brought by the company, against Debbian Dewar.

[14] In assessing Joni Torres' claim as to whether there had in fact been a breach of the company's articles of association, the judge conducted a thorough and detailed

review of its provisions relating to the allotment of shares upon the death of a shareholder. Referencing the decision in **Thompson and another v Goblin Hill Hotels Ltd** [2011] UKPC 8, the judge reasoned that in interpreting a commercial document, inclusive of a company's articles of association, "the plain and ordinary meaning of the words used ... can only be displaced if it produces a commercial absurdity".

[15] The judge accepted that section 61 of the Act, along with article 47(a) of the company's articles of association, did provide a right of pre-emption to existing members, with respect to unissued shares. He, however, concluded that for this provision to be applicable to the case of a deceased shareholder who had died intestate, someone would have to be appointed a legal personal representative to their estate. The judge found that the requirement for notice to, or the recognition of, a legal personal representative, as provided for by the company's articles of association, did not refer to beneficiaries, and as such, there was no foundation for the proposition that the company was under a legal obligation to give notice to or recognise the beneficiaries, in the absence of a legal personal representative.

[16] The judge noted also, that the failure of the company's articles of association to make provision for any potential time lapse between a shareholder's death and the issuing of shares before a legal personal representative is appointed, was perhaps a fault of its author. Notwithstanding, he found that the court was not at liberty to "fix" this deficiency by implying some term regarding the time between the death of a

shareholder and when unissued shares may be allotted. In the circumstance, the judge concluded that until a legal personal representative had been appointed, there had, in fact, been no one in existence to whom the company's articles of association could have applied. He found, therefore, that the company would have been unable to make an offer, in respect of the unissued shares, to a non-existent person.

[17] With respect to Joni Torres' contention that the company failed to pass a special resolution in order to dispense with the requirement to offer shares to existing members, the judge reasoned that this requirement would only have arisen if at the time the decision was taken to allot the unissued shares, there were in fact members to whom that offer could have been made. There being no such members, the judge held that there had, in fact, been no need for a special resolution.

[18] With regard to Joni Torres' submission that the allotment of shares to Chad Young was unlawful and was done for an improper purpose, the judge found that this was also without merit. He held that, in order for the claim to have been successful, the onus was on the person attacking the decision to allot the shares, to demonstrate that the purpose was illegitimate. Having examined the evidence, the judge concluded that, notwithstanding the majority shareholding having been destroyed by the allotment, there was no evidence, direct or circumstantial, to substantiate the assertion that it was done for an improper purpose.

[19] The judge also rejected the argument that the shares were sold at undervalue. He held that the fact that the shares were not valued could not rationally lead to a firm conclusion that they were necessarily sold at undervalue.

The appeal

[20] Joni Torres, being aggrieved by the order of the judge, filed a notice and grounds of appeal on 22 February 2016. In her notice and grounds of appeal, she challenges several findings of fact and law made by the judge. There are 11 grounds of appeal filed, which are as follows:

> "(1) There was insufficient evidence to support the learned trial Judge's conclusion that Ervin Moo-Young did not want to have the benefit of article 47 and exercised his director's power in allotting 490,000 of the shares in [the company] to Chad Young for a proper purpose.
>
> (2) The learned trial Judge erred in disregarding entirely, or insufficiently regarding, Ervin Moo-Young's evidence that:
>
> i) He was unaware of the proper procedure for the allotment of shares in [the company];
>
> ii) He didn't attend a meeting of the Board of Directors of [the company] on July 8, 2010 in which discussions were held with Chad young about making an allotment of 490,000 of the shares in [the company] to him;
>
> iii) He signed a document in his capacity as director without thinking anything of it and without taking any legal advice and subsequently realized it was an allotment of 490,000 shares in [the company] to Chad young;
>
> iv) Chad Young did not pay fair market value for the shares;

v) There was no valuation of the shares to arrive at the fair market value in relation to the purported allotment;

vi) [The company] did not receive the value of the shares as consideration for the allotment;

vii) He did not participate in a discussion regarding the consideration to be paid for the shares and did not agree the sum of $490,000 on behalf of [the company].

(3) As regards the company's Articles of Association the learned trial Judge erred in failing to make a distinction between a person having title to a share and being entitled to be registered as the holder of that share (as in articles 34 & 47(d), on the one hand) and a person entitled to a share in consequence of death (as in articles 35, 36, 37 & 133, on the other hand). In consequence of that he failed to appreciate that the beneficiaries of the estate of Karl Young were the persons entitled to his share (and the dividend and other advantages of that share [per article 37] in consequence of his death and, therefore, were persons who could and should have received notice from the company pursuant to article 133.

(4) The learned trial Judge erred in failing to appreciate the absurdity of interpreting the Companies Act and company's Articles of Association in such a way as resulted in the pre-emptive right attaching to a member's share in the company being lost between the period when the member died intestate and the grant of administration of his estate.

(5) The learned trial Judge erred in not appreciating that, in such circumstances, equity intervenes in order to allow the Administrator of the deceased's estate to recover against the wrongdoer who has trespassed upon the pre-emptive rights of the personal representative of the deceased. It does so by regarding the title of an appointed Administrator as relating back to the time of death of the intestate. For that reason, the learned trial Judge ought to have found that the trespass could, and should, have been avoided by the directors giving prior notice to the beneficiaries of the deceased's shareholding (the entire class of which comprised

identifiable, known relatives of theirs who were few in number) prior to allotting unissued shares in the company to one of their number.

(6) The learned trial Judge erred in disregarding, or insufficiently regarding, the evidence that:

i) Chad Young, though appointed a director of [the company]in 2004 was never made a shareholder of [the company] during the lifetime of his father who died on June 10, 2010;

ii) After his father's death Chad Young approached the firm of Nunes, Scholefield, DeLeon & Co to deal with the estate of his father but failed to follow through by applying for a grant of administration upon discovery of his father's intestacy.

iii) Chad Young was equally entitled with [Joni Torres] to apply for a grant of administration of his father's estate on realising his father died intestate, yet did not do so;

iv) On July 8, 2010 (less than a month after his father died) Chad Young chaired a meeting of [the company] in which he used his power as a director of the company to allot 490,000 of the company's 500,000 shares to himself thereby making himself a supermajority shareholder of the company and diluting the voting power of the previous shareholders who held 1 each of the 2 allotted shares in the company.

(7) The learned trial Judge erred in failing to sufficiently appreciate that where the self interest of directors is involved they will not be permitted to assert the exercise of their power was *bona fide* thought to be, or was, in the interest of the company.

(8) The learned trial Judge failed to realize that the fact of the private benefit of Chad Young was, without more, sufficient evidence of his improper purpose as not to require any further proof of that fact.

> (9) The learned trial Judge failed to appreciate that where [as in this case] that act of self interest also destroys an existing majority and creates an existing majority that did not previously exist that co-existent purpose will also be improper.
>
> (10) The test of impropriety in such circumstances is not subjective, it is objective, and the learned trial Judge erred in failing to so conclude.
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> (11) That failure also caused the learned trial judge to err in concluding that [Joni Torres] had failed to prove improper purpose on the part of the directors allotting the unissued shares in the company to Chad Young."

Ervin Moo-Young's counter-notice of appeal

[21] Ervin Moo-Young filed a counter-notice of appeal, which, in essence, supported Joni Torres in her challenge to the judge's findings of fact and law. In his grounds of appeal, Ervin Moo-Young makes several complaints against the judge's findings. For completeness, they too will be delineated below:

> "(a) The learned trial judge erred when he concluded that:
>
> i) Ervin Moo-Young did not want to have the benefit of Article 47 and that Ervin Moo-Young had no difficulty being a minority shareholder;
>
> ii) Ervin Moo-Young addressed his mind to the allotment and issuing of the shares.
>
> as these findings were not supported by the evidence.
>
> (b) The learned trial judge erred in disregarding entirely, or insufficiently regarding, or deriving an erroneous conclusion from Ervin Moo-Young's evidence that:

i) He was unaware of the proper procedure for the allotment of shares in [the company];

ii) He did not attend a meeting of the Board of Directors of [the company] on July 8, 2010 at which meeting it is alleged that discussions were held with Chad Young about making an allotment of 490,000 shares in [the company] to him;

iii) He signed the document in his capacity as director without thinking anything of it and without taking legal advice and subsequently realized it was an allotment of 490,000 shares in [the company]to Chad Young;

(c) The learned trial judge erred in disregarding, or insufficiently regarding the evidence that Chad Young, as a director, derived a private benefit from the allotment of 490,000 [unissued shares] in [the company] to himself.

(d) The learned trial judge erred in finding that the exercise of powers as director by Chad Young in allotting 490,000 unissued shares in [the company] to himself was done for a proper purpose."

Debbian Dewar's counter-notice of appeal

[22] Debbian Dewar filed a counter-notice of appeal. In it she contends that, notwithstanding the judgment being in her favour, it ought to be affirmed on the following additional grounds:

"1. A declaration of nullity would require rectification of the register of members under the Companies Act and this is a discretionary remedy and not as of right and that applications to rectify the register of members have to be made promptly;

2. The application to set aside the allotment of shares should be refused for the following reasons:

    a. Over five years had elapsed since the allotment of shares and the filing of this claim by [Joni Torres] and laches arising from such a delay is fatal to the claim;

    b. The allotment of shares was a matter of public record and it necessitated prompt action from [Joni Torres] to challenge the allotment;

    c. [Joni Torres] has allowed an unreasonable amount of time to elapse since the death of Karl Young and the allotment of shares to Chad Young; and

    d. It is unfair and unjust to treat Chad Young's investment in [the company] as a nullity after his death when he could neither respond nor explain the circumstances concerning the allotment of shares to him."

[23] A counter-notice of appeal was also filed by the company on 7 March 2016. However, at the hearing of the appeal, counsel for the company, Ms Carlene Larmond, withdrew the counter-notice filed and asked the court to disregard the arguments filed in support thereof.

The issues

[24] Purely for the sake of convenience and expediency, I find that the issues raised in these grounds of appeal may be merged, analysed and disposed of by this court, under the following broad headings and sub-headings:

A. Whether there was a trespass upon the pre-emption rights attached to the shares of Karl Young, when 490,000 of the unissued shares of the

company were allotted to Chad Young without following the procedures set out in the company's articles of association.

i) Whether prior to allotting the unissued shares in the company, the directors were obliged to give notice offering those shares to the beneficiaries of the estate of Karl Young (grounds three, four and five of the Joni Torres' grounds of appeal); and

ii) Whether the title of Joni Torres as administrator of the estate of Karl Young relates back to the time of his death, to give her the right to claim against the directors for trespassing on the pre-emptive rights attaching to the deceased's estate and whether the judge failed to appreciate that trespass could have been avoided by notice to the beneficiaries (grounds four and five of Joni Torres' grounds of appeal).

B. Whether the judge was wrong to conclude that Ervin Moo-Young did not want to have the benefit of article 47 and that he had waived his right to the protection provided by the provisions in the articles of association.

i) Whether there is sufficient evidence from which the judge could conclude that Ervin Moo-Young did not wish to have the benefit of article 47; and

ii) Whether the actions of Ervin Moo-Young amounted to a waiver of the provisions in article 47 of the company's articles of association.

(Grounds one, two (i), (ii), (iii) and (vii) of Joni Torres' grounds of appeal as well as grounds (a) and (b) of Ervin Moo-Young's counter-notice of appeal).

C. Whether the judge erred in rejecting the evidence that a fair market value was not paid for the shares allotted to Chad Young (ground two (iv), (v), (vi) and (vii) of Joni Torres' grounds of appeal).

D. Whether in allotting 490,000 of the company's unissued shares to Chad Young, the directors exercised their powers within limits and for a proper purpose (grounds one, six, seven, eight, nine, 10 and 11 of Joni Torres' grounds of appeal as well as grounds (c) and (d) of Ervin Moo-Young's counter-notice of appeal).

E. Whether the delay in challenging the allotment of shares to Chad Young should be a bar to relief (grounds one and two of Debbian Dewar's counter-notice of appeal).

The basis on which the Court of Appeal will interfere in the decision of a judge at first instance.

[25] An appellate court, in reviewing a trial judge's decision, ought not to conclude that the decision was wrong, simply because it is not the decision that an appeal judge would have made, had he or she been called upon to make it in the court below. There has to be evidence of more than personal unease, for this court to find the decision faulty. It must be demonstrated that the judge was palpably or plainly wrong in concluding as he did.

[26] It is also well known that an appellate court is loath to interfere with a trial judge's findings, with respect to facts. This is so, as trial judges often have the advantage of seeing and reviewing all the evidence first hand. This enables them to observe a witness' disposition so as to determine their credibility and reliability. Notwithstanding this position, the appellate court may disturb a finding of fact, in circumstances where it can be seen, among other things that, any advantage enjoyed by the trial judge, by reason of having seen and assessed the evidence first hand, does not sufficiently explain or justify the ultimate conclusion. This guidance has been applied continuously by this court. In **Price Waterhouse (A Firm) v Caribbean Steel Company Limited** [2011] JMCA Civ 29 Panton P, at paragraph [40], quoted with approval, the dictum of Lord Thankerton in **Watt (or Thomas) v Thomas** [1947] AC 484 at 487 and 488, thus:

> "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..."

[27] This court is also guided by the decision of Morrison JA (as he then was) in **Locksley Waller, Judith Dallas-Waller v Larkland F Robinson, Amy Reece-Robinson and Ingrid Lee Clarke-Bennett (Executors of the Estate Of Glasford Robinson, Deceased)** [2013] JMCA Civ 32, where at paragraph [55], he restated and reiterated the guidance given by Clarke LJ (as he then was) in **Assicurazioni Generali SpA v Arab Insurance Group** [2003] 1 WLR 577, that:

> "15 In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the Rules of the Supreme Court and should be its approach on a "review" under the Civil Procedure Rules 1998."

[28] Ward LJ's reasoning at paragraph 196-197 of the same judgment, is also of relevance. There, he made the following pronouncement:

"196 The trial judge's view inevitably imposes a restraint upon the appellate court, the weight of which varies from case to case. Two factors lead us to be cautious about interfering. First, the appellate court recognises that judging the witness is a more complex task than merely judging the transcript. Each may have its intellectual component but the former can also crucially rely on intuition. That gives the trial judge the advantage over us in assessing a witness's demeanour, so often a vital factor in deciding where the truth lies. Secondly, judging is an art not a science. So the more complex the question, the more likely it is that different judges will come to different conclusions and the harder it is to determine right from wrong. Borrowing language from other jurisprudence, the trial judge is entitled to 'a margin of appreciation'.

197 Bearing these matters in mind, the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used – 'clearly', 'plainly', 'blatantly', 'palpably' wrong, is an adaptation of what Lord Fraser of Tullybelton said in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 642, 652, admittedly dealing with the different task of exercising a discretion. Adopting his approach, I would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible. The difficulty or ease with which that test can be satisfied will depend on the nature of the finding under attack. If the challenge is to the finding of a primary fact, particularly if founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts. The judgment of the Court of

Appeal in *The Glannibanta* (1876) 1 PD 283, 287, seems as apposite now as it did then:-

> 'Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to [*The Julia* 14 (1860) Moo PC 210 and *The Alice* (1868) LR 2 PC 245], the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to a cause are nevertheless entitled, as well on question[s] of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, even though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.'"

Issue A- whether there was a trespass upon the pre-emption rights attached to the shares of Karl Young, when 490,000 of the unissued shares of the company were allotted to Chad Young without following the procedures set out in the company's articles of association

(i) whether prior to allotting the unissued shares in the company, the directors were obliged to give notice offering those shares to the beneficiaries of the estate of Karl Young

[29] The gravamen of Joni Torres' complaint in these grounds of appeal, is that the judge failed to appreciate that the beneficiaries of Karl Young's estate were persons entitled to his share, consequent upon his death and were therefore entitled to exercise the right of pre-emption attaching to those shares. Notice, therefore, she says, ought to have been given to the beneficiaries of the estate of Karl Young, pursuant to article 133

of the company's articles of association. Whether this complaint has substance, has to be determined by an examination of the relevant articles of association.

[30] The company's articles of association grant certain rights and benefits to its members, which include, among other things, the ability to participate in the process of allotment of shares. Karl Young being a shareholder, following upon his death, article 34 of the articles of association of the company would become applicable. Article 34 stipulates that upon the death of a member (who is not a joint holder of shares), his "legal personal representatives...shall be the only persons recognised by the Company as having any title to his interest in the shares..."

[31] It is not being disputed by the parties that the company had notice of Karl Young's death, the surviving directors being his son and brother, respectively. It is also accepted by them that the entire pool of beneficiaries of the estate of Karl Young were also known to the company.

[32] Mrs Sandra Minott-Phillips QC argued, on behalf of Joni Torres, that this fact is of importance, as it would have been incumbent on the company to notify the beneficiaries entitled to Karl Young's share, of its intention to allot the unissued shares to Chad Young, prior to doing so. The failure to give this notice, Queen's Counsel submitted, trespassed upon the pre-emption right which attached to the estate of Karl Young's share.

[33] According to Mrs Minott-Phillips, the articles make a distinction between a person being entitled to be registered as the legal holder of the share and a person becoming

entitled to the share consequent upon the death of the member. Mrs Minott-Phillips contended that the provisions of the company's articles of association contemplated that due regard should be given to the rights of persons beneficially entitled to the shares, such as the beneficiaries of the estate of a deceased member who died intestate, where an administrator has not yet been appointed. As such, she said, the judge would have erred in conflating the company's ability to recognize the person having title to the share, with its ability to recognize the person entitled to the shares. Queen's Counsel submitted that, in the light of this, there was in fact no need for a personal representative to be in place for the company to have given notice to the persons entitled to the shares, notwithstanding their inability to vote at meetings of the company.

[34] Queen's Counsel relied on article 133 of the company's articles of association which states:

> "A Notice may be given by the Company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, **or by the title of representatives of the deceased or trustee of the bankrupt, or by the like description, at the address**, if any, within the island supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred." (Emphasis added)

[35] Mr Allan Wood QC, on behalf of Debbian Dewar, referred this court to the principles enunciated by the learned authors of **Mayson, French & Ryan on Company Law**, 2012-2013 edition, page 237, as guidance on how to interpret the

language used in the company's articles of association, in order to determine whether, in these circumstance, notice of the allotment of shares ought properly to have been given to the beneficiaries of the estate of Karl Young, who, at the time of the allotment were known to the company. The authors state at page 237 that:

> "The term 'transmission' is used to describe the automatic transfer of ownership of an individual shareholder's shares which occurs by operation of law when the individual dies or is adjudged bankrupt. On death, an individual's shares are transmitted to his or her personal representatives or, if the individual was a co-owner of the shares, to the surviving co-owner or co-owners...
>
> Transmission of a share of a company to a personal representative or trustee in bankruptcy does not by itself make that person a member of the company: the status of membership is not achieved until the person has agreed to be registered as a member *(Re Bowling and Welby's Contract* [1895] 1 Ch 663 per Lindley LJ at p 670). Nevertheless, in the absence of a contrary provision, 'member' in articles of association must be read, as far as possible, as including the estate of a deceased member *(New Zealand Gold Extraction Co (Newbery-Vautin Process) Ltd v Peacock* [1894] 1 QB 622; *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456).
>
> ...
>
> The model articles for private companies, art 27, and the model articles for public companies, art 66, in SI 2008/3229, **provide that a person to whom a shareholder's share is transmitted on death or bankruptcy (a transmittee) has the same rights as the holder, except that the transmittee cannot attend or vote at a general meeting until registered as the new holder of the share**. Those articles provide that a transmittee of a share may choose either to become registered as the holder of the share or to have it transferred to another person." (Emphasis added)

[36] Mr Wood also relied on the case of **Re Greene (deceased); Greene v Greene and others** [1949] 1 ALL ER 167. In that case, following a resolution of the board of directors, at an extraordinary general meeting of a private company, a special resolution was passed to the effect that the articles of association of the company would be altered. So far as is relevant, the alteration provided that, in respect of three named members of the board of directors: "upon the death of any … director, if such director leaves a wife him surviving, the … shares of such deceased director shall, notwithstanding any provision or direction made by such director in his lifetime as to the disposition of such …. shares upon his death to the contrary, be deemed to have passed upon the death of such director to such deceased director's wife and such wife shall be the only person recognized by the company as having any title to the shares and shall forthwith be registered as the holder of such … shares …"

[37] Mr Greene, a director of the company, died intestate, survived by his second wife, two children of his former marriage, and one child by his second wife. Subsequent to his death, the board of directors of the company resolved in accordance with the company's amended articles of association that the widow be registered as the holder of the shares that were held by Mr Greene, and the registration was made accordingly. On a summons to determine the validity of the articles, the court concluded that this amendment to the company's articles of association was invalid. It was held, among other things, that the articles introduced by the special resolution was in contravention of section 63 of their Companies Act 1929, which provided that it should not be lawful for a company to register a transfer of share, unless a proper instrument of transfer

had been delivered to the company, or, unless ownership passed by "operation of law". The transfer to the widow was, therefore, unlawful because ownership had not passed by "operation of law" and there was no instrument of transfer.

[38] Mrs Minott-Phillips contended that this decision was distinguishable, as in that case, the directors sought to circumvent the laws of succession by amending the company's articles of association to provide for an automatic registration of a widow as the holder of shares on death. In this case, she contended, the company's articles of association provide for recognition of a person, other than the registered shareholder.

[39] I am unable to agree with the contentions of Mrs Minott-Phillips and I find that the position taken by Mr Wood on this point is in keeping with the principles of law and the articles of association of the company.

[40] It is necessary at this point to examine the relevant articles touching and concerning these submissions. The relevant articles are: articles 34, 35, 36, 37, 133 and 134, respectively. Articles 34 to 37 state as follows:

> "34. In case of death of a member the survivor or survivors where the deceased was a joint holder, and the **legal personal representatives of the deceased where he was a sole holder, shall be the only persons recognized by the Company as having any title to his interest in the shares**; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.
>
> 35. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly

> be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy as the case may be.
>
> 36. If the person so becoming entitled shall elect to be registered himself, he shall deliver or send to the Company a notice in writing signed by him stating that he so elects. If he shall elect to have another person registered he shall testify his election by executing to that person a transfer of the share. All the limitations, restrictions and provisions of these articles relating to the right to transfer and the registration of transfer of shares shall be applicable to any such notice or transfer as aforesaid as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer signed by that member.
>
> 37. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividend and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the Company.
>
> Provided always that the directors may at any time give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the notice is not complied with within ninety days the directors may thereafter withhold payment of all dividends bonuses or other monies payable in respect of the share until the requirements of the notice have been complied with." (Emphasis added)

[41] Articles 34-37, therefore, make specific provisions regarding, not only who is to be recognized but also, how the company is to treat with a person becoming entitled to a share as a consequence of the death of a shareholder.

[42] Article 34 makes it clear that upon the death of a member, the company will only recognise one of two persons as having title to a deceased member's interest in a share(s): (a) a surviving joint holder of the shares, or (b) the legal personal representative of the deceased estate, in the case of a sole holder of shares. Article 35 is dealing with registration of the person recognised as becoming entitled to the shares or his nominee, consequent on the death of a member, as the new holder of the shares. This means that a legal personal representative of a member who died intestate would be entitled to a share by virtue of his/her letters of administration. That person would have to be recognised by the company as having title to the deceased interest in the share(s). The personal representative may then elect not to be registered as a holder of the share(s) or he/she, having administered the estate, may elect to have the beneficiaries registered as the holders of the share(s). Until that election takes place, the company is not authorised to recognise title or entitlement in any other person, except, the legal personal representative, the person who was the joint holder with the deceased of the share or a trustee in bankruptcy.

[43] Article 36 provides for what is to occur if an election is made by the legal personal representative. It is the legal personal representative of the deceased estate who is entitled, in law, to hold the share(s) of the deceased and article 37 provides that such a person is entitled to dividends and other advantages to which the deceased would have been entitled, except that until registration takes place, they would not be entitled to exercise any voting rights.

[44] Articles 34, 35, 36 and 37, when read cumulatively, convey the following practical position, in so far as it is relevant to a legal personal representative:

> (a) only a legal personal representative of the deceased, who is the sole owner of the shares, is to be recognised by the company as having title to the deceased's shareholders interest in the shares;
>
> (b) when that person becomes entitled to the shares, by reason of grant of letters of administration, upon proof of that grant to the directors, if they so require, the administrator may elect to be registered or nominate a beneficiary to be registered; and
>
> (c) where the administrator nominates a beneficiary to be registered, they are required to notify the company of this fact. The administrator is entitled to the same dividend and other advantages as if he was a registered holder of the shares.

[45] Accordingly, notwithstanding the company having been notified of Karl Young's death, with a legal personal representative having not yet been appointed at the time of the allotment of shares to Chad Young, on what basis would the directors have been required to notify the beneficiaries?

[46] The judge resolved this question, when, at paragraphs [17] and [18] of the judgment, he, having considered that no legal personal representative had been appointed at the time of the allotment of the shares to Chad Young, concluded that

there was nothing the directors could have done, until someone was lawfully appointed to administer the estate. This, he concluded, was the case, notwithstanding the company being notified of Karl Young's death. The judge proffered his reasons for so concluding, as follows:

> "[17] Where a person dies intestate the law already tells us how that matter is to be resolved. As Mr Wood pointed out someone has to take the steps necessary to obtain letters of administration. The company cannot determine who that person should be. Until someone is legally constituted as the personal representative of the deceased shareholder that someone or indeed any other person cannot be recognised as having any title to the share for the purposes of the articles. No such person was the legal personal representative of Karl for over five years. Joni only became the administratrix of Karl's estate on August 28, 2015 and consequently the legal personal representative of Karl's estate. She gets her authority from the letters of administration. Before the letters of administration were granted to her she was not the legal personal representative of the estate. Joni, therefore, was not unconditionally entitled to be registered as the holder of Karl's share until she was granted the letters of administration.
>
> [18] As this court understands it the general position is that it is the person handling the deceased's estate who is to inform the company of the death of the person. In this case, Ervin and Chad as the brother and son of Karl respectively would have known of his death and in that sense the company would have known of his death but beyond that knowledge there was nothing the company could do until someone was lawfully appointed to administer the estate."

[47] This reasoning by the judge cannot be faulted. Where a person dies, it is settled law that some person is required to apply for the legal right to deal with their estate. In the case of an intestacy, the person is required to apply for a grant of letters of administration. It is this grant that empowers the person, to whom it is issued, to step

into the shoes of the deceased person and to administer their estate. The authority of a person who has obtained letters of administration, being the legal personal representative, commences, therefore, from the date of issuance by the court of the grant, and not before. These sentiments are similarly articulated by the learned authors of **Halsbury's Laws of England**, 4th edition reissue, Volume 17(2), paragraph 33, as follows:

> "**Source of administrator's title.** The administrator derives his title entirely from the grant of letters of administration, and the deceased's property does not vest in him until the grant, so he cannot make a lease or other disposition before the grant. After the grant of administration the administer has, subject to the limitations contained in the grant, the same rights and liabilities and is accountable in the same way as if he were the executor of the deceased."

[48] With respect to shares in a company, therefore, the title of a deceased shareholder is transmitted by operation of law, and, in the case of a will, it devolves immediately upon death to the executors, who act for and represent the estate, even before probate has been obtained. Where a shareholder dies intestate, however, the title of the deceased shareholder is not transmitted until the grant of letters of administration. When evidence of having obtained the grant of letters of administration is produced to a company, section 81 of the Companies Act mandates that this is to be accepted by the directors. The provisions in articles 34, 35, 36 and 37 of the company's articles are simply a recognition of and adherence to those legal principles.

[49] Article 134 of the company's articles is also relevant to this discourse. It states as follows:

> "Notice of every general meeting shall be given in any manner hereinbefore authorised to:
>
> (a) every member except those members who (having no registered address within the island) have not supplied to the Company an address within the island for the giving of notices to them;
>
> (b) **every person upon whom the ownership of a share devolves by reason of his being a legal personal representative or a trustee in bankruptcy of a member where the member, but for his death or bankruptcy would be entitled to receive notice of the meeting**; and
>
> (c) the Auditor for the time being of the Company.
>
> **No other person** shall be entitled to receive notices of general meetings." (Emphasis added)

[50] It can be immediately seen that article 133 does not support Joni Torres' position, as articulated by Mrs Minott-Phillips. Article 133 goes as far as to identify who is meant by a person entitled to a share in consequence of death or bankruptcy of a member by indicating that the notice may be sent to them by name or by their titles. The only titles referred to in article 133 are "representatives of the deceased" and "trustee of the bankrupt". There is no reference to beneficiaries of the deceased. Furthermore, article 134 states that notice of a general meeting shall be given to owners of shares by reason of the person being a legal personal representative or a trustee in bankruptcy. Again there is no mention of beneficiaries.

[51] The provisions in articles 34 to 37 as well as 133 and 134 are in harmony with the legal principles. The contentions of Mrs Minott-Phillips are not supported by the principles of the law of succession or by the company's articles of association. The only

person recognised as having title to the shares, other than the deceased owner, in articles 34 to 37, is the legal personal representative of the deceased estate where the deceased was the sole holder of the shares. The only person to whom notice is required to be given, therefore, is the legal personal representative of the deceased and not his beneficiaries.

[52] The dictum of Harman J at page 169 of the judgment in **Re Greene** is instructive, as it supports the principle that a beneficiary would have no entitlement to be recognised as the holder of shares, prior to obtaining a transfer from the estate's personal representative. This can be seen where he states that:

> "On the death of the intestate it was resolved at a board meeting held on 15 February 1945 that the intestate's widow, the first defendant, should be registered forthwith as the holder of the shares held by her husband. This was carried into effect, and she has been since, and is now, the registered holder of these shares, and claims to be the beneficial owner of them. The first question which arises is as to the validity of the article introduced by the special resolution of 20 August 1942. **Is it competent to a company by an article in this form to by-pass, so to speak, the personal representatives of a deceased holder of shares and to put them direct into the name of his widow? In my judgment, it is not**. Such an article is contrary to s 63 of the Companies Act, 1929, (now s 75 of the Companies Act, 1948) which provides:
>
> > 'Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company: Provided that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of

> the company has been transmitted by operation of law.'
>
> I believe that the primary object of a section in this form, which first appeared in the Act of 1928, was to scotch the then prevalent practice of providing for the oral transfer of shares to the great detriment of the Revenue, but, in my judgment, it applies to this or a similar case, **for no proper instrument of transfer has been delivered, nor has the right to the shares been transmitted to the widow by operation of law.** In my judgment, therefore, the registration of the widow was wrong and the register ought to be rectified accordingly by registering the shares in the joint names of the personal representatives, who are the plaintiff and the first defendant." (Emphasis added)

[53] It is clear, therefore, that the company would not have been legally required to give notice to, and/or deal with, the beneficiaries of Karl Young's estate, until it was provided with proper evidence of the grant of letters of administration to a legal personal representative and that person then nominates the beneficiaries to be registered in his or her place.

[54] Section 23 (1)(b) of the Act also outlines who ought properly to be considered as a member of a company. It provides, in part, that:

> " 23.-(1) The following persons are members of a company and shall be entered as members on its register of members-
>
> ...
>
> (b) the personal representatives of a deceased member and the trustee in bankruptcy of a bankrupt member;"

[55] The definition of a member, in section 23 of the Act, is unequivocal. It states that a personal representative shall be registered as a member. Section 23 makes no

reference to beneficiaries of the deceased's estate. This is understandable because, by law, the property of the deceased devolves to the legal personal representative of his estate.

[56] The judge's finding that it was at the point of the appointment of a legal personal representative that the company would have been obliged to recognise that person as having title to the share, was unassailable. I further find, that the judge would have also been correct in his finding that a legal personal representative having not been appointed, there was no one in existence to whom the articles could have applied for the directors to give notice.

[57] Grounds three, four and five of Joni Torres' appeal are, therefore, without merit.

(ii) whether the title of Joni Torres as administrator of the estate of Karl Young relates back to the time of his death, to give her the right to claim against the directors for trespassing on the pre-emptive rights attaching to the deceased's estate and whether the judge failed to appreciate that trespass could have been avoided by notice to the beneficiaries

[58] Pre-emptive provisions are often utilized by private companies, as was done in the instant case, to ensure that existing members have the opportunity to purchase shares prior to them being offered to non-members.

[59] Mrs Minott-Phillips argued that the judge's approach to the position of Joni Torres was wrong, in that he found that there was a lacuna in the articles which resulted in the right of pre-emption being lost between the death of the shareholder and the grant of letters of administration. She complained that he failed to consider the doctrine of "relation back". Mrs Minott-Phillips asked the court to note that the shares

existed in perpetuity and the principle of "relation back" operates to protect an estate against trespass during the period when there was no personal representative appointed. She argued further, that the principle of "relation back", as well as the articles of association, provide protection from such trespass. She pointed to the fact that Joni Torres in her fixed date claim form, had sought redress for trespass on the pre-emptive rights attaching to the shares of the estate of Karl Young. Queen's Counsel relied on the cases of **Howard Smith Ltd v Ampol Petroleum Ltd and others** [1974] 1 AC 821, **Re Thundercrest Ltd** [1995] 1 BCLC 117 and **In the Goods of Elizabeth Pryse, Deceased** [1904] P 301.

[60] Mrs Minott-Phillips contended that, whereas an executorship is effective at death, an administratorship is effective at the date of the grant of letters of administration. She stated that the law on "relation back" would, therefore, intervene to protect the property of an intestate after his death and during the period up to obtaining the grant of letters of administration. She submitted, therefore, that whilst the company's articles of association are sufficient to protect the interest of the deceased's estate and provide for what ought to be done in the circumstances of the case, the doctrine of "relation back" is, such that, the title of an administrator, though it did not exist until the grant of letters of administration, relates back to the time of the death intestate, both to real estate and to personalty. In those circumstances, she submitted that the administrator would be able to recover against a wrongdoer who had seized or converted the goods of the intestate after his death, in an action for trespass.

[61] I take note of Mr Woods' submission that the doctrine of "relation back" had not been raised before the judge below. However, the doctrine is a principle of law which any party is entitled to raise either in the court below or before this court, so long as the other side has the opportunity to fully submit thereon. In any event, rule 1.16 of the Court of Appeal Rules empowers the court to permit a hearing on any ground, even if such ground is not set out in the notice or counter-notice of appeal, provided the other side has had the opportunity to contest it. Before this court, Mr Wood did make full submissions on the principle, in contesting its relevance to this case.

[62] Mr Wood submitted that the principle of "relation back" applies to injury to the estate, which would otherwise be without remedy. He argued that the substance of the principle meant that, even if the personal representative had been appointed on 11 June 2010, she could not have accepted, by law, any offer of shares. The legal personal representative, he claimed, could only have had the power to hold the estate on a statutory power of sale. There was no power, he said, to take up shares.

[63] Mrs Minott-Phillips is correct in her assertion that the courts have, over the years, affirmed that on the grant of letters of administration being made, the administrator's title relates back to the time of death (see **In the Goods of Elizabeth Pryse Deceased**, per Stirling LJ at page 305). This principle is, however, inapplicable in circumstances where a person would have validly obtained title (bona fide purchaser for value without notice) in the interval between death and the obtaining of grant of letters of administration. Furthermore, the principle would not operate to give the

administrator title to something which had ceased to exist in the interval (see **Fred Long & Son Ld v Burgess** [1950] 1 KB 115).

[64] I have already found that there is no merit in Mrs Minott-Phillips' arguments that the beneficiaries of the estate of Karl Young had the right to be given notice before the allotment of the unissued shares.

[65] Based on the doctrine of "relation back", Joni Torres, as the administrator of the estate of Karl Young, does have the standing to bring a claim that there was a trespass on the pre-emptive rights attaching to the shares in the estate of Karl Young and to challenge the validity of the issue of shares to Chad Young. However, the doctrine of "relation back" cannot result in a finding that the trespass could have been avoided by giving prior notice to the beneficiaries and it would not entitle her to the remedy she seeks, without more. The fact of the trespass alone does not invalidate the issue and could only entitle her to compensation.

[66] Grounds four and five of Joni Torres' grounds of appeal, therefore, succeed in part.

Issue B- whether the judge was wrong to conclude that Ervin Moo-Young did not want to have the benefit of article 47 and that he had waived his right to the protection provided by the provisions in the articles of association

(i) Whether the evidence was sufficient for the judge to have concluded that Ervin Moo-Young did not wish to have the benefit of article 47 of the company's articles of association

[67] Mrs Minott-Phillips argued that the evidence established the case for Joni Torres. She asked this court to note that only two persons were said to be present at the directors' meeting where the decision was taken to allot the shares to Chad Young and that no notice of that meeting was sent out. She pointed out further that the estate of the deceased shareholder was not present or represented at that meeting. Queen's Counsel further argued that it was impatient of debate that under article 47 as well as section 61 of the Act, the existing shareholders should have received pre-emptive rights, giving them the right to subscribe for those shares. She cited section 61 of the Act, which states that:

> "61.-(1) If the articles so provide, no shares or a class of shares may be issued unless the shares have first been offered to the shareholders of the company holding shares of that class.
>
> (2) The shareholders mentioned in subsection (1) have a pre-emptive right to acquire the offered shares in proportion to their holding at such price and on such terms as those shares are to be offered to others.
>
> (3) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (I), the shareholders of the company have no pre-emptive right in respect of shares to be issued by the company -
>
> (a) for consideration other than cash;
>
> (b) pursuant to the exercise of conversion privileges, options or rights previously granted by the company."

[68] She submitted that not only was article 47 violated, but that section 61 of the Act was also breached. She also adopted the submissions of counsel for Ervin Moo-Young.

[69] Counsel Mrs Symone Mayhew, on behalf of Ervin Moo-Young, submitted that, with respect to the "return of allotment", Ervin Moo-Young signed it without thinking anything of it, had no legal advice, and having subsequently sought legal advice, felt he could not, in all conscience, challenge the claim brought by Joni Torres, in the court below, or in this appeal. Counsel contended that whilst Ervin Moo-Young was not contesting the appeal brought by Joni Torres, he was taking issue with the findings of fact and law made by the judge below with respect to himself. Counsel submitted that the judge's conclusion that Ervin Moo-Young did not wish to benefit from article 47 of the company's articles of association was without merit. This is so, counsel argued, as the following salient evidence were not properly assessed by the judge:

a) Ervin Moo-Young's evidence that he signed the return of allotment in his capacity as a director without thinking anything of it and without taking legal advice;

b) Ervin Moo-Young's contention that he did not attend the meeting of the company's board of directors of 8 July 2010, in which discussions were said to have been held with Chad Young with respect to the allotment of the 490,000 unissued shares; and

c) Ervin Moo-Young's evidence did not support the conclusion that he had no desire to benefit from the company's articles of association or that he had no difficulty becoming the minority shareholder.

[70] Mrs Mayhew submitted that this court ought to properly consider the circumstances surrounding the allotment of shares, particularly in the light of the un-contradicted evidence of Ervin Moo-Young, which made it clear that the allotment was done by Chad Young to himself, as a director, for his personal benefit. Counsel also pointed out that, as the allotment was in breach of the articles, it was unlawful and the question whether or not Ervin Moo-Young was at the meeting, was, in those circumstances, irrelevant in resolving the issue of lawfulness.

[71] Counsel also argued that if this court were to find that Ervin Moo-Young's presence was a material factor in the waiver of the requirements of the articles, then the judge would have erred in resolving the issue without the cross examination of Ervin Moo-Young. Counsel pointed out that he had given an affidavit in support of the company's ancillary claim, in response to the affidavit of Debbian Dewar and that evidence had been rejected by the judge. Counsel argued that given the fact that Ervin Moo-Young was also prejudiced by the allotment, the judge ought to have accepted his evidence and draw inferences contrary to those he drew. Counsel submitted further that the judge ought not to have rejected his evidence, regarding the signing of the "return of allotment". Counsel maintained that, in the absence of cross-examination, the judge ought to have given him the benefit of the doubt.

[72] The judge questioned the rationale for Ervin Moo-Young having not been cross-examined. He also rejected the assertion that Ervin Moo-Young's signing of the "return of allotment" without legal advice, inescapably meant that he did not address his mind

to the issuing of the shares. He found, in the alternative, that the conclusion could also be drawn, that "he did not think the document sufficiently complicated so as to require legal advice ... [and] was plain and simple and consistent with what was agreed by him at the July 8 meeting".

[73] I find two essential features of the instant case, significant to this issue: (i) Ervin Moo-Young's signing of the "return of allotment" of shares and his declaration that he did so without thinking anything of it, and, (ii) his assertion that he was not in attendance at the 8 July 2010 board of directors meeting.

[74] The judge reasoned that it was "Ervin who signed the return of allotment. He was present at the meeting of July 8, 2010". The judge, not having had the advantage of observing the demeanour of Ervin Moo-Young during cross-examination, nonetheless concluded that he did not appear to be someone lacking in intelligence. The judge also noted that there was nothing in the affidavit evidence before him which would lead him to conclude that Ervin Moo-Young wanted to maintain his 50% proportion in the issued shares. He held further that Ervin Moo-Young had failed to demonstrate that he had been "tricked or misled or deceived by Chad". He found that in participating in the allotment, Ervin Moo-Young did so with his eyes wide open and waived the protection offered by article 47.

[75] The aspect of the judge's finding regarding the lack of evidence that Ervin Moo-Young was tricked, misled or deceived by Chad Young into the signing of the "return of allotment" could not reasonably be faulted. Ervin Moo-Young simply stated that Chad

Young brought it to him to sign and he signed it. The same cannot be said, however, of the judge's assessment with respect to the meeting of the board of directors of 8 July 2010. Ervin Moo-Young was, at the time of the allotment, the only living shareholder and *ipso facto* was entitled to the protection provided by the articles. Therefore, in relation to the meeting and the question of whether Ervin Moo-Young acted with eyes wide open and waived the benefit of article 47, a careful assessment was required. With regard to that issue, the judge concluded at paragraph [66] as follows:

> "[66] Indeed in his December 8, 2015 affidavit he is not saying that he did not attend the July 8, 2010 meeting. Ervin's December 8, 2015 affidavit was filed in response to Joni's affidavit dated October 28, 2015. It is Joni's affidavit that exhibits the minutes of the July 8, 2010 meeting. If he did not attend that meeting one would have expected him to say in his December 8, 2015 affidavit that he was not at the July 8, 2010 or if present the minutes do not accurately record what happened. Ervin even filed another affidavit dated December 23, 2015. In that affidavit he does not address the minutes of July 8, 2010."

[76] In dealing with this evidence, the issue that arises for determination, with respect to the 8 July 2010 board of directors meeting, is whether the judge would have been palpably or plainly wrong in his conclusion that Ervin Moo-Young failed to indicate that he was not in attendance at that meeting. The judge noted that Ervin Moo-Young's affidavit evidence dated 8 December 2015 did not deny attendance at this very crucial meeting. He concluded, from what he perceived as an omission, that if Ervin Moo-Young was not in attendance, he would have been expected to make some indication of this and make it known that he took no part in any discussion in relation to the allotment of shares.

[77] This conclusion by the judge is erroneous, and unfortunately, would have gone to the heart of his findings as to whether, as he says, Ervin Moo-Young did not wish to benefit from article 47. The judge, made two errors. Firstly, Ervin Moo-Young's affidavit of 8 December was in response to Joni Torres first affidavit. Her affidavit of 28 October 2015 did not speak to any meeting of 8 July 2010 or any minutes of such a meeting but, instead, spoke to the allotment made to Chad Young on 8 July 2010 and the amended "return of allotment" signed by Ervin Moo-Young and filed in the Companies Office. It is to these averments that Ervin Moo-Young responded in his affidavit of 8 December 2015. In it, he makes no mention of any meeting on 8 July 2010 but spoke to the fact that after Karl Young's death, Chad Young brought him a document to sign, which he signed as director, not knowing what it was at the time.

[78] The second error made by the judge, in this regard, is that he seemingly failed to comprehend the fact that the evidence of the meeting of 8 July 2010, and the minutes in support of that meeting, first appeared in the affidavit of Debbian Dewar dated 9 December 2015, which was deposed to in response to the October affidavit of Joni Torres. Ervin Moo-Young filed an affidavit dated 16 December 2015, in support of the company's ancillary claim, in response to the affidavit of Debbian Dewar. It is true that in that affidavit he makes no reference to the assertions by Debbian Dewar that there was a meeting on 8 July 2010 which he attended. Ervin Moo-Young, however, filed an affidavit dated 11 January 2016, also in response to Debbian Dewar's affidavit dated 9 December 2015. In this 11 January 2016 affidavit, he referred to, and relied on, his

previous three affidavits, repeats some of his denials made in those affidavits and at paragraph 7 he distinctly denies attending the 8 July meeting.

[79] In coming to his conclusion on the point, the judge failed to take note of Ervin Moo-Young's affidavit of 11 January 2016, where he stated at paragraph 7 that:

> "7. I deny attending a meeting of the Board of Directors of [the company] on July 8, 2010 in which discussions were held with Chad Young about making an allotment of 490,000 of the shares in [the company] to him."

[80] This evidence was unchallenged (as the only person who could challenge it was deceased) and it was not tested in cross-examination. The judge would have been required, therefore, to make a determination as to whether he had, in fact, found this bit of evidence credible. He ought to have assessed the evidence against the case in its entirety, so as to make a determination as to what weight, if any, he should give to it. In his affidavit of 11 January 2016, Ervin Moo-Young said he was not in attendance at this critical meeting of the directors and, even more importantly, took no part in any discussion in relation to the allotment of shares. It is equally significant that at no time did he state, in his affidavits, that he did not want to maintain his 50% shareholding in the company.

[81] The judge also erred in his finding that the minutes of the directors' meeting were exhibited to the affidavit of Joni Torres. They were, in fact, exhibited to the affidavit of Debbian Dewar, which was filed in response to Joni Torres affidavit and after the first affidavit of Ervin Moo-Young. The judge, seemingly, failed to have appreciated also, that Ervin Moo-Young's affidavits were filed in his different capacities.

Two were filed in response to Joni Torres, where he was sued by her, and two were filed in support of the company's ancillary claim against Debbian Dewar. His affidavit of 11 January 2016 was a rejection of the minutes and the contentions in Debbian Dewar's' affidavit. The judge, therefore, erred in his assessment of this aspect of the evidence and gave no regard to Ervin Moo-Young's denial in his affidavit dated 11 January 2016, that he did not attend the meeting of the board of directors.

[82] The judge having erred in this regard, there is merit in Mrs Mayhew's contention that he must have erred when he conclusively found that Ervin Moo-Young had failed to indicate that he had not been in attendance at the meeting, when in fact he did so in his affidavit evidence dated 11 January 2016. Without the assessment of the denial in the 11 January 2016 affidavit, the judge erred when he said definitively that Ervin Moo-Young did not deny being present at the meeting and did not wish to benefit from article 47.

[83] There is also merit in Mrs Mayhew's contention that the judge was plainly wrong when he rejected Ervin Moo-Young's evidence surrounding the circumstances of the signing of the allotment, by coming to that conclusion based on his erroneous conclusion that Ervin Moo-Young had not denied that he was at the 8 July 2010 directors' meeting and was aware of what he was doing.

(ii) Whether the actions of Ervin Moo-Young amounted to a waiver of the provisions in article 47 of the company's articles of association

[84] Article 47(a)and (d) of the company's articles of association provide that:

> "(a) **Unless the Company shall by special resolution otherwise direct all unissued shares** (whether in the original or any increased share capital) **shall, before issue, be offered to the member**. Every such offer shall refer to this article, shall give details of the shares which the Company desires to issue and the proposed terms of issue thereof and shall invite each member to apply in writing within such period as shall be specified (being a period expiring not less than twenty-one days from the date of the despatch (sic) of the offer) for such maximum number of shares then to be issued as he wishes.
>
> (b)...
>
> (c)...
>
> (d) For the purposes of this article, where any person is unconditionally entitled to be registered as the holder of a share, he and not the person actually registered as the holder thereof, shall be deemed to be a member of the Company in relation to that share." (Emphasis added)

[85] Article 47(a) confers the right of each member to receive an offer with respect to any allotment of unissued shares. The only exception to this being, where the company, by special resolution, directs otherwise. The import of articles 51, 52 and 53 is that a special resolution must be taken at an extraordinary general meeting, called for that purpose, after the giving of twenty-one days' notice.

[86] Article 47(a) clearly confers a right on the members of the company to be a participant in the allotment of unissued shares in a company. This right may only be circumvented by the company passing a special resolution to this effect. Where someone other than the shareholder is unconditionally entitled to be registered as the holder of the share, he or she is deemed a member and article 47(d) confers a right on that deemed member to also be offered a share. So, in this case, if there had been an

administrator of the estate of Karl Young at the time, that administrator would have been deemed a member and would have been entitled to an offer under article 47.

[87] Similarly, an article 47 offer of the unissued shares ought to have been made to Ervin Moo-Young, he being the only member of the company at the time. It is also clear from the provisions, that, this offer should have been in writing, referring to article 47, and giving details of the shares which the company wished to issue and on what terms. It should have also invited Ervin Moo-Young to apply for the shares, in writing, within a specified period.

[88] There is no evidence that such an offer was ever made to Ervin Moo-Young or that he refused an article 47 offer. It is only after the member has refused the offer, or had applied for less shares than was offered, that the directors are authorised to dispose of any shares not applied for, as they think proper, pursuant to article 47(c) which states:

> "(c) The directors may dispose of any shares not applied for by members in such manner as they think proper PROVIDED NEVERTHLESS that they shall not dispose of any shares in such manner as to cause the Company to cease to be a private company."

[89] If the company were not to make an article 47 offer to Ervin Moo-Young, a special resolution would have had to be passed at an extraordinary general meeting, directing otherwise. No extraordinary general meeting was held and no special resolution was passed in this case.

[90] Article 53 provides that an annual general meeting and a meeting called for the passing of a special resolution shall be called by at least 21 days' notice in writing to be given to such persons as are entitled to receive such notice. Ervin Moo-Young, as a member and director of the company, would have been entitled to such a notice and to be present and vote on such a resolution. There is no evidence that any notice of meeting was issued or that any such meeting was called where Ervin Moo-Young waived his right of pre-emption which was attached to his share and that a special resolution was passed, thereafter.

[91] A waiver of right is different from a rejection of an offer made. To my mind, where it is a rejection of the article 47 offer, the directors may dispose of the rejected shares as they see fit. Where it is a waiver of the right of pre-emption under the article, the only procedure in which the shares may then be validly disposed of is by special resolution at an extraordinary general meeting.

[92] Article 92(c) provides that a resolution passed at any meeting of the company, of directors or committees must be entered in the minute book which is conclusive evidence of the fact. No minutes of the proceedings passing a resolution not to first offer the shares to a member was produced in court. No such minute exists as no meeting was held and no resolution was passed.

[93] It seems to me that Ervin Moo-Young did have the right to reject the offer of shares, and even possibly waive his own pre-emption rights, if he so desired. Nevertheless, this would still have had to be done in accordance with the articles of

association, which made no specific provision for a waiver. What the articles do provide for, are procedures which must be followed and which cannot be unilaterally waived by an individual member or director. In this case, no offer was made pursuant to the articles and thereafter rejected, and the shares were allotted to a non-member. The only way this could have lawfully been done, even after a waiver of the pre-emption right (assuming such a right can be waived other than as a rejection of an offer as provided in the article), was by a special resolution passed at an extraordinary general meeting of the company. There was no such meeting held and no such resolution passed. The meeting of the directors on 8 July 2010 was no substitute for the requirements under the articles.

[94] The judge fell into error when he found that no special resolution was required because no personal representative was in place. He overlooked the fact that an offer had to be made to Ervin Moo-Young as member and rejected by him or a special resolution had to be passed to by-pass such an offer. This is independent of whether a personal representative of the estate of Karl Young was in place or not. Even if Ervin Moo-Young waived his own pre-emption rights, he had no power to waive the procedure under the articles, which called for a special resolution before shares can be offered first to a non-member. That waiver would simply have become the basis for the special resolution.

[95] It is against that background that the evidence of Ervin Moo-Young that he was unaware of this procedure; he was not present at the 8 July 2010 meeting; and that he

signed the "return of allotment" as director without thinking anything of it and without legal advice, should have been considered by the judge. It is clear the proper procedure for allotting the unissued shares to Chad Young was not followed. The articles do not provide for allotment to be made after "discussions" at a board meeting. The judge was, therefore, in error when he concluded that Ervin Moo-Young, by his conduct, did not want to benefit from article 47 and that a special resolution was not necessary.

[96] The allotment of the shares made to Chad Young was, therefore, unlawful, having been made in breach of the company's articles.

[97] Mr Wood submitted that when Chad Young brought the "return of allotment" to Ervin Moo-Young for signature, in such a small family company, it would have amounted to a meeting of directors. Queen's Counsel argued further that, in any event, his signature to the "return of allotment" form amounted to a ratification of the allotment.

[98] There is some authority that the unlawful action of the directors may be ratified by shareholders at a general meeting. See the first instance decision of Buckley J in **Hogg v Cramphorn Ltd**. **and Others** [1967] Ch 254, where a shareholder sued claiming the actions of the directors in issuing shares was *ultra vires* and was done for improper purpose. Buckley J agreed that it was invalid but stood the case over for shareholders to ratify the decision, in a general meeting, with no votes allowed to the newly issued shares. See also **Bamford and another v Bamford and others** [1969] 2 WLR 1107, where Harman LJ in the English Court of Appeal took the view that there

could be ratification of a breach of duty by directors, if such breach did not involve any unlawful conduct. Buckley J, at first instance, in **Re Duomatic Ltd** [1969] 1 ALL ER 161, held that, if it could be shown that all the shareholders with a right to attend and to vote at a general meeting, had agreed to a matter which the members in general meeting could agree to carry into effect, this agreement was as binding as if it had been done by resolution at the general meeting.

[99] Mr Wood's submission that when the "return of allotment" was brought by Chad Young to Ervin Moo-Young to be signed and he signed it, his signature amounted to a ratification of the directors' actions in allotting the shares to Chad Young in my view, must be rejected by this court. Ratification usually takes place at a general meeting. The articles prescribe how a general meeting is to be called. No such general meeting was called pursuant to the articles, no ordinary or special resolution was passed ratifying the action and no such ratification took place.

[100] Even if Ervin Moo-Young's actions, as the only member entitled to vote at a general meeting (assuming the impugned shares would have no vote), of signing the "return of allotment" could objectively be viewed as a ratification by shareholders in a general meeting, on what is generally known as the **Duomatic** principle, such ratification must be done with full knowledge and understanding of what is being assented to. Ervin Moo-Young's claim is that he did not know what it was all about. Furthermore, full and frank disclosure must be made to members and they must demonstrate that they are aware of all the facts before assent. Everyone entitled to

vote must have applied their minds to the issue before ratification. For the principle to be applicable the shareholders must have the appropriate "full knowledge" (see Neuberger J in **EIC Services Ltd. v Phipps** [2003] EWHC 1507 (Ch)2). However, where the sole shareholder or the entire body of shareholders are also the wrongdoers, they cannot ratify their own unlawful and *ultra vires* actions. See also **Prest v Prest** [2013] 2 AC 415 per Lord Sumption at page 491, paragraph [41] of his judgment. The Directors who were the wrong doers in this case, and also the only shareholders entitled to vote at general meeting, could not lawfully ratify their unlawful actions, especially that which was not done in the company's interest.

[101] Any claim for ratification is also subject to the provisions in the articles themselves. Consideration must, therefore, be given to the meaning and effect of article 77, which states that:

> "Subject to the provisions of the Act, a resolution in writing signed by all members for the time being entitled to receive notice of and to attend and vote at general meetings (or being corporations by duly authorised representatives) shall be valid and effective as if the same had been passed at a general meeting of the Company duly convened and held."

In my view, without having heard argument on the matter, in this particular case, any action which requires a resolution at a general meeting for its validity, if carried out without said meeting being held, or validly held, can only be ratified if a written resolution is signed by all the members so entitled to vote at a general meeting, pursuant to article 77.

[102] Joni Torres was therefore entitled to the declarations sought in the claim below.

[103] In the circumstance grounds one, two (i), (ii), (iii) and (vii) of Joni Torres' grounds of appeal as well as grounds (a) and (b) of Ervin Moo-Young's counter-notice of appeal succeed.

Issue C- whether the judge erred in rejecting the evidence that fair market value was not paid for the shares allotted to Chad Young

[104] Joni Torres' primary contention, in this regard, is that the judge erred when he disregarded entirely or gave insufficient regard to Ervin Moo-Young's evidence that the shares in the company were not sold at a fair market value.

[105] Chad Young paid $490,000.00 for the unissued shares in the company, which were not valued prior to their allotment. There is evidence from Debbian Dewar of a cheque payment to the company for the value of the shares as consideration for the issue to Chad Young. Ervin Moo-Young did not raise any issue regarding this purchase until after Chad Young's death, when he says that following a visit to his attorneys-at-law, the question as to the shares being undervalued was raised.

[106] The question, therefore, is whether the judge was correct in his assessment of the evidence and the conclusion made that there had been no evidence before him, on which he could conclude that the shares were, in fact, sold at an undervalue. In arriving at this finding of fact, the learned judge relied significantly on Ervin Moo-Young's evidence, as outlined in his affidavits.

[107] The judge noted that Ervin Moo-Young had come to the conclusion as to the alleged undervaluing of shares by: (i) speaking to his attorney-at-law; and (ii) having

not been aware of any contract or memorandum for the sale and purchase of the shares. In reviewing this evidence, the judge expressed the view that Ervin Moo-Young went from making an allegation to a firm conclusion, without placing before the court any evidence to substantiate his assertion. It was on this basis that the judge questioned the strength of Ervin Moo-Young's evidence. He stated at paragraphs [71] and [72] that:

> "[71] How does Ervin get to this conclusion? He does not adduce any evidence at all. Less than fair market value can only mean that there was a market value and that it was properly arrived at, hence the use of the adjective fair, and that the price paid for the shares was less than that fair market value. There is no evidence of this. Conceptually, this is no different from a mortgagee accusing the mortgagor of selling the security at an undervalue. The mortgagee must prove that (sic) the true value of the property was before one can even begin to discuss whether the actual sale price was under that value.
>
> [72] This evidential gap has been supplied by the ingenuity of Mrs Gibson Henlin. Her submission is this: the Companies Act 2004 has abolished the concept of par or nominal value (section 36). In order to accommodate companies incorporated before the present Act came into force, section 37 (1) gives those companies six months to decide whether it will keep its existing shares are nominal or par value. If it makes the election to retain nominal or par value then it can continue issuing shares are nominal or par value. Under section 37 (2) if the company fails to make such an election then after six months it is deemed not to retain shares at nominal or par value and any shares issued is not at nominal or par value. There was no resolution in the case of Zip to retain the nominal or par value of shares and so the deeming provision applies. This means, says Mrs Gibson Henlin, that the price paid for any of the shares must necessarily be the fair market value."

[108] The judge concluded that the evidence with regard to the value of the shares was "supplied by the ingenuity" of counsel for Ervin Moo-Young. The judge found, therefore, that the fact that the price paid coincided with the nominal or par value of the shares, did not invariably mean that that price was not a fair market value.

[109] So far as these findings are concerned, I find that the judge did not misdirect himself or err in his assessment and the ultimate conclusion reached. The burden of proving that the shares were sold below market value would have rested on the person making such an assertion. There being no evidence from Joni Torres in relation to this issue, the judge would have only had the evidence of Ervin Moo-Young upon which to base his conclusion. He was, therefore, correct in his assessment, as no evidence was provided to the court in order for him to have found otherwise. His assessment of the "evidence" from counsel also cannot be faulted, as no evidence of what was the fair market value of the shares at the time of the allotment was provided to him.

[110] Grounds two (iv), (v), (vi) and (vii) of Joni Torres' grounds of appeal are, therefore, without merit.

[111] Be that as it may, a conclusion on this point does not ultimately dispose of the appeal in its entirety. A crucial issue to the resolution of the issues between the parties is whether the allotment of shares to Chad Young ought to be set aside on the basis that they were issued for an improper purpose.

Issue D- Whether in allotting 490,000 of the company's unissued shares to Chad Young, the directors exercised their powers within limits and for a proper purpose

[112] Joni Torres' primary contention, on this issue, is that the allotment of the 490,000 shares to Chad Young was, among other things, an exercise of the directors' powers for an improper purpose and accordingly void *ab initio* as:

i. the issuing of the shares disregarded the pre-emption right entitlement of the estate of Karl Young;

ii. the directors of the company, in acting as they did, benefitted one of their own, and in so doing, destroyed an existing majority and relegated the shareholders, being the estate of Karl Young and Ervin Moo-Young to an insignificantly small ownership position; and

iii. deprived the estate of Karl Young of its joint ownership of the company.

[113] In addition to their duty to act bona fide in the interests of the company, directors are required to exercise their powers for a proper purpose. That usually means, acting in accordance with the purpose for which the power is conferred. In so doing, directors must not act for a personal or improper purpose. This proper purpose requirement extends to among other things, a director's power when allotting shares. In this case, there is no dispute that the directors had the power to allot shares, the contention is that they did so in breach of the articles and for an improper purpose.

[114] The case of **Howard Smith Ltd v Ampol Petroleum Ltd and others** [1974] AC 821 (PC), is the leading case on the proper purpose doctrine. In that decision the

Board made it clear that the question whether a power was exercised for a proper purpose was one of law. Whether the directors subjectively thought their actions were proper is not conclusive on the issue.

[115] At the 8 July 2010 meeting of the company's board of directors, the minutes reflect that both Chad Young and Ervin Moo-Young had been present. A discussion is said to have ensued and a decision was taken to allot 490,000 of the company's unissued shares to Chad Young. These are the facts that Mrs Minott-Phillips asks this court to consider as the relevant circumstances surrounding the allotment of shares to Chad Young. These facts, she contended, gave a clear indication as to the purpose for which the allotment was made. They are relevant, she argued, as they demonstrate that:

a) The allotment of the 490,000 shares was essentially to one of their own, who chaired the meeting at which the decision is said to have been made to allot the shares to himself;

b) The circumstances surrounding the allotment of shares to Chad Young, notwithstanding his death, was such that he would not be permitted to assert that he acted *bona fide* in the company's interest; and

c) The directors use of their fiduciary powers over the shares to destroy the existing majority shareholding in the company and create a new majority, makes a departure from their legitimate use of their fiduciary powers all the greater.

[116] Mrs Minott-Phillips maintained that the judge's reasoning, on this issue, was flawed, in that, he determined that the allotment to Chad Young was for a lawful purpose, without determining whether the power was lawfully exercised. She argued that the judge had assumed it was lawfully exercised and that was a wrong assumption. She argued further, that the judge only considered that there was a power but failed to consider the limits of those powers.

[117] Queen's Counsel also argued that based on the authorities it could not be argued that Chad Young acted for a lawful purpose. She submitted that, in principle, a director who allotted shares to himself, in the circumstances in which it was done by Chad Young, was deemed to have acted for an unlawful purpose. Queen's Counsel noted that Chad Young ignored the rules applicable to the allotment of the unissued shares and then in turn issued the shares to himself. In those circumstances, Queen's Counsel argued, he cannot assert that he acted for a lawful purpose. The circumstances of the allotment, she further contended, was sufficient to prove unlawful purpose. Queen's Counsel maintained the argument that the fact that it created a super majority by destroying an existing majority, also supported the contention that it was for an unlawful purpose. She said the element of self-interest made it illegitimate, without more.

[118] Mrs Mayhew, on behalf of Ervin Moo-Young, pointed out that he had contended that the allotment was done for an improper purpose before the judge in the court below. During oral submissions in this court, counsel noted the following salient facts

with respect to the allotment of shares, which she contended, was evidence of the improper purpose for which it was done. These were as follows:

a) Ervin Moo-Young's evidence that he took no legal advice prior to signing the "return of allotment" or took no note of it;

b) Ervin Moo-Young's evidence that the procedure for the allotment of shares was not followed, unbeknownst to him;

c) No mention was made in the minutes of the board of directors meeting of 8 July 2010 as to the consideration that was given for the shares;

d) Ervin Moo-Young's denial that he was in attendance at the meeting of the board of directors of 8 July 2010; and

e) The fact that the allotment of shares to Chad Young had the effect of destroying the majority shareholding in the company.

[119] Mr Wood, for his part, argued that the claim for improper purpose could not succeed if Joni Torres and Ervin Moo-Young failed to show that the motive and intent in allotting the shares to Chad Young, was for an improper purpose. This, he said, they have failed to do, irrespective of the obvious self-benefit. Queen's Counsel noted, that based on the authorities, what was in the director's minds at the time of allotment, must be shown. In that respect, he said, it is a subjective test. The court, he said further, would then engage in an objective analysis of the evidence. Queen's Counsel pointed to the fact that the shares were issued for consideration and that Debbian

Dewar had produced proof of payment. Queen's Counsel submitted that Ervin Moo-Young's evidence was contradicted by the documentary evidence, in the form of the "return of allotment", which he signed and the evidence of payment for the shares.

[120] Notwithstanding the evidence highlighted by counsel for the respective parties, the judge expressed the opinion that the state of the evidence was such that there was no proof of improper purpose. He concluded that the "golden thread is that there must be evidence of improper purpose", in that, whoever alleges must prove. The burden, he said, was therefore, on Joni Torres who asserted the impropriety of the directors, to provide evidence that the exercise of their power was improper.

[121] Applying a subjective test, the judge further reasoned that he was unable to ascertain the reasons why the shares were issued or much about the affairs of the company. This, he said, was worsened by the fact that the only living director Ervin Moo-Young, was not cross-examined. He said further, that in the circumstance, at the commencement of the challenge, it was for Joni Torres to have adduced sufficient evidence which, if left unchallenged, would lead to the conclusion that the purpose for which the shares were allotted, was improper.

[122] The leading speech of Lord Wilberforce in **Howard Smith Ltd v Ampol Petroleum Ltd and others** provides useful guidance on how to assess whether a director acted for a proper purpose with respect to the allotment of shares. At page 835 he states:

> "...[I]t is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. in doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

[123] Lord Wilberforce further expounded on this by stating at page 832 that:

> "...[W]hen a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, **is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme**." (Emphasis added)

[124] Although the company's constitution may authorize the directors to issue shares as they see fit, it is clear from the authorities, that the issue of shares for certain purposes will be held to be an improper exercise of that power. Therefore, the exercise of the power to issue shares simply in order to destroy an existing majority, or to create a new majority which did not exist before has been held to be improper (see **Punt v Symons & Co Ltd** [1903] 2 Ch 506; **Piercy v S Mills & Co Limited** [1920] 1 Ch 77

and **Hogg v Cramphorn Ltd and others** [1967] Ch 254). This is largely because share ownership is within the purview of the shareholders and the power which accompanies majority ownership is a decision for shareholders, not directors.

[125] The case of **Howard Smith Ltd v Ampol Petroleum Ltd** involved a takeover bid for a company, where the directors showed a preference to a particular bidder and, accordingly, made an allotment of shares to that bidder, with a view to diluting the shareholdings of the potential rival bidders for the company. A challenge was raised as to the validity of the issuing of the shares. On appeal to the Privy Council, the Board, in agreeing with the decision of the trial judge, found that although the directors acted honestly and had the requisite power to make the allotment, to alter a majority shareholding was to interfere with that element of the company's constitution which was separate from and set against the directors' powers, and accordingly, it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority. The Board further concluded that since the directors' primary objective for the allotment of shares was to alter the majority shareholding, they had improperly exercised their powers and the allotment was invalid.

[126] The guidance given by Lord Wilberforce in **Howard Smith Ltd v Ampol Petroleum Ltd** requires a court to first construe the article conferring the power in order to determine the nature of the power and the limits within which it may be exercised. Having done so, the next requirement is for the court to examine and

determine objectively, the range of purposes for which the director may have exercised their power and thereafter the substantial purpose for which it was exercised.

[127] Applying the principle in **Howard Smith Ltd v Ampol Petroleum Ltd**, which was relied on in the first instance decision in **Benkley Northover v Eric Northover and others** [2014] JMCC Comm 14 (a case which was considered by the judge below in the instant case), it has been firmly established that, in any case where the exercise of a director's power is being challenged, the approach to be adopted by the court is:

a) an identification of the nature and extent of the power in question;

b) an identification of the range of purpose for which the power may be exercised;

c) an identification of the substantial purpose for which it was actually exercised in the particular case; and

d) weighing the actual purpose that was identified in (c) above, against the range of permissible purposes for the exercise of that power as indicated by the articles or determined by the court, in accordance with (b) above.

[128] The duty of the company's directors, in exercising their power, is contained in part, in section 174 of the Companies Act, which provides that:

"174.-(1) Every director and officer of a company in exercising his powers and discharging his duties shall -

(a) act honestly and in good faith with a view to the best interest of the company; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.

(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.

(3) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence, and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.

(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.

(5) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone.

(6) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of

> those functions, to observe a higher standard than that specified in subsection (1)."

[129] In this case, article 47(c) of the company's articles of association empowers the directors of the company to dispose of shares not applied for by its members, in such manner as they think proper.

[130] Both provisions, when read together, demonstrate that the power conferred on the directors with respect to the disposition of shares, although very wide, is still a fiduciary one. The duty owed to the company is to act in its best interest and for a proper purpose. It means, therefore, that the directors may dispose of shares in any manner that they deem proper, providing that in doing so, they acted honestly, in good faith and in the company's best interest and for a proper purpose. However, the duty to act for proper purpose is much wider and a more exacting duty than that to act in the company's interest. The latter is determined on a subjective test whilst the former is objective.

[131] Although empowered with a wide discretion to allot shares, it is also clear that this power must be exercised in keeping with the provisions in the articles of association and the Act, which require directors to act *bona fide* in the company's interest. Acting *bona fide* in the company's interest also includes acting for a proper purpose. It is left to the directors, therefore, in the exercise of their business judgment, to decide how the interest of the company may best be served. Where the question is only whether the directors acted in the interest of the company, a court ought only to interfere in circumstances where it is apparent that no reasonable director could have concluded

that a particular course of action was in the interest of the company. The director's duty is not simply to display subjective good faith, since they may breach it when they have not acted with conscious dishonesty, but also where they have failed to direct their minds to whether a transaction was in fact in the company's interest. The assessment as to whether an action was taken for proper purpose is different, for there may well be a genuine belief that the action was in the best interest of the company, but that said action, viewed objectively, may still be improper.

[132] In assessing whether the directors of the company acted for an improper purpose the judge, in the instant case, commented at paragraphs [56] and [57] of his judgment that:

> "[56] In all this discussion of the cases the undeniable golden thread is that there must be evidence of improper purpose. She who alleges must prove. There must be evidence from the challenger that the power was exercised for an improper purpose. At the commencement of the challenge the evidential burden is on the challenger and the legal burden remains on the challenger throughout. The challenger must adduce sufficient evidence which, if left unchallenged, may lead to the conclusion that the improper purpose is established. From the cases examined none has shown that the only thing the (sic) needs be done is to say the shares were issued, I don't know why they were issued and I don't know much about the affairs of the company and thereafter the evidential burden shifts to the directors. This is, to be exceptionally generous, at best suspicion about the purpose but is not capable of proving that allotment and issue were for an improper purpose. The evidence can be direct or circumstantial but evidence there must be. It is not for the directors to prove that the purpose was proper but for those attacking the decision to prove that purpose was illegitimate.

> [57] What complicates matters is that the test is entirely subjective. The enquiry is always about the purpose for which the directors exercised the power. The court is not looking at how reasonable directors in the same position as those directors whose decision is under attack would have acted but rather the court is looking for the subjective reasons why these particular directors made the decision that they did."

[133] As correctly noted by the judge, the courts are often reluctant to interfere with or review business decisions made by company's directors. It is also equally difficult for the courts to determine the substantial purpose for which a director exercised a particular power, in the absence of an expressed statement as to that fact.

[134] However, I agree with the arguments proffered by Mrs Minott-Phillips that the judge erred in applying only the subjective test, in coming to his conclusion on the point. Queen's Counsel is also correct in her contention that, in the ordinary course of things, a director is not permitted to exercise his powers only to secure a private benefit or advantage, for, if this is done, the directors would have exercised their powers improperly.

[135] It is my view that where the judge erred in his approach, is in the assessment required to be undertaken as recommended in steps (b), (c) and (d) outlined at paragraph [127] above. For, having identified that the company's directors did possess the power to allot shares, he seemingly placed a positive duty on Joni Torres, without more, to prove that the directors acted for an improper purpose. He found that both the evidential and legal burden rested with the challenger "throughout" to elicit evidence which would lead to a conclusion that the directors acted for an improper purpose. In

taking this approach the judge fell into error. The burden of proof is on the directors to show that their actions were "proper" (see **Bishopsgate Investment Management Ltd (in liq) v Maxwell (No 2)** [1994] 1 ALL E R 261).

[136] The judge further fell into error, when he concluded that the test to be adopted in the assessment of the evidence of the purpose for which the directors acted, was purely a subjective one. Whilst the state of mind of the directors is relevant to any question as to whether there was an abuse of power, in the sense of the intention and motive in doing an act, the court is equally entitled to look at the situation objectively in order to determine whether the action was necessary at the time it was taken.

[137] Contrary to the judge's assertions, the assessment must be undertaken by the application of an objective detailed examination of all the facts surrounding the allotment of any shares and what was the primary purpose for the allotment.

[138] In this case, what was the evidence of the purpose of the allotment of shares to Chad Young? The evidence on the issue led before the judge was that a meeting of the board of directors was held on 8 July 2010, roughly one month after the death of Karl Young. The minutes produced by Debbian Dewar reflect that the two directors of the company had discussions and it was agreed that 490,000 of the company's 498,000 unissued shares were to be allotted to the chairman of the meeting, Chad Young. Neither the nature of the discussion between the directors nor the purpose of the allotment appears in the minutes.

[139] Notwithstanding those minutes, Ervin Moo-Young, in his affidavit sworn to on 11 January 2016, denied being in attendance at the board of directors meeting and denies agreeing that $490,000.00 should have been paid by Chad Young for the shares. Ervin Moo-Young further deponed that he had signed the return of allotment "without thinking anything of it and without taking legal advice".

[140] Ervin Moo-Young further contended that it was not until Chad Young's death that he spoke with lawyers at the law firm Nunes, Scholefield, DeLeon & Co, and was made aware that the process for the allotment of shares in the company was not followed; that he had signed the allotment of shares without being cognisant of the implications; and that the shares should have been sold at market value.

[141] An email of 31 March 2014 from an attorney-at-law at Nunes, Scolefield, DeLeon & Co to Joni Torres confirmed that prior to the death of Chad Young, he had approached them to deal with the estate of Karl Young. The attorney-at-law spoke to an attempt to locate a will for Karl Young, but that a will not having been located, it was presumed that he had died intestate. The attorney-at-law further stated that notwithstanding having been approached by Chad Young, the firm had received no instructions from him to apply for the grant of letters of administration in that estate.

[142] There was, therefore, no direct evidence led before the judge regarding the purpose of the allotment. Admittedly, it is difficult to ascertain the purpose for which an individual may have acted, in the absence of express statements in that regard. In this case, the situation is worsened by the fact that the minutes of the 8 July 2010 meeting

of the board of directors, at which the decision was purportedly taken, is conspicuously devoid of details surrounding what was "discussed" by the directors in coming to their decision to allot the unissued shares. In resolving this issue, however, even without direct evidence, the judge was duty bound to consider all the several factors in the case, including whether there was any critical, pressing or urgent requirement for the allotment to have taken place at that particular time. This is against the background that the holder of the shares had recently died and Chad Young was only one of several persons entitled to benefit equally in his estate under the laws of succession.

[143] Mr Wood also argued that there were no averments or particulars in the present claim to have alerted anyone that improper purpose and bad faith was being alleged. The evidence before the lower courts, Queen's Counsel maintained was:

a) Ervin Moo-Young's contention that he simply proceeded at the request of Chad Young without thinking anything of it;

b) The only director who could give evidence as to what occurred with respect to the decision to allot shares was not cross examined so as to elicit anything to substantiate the assertion that Chad Young was motivated by an improper purpose in the allotment of shares; and

c) Ervin Moo-Young's act of signing the "return of allotment" was the operative and decisive act, giving effect to the allotment to Chad Young. He took no benefit from the allotment.

This evidence, Queen's Counsel contended, was not in and of itself sufficient to establish a prima facie case of directors acting for an improper purpose.

[144] It is clear, however, that averments having been made in the claim before the court below that the allotment was unlawful, submissions were also made to the judge that it was also improper and this was contested. The judge also dealt with this issue in his decision. It is, therefore, not open to Mr Wood to complain before this court that there was no averment of improper purpose in the court below. There is also no counter notice of appeal filed by Debbian Dewar against the judge's decision to deal with this issue.

[145] In addition to examining the situation in the company at the time of the allotment, there would also have been a need to examine the state of mind of the directors at the time the power was exercised. This may reveal that the directors acted *bona fide*, as well as in the interest of the company or that the director's exercise of their power, although *bona fide*, was still improper and not in the company's interest. A careful examination of the facts was required to determine what was the purpose or the substantial purpose for the allotment.

[146] The analysis that is required is better explained by Lord Wilberforce in **Howard Smith Ltd v Ampol Petroleum Ltd** at page 834 as follows:

> "The extreme argument on one side is that, for validity, what is required is bona fide exercise of the power in the interests of the company: that once it is found that the directors were not motivated by self-interest - i.e. by a desire to retain their control of the company or their

positions on the board - the matter is concluded in their favour and that the court will not inquire into the validity of their reasons for making the issue. All decided cases, it was submitted, where an exercise of such a power as this has been found invalid, are cases where directors are found to have acted through self-interest of this kind.

On the other side, the main argument is that the purpose for which the power is conferred is to enable capital to be raised for the company, and that once it is found that the issue was not made for that purpose, invalidity follows.

It is fair to say that under the pressure of argument intermediate positions were taken by both sides, but in the main the arguments followed the polarisation which has been stated.

In their Lordships' opinion neither of the extreme positions can be maintained. It can be accepted, as one would only expect, that the majority of cases in which issues of shares are challenged in the courts are cases in which the vitiating element is the self-interest of the directors, or at least the purpose of the directors to preserve their own control of the management; see *Fraser v Whalley* (1864) 2 Hem & M 10; *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Piercy v S Mills & Co Ltd* [1920] 1 Ch 77; *Ngurli Ltd v McCann* (1953) 90 CLR 425 and *Hogg v Cramphorn Ltd* [1967] Ch 254, 267.

Further it is correct to say that where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company; pleas to this effect have invariably been rejected (eg *Fraser v Whalley*, 2 Hem & M 10 and *Hogg v Cramphorn Ltd* [1967] Ch 254) - just as trustees who buy trust property are not permitted to assert that they paid a good price.

But it does not follow from this, as the appellants assert, that the absence of any element of self-interest is enough to make an issue valid. Self-interest is only one, though no doubt the commonest, instance of improper motive: and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made." (Emphasis added)

[147] It is clear from this that once it is found that the main object for which the power was exercised was to advance a director's self-interest, the power would have been exercised improperly. A further example of the principle is to be found in the Australian case of **Mills and others v Mills and others** [1938] 60 CLR 150, where Dixon J, very helpfully, gives the following guidance:

> "Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some **private advantage or for any purpose foreign to the power**. It is only one application of the general doctrine expressed by Lord Northington in *Aleyn v Belchier*[(1758) 1 Eden 132, at p 138]: 'No point is better established than that, a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void'." (Emphasis added)

[148] In that case, the court was asked to determine whether a resolution which had been approved by the directors, which increased the extent of the voting power of the managing director, was bona fide for the interest of the company. The court, in its ruling, found that, if the act of the director was neither for the purpose of promoting the interest of the company nor achieving the company's primary objective, then the purpose of the act was not proper. The court, in intervening, found that in acting as fiduciary agents, directors ought not to obtain a private advantage when exercising their power.

[149] In **Brady v Brady** [1989] AC 755 HL, Lord Oliver held that the requirement to act in good faith meant that the director must act in the genuine belief that his action is in the company's interest.

[150] In circumstances where there is evidence of self-interest or where the director's actions served the purpose of promoting personal interests, instead of that of the company, they will be deemed to have acted for an improper purpose. This would be the case, notwithstanding any evidence that the director may have believed that they acted honestly and that their action was in the interest of the company. Where there is no evidence of self-interests then the court would be required to undertake a much wider investigation. To this end, Lord Oliver in **Brady v Brady** reasoned at pages 779 and 780 that:

> "If one postulates the case of a bidder for control of a public company financing his bid from the company's own funds - the obvious mischief at which the section is aimed - the immediate purpose which it is sought to achieve is that of completing the purchase and vesting control of the company in the bidder. The reasons why that course is considered desirable may be many and varied. The company may have fallen on hard times so that a change of management is considered necessary to avert disaster. It may merely be thought, and no doubt would be thought by the purchaser and the directors whom he nominates once he has control, that the business of the company will be more profitable under his management than it was heretofore. These may be excellent reasons but they cannot, in my judgment, constitute a "larger purpose" of which the provision of assistance is merely an incident. The purpose and the only purpose of the financial assistance is and remains that of enabling the shares to be acquired and the financial or commercial advantages flowing from the acquisition, whilst they may form the reason for forming the purpose of providing assistance, are a by-product of it rather than an independent purpose of which the assistance can properly be considered to be an incident."

[151] The authorities demonstrate that the duty to act bona fide in the interest of the company is relevant, not only in determining whether the purpose for which a director

may have acted was properly in the interest of the company but also to show that acting solely or substantially for a private advantage or self-interest is not bona fide in the interest of the company. See also **In re Smith and Fawcett, Limited** [1942] Ch 304. In **Eclairs Group Limited v JKX Oil & Gas plc** [2015] UKSC 71, Lord Sumption introduced a "but for" test. That case was not a case dealing with the power to issue shares but it cited with approval the decision of the Board in **Howard Smith Ltd v Ampol Petroleum Ltd**. However, it was generally agreed in the former case that it made little difference whether a "substantial purpose" test was applied or whether a "but for test" was applied.

[152] It is usually the case, as enunciated by the judge, that it is the directors who would give direct evidence of the thought process undertaken by them at the time the decision was being taken to allot shares. However, of the two directors in this case, one, Chad Young, is deceased. The other, Ervin Moo-Young, for his part, gives evidence that he was not present at the meeting of the board of directors on 8 July 2010 and took no notice of the "return of allotment" which he signed and lodged at the request of Chad Young. This is an admission that, as a director, he acted in the interest of Chad Young and not bona fide in the interest of the company. On this evidence alone, Ervin Moo-Young would have failed to act bona fide in the interest of the company and would have acted in breach of his fiduciary duty to the company to exercise an independent judgment. This was not a factor considered by the judge.

[153] In **Boulting and another v Association of Cinematograph, Television and Allied Technicians** [1963] 2 QB 606, Lord Denning MR explained the ramifications of failing in the duty to exercise an independent judgment when he said at page 626 this:

> "It seems to me that no one, who has duties of a fiduciary nature to discharge, can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions of another rather than on his own conscientious judgment; or by which he agrees to subordinate the interests of those whom he must protect to the interests of someone else."

[154] The minutes of the directors meeting of 8 July 2010, as I have said before, give no indication of the reasons for the decision to allot shares to Chad Young. The findings of the judge, in respect of this very crucial fact is questionable, since it is based on the incorrect notion that Ervin Moo-Young did not deny in affidavit evidence, that he was not present at the meeting. This issue would have to be resolved, as apart from the absence of the required resolution, it also puts into question whether there was the requisite quorum in order for a decision to have been taken to dispose of the shares in this way.

[155] Article 99 of the company's articles of association provides that a quorum necessary for the transaction of the company's business of the directors may be fixed, and if not fixed, the quorum shall be two. It was therefore necessary for at least two directors to be present at that directors meeting. It was, therefore, also necessary and supremely important, in light of the obvious self-interest in the allotment, for the

minutes to reflect the nature of the discussions and the reasons for the allotment of the company's unissued share to a director.

[156] When one examines the entire circumstances surrounding the allotment of the unissued shares to Chad Young immediately before, during and after the issue, it is seen that:

i. Chad Young had been a director with his father Karl Young from 2004 and had never acquired any share in the company the entire time up to his father's death in 2010.

ii. Karl Young died intestate leaving six children, all of whom were entitled to share equally in his estate under the rules of intestacy.

iii. After the death of Karl Young, Chad Young, who was the only sibling residing in this jurisdiction, contacted lawyers to ascertain the status of his father's estate and learnt that he had died intestate.

iv. Chad Young made no effort to apply for letters of administration to administer his father's estate, although he was the only sibling residing in Jamaica, bearing in mind that he had sought legal advice upon the death of his father.

v. Within one month of the death of Karl Young, and with full knowledge that no administrator had yet been appointed to administer the estate

of the only other shareholder, 490,000 of the company's unissued shares were allotted to Chad Young, a director, at a director's meeting.

vi. The shares were not valued before allotment and there is no evidence that the nominal par value paid for the shares benefited the company in anyway.

vii. No written offer to acquire the shares was made to the only remaining member of the company after Karl Young's death, as required by the articles of association.

viii. No general meeting was held and no special resolution was passed by the company to waive the requirement to first offer the share to the member.

ix. Ervin Moo-Young, by his own admission, failed in his fiduciary duty to act bona fide in the interest of the company and acted solely in the interest of, or the benefit of Chad Young.

x. Chad Young, as one of only two directors, clearly derived a sole personal benefit or advantage from the allotment to himself.

xi. A super majority was created by the allotment.

xii. The 50% shareholding of Karl Young was thereby diluted to the detriment of his estate.

xiii. The capital raised by the company was minimal and there is no evidence that it was required.

xiv. No evidence was given as to the urgent or critical need to raise capital for the company by the allotment, at the time when it was done; and, in any event,

xv. Ervin Moo-Young puts into question whether there were the required number of directors present at the meeting, to undertake the company's business.

xvi. The minutes of the directors meeting at which the decision to allot the company's unissued shares to Chad Young, give no detail of the purpose for the allotment.

[157] All these factors are indicative of the promotion of personal self-interests by Chad Young, who was the only one who benefited from this transaction. This appears to me to have been the sole or substantial purpose for the allotment. There is no evidence, subjectively or objectively viewed, from which it could be inferred that the allotment was done in the interest of the company or otherwise for any proper purpose. The actions of Chad Young, viewed objectively, appeared to have been done to, firstly, circumvent the laws of succession and secondly, to place in his hands total control of the company, whilst depriving the existing members of their rights as shareholders. It was not done for the benefit of the company, in any regard. Therefore, the allotment

done in breach of the articles and for improper purpose was an unlawful and invalid exercise of the directors' powers.

[158] The judge therefore erred when he found that there was no evidential burden on the directors to demonstrate the propriety of their actions (see **Bishopsgate Investment Management Ltd (in liq) v Maxwell (No 2)**.

[159] When the circumstantial evidence is viewed objectively, it is clear that not only was the allotment not done in accordance with the articles, but further, and equally fundamentally, it was an abuse of the power given in article 47 (c) and was done for an improper purpose. It also infringed the member's contractual rights under the articles and was a trespass on those rights. See Hoffmann J in **Re a Company (Case No 005136 of 1986)** [1987] BCLC 82.

[160] The directors did not act in the interest of the company or for a proper purpose when the shares were allotted to Chad Young. In the interest of the company equates to the long term interest of its members as a general body, so long as the company is solvent. The allotment was made purely for the purpose of creating a super majority in a director, who previously owned no shares, thus not only altering the voting power in the company but also circumventing the laws of succession. The price at which the shares were to be sold to himself seems to have been a decision made entirely by the purchaser. Based on a plethora of authorities, this conduct is subject to condemnation. The allotment was made to a person who was aware of the impropriety of it and participated in it. The company is not bound by this excess of authority in its directors,

and the allotment was thereby liable to be set aside both on the action brought by Joni Torres and that brought by the company itself.

[161] In dealing with this issue of improper purpose, I have also borne in mind the submissions of Mr Wood on the question whether the action of the directors in allotting the shares to Chad Young was ratified by the conduct of Ervin Moo-Young. For the reasons set out at paragraphs [98] to [101], I would hold that the shareholders could not ratify their own unlawful and improper action.

[162] Grounds one, six, seven, eight, nine, 10 and 11 of the Joni Torres' grounds of appeal, as well as grounds (c) and (d) of Ervin Moo-Young's counter-notice of appeal succeed.

Issue E - Whether the delay in challenging the allotment of shares to Chad Young should be a bar to relief

[163] Mr Wood argued that Joni Torres should, nevertheless, be barred from the relief sought because five years had elapsed before any claim was brought. This was an argument raised before the judge who did not find it necessary to address the issue. This delay, Queen's Counsel argued, ought not to be simply ignored and the court should not order the share structure to be altered, after such a long lapse of time, especially since there have been intervening events. In mounting this argument, Mr Wood relied on paragraph 46 of the reasoning in **Northover v Northover**, which dealt with the effect of a breach of pre-emption rights. He asked this court to find that due to the delay, the allotment could only be invalidated on the basis that, as was found in

that case, it had been done for an improper purpose and not in the interest of the company.

[164] Queen's Counsel also pointed to the fact that one of the reliefs sought was cancellation of the shares by way of a declaration that the allotment was a nullity, which he noted would necessitate a rectification of the share registry under section 115 of the Companies Act. This, Mr Wood noted was a discretionary remedy and as such, any application for rectification ought to have been made promptly. This having not been done, Queen's Counsel contended that this relief ought to be refused and the judge's orders be affirmed also on this basis. He relied on the cases of **Re The British Sugar Refining Company** [1857] 3 K&J 408 at 416 and **Re Sussex Brick Company** [1904] 1 Ch 598 at 606-607 to show that the right to rectification is not a right *ex debito justitiae,* but is at the discretion of the court.

[165] Queen's Counsel pointed out that during the five years delay, the shares allotted to Chad Young was paid for, he was duly registered as a shareholder and he operated the company and made significant capital investments in it. As such, it would be unjust to treat his investment in the company as a nullity and gift it away after his death. Queen's Counsel further pointed out that in the United Kingdom, there is a statutory limitation of two years to challenge the allotment of shares. He argued, however, that whilst there is no statutory time limit in this jurisdiction, Debbian Dewar was relying on the equitable doctrine of laches to defeat Joni Torres' claim.

[166] Mr Wood submitted that Joni Torres' reasons for the delay of five years was inexcusable and fatal to the claim. He, therefore, submitted, that the judge's decision should also be affirmed on this basis and the appeal and counter notices of appeal on behalf of Ervin Moo-Young, dismissed with costs.

[167] The dictum in the Privy Council decision of **Lindsay Petroleum Company v Hurd**, (1874) LR 5 PC 221 at page 239, is, I find, of relevance to these arguments. There, the Board stated that:

> "...[T]he doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy ... In order that the remedy should be lost by laches or delay, it is, if not universally, at all events, ordinarily—and certainly when the delay has been only such as in the present case—necessary that there should be sufficient knowledge of the facts constituting the title to relief."

[168] What is of importance, therefore, is an examination of the length of the delay and the nature of the acts done during the delay. Whilst Mr Woods' arguments are

noted, it is evident that letters of administration were applied for promptly by Joni Torres upon being made aware that it had not been done by her brother, Chad Young, who was the only sibling residing in Jamaica at the time of their father's death. Furthermore, it is unlikely that letters of administration would have been obtained within the period before the allotment to Chad Young, as it took place within a month after the death of Karl Young.

[169] In her second affidavit of 4 January 2016, Joni Torres stated that at the time of her father's death, she resided in the United States of America and that Chad Young was the only beneficiary to the estate who resided in Jamaica and who had any knowledge of their father's business affairs, finances and corporate shareholdings. It was on this basis that she assumed he would see to the settling of their father's estate. She stated that up until the death of Chad Young, neither she nor her siblings were aware that their father had died intestate and that nothing had been done to administer his estate. Upon becoming aware sometime in February 2014, that nothing had been done, she immediately sought to ascertain the whereabouts of all surviving children, as well as obtained legal advice in March of that same year. Subsequently, letters of administration of the estate of Karl Young was applied for by her on 17 July 2015 and obtained on 28 August 2015.

[170] In the interim years, it appears Chad Young ran the company, along with Debbian Dewar, who was not a shareholder. It is unclear what part Ervin Moo-Young played, his shareholding having been diluted. However, Chad Young, having moved

expeditiously, after the death of his father, to create a super majority in himself and, in so doing, acted with impropriety, cannot now complain of delay. Debbian Dewar also cannot complain of prejudice from any delay, since any benefit she derived was entirely as a result of the wrongdoing of Chad Young. She was not a purchaser for value without notice.

[171] Grounds one and two of Debbian Dewar's counter-notice of appeal are without merit.

Conclusion

[172] The judge was correct to find that a legal personal representative of the deceased shareholder having not yet been appointed, there was no one to whom notice could have been given regarding the allotment of the shares to Chad Young at the time it was done. However, I find that the judge was plainly wrong in almost all other respects.

[173] With respect to the position of Joni Torres, she is entitled, as the personal representative, to complain about any breach in procedure regarding the allotment of the shares and the effect it had on the estate, based on the principle of "relation back". She is also entitled to point to conduct by the directors of the company which was in breach of the articles and which was not done for a proper purpose, the results of which have been inimical to her as the personal representative of the deceased shareholder. The shares exist in perpetuity and once they have been disposed of unlawfully, she is entitled, on behalf of the estate, to make that claim. The judge was

also wrong to find that the allotment of shares was done *intra vires*, as it was done in breach of article 47 of the company's articles of association which provides the procedure to be followed in allotting shares.

[174] The shares were also allotted for an improper purpose and the allotment was therefore invalid. With respect to the claim of delay, although some time has passed, it is not such as would cause this court to find that Joni Torres should be denied the remedy being sought. The appeal of Joni Torres and the counter notice of appeal of Ervin Moo-Young should be allowed. The orders of the judge below ought to be set aside.

[175] Joni Torres is also entitled to the declarations and orders that were sought in the fixed date claim form in the court below as well as any consequential orders arising naturally therefrom. I would, therefore, recommend, in keeping with rule 2.15(a) and (b) of the Court of Appeal Rules, that this court orders that the allotment to Chad Young be set aside and the shares returned to the company. The share register is to be rectified to reflect the changes.

MCDONALD-BISHOP JA

ORDER

1) The appeal by the appellant Joni Kamille Young-Torres (as Administrator of the Estate of Karl Augustus Young) is allowed.

2) The counter-notice of appeal of the 1st respondent Ervin Moo-Young is allowed.

3) The counter-notice of appeal of the 2nd respondent Debbian Dewar (as an Executor of the estate of Chad Adrian Young) is dismissed.

4) The judgment of Sykes J (as he then was) dated 5 February 2016 is set aside.

THE COURT FURTHER DECLARES AND ORDERS THAT:

5) Only two of the 500,000 shares in the 3rd respondent Zip (103) Limited have been lawfully issued.

6) The appellant Joni Kamille Young-Torres (as Administrator of the Estate of Karl Augustus Young) is the holder of one of the two lawfully issued shares in the 3rd respondent Zip (103) Limited and the 1st respondent Ervin Moo-Young is the holder of the other lawfully issued share.

7) The purported allotment of 490,000 shares in the 3rd respondent Zip (103) Limited to Chad Adrian Young was unlawful and a nullity.

8) The allotment by the 1st respondent Ervin Moo-Young of 490,000 shares in the 3rd respondent Zip (103) Limited to Chad Adrian Young is void.

9) Any resolutions passed or decisions taken by the 3rd respondent Zip (103) Limited in a general meeting or otherwise, premised on Chad Adrian Young being the holder of 490,000 of the shares in the 3rd respondent Zip (103) Limited, are null and void, save that bona fide third party rights thereby created are unaffected by this order.

10) The 3rd respondent Zip (103) Limited is to file amended Annual Returns to reflect that only two of its 500,000 shares have been lawfully issued to date and showing the appellant Joni Kamille Young-Torres (as Administrator of the Estate of Karl Augustus Young) and the 1st respondent Ervin Moo-Young as the holder of one share each.

11) The shares allotted to Chad Adrian Young be returned to the 3rd respondent Zip (103) Limited. The share register is to be rectified to reflect the changes.

12) Costs of the appeal and of the counter-notice of appeal of the 2nd respondent Debbian Dewar (as an Executor of the Estate of Chad Adrian Young) to the appellant Joni Kamille Young-Torres to be agreed or taxed.

13) Costs of the counter-notice of appeal of the 1st respondent Ervin Moo-Young to the 1st respondent Ervin Moo-Young against the 2nd respondent Debbian Dewar to be agreed or taxed.

14) Costs in the court below to the appellant Joni Kamille Young-Torres (as Administrator of the Estate of Karl Augustus Young) against the 2nd respondent Debbian Dewar (as an Executor of the Estate of Chad Adrian Young) to be agreed or taxed.

15) There shall be no order as to costs in respect of the 3rd respondent Zip (103) Limited.