

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 133 OF 1990

IN THE MATTER of the Companies Act

A N D

IN THE MATTER of the Register of Members of
Barnett Limited

A N D

IN THE MATTER of the Rectification of the
said Register of Members

BETWEEN	BARNETT LIMITED	PLAINTIFFS
A N D	PETER FRANCIS KERR-JARRETT	
A N D	BARNETT HOLDINGS LIMITED	DEFENDANTS
A N D	ISABEL JOYCE CHADWICK	
A N D	DOREEN WHITMAN	
A N D	IAN KERR-JARRETT AND CHRISTINE NOBLE (Executors of Estate Marion Kerr-Jarrett, deceased)	

Mr. R. Mahfood, Dr. Barnett and Mr. John Vassell instructed by Mrs. Somers of Messrs. Dunn, Cox and Orrett for Plaintiff.

Mr. R.M. Henriques, Q.C., Mrs. Benka-Coker, Mr. C. Honeywell and Miss Joy Donaldson for Defendants.

HEARD: DECEMBER 2-5, 1991 AND JANUARY 29, 1992

THEOBALDS, J.

By an Amended Originating Summons dated the 5th July, 1991 the above-named Plaintiffs sought Declarations in the following terms.

- "(a) The sales and transfers of 49,920 shares each by ISABEL JOYCE CHADWICK, DOREEN WHITMAN and the Executors of Estate MARION KERR-JARRETT, deceased to Barnett Holdings Limited were made in breach of the provisions of Articles 29 to 33 (inclusive) of the Plaintiff's Articles of Association.
- (b) The Directors present at a meeting held on the 10th day of January, 1989 acted ultra vires or alternatively improperly and in breach of the Articles of Association in confirming and ratifying the transfers which had been effected at the instance of the shareholders ISABEL JOYCE CHADWICK, DOREEN WHITMAN and the Executors of ESTATE MARION KERR-JARRETT, deceased to Barnett Holdings Limited.
- (c) The Second Plaintiff was entitled to notice of the intention of ISABEL JOYCE CHADWICK, DOREEN WHITMAN and the Executors of ESTATE MARION KERR-JARRETT,

- " deceased to transfer their shares under and by virtue of Articles 29 to 32 (inclusive) of the Articles of Association.
- (d) The Resolutions passed on the 5th day of April, 1988 and on the 10th day of January, 1989 in respect of the transfer of shares to Barnett Holdings Limited are ultra vires and null and void.
 - (e) The Directors present at the meeting held on the 10th day of January, 1989, abused their powers as directors and acted in breach of their fiduciary duties.
 - (f) By instructing the Secretary of the Plaintiff Company to proceed with the scheduling of the Meeting for 2:00 p.m. on the 10th January, 1989, Peter Ross Kerr-Jarrett abused his power as a director and acted in breach of his fiduciary duties.
 - (g) The directors present at the meeting of the 10th January, 1989 abused their powers and pursued a course of conduct designed to circumvent the legal consequences of the Judgment of the Court of Appeal in Suit No. C.L. of 1988/K 023 which Judgment frustrated the abortive attempt of the group led by Peter Ross Kerr-Jarrett and Dr. Paul Chen-Young to take over Barnett Limited.
 - (h) By requisition to the Directors of the Plaintiff Company dated the 22nd day of December, 1988, to convene an extraordinary general meeting to put to members a resolution that, inter alia, Peter Ross Kerr-Jarrett, Ian Kerr-Jarrett, Christine Noble and Joyce Chadwick be removed as directors of the Plaintiff Company, the Plaintiff Peter F. Kerr-Jarrett was exercising his fundamental legal rights as a shareholder conferred by Section 175 of the Companies Act & Article 36 of the Articles of Association of the Plaintiff Company.
 - (i) The directors present at the meeting of 10th January, 1989 acted in breach of their fiduciary duties and abused their powers as directors by holding the meeting on that date to exercise their voting power to ratify and confirm the transfers which had been effected at the instance of the shareholders Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion Kerr-Jarrett deceased to Barnett Holding Limited.
 - (j) That the aforesaid transfers were made in contravention of the provisions of Article 99 of the Articles of Association of the Plaintiff Company.

Additionally, an order that pursuant to Section 115 of the Companies Act the Register of Members of the Plaintiff Company be rectified

"by striking out the name of the First Defendant BARNETT HOLDINGS LIMITED as the holder of 149,760 shares of the said company and by restoring to the said Register the names of the Second Defendant ISABEL JOYCE CHADWICK, DOREEN WHITMAN and the Executors of Estate Marion Kerr-Jarrett, deceased as the holders of the said shares as follows:

ISABEL JOYCE CHADWICK

49,920 shares

"DOREEN WHITMAN 49,920 shares
ESTATE MARION KERR-JARRETT, deceased 49,920 shares"

On 22nd July, 1991 a Consent Order giving directions was made by Langrin, J. in chambers. The relevant provisions of that Order for the purpose of this judgment were:

- "1. That the Originating Summons proceedings herein shall be treated as if they were begun by Writ.
2. That the Plaintiffs file and serve a Statement of Claim within seven (7) day of the date hereof.
3. That the Defendants file and serve their Defence within fourteen (14) days of the service on them of the Plaintiffs' Statement of Claim.
4. That the Plaintiffs file and serve their Reply, if any, within seven (7) days of the filing and service of the said Defence.
6. That the pleadings be deemed to have been closed at the expiration of the time limited for filing the Reply.
10. That the affidavits filed herein by each party together with their supplemental affidavits, if any, shall be deemed to be the evidence in the case, subject to the right of each party to adduce additional evidence and cross-examine the affidavants at the trial."

In compliance with this order for Directions abovementioned the Plaintiffs on the very next day viz 23rd July, 1991 filed a Statement of Claim in the following terms. Here again, for the purpose of clarity, it is necessary to set out this Statement of Claim in extenso.

" STATEMENT OF CLAIM
SUIT NO. E-133 OF 1990

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY

BETWEEN	BARNETT LIMITED	PLAINTIFFS
A N D	PETER FRANCIS KERR-JARRETT	
A N D	BARNETT HOLDINGS LIMITED	DEFENDANTS
A N D	ISABEL JOYCE CHADWICK	
A N D	DOREEN WHITMAN	
A N D	IAN KERR-JARRETT	
	and	
	CHRISTINE NOBLE (Executors of Estate Marian Kerr-Jarrett, deceased)	

1. The first named Plaintiff Company was incorporated on the 28th day of May, 1953 and has a nominal share capital of \$700,000.00 divided into 350, 000 shares of \$2.00 each of which 312,000 shares have been issued and are fully paid up.
2. Isabel Joyce Chadwick, Doreen Whitman and Ian Kerr-Jarrett and Christine Amber Noble as executors of Estate Marian E. Kerr-Jarrett (deceased) as well as

- " the other shareholders excepting the second named Plaintiff gave to the Board of Directors notice of intention to sell their shares and at a director's meeting held on the 9th day of March, 1988 it was resolved inter alia that notice be given to the second named Plaintiff of the intention of the said shareholders to sell their shares.
3. On the 9th day of March 1988 Notice of intention of the said shareholder to sell their shares was given to the second named Plaintiff and requiring the second named Plaintiff within twenty-two (22) days from the 9th of March 1988 to indicate whether he was willing to purchase any of the said shares and if so what maximum number.
4. On the 9th day of March 1988 the members of the Plaintiff Company and its respective shareholdings were as follows:-
- | | |
|-----------------------------------|---------------|
| (a) Isabel Joyce Chadwick | 49,920 |
| (b) Peter Francis Kerr-Jarrett | 49,920 |
| (c) Ian Kerr-Jarrett | 49,920 |
| (d) Christine Amber Noble | 49,920 |
| (e) Doreen Whitman | 49,920 |
| (f) Sydney John Winder | 12,480 |
| (g) Estate Marian E. Kerr-Jarrett | <u>49,920</u> |
| | 312,000 |
5. On the 5th day of April 1988 the Directors of the Plaintiff Company purported to pass the following resolutions:-
- "1. BE IT RESOLVED that the Directors in exercise of their discretion pursuant to Article 30 of the Articles of the Company require that the shares being offered by Ian Kerr-Jarrett, Isabel Joyce Chadwick, Christine A. Noble, Doreen Whitman, Sydney Winder and Ian Kerr-Jarrett as executors of the estate of Marian Kerr-Jarrett, dec'd be sold as one (1) lot."
- "2. THAT the following transfers of shares now tendered to the Board be and are hereby approved:-
- | | |
|---------------------------------------|----------------------------------------------------|
| ISABEL JOYCE CHADWICK | 49,920 shares to BARNETT HOLDINGS LIMITED |
| CHRISTINE A. NOBLE | 49,920 shares to BARNETT HOLDINGS LIMITED. |
| DOREEN WHITMAN | 49,920 shares to BARNETT HOLDINGS LIMITED. |
| ESTATE MARIAN KERR-JARRETT (Deceased) | 49,920 shares to BARNETT HOLDINGS LIMITED |
| SYDNEY WINDER | 12,480 shares to BARNETT HOLDINGS LIMITED. |
| IAN KERR-JARRETT | 1 share to EAGLE MERCHANT BANK OF JAMAICA LIMITED. |
| IAN KERR-JARRETT | 1 share to EAGLE HOLDINGS & INVESTMENTS LIMITED" |
6. On the 8th day of April 1988 the second named Plaintiff brought an action in Suit No. C.L. of 1988/K-023 seeking inter alia an Order that he was entitled to purchase 112,320 shares of the shareholding of the other shareholders by virtue of the pre-emptive rights given in Article 29 of the Articles of Association and on the 13th day of November, 1988 this Honourable Court handed down a judgment in his favour. The Plaintiffs crave

- " leave to refer to the said Judgment for its full terms and full effect.
7. The said judgment was the subject of an Appeal which was dismissed on the 14th day of December 1988 and on the 31st day of January 1989 the written judgments of the Court of Appeal was handed down. The Plaintiffs crave leave to refer to the said judgments for their full terms and full effect.
 8. The second named Plaintiff purchased the shares of Ian Kerr-Jarrett, Christine Amber Noble and Sydney John Winder and became the holder of 52% of the issued shares of the Plaintiff company.
 9. On the 22nd day of December 1988 the second named Plaintiff nominated himself as Chairman of the Board of Directors by virtue of Article 94 of the Articles of Association. The second named Plaintiff had held the position as Chairman of the Plaintiff Company since the inception of the Plaintiff Company up until the 5th day of April 1988 when he was removed there from.
 10. On the 22nd day of December 1988 the second named Plaintiff pursuant to Article 50 of the Articles of Association of the Plaintiff Company sent a requisition to its Directors for the convening of an Extraordinary General Meeting of the Company.
 11. By Notice dated the 23rd day of December 1988 the shareholders and Directors of the Plaintiff Company were advised of a meeting which was due to be convened for the 11th day of January 1989.
 12. On the 9th day of January 1989 at approximately 2:00 p.m. the second named Plaintiff received a telephone call from the Secretary advising him that a Board Meeting had been requested for 2:00 p.m. on January 10, 1989. The second named Plaintiff advised the Secretary that he had prior business arrangements and could not attend at such short notice. He requested her to advise the Directors of his objection to the meeting being called at such short notice and that he would be available the following day.
 13. The second named Plaintiff was not provided with any agenda for the proposed meeting and was not advised and had no knowledge of the nature of the business which was proposed to be transacted.
 14. The shares of Isabel Joyce Chadwick, Doreen Whitman and Estate Marian E. Kerr-Jarrett, deceased were transferred by the said Directors to the first named Defendant Company in breach of Articles 29-33 of the Articles of Association of the Plaintiff Company.

PARTICULARS

- (a) The said transfer was not made within three (3) calendar months after the expiration of the Notice as required by Article 33 of the Articles of Association.
- (b) Following the abortive attempt of the first named Defendant to take over the Plaintiff Company the second named Plaintiff was not offered the opportunity to acquire the shares that were transferred.
- (c) The said transfers did not result from the issue of such a Notice as is required by the provisions of the said Articles.

- "15. The Directors present at the meeting on the 10th of January 1989 and participating in the decision to transfer the said shares acted in abuse of their powers as Directors and or in breach of their fiduciary duties and/or in bad faith and/or in their own interests and not in the interest of the Company as a whole.

PARTICULARS

- (a) Peter Ross Kerr-Jarrett instructed the Secretary of the Plaintiff Company to proceed with the scheduling of the meeting for 2:00 p.m. on the 10th January 1989 despite the circumstances hereinbefore described.
- (b) The said meeting was called and proceeded with the objective of frustrating and/or defeating the legitimate exercise of the fundamental rights of the majority of the shareholders conferred by Section 175 of the Companies Act and Article 36 of the Articles of Association of the Plaintiff Company to call an Extraordinary Meeting for the purpose of removing Directors of the Company.
- (c) The said meeting and the decision to transfer the said shares were effected so as to circumvent the Judgments of the Court of Appeal mentioned in paragraph 7 hereof which Judgments prevented the attempt of the group led by Peter Ross Kerr-Jarrett and Dr. Paul Chen Young to take over the Plaintiff Company.
- (d) In convening the said Directors meeting and in effecting the transfer of the said shares the said Peter Ross Kerr-Jarrett acted in his own interest in that he obtained or sought to obtain direct and/or indirect financial benefits and/or personal advantage.
16. Further or alternatively the said transfers were effected in contravention of the provisions of Article 99 of the Articles of Association of the Plaintiff Company in that the seal of the Company was not affixed by virtue of the authority of the Directors thereof.

AND THE PLAINTIFFS claim against the Defendants:-

- (1) A Declaration that the registration of the said transfer is unlawful, illegal, ultra vires, void and of no legal effect.
- (2) An Order that pursuant to Section 115 of the Companies Act the Register of Members of the Plaintiff Company be rectified by striking out the name of the first named Defendant BARNETT HOLDINGS LIMITED as the holder of 149,760 shares of the said Company and by restoring to the said Register the names of the second, third and fourth named Defendants ISABEL JOYCE CHADWICK, DOREEN WHITMAN and the Executors of the Estate of Marian Kerr-Jarrett, deceased as the holders of the said shares as follows:-

ISABEL JOYCE CHADWICK	49,920 shares
DOREEN WHITMAN	49,920 shares
ESTATE MARIAN KERR-JARRETT, deceased	49,920 shares

- (3) Such further or other relief as this Honourable Court may deem just.

A Defence and Counterclaim was settled on the 6th August, 1991 and served on the Plaintiffs' attorneys on the 7th. The relevant admissions and issues which arise are extracted from this pleading.

- "5. The Defendants admit paragraph 8 of the Statement of Claim.
6. The Defendants do not admit paragraph 9 of the Statement of Claim in so far as it alleges that the Second named Plaintiff nominated himself as Chairman of the Board of Directors on the 22nd December, 1988 by virtue of Article 94 of the Articles of Association, however the Defendants admit that the Second named Plaintiff Peter Francis Kerr-Jarrett had held the position as Chairman of the Plaintiff company since the inception of the Plaintiff company up until the 5th day of April, 1988 when he was removed therefrom.
7. The Defendants admit paragraph 10 of the Statement of Claim and admit paragraph 11 of the Statement of Claim in that it is a fact that the Second named Plaintiff on the 22nd day of December, 1988 and purportedly acting pursuant to Article 50 of the Articles of Association of the Plaintiff company sent a requisition to its Directors for the convening of an extraordinary general meeting of the First named Plaintiff. The Second named Plaintiff also by notice dated 23rd December, 1988 and directed to the Shareholders and Directors of the First named Plaintiff advised them of an extraordinary general meeting which was due to be convened for the 11th January, 1989.
8. The Defendants assert that the extraordinary general meeting held by the First named Plaintiff as a consequence of the requisition sent to its Directors by the Second named Plaintiff was null and void and all proceedings and decisions taken thereunder were null and void and of no effect.

PARTICULARS

- (1) Articles 50(A) under which the requisition was sent empowers the Directors on the requisition of the holders of not less than one tenth of the issued share capital of the company which carries the right to vote at general meetings and upon which all calls and other sums then due have been paid, forthwith to proceed to convene an extraordinary general meeting.
- (2) Article 50(C) states that if the Directors do not proceed to cause a meeting to be held within twenty-one (21) days from the date of the requisition being so deposited, the requisitionists or a majority of them in value may themselves convene a meeting.
- (3) Contrary to the terms of Article 50C in which the Directors have twenty-one (21) days from the date of the requisition to convene an extraordinary general meeting the second named Plaintiff by notice dated 23rd December, 1988, one day after the date on which the requisition was deposited purported to convene an extraordinary general meeting.
- (4) It is clear from particulars (1) to (3) outlined above that the Second named Plaintiff had no right under the Articles of the First named Plaintiff to send out a notice purporting to convene an extraordinary general meeting for the 11th day of January 1989.

- "(5) The Second named Plaintiff acted illegally and ultra vires the Articles of Association of Barnett Limited when he himself caused the three (3) sets of shares to which he was entitled to purchase by the decision of the Supreme Court of Judicature of Jamaica to be registered in his name on or around the 16th December, 1988.
- (6) The Second named Plaintiff only became entitled to be registered as shareholder of the three (3) sets of shares when on the 10th day of January, 1989 a properly constituted Board of Directors of Barnett Limited at a properly constituted and legal board meeting approved the transfer of the three (3) sets of shares to the Second named Plaintiff.
9. The Defendants admit that the Second named Plaintiff was advised of a board meeting of the First named Plaintiff to be held on the 10th January, 1989. The Defendants also admit that the Second named Plaintiff failed to attend the board meeting of the First named Plaintiff held on the 10th January, 1989. The Defendants however assert that the Second named Plaintiff was given sufficient notice by the Directors of their intention to hold the said board meeting on the 10th January, 1989 and the Second named Plaintiff voluntarily and of his own free will refused and/or neglected to attend the said board meeting.
10. Contrary to that expressed in paragraph 13 of the Statement of Claim, the Directors were not obliged under the Articles of the First named Plaintiff to supply the Second named Plaintiff with an agenda of the meeting held on the 10th January, 1989 nor were they obliged to inform the Second named Plaintiff of the nature of the business to be conducted. Failure to supply the agenda, which is not admitted, and the failure to inform the Plaintiff of the nature of the business, which is not admitted, would in no way detract or impugn the legality of the board meeting held on the 10th January, 1989.
11. The Defendants deny as alleged in paragraph 14 of the Statement of Claim that the shares of Isabel Joyce Chadwick, Doreen Whitman and Estate Marion E. Kerr-Jarrett, Deceased were transferred by the said Directors to the First named Defendant company Barnett Holdings Limited in breach of Article 29 of the Articles of Association of the First named Plaintiff.
12. The Defendants assert that prior to March 1988 all Shareholders save and except the Second Plaintiff decided to sell all their shares in Barnett Limited in one block to Barnett Holdings Limited. The Second Plaintiff agreed to the proposed sale and on the 19th February, 1988 he signed a waiver of his pre-emptive rights. At the appointed time on the 7th March, 1988 when 84% of the shares held in the First named Plaintiff was to be transferred or sold to the First named Defendant company the Second named plaintiff verbally withdrew his waiver.
13. Subsequently and in keeping with the terms of Article 30 of the Articles of Association of the First named plaintiff the vending shareholders, Isabel Joyce Chadwick, Ian Kerr-Jarrett, Christine Noble, Doreen Whitman, Sydney John Winder and the Estate Marion E. Kerr-Jarrett, deceased gave notice of their intention to sell their shares to the Directors of the First named Plaintiff Barnett Limited.

14. That on the receipt of these notices and in keeping with the terms of Article 30 of the Articles of Association of Barnett Limited the Directors of Barnett Limited became the vending shareholders for the purpose of the sale of the said shares. That as stated in paragraph 3 of the Statement of Claim and at a meeting of the Board of Directors of Barnett Limited held on the 9th March, 1988 the Directors of the First named Plaintiff unanimously resolved and determined the price of the shares being sold and notice was given to the Second named Plaintiff of the intention of the six (6) vending shareholders to sell their shares. This notice was dated the 9th March, 1988 and will be referred to at the hearing of this suit for their full terms and effect.
15. That by letter dated 23th March, 1988 and which will be referred to at the hearing of this suit the Second named Plaintiff purported to accept the offer of the shares being sold by the vending shareholders in respect of three (3) sets of shares in Barnett Limited namely those of Ian Kerr-Jarrett, Christine Noble and Sydney John Winder.
16. That at a properly constituted meeting of the Board of Directors held on the 5th April, 1988 the Directors in interpreting Article 30 of the Articles of Association of Barnett Limited passed a resolution that the shares be sold in one block and declined to sell the three (3) sets of shares to the Second named Plaintiff. Resolutions were passed by the Board of Directors incorporating their decisions. The certificate of the relevant resolutions passed will be referred at the hearing of this suit for its full terms and effect.
17. That the Directors bona fide construed Article 30 to mean that they had the legal right and authority to reject the Second Plaintiff's election that he be sold three (3) sets of the shares being sold instead of the six (6) sets of shares being sold. It is in the light of this bona fide belief, honestly held that the Directors resolved to sell the six (6) sets of shares to Barnett Holdings Limited, the First named Defendant. That pursuant to these decisions, the Directors, at the said meeting being held on the 5th April, 1988 approved the transfers of the shares recording the sale of the shares of the vending shareholders to Barnett Holdings Limited. The Secretary of Barnett Holdings Limited was also directed to issue a certificate as a consequence of the transfer of the shares.
18. The Second named Plaintiff then instituted proceedings in the Supreme Court of Judicature of Jamaica against Barnett Limited in Suit intituled C.L. K-023 of 1988 seeking certain orders and declarations. The orders and Declarations sought are all incorporated in the pleadings to the said suit. That the Second named plaintiff sought and obtained an exparte injunction against Barnett Limited on or around the 11th March, 1988 preventing the Defendant Barnett Limited from transferring the three (3) sets of shares which he had offered to purchase from being sold to Barnett Holdings Limited.
19. That as a consequence of the injunction granted to the Second named Plaintiff by the Supreme Court of Judicature of Jamaica the Directors of Barnett Limited were effectively prevented from transferring all the shares being sold by the vending shareholders to Barnett Holdings Limited and effectively hindered from completing

the Agreement made between Barnett Limited and Barnett Holdings for the sale of the 84% of the shares in Barnett Limited. Consequently Barnett Limited could not have transferred all the shares being sold to Barnett Holdings Limited until the issues raised in Suit No. C.L. K-023 of 1988 had been resolved. The Defendants deny as alleged in paragraph 14 of the Statement of Claim that the shares of Isabel Joyce Chadwick, Doreen Whitman and Estate Marion E. Kerr-Jarrett, Deceased were transferred by the said Directors to the First named Defendant company in breach of Articles 29-33 of the Articles of Association of the Plaintiff company.

24. The Defendants deny that the Directors present at the meeting on the 10th January, 1989 and participating in the decision to transfer the said shares to Barnett Holdings Limited acted in abuse of their power as Directors or in breach of their fiduciary duty and/or in bad faith and/or in their own interest and not in the interest of the company as a whole. The Defendants state that at all material times the Directors present at the meeting held on the 10th January, 1989 acted bona fide, honestly and in the interest of Barnett Limited. The Defendants therefore deny the particulars outlined in paragraphs (A) to (D) of paragraph 14 of the Statement of Claim and in particular the Defendants wish to state that the Directors were perfectly entitled in law and under the Articles of Association of the Plaintiff company to hold the board meeting held on the 10th January, 1989. The Defendants therefore deny:

- (i) that the said meeting was called and proceeded with by the Directors with the objective of frustrating and/or defeating the legitimate exercise of the fundamental rights of the majority of the shareholders conferred under Section 175 of the Companies Act and Article 86 of the Articles of Association of the Plaintiff company to call an extraordinary general meeting for the purpose of removing Directors of the company. The Defendants again refer to paragraph 8 of the within Defence as to the validity of the said extraordinary general meeting which was scheduled for 11th January, 1989.
- (ii) the Defendants assert that the said meeting and the said decision to transfer the said shares were not effected so as to circumvent the Judgment of the Court of Appeal delivered on the 19th December, 1988. The Defendants repeat that the Judgment of the Supreme Court of Judicature of Jamaica and the Court of Appeal related solely to the Second named Plaintiff's confirmed interest in buying only the three (3) sets of the shares being sold by the vending shareholders.
- (iii) The Defendants also deny that in convening the said board meeting and in effecting the transfer of the said shares to Barnett Holdings Limited that the Defendant Peter Ross Kerr-Jarrett acted in his own interest or that he obtained direct and/or indirect benefits and/or personal advantages.

25. The Defendants deny that the said transfer of shares to Barnett Holdings Limited were effected in contravention of Article 29 of the Articles of Association of the first named Defendant company and deny that it was not affixed by virtue of the authority of the Directors thereof.
26. The Defendants assert that the Plaintiffs are estopped from seeking to impugn the validity of the transfer of the three (3) sets of shares to Barnett Holdings Limited in that from the 30th December, 1988 up until 7th May, 1990 the date of the filing of the Originating Summons herein the Plaintiffs have recognised and treated Barnett Holdings Limited as a valid and legal member of Barnett Limited.
27. Save as is hereinbefore expressly admitted the Defendants deny each and every allegation contained in the Statement of Claim as though the same were herein set out and traversed seriatim.

COUNTERCLAIM

28. And by way of counterclaim the Defendants repeat paragraphs 1 to 26 of the within Defence and the Defendants claim:
- (i) a declaration that the sale and transfer of 49,920 shares each by Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate of Marion E. Kerr-Jarrett, Deceased to Barnett Holdings Limited were not made in breach of the provisions of Articles 29 - 33 (inclusive) of the Plaintiff's Articles of Association;
 - (ii) a declaration that the Directors present at a board meeting of Barnett Limited held on the 10th day of January, 1989 did not act ultra vires or alternatively improperly and in breach of the Articles of Association in confirming and ratifying the transfers which had been effected at the instance of the shareholders, Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion E. Kerr-Jarrett, Deceased to Barnett Holdings Limited.
 - (iii) a declaration that the Second named Plaintiff had in fact received notice of the intention of Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion E. Kerr-Jarrett, Deceased to transfer their shares under and by virtue of Article 29 - 32 (inclusive) of the Articles of Association.
 - (iv) a declaration that the resolutions passed by the Directors at the board meetings held on 5th April, 1988 and on the 10th day of January, 1989 in respect of the transfer of shares to Barnett Holdings Limited in so far as they related to the transfer of the three (3) sets of shares to Barnett Holdings Limited and formerly belonging to Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion E. Kerr-Jarrett, Deceased are not ultra vires and null and void.

- (v) a declaration that the said transfers were not effected in contravention of the provisions of Article 99 of the Articles of Association of the Plaintiff company.
- (vii) such further or other relief as this Honourable Court may deem just.
- (viii) Costs.

DATED the 6th day of August, 1991."

Plaintiffs are contending that Peter Ross Kerr-Jarrett and the Second, Third, Fourth and Fifth Defendants failed to exercise their fiduciary power as directors in the interests of the Barnett Ltd. Company as a whole. It was the Plaintiff's contention that these Defendants acted in their own personal interests and not in the interest of Barnett Limited. The rules applicable to trustees, executors and administrators and indeed to all persons who stand in fiduciary positions whether as agents, solicitors, directors of companies are quite clear. See Snell's Principles of Equity 23rd Edition and Transvaal Lands Co. vs. New Belgium, etc. Co. [1914] 2 Ch 488. A director of a company is not allowed to put himself in a position where his interest and duty conflict or indeed appear to conflict. It is not in issue that Barnett Holdings Ltd. the First Defendant is a Company in which, Peter Ross Kerr-Jarrett is the sole beneficial owner of and controls all the issued shares. This fact appeared to have escaped the notice of the Second Plaintiff initially. How this case to pass is not for this Court to decide, but certainly its significance is not without importance.

Peter Francis Kerr-Jarrett has been the Chairman of the Plaintiff's Company from its formation on 26th May, 1953. He held this position for nearly 35 years. He was removed therefrom by a Resolution of the Board. The minutes of the meeting of the 5th April, 1988 of the Board of Barnett Ltd. form part of the Agreed Bundle of Exhibits. It is noted that a resolution removing the Second Plaintiff from the position of Chairman is conspicuous by its absence from the minutes, but the Defence has admitted that it was on that day that the Second Plaintiff was removed as Chairman. What does not escape the attention of the Court, however, is that the Manager (Mr. Peter Ross Kerr-Jarrett) "had given Miss Fuller, the Company's secretary the day off and had made no provision for anyone to take short-hand notes" Question is was this a desirable

state of affairs in view of the proposed sale of shares to be discussed? Did Mr. Peter Francis Kerr-Jarrett have a foreboding or sixth sense when (and this is recorded) he pointed out that "Mr. Peter Ross Kerr-Jarrett was employed to manage the company's property and was a director because of this position. He was present to further the interest of the company and not to further his own private interests. Barnett Holdings was not a director or shareholder and had no connection with Barnett Limited." To use an unforensic expression did the Second Plaintiff "smell a rat" somewhere. If he did no reasonable tribunal could condemn him for being over sensitive. If he did not then the same tribunal could justifiably hold that his tenure of office as chairman of Barnett Limited should have been terminated before the 5th April, 1988.

Reference is made at paragraph 15 (c) of the Statement of Claim to "the attempt of the group led by Peter Ross Kerr-Jarrett and Dr. Paul Chen Young to take over the Plaintiff Company." Paragraph 15 contains the main thrust of the Plaintiff's case and is quite clear in relation to the particulars given and it follows, in relation to the Declaration sought from this court.

Peter Ross Kerr-Jarrett knew long before this hearing that his bonafides were being challenged. On the basis of the pleadings and affidavits filed by the Plaintiffs he was aware of this. Percival Ross is sole beneficial owner of the First Defendant's Company. That company pleads to the effect that the Plaintiffs be estopped from seeking to impugn the validity of the transfer of the three (3) set of shares to Barnett Holdings Limited... in that up to the date of the filing of the Originating Summons herein the Plaintiffs had recognised and treated Barnett Holdings Limited as a valid and legal member of Barnett Limited. No evidence is adduced to show this. This pleading is therefore found to be absurd. So absurd in fact that at the trial learned counsel who represented the defendants had to make his position clear by withdrawing this particular line of the defence. Other aspects of the Plaintiffs' case which remain unanswered are the allegations of bad faith and breach of fiduciary duty to the First Plaintiff. The consent Order for Directions

filed herein made it quite clear what should be deemed to be the evidence in the case. The Affidavit evidence of Peter Francis Kerr-Jarrett along with his viva voce evidence in court and the reasonable and quite inescapable inferences to be drawn therefrom justify, in my view, a rejection of the submission that the Plaintiffs have not discharged the burden of proving their case on a balance of probability or at all. There was a clear conflict of interest between Peter Ross Kerr-Jarrett as sole beneficial owner of Barnett Holdings Limited and in his position as a Director of the Plaintiff Company. The same conflict of interests applies to the second, third, fourth and fifth Defendants.

A Declaration is accordingly made in terms of paragraph (a), (d), (f), (g), (h), (i) of the Amended Originating Summons dated 5th July, 1991.

It is ordered that pursuant to Section 115 of the Companies Act the Register of Members of the Plaintiff Company be rectified by striking out the name of the First Defendant Barnett Holdings Limited as the holder of 149,760 shares in the said Company and by restoring to the said Register the names of the Second Defendant Isabel Joyce Chadwick, Doreen Whitman and the Executors of Estate Marion Kerr-Jarrett, deceased, as the holders of the said shares as follows

ISABEL JOYCE CHADWICK	49,920 shares
DOREEN WHITMAN	49,920 shares
ESTATE MARION KERR-JARRETT, deceased	49,920 shares

The Plaintiffs are to have their costs of this trial to be agreed or taxed and to be paid by the Defendants. The Counterclaim is dismissed with no order as to costs.